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IN THE SUPREME COURT OF CALIFORNIA

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

THE LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Respondent,

v.

O.R.,

Defendant and Appellant.

From an Unpublished Decision by the Court of Appeal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

ANSWER BRIEF ON THE MERITS

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Introduction

This case concerns how juvenile courts should interpret the term "substance abuse" as codified in Welfare and Institutions Code[1] section 300, subdivision (b)(1).[2] In addition, this Court is asked to evaluate the soundness of a long-standing, commonsense inference that a finding of parental substance abuse is prima facie evidence that a child of "tender years" is at substantial risk of harm due to the parent's inability to provide regular care for the child.

Petitioner, O.R. (Father), urges this Court to step in the role of the Legislature, rewrite the dependency statutes, and narrow the definition of "substance abuse" by requiring evidence that a parent meets the clinical definition of "substance abuse" as defined in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders (DSM)[3] before a juvenile court can assert dependency jurisdiction under the fourth clause of section 300, subdivision (b)(1). (Opening Brief on the Merits [OBM] 20-44.)

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

[2] Section 300, subdivision (b)(1) was amended in January 2023. The amendments do not impact the matter at bar.

[3] Consistent with Father's citations, the Los Angeles County Department of Children and Family Services (Department) will use the term "DSM" to refer to the manual in general and specify any particular manual edition of the DSM when needed. (See OBM 9, fn. 2.)

Yet, there is nothing in section 300, subdivision (b)(1)'s text, structure, policies, or legislative history that demands such a requirement. The plain meaning of the term "substance abuse" does not adhere to any clinical definition. Giving the term its ordinary and plain meaning is consistent with the purpose of dependency law to provide maximum protection and safety to children at risk of harm and ensure the home environment is free from the negative effects of parental substance abuse. (§ 300.2.) Therefore, this Court should reject the strict use of clinical definitions of "substance abuse" for purposes of dependency jurisdiction.

Petitioner also asks this Court prohibit juvenile courts from utilizing a rule that has been long-recognized and unchallenged – a finding of parental substance abuse is prima facie evidence of a parent's inability to provide regular care for a vulnerable child of tender years. (OBM 44-61.) Father overstates the rule, asserting it creates a rebuttal presumption that shifts the burden of producing evidence. Not so. The rule is simply an inference that when starting with two facts, a finding of parental substance abuse and a child of tender years (such as the 16-month-old in the case at bar), the parent is unable to provide the child regular care. A juvenile court must still weigh all the relevant evidence and make a determination whether the child is described by section 300. The tender-years doctrine is consistent with the statutory scheme and furthers the Legislature's stated purpose regarding substance abuse. This rule is well-grounded and has

not been criticized by any California Court of Appeal, much less rejected, as running contrary to dependency law.

Accordingly, the Department asks this Court affirm the decision of the Second District Court of Appeal entitled *In re N.R.* (April 29, 2022, B312001) [nonpub. opn.] (Opinion).

Combined Statement Of The Case And Facts

This matter concerns the welfare of a 16-month-old child, N.R.,[4] the son of S.H. (Mother) and Father, over whom the juvenile court assumed dependency jurisdiction after finding the child was at substantial risk of serious physical harm from Father's substance abuse and Mother's failure to protect N.R. from Father's conduct.[5] The Department adopts and summarizes the "Background" set forth in the Opinion and adds additional facts from the record.

Proceedings In The Juvenile Court.

"A. The Department Begins Investigating

"On November 19, 2020, the Los Angeles County Sheriff's Department executed a search warrant at Mother's home. The primary targets of the warrant were maternal uncle E.P. and maternal grandmother's male companion, J.R. After law enforcement deemed the home safe, a Los Angeles County Department of Children and Family Services (Department) social worker entered and spoke with Mother.

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[4] N.R. was 16 months old at the time of the section 300 jurisdictional hearing.

[5] Mother did not appeal or file a Petition for Review.

"Mother reported she and Father were not currently in a relationship but were cooperatively co-parenting without any custody orders. Mother denied having a substance abuse history. Mother admitted maternal grandmother had a history of drug abuse, which had, in part, led to the removal of one of maternal grandmother's children from her custody. The social worker asked Mother why she allowed maternal grandmother to care for N.R. given her history, and Mother said she had not thought about it as a concern.

"The social worker completed a walk-through of the home, which smelled of marijuana. There was a partially consumed bottle of alcohol in Mother's bedroom on a dresser low enough to be accessible to N.R. There were pots of marijuana plants in the front yard near maternal uncle E.P.'s sleeping area. Mother's car contained empty beer cans and bottles." (Opinion, at pp. 3-4.)

N.R. was 12 months old at the time of the investigation and too young to make any statements. (CT 1, 62.)

"Mother agreed to have N.R. stay with Father during the Department's investigation. The social worker spoke to Father when he arrived to pick up N.R., and Father consented to an assessment of his home. During his conversation with the social worker, Father denied abusing any substances and agreed to take a drug test. The social worker then conducted a walk-through of Father's home and left N.R. in Father's care.

"Father did submit to a drug test the same day, and the test results later returned positive for cocaine metabolites—with the metabolites registering at a high level. When questioned

about the result, Father said he had been scared to tell the social worker he used cocaine. Father said his cocaine use occurred the prior weekend while celebrating his birthday—when he was not expecting to have to take care of N.R. Father claimed he did not know how much cocaine he used and said he was not an active user of cocaine." (Opinion, at p. 4.) Father was unsure if cocaine was the only drug he used during his four-day birthday binge. (CT 13.)

Father's first drug test on November 19, 2020,[6] was positive for cocaine metabolite at a level of 1441 ng/ml where the test screen cut off was 150 ng/ml and the confirm cut off amount was 100 ng/ml. (CT 12, 21-22.)

"The Department subsequently sought, and the juvenile court granted, an order removing N.R. from Father's custody. The child was placed with his maternal uncle.

"B. The Petition and Detention Hearing

"The Department filed a two-count dependency petition in December 2020. Count one alleged N.R. was at substantial risk of serious physical harm from Mother's decision to permit the maternal grandmother, a known drug abuser, to reside with N.R. and have unlimited access to him. Count two alleged N.R. was at similar risk from Father's past and current drug abuse.

"The juvenile court held a detention hearing and continued N.R.'s placement with the maternal uncle. The court ordered the

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[6] November 19, 2020, was a Thursday. (<https://www.calendar-365.com/calendar/2020/November.html>.)

Department to provide appropriate referrals and voluntary drug testing to Mother and Father. They were granted monitored visitation." (Opinion, at pp. 4-5.) Regarding drug testing for the parents, the court stated, "They don't have to test, but that could help a lot." (RT 6.)

Father responded, "Yeah, I'm willing to participate at any given cost." (RT 7.)

The juvenile court said, "Okay. Great. Your next court date here is February 5th. The social worker will be providing referrals for you so you can drug test and just start doing things to show you can safely take care of your child, okay?" (RT 7.)

Father responded, "Okay." (RT 7.)

At the next hearing on February 5th, 2021, Father's counsel requested the Department "set up Father on weekly on-demand testing" before clarifying Father wanted to participate in weekly, random drug testing. (RT 9-10.)

"C. Further Investigation

"A Department social worker interviewed family members in the ensuing months. Mother claimed the maternal grandmother had not used drugs since Mother was thirteen and Father denied knowing the maternal grandmother used drugs at all. Mother had by then moved out of the home she was living in with maternal grandmother and had her own apartment.

"As to the allegations about Father's drug use, Mother claimed she was shocked when she learned Father was using cocaine. She said they never lived together (they dated when they were eighteen and stopped when they were nineteen) and she did

not even see Father smoke marijuana when the two were dating. Mother reported she had spoken to Father about the cocaine use, Father told Mother he was no longer using, and Mother believed Father was no longer under the influence." (Opinion, at p. 5.) During the same interview, Mother said, "Now that I think back – [Father's] eyes would always be opened, he was very hyper, this is when we didn't have [N.R.]." (CT 63.) In retrospect, Mother said she realized Father used cocaine since before N.R.'s birth until recently. (CT 63.) After the Department's involvement, Mother believed Father stopped used cocaine, stating she could tell he was no longer under the influence because Father cried that he missed N.R. and he "seems different now. More emotional, but that's maybe because [N.R.] is taken away." (CT 64.) Mother stated she ended her relationship with Father because of Father's infidelity, promising but forgetting to pick Mother up, and inability to stick to the family's plans. (CT 64.) The Department informed Mother that Father's behavior was consistent with someone who had a substance abuse problem. (CT 64.)

"When asked about the allegation regarding his drug use, the Department reported that Father said, 'I'm so upset that they caught me! My mom was upset too. She was crying when I told her I tested positive. This cocaine thing is not me! I'm so upset!' Father admitted he first tried cocaine at age 21 or 22 (he was 26 at the time of the dependency proceedings) and he denied his

cocaine use was an addiction.[7] Later during his conversation with the social worker, however, Father acknowledged he had been using cocaine once or twice every two weeks and he said he used to 'rave' a lot and would use cocaine with friends at big parties. As to the circumstances leading to the positive cocaine metabolite test result, Father said his birthday was on Wednesday, November 11, and he celebrated from Thursday, November 12 to Sunday, November 15—using cocaine all four days. Father was unsure how much cocaine he consumed (allowing it was '[m]aybe . . . a big amount'), but he claimed he and his friends 'pitched in 10 dollars each to get something small and that's it.'[8]" (Opinion, at pp. 5-6.) Father also consumed alcohol all four days, stating, "[J]ust maybe 2 tall cans a day." (CT 66.)

In addition to using cocaine since age 21 (five years prior), father stated he started drinking alcohol at age 16 and smoking marijuana at age 14. (CT 66.)

"Father represented he did not 'party' or use cocaine on the weekends when N.R. previously stayed with him pursuant to the custody arrangement with Mother. Father believed Mother knew about his cocaine use. Father admitted he used marijuana in the past, but he denied being a current user. Father expressed a

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[7] Father claimed if he were addicted to cocaine he would "be broke." Father lived with his mother and was an out-of-work barber who found a job working in a warehouse for 20 hours a week.

[8] At another point during the same interview, Father said he never paid for cocaine himself and he would just participate when his friends "did it together."

willingness to submit to random drug tests. The social worker asked Father if he wanted to participate in the Child Family Team program, and Father declined, stating he just wanted the drug testing. Father also said, 'It's too much. It's already a big deal I have two kids. I just want it over with.'[9]

"The Department's jurisdiction and disposition report stated Father's positive test for cocaine metabolite, at the level of 1441 ng/ml, was an 'extremely high and rare level even four days after use.' The Department found Father's cocaine use—and the amount of use shown by the lab test results—extremely concerning. The jurisdiction report explained the combination of cocaine and alcohol (both of which Father used when 'celebrating' his birthday) creates a substance called cocaethylene, which increases the addictiveness of each individual substance and the risk of violent behavior, paranoia, anxiety, depression, seizures, intense drug cravings, and sudden death.

"Father submitted to two random drug tests in January 2021 that were both negative. Father missed his next test and told the social worker he missed the test because of work. He asked to only test on Mondays and Fridays to accommodate his work schedule; the social worker responded testing was random and he had to test when his name was called. The social worker set Father up for a makeup test and the sample at that test leaked and could not be tested. Father missed a subsequent test

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[9] Father's other child came from a different relationship.

and then appeared and tested negative once in March 2021." (Opinion, at pp. 6-7.) Father's drug tests were as follows:

- November 19, 2020 (Thursday) – Positive for Cocaine metabolite;
- January 6, 2021 (Wednesday) – Negative;
- January 27, 2021 (Wednesday) – Negative;
- February 9, 2021 (Tuesday) – No Show;
- February 12, 2021 (Friday) – Leaked Test;
- February 23, 2021 – (Tuesday) No Show; and
- March 19, 2021 (Friday) – Negative.

(CT 21-22, 158; <https://www.calendar-365.com/2021-calendar.html>.)

"In advance of the jurisdiction and disposition hearing, the Department submitted a report describing, in list form, the reasonable efforts the Department claimed to have made to avoid the need for removing N.R. from the parents' care: emergency response services; family reunification services; face-to-face contacts; notices for the jurisdiction and disposition hearing; and the Child Family Team program, which both parents declined at the time it was offered.

"In the months shortly before the April 2021 jurisdiction hearing, the juvenile court ordered the Department to, among other things, provide a weekly drug and alcohol testing referral for Father. A last minute information report prepared by the Department indicated a social worker verbally referred Father to services on March 23, 2021, and sent him an email listing available services on March 31, 2021.

"D. The Jurisdiction and Disposition Hearing

"After hearing argument at the jurisdiction and disposition hearing, the juvenile court dismissed the petition count alleging risk of harm from exposure to the maternal grandmother because the Department had not provided any evidence regarding the maternal grandmother's current drug use—such that there was no evidence Mother did anything wrong in allowing the maternal grandmother to care for N.R.

"The juvenile court, however, found the Department had shown Father has a substantial drug abuse history and tested positive for a fairly high amount of cocaine metabolites in November of 2020.[10] The court noted both Mother and Father admitted Father used alcohol and cocaine. While both Mother and Father claimed Father would not care for N.R. while using cocaine, it was undisputed Father was responsible for taking care of N.R. at the time of the November 2020 positive test. After amendments by interlineation, the petition as sustained by the court stated Father has a history of substance abuse and is a recent abuser of cocaine, rendering him incapable of providing regular care to N.R., who is of such a young age as to require constant care and supervision. As to Mother, the petition stated she failed to protect N.R. when she knew or reasonably should

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[10] The court declined to consider the missed tests as positive results because Father had been testing voluntarily, not pursuant to a court order, and the court believed case law holding a missed test can constitute a positive test applies only after a person has been ordered to test.

have known about Father's substance abuse but allowed Father to have unlimited access to the child.

"Turning to disposition, Father and Mother objected to having N.R. removed from their custody. The Department argued it was necessary to remove N.R. from both parents' custody. Counsel for N.R. contended that under the applicable clear and convincing evidence standard of proof, the Department had demonstrated it was necessary to remove N.R. only from Father's custody, not from Mother's." (Opinion, at pp. 7-9.) During argument, counsel for Father admitted Father "did abuse cocaine" during his four-day birthday binge but claimed the cocaine abuse was a "one-time incident." (RT 28.)

"The juvenile court agreed with the argument made by counsel for N.R. and found the Department met its burden to order the boy removed from Father's custody (but did not meet its burden as to Mother). The court placed N.R. with Mother and ordered Father to submit to 12 drug tests, with the further condition that Father must participate in a drug treatment program if he missed a test or tested positive for drug use. The court also ordered Father to participate in a parenting course and granted him monitored visitation with N.R." (Opinion, at p. 9.)

Regarding Father's disposition programs, the juvenile court stated, "Okay. And then for the Father, it says a full program. I think it would be more appropriate to require tests, and then if any test is dirty, to do a program. If [Father] currently is claiming he's not using and he goes to try to enroll in a program, they'll just tell him he's not eligible. So I think it would also be

more appropriate to just say 12 tests, and then if any test is missed or dirty, then do a program." (RT 33.)

Proceedings in the Court of Appeal

In his Appellant's Opening Brief (AOB), Father contended the juvenile court's jurisdictional findings of substance abuse and dispositional orders removing N.R. from his custody were improper.[11] (AOB 25-59.) Father discussed the split in the Courts of Appeal regarding the definition of "substance abuse" for purposes of section 300 dependency jurisdiction. (AOB 29-32.) However, Father never argued the DSM clinical definition of "substance abuse" was mandated for purposes of adjudicating section 300 petitions, and Father never analyzed the facts of the case under the DSM. (AOB, generally.)

Father also acknowledged the well-accepted inference that when there is a child of tenders years, a finding of parental substance abuse is prima facie evidence the child is at substantial risk and subject to juvenile court jurisdiction. (AOB 39.) Father noted this prima facie rule is not conclusive, does not shift the burden of proof to a parent, and once contrary evidence is introduced, the trier of fact must weigh the evidence under the applicable burden of proof without regard to the presumption. (AOB 39-40.) Father did not argue the prima facie rule should be rejected. (AOB, generally.) Instead, Father argued he "rebutted any prima facie case of risk" of harm to N.R. (AOB 39-40.)

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[11] The issues before the California Supreme Court only involve the jurisdictional findings.

In its Respondent's Brief (RB), the Department argued dependency jurisdiction was warranted regardless of whether Father's substance abuse fell neatly within the DSM medical definition of "substance abuse." (RB 24-31.) The Department further argued the evidence supported the tender years prima facie inference that Father's substance abuse rendered him unable to provide regular care for 16-month-old N.R. (RB 31-32.)

Father's Reply Brief again mentioned the split of authority regarding the definition of "substance abuse" as used in section 300, subdivision (b)(1), and contended his recreational use of cocaine while N.R. was in Mother's care does not qualify as substance abuse. (Reply Brief 6-8.) Furthermore, Father again acknowledged the tender years prima facie inference and argued he rebutted the presumption; he did not ask the Court of Appeal to reject the rule. (Reply Brief 11-13.)

Division Five of the Second District Court of Appeal found "[s]ubstantial evidence supports the juvenile court's jurisdiction finding. Father's regular cocaine use, which he described as occurring once or twice every other week, combined with the positive test result showing a high level of cocaine metabolites while he was responsible for caring for N.R., were sufficient to demonstrate he abused, not just used, cocaine. Particularly given N.R.'s young age, this was sufficient to establish jurisdiction." (Opinion, at p. 10.)

The Court of Appeal did not limit the definition of "substance abuse" to the criteria found in the DSM but adopted a broader definition, finding Father's longstanding cocaine habit

that was primarily funded by friends, attempt to hide his cocaine abuse, four-day alcohol and cocaine binge that resulted in high levels of cocaine metabolites on the day Father received N.R. in his care, missed drug tests, inability to recognize the problematic nature of his drug abuse, and refusal to engage in services constituted substantial evidence supporting the juvenile court's finding that Father's substance abuse warranted dependency jurisdiction. (Opinion, at pp. 11-13, citing to *In re Christopher R.* (2014) 225 Cal.App.4th 1210 [*Christopher R.*])

The Court of Appeal also applied the tender years reasoning. (Opinion, at pp. 12-13, citing *Christopher R., supra,* 225 Cal.App.4th at p. 1219 and *In re K.B.* (2021) 59 Cal.App.5th 593, 603.) Ultimately, by weighing the evidence, the Court of Appeal found Father's "occasional negative tests" and "the passage of time since the last positive drug test" were insufficient to overcome dependency jurisdiction given Father's "substantial history with cocaine, his admission of regular use, and his four-day binge prior to accepting custody of N.R." (Opinion, at p. 13.)

Father's Petition for Rehearing was denied. (See Second District Court of Appeal, docket, case B312001.)

Actions in the Supreme Court and Issues Presented

Father filed a Petition for Review in the California Supreme Court (Petition). For the first time in these proceedings Father argued the following: *Christopher R.* was wrongly decided; a juvenile court is prohibited from asserting dependency jurisdiction under section 300, subdivision (b)(1), due to a parent's "substance abuse" absent a finding the parent's substance abuse constitutes "substance use disorder" as defined

by the DSM; and the judicially created prima facie rule surrounding substance abuse and children of tender years should be rejected as running afoul of the plain language of the Welfare and Institutions Code's statutory language. (Petition 3-4.) Father framed the issues as follows: (1) Section 300, subdivision (b)(1) authorizes juvenile court jurisdiction based on a substantial risk of serious physical harm posed by parental substance abuse. Concerning the term *substance abuse* did the Legislature intend juvenile courts to utilize the objective and scientifically based definition accepted by the medical and mental health professions? Or did the Legislature intend to adopt a separate and more expansive definition of "substance abuse" not recognized by medical or mental health professionals? (2) Does recurrent use of an illicit substance qualify as "substance abuse" for the purposes of section 300, subdivision (b)(1) despite no evidence the use has ever negatively impacted the parent's ability to fulfill any major life obligation?[12] (3) Despite no indication of such in the statute itself, where a child is under the age of six does a finding of parental substance abuse (even if falling short of a medical diagnosis sufficient to warrant treatment) *alone* provide

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[12] Appellant did not separately brief the second issue, and the Department does not dedicate a separate section to answering this question. As will be discussed, this question is readily answered in the affirmative by referencing appellant's own proposed definition of "substance abuse." A parent's "failure to fulfill major role obligations at work, school, or home" is only one of eleven criteria listed in the DSM; meeting any two of the eleven criteria constitutes a substance use disorder. (See DSM-V criteria; JN-A, pp. 14-15.)

sufficient evidence to warrant juvenile court jurisdiction? (Petition 10.)

On August 24, 2022, the Supreme Court granted the Petition.

Argument

I. Standard of Review.

The interpretation and applicability of a statute is a question of law. (*In re R.T.* (2017) 3 Cal.5th 622, 627; *Jose O. v. Superior Court* (2008) 169 Cal.App.4th 703, 706.) Questions of law that do not involve resolution of disputed facts are subject to de novo review. (*Jose O. v. Superior Court, supra,* 169 Cal.App.4th at p. 706.)

II. Nothing in the Text, Structure, Stated Purpose, or History of the Dependency Statutes Supports Petitioner's Contention that Section 300, Subdivision (b)(1), Requires Juvenile Courts to Narrowly Construe "Substance Abuse" to the Medical Definition Provided in the DSM.

When interpreting a statute, the judiciary's role is to ascertain the intent of the Legislature. (*Greyhound Lines, Inc. v. County of Santa Clara* (1986) 187 Cal.App.3d 480, 487.) In doing so, reviewing Courts "start with the statute's words, which are the most reliable indicator of legislative intent." (*In re R.T., supra,* 3 Cal.5th at p. 627.) "If the language is clear, courts must generally follow its plain meaning unless a literal interpretation would result in absurd consequences the Legislature did not intend." (*Coalition of Concerned Communities, Inc. v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) Relevant terms are to be interpreted "'in light of their ordinary meaning, while also taking

account of any related provisions and the overall structure of the statutory scheme to determine what interpretation best advances the Legislature's underlying purpose.' [Citations]. 'When language is included in one portion of a statute, its omission from a different portion addressing a similar subject suggests that the omission was purposeful.' [Citation]." (*In re R.T., supra,* 3 Cal.5th at p. 627.)

It is not the judiciary's role to insert into a statute what the Legislature has omitted, nor should the judiciary omit from a statue what has been inserted. (*Greyhound Lines, Inc. v. County of Santa Clara, supra,* 187 Cal.App.3d at p. 487; Calif. Code Civ. Proc., § 1858.) Put another way, "'[t]he judiciary has no power to rewrite plain statutory language' under the guise of construction. [Citation]." (*Ibid.*) "Only when the statute's language is ambiguous or susceptible of more than one reasonable interpretation, may the court turn to extrinsic aids to assist in interpretation." (*In re Ethan C.* (2012) 54 Cal.4th 610, 627, internal quotes and citations omitted.)

A. The Plain Language of Section 300, Subdivision (b)(1), Does Not Preclude Juvenile Courts From Finding Parental Substance Abuse Outside the Definition Provided by the DSM.

Section 300, subdivision (b)(1), authorizes a juvenile court to exercise dependency jurisdiction over a child if "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness . . . by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse."

"The Legislature included no definition of the term 'substance abuse' when it rewrote section 300 in 1987." (*In re Drake M.* (2012) 211 Cal.App.4th 754, 765 [*Drake M.*].)

"Although not binding, it can be useful to refer to the dictionary definition of a word in attempting to ascertain the meaning of statutory language." (*In re Marriage of Davis* (2015) 61 Cal.4th 846, 852, fn 1.)

The usual and ordinary meaning of the term "substance abuse" as defined in lay dictionaries include "the habit of taking too much of a harmful drug or drinking too much alcohol" (Oxford Learner's Dictionary at <https://www.oxfordlearnersdictionaries.com/us/definition/english/substance-abuse> [as of February 10, 2023]); "excessive use of a drug (such as alcohol, narcotics, or cocaine)" or the "use of a drug without medical justification" (Merriam-Webster Dictionary at <https://www.merriamwebster.com/dictionary/substance%20abuse> [as of February 10, 2023]); and "[e]xcessive, inappropriate, or illegal use of a substance, such as a drug, alcohol, or another chemical such as an inhalant, especially when resulting in addiction. Also called *chemical abuse*" (The American Heritage Dictionary of the English Language at <https://ahdictionary.com/word/search.html?q=substance+abuse> [as of February 10, 2023]).

Black's Law Dictionary (8th ed. 2004) defines "drug abuse" as "[t]he detrimental state produced by the repeated consumption of a narcotic or other potentially dangerous drug, other than as prescribed by a doctor to treat an illness or other medical

condition." (Black's Law Dict. (8th ed. 2004) p. 536, col. 1.) Another legal dictionary defines "drug abuse" as "a term used to describe the actions of a person who self-administers drugs that are dangerous and or harmful." (The Law Dictionary at <https://thelawdictionary.org/drug-abuse/> [as of February 10, 2023].)

The DSM was first published in 1952. (JN-B, p. 18.)[13] The DSM-III was in effect in 1987 when the Legislature revised section 300; the stated purpose of the DSM-III was for the diagnosis of mental disorders in clinical practice and research. (JN-B, pp. 1-2.) The DSM-III expressly cautioned against using the manual for non-clinical purposes, such as determination of legal responsibility or competency. (JN-B, p. 29.) Under the DSM-III, "substance abuse" and "substance dependence" were defined separately. (JN-B, p. 30.) "Substance abuse" was defined as (1) pattern of pathological use; (2) impairment in social or occupational functioning due to substance use; and (3) minimal duration of disturbance of at least one month. (JN-B, p. 30.) Each of these three criteria was further defined by the DSM-III. (JN-B, p. 31.)

The current version of the DSM, the DSM-V, no longer defines "substance abuse" or "substance dependence"; the two terms were eliminated and replaced with the new category "substance use disorder." (JN-A, p. 6.) "Substance use disorder"

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[13] Father filed a request for judicial notice concurrently with the OBM. (See OBM 26.) The Department will reference those documents in the same manner as Father.

describes the wide range of the disorder, from mild (presence of two to three symptoms), moderate (four to five symptoms), and severe (six or more symptoms). (JN-A, pp. 9, 12.) Relevant here, the sub-category, "stimulant use disorder" is defined as a pattern of amphetamine-type substance use leading to clinically significant impairment or distress as indicated by at least two of the following within a 12-month period: (1) taking larger amounts or over a longer period of time than intended; (2) persistent desire or unsuccessful efforts to stop or limit consumption; (3) spending large amounts of to obtain, use, or recover from the substance; (4) having strong cravings; (5) recurring use resulting in a failure to fulfill major work, school, or home obligations; (6) continued use despite recurring social or interpersonal problems caused or exacerbated by the effects of the drug; (7) neglecting important activities because of drug use; (8) recurrent use in situations that are physically hazardous; (9) continued use despite recurring physical or psychological problems caused or exacerbated by the drug; (10) needing more of the drug to achieve the desired effect; and (11) having withdrawal symptoms as defined in the DSM-V or needing drugs to alleviate withdrawal symptoms. (JN-A, pp. 14-15.)

Nothing in section 300's plain language suggests juvenile courts must consult this clinical definition – used for research and diagnosing patients – to assess child risk and invoke dependency jurisdiction. The statute's plain language does not indicate "substance abuse" means anything other than its ordinary, lay definition.

Therefore, the term "substance abuse" should be broadly defined by its ordinary and plain meaning, and courts should determine, based on the particular facts of a case, whether a parent's "substance abuse" places their child at risk of harm and warrants dependency jurisdiction.

B. The Statutory Context Confirms the Term "Substance Abuse" in Section 300, Subdivision (b)(1), Is Not Limited to the DSM's Clinical Definition.

A whole-text reading of section 300 reinforces that the Legislature did not intend dependency jurisdiction to hinge on the clinical definition of "substance abuse" found in the DSM.

The Legislature knows how to narrowly define terms supporting dependency jurisdiction, as it narrowly defined terms in some parts of the statute but not in others. For example, section 300, subdivision (d), allows for dependency jurisdiction when a "child has been sexually abused, or there is a substantial risk that the child will be sexually abused, as defined in Section 11165.1 of the Penal Code, ..." Under this provision, the Legislature defined the term "sexual abuse" by referencing the criminal offenses enumerated in California Penal Code section 11165.1. (§ 300, subd. (d).)

Likewise, section 300, subdivision (b)(2), protects commercially sexually exploited children "as described in Section 236.1 of the Penal Code, . . . or 11165.1 of the Penal Code, ..."

Also, the Legislature defined the term "emotional abuse" in section 300, subdivision (c), by declaring the subject child must show evidence of "severe anxiety, depression, withdrawal, or

untoward aggressive behavior toward self or others, as a result of the conduct of the parent. . . ."

Another example of where the Legislature limited the grounds for asserting dependency jurisdiction is section 300, subdivision (e), which narrowly defines "severe physical abuse" as "any single act of abuse that causes physical trauma of sufficient severity that, if left untreated, would cause permanent physical disfigurement, permanent physical disability, or death; any single act of sexual abuse that causes significant bleeding, deep bruising, or significant external or internal swelling; or more than one act of physical abuse, each of which causes bleeding, deep bruising, significant external or internal swelling, bone fracture, or unconsciousness; or the willful, prolonged failure to provide adequate food."

Under section 300, subdivision (a), the Legislature narrowed the definition of "serious physical harm" by stating the term "does not include reasonable and age-appropriate spanking to the buttocks if there is no evidence of serious physical injury."

In comparison, the Legislature did not narrowly define the term "neglect" in section 300, subdivision (f), or the term "cruelty" in section 300, subdivision (i). (See, e.g., *In re Ethan C., supra,* 54 Cal.4th at pp. 617, 626-637 [section 300, subdivision (f), does not limit its application to criminal negligence].) Nor did the Legislature narrowly define the terms "mental illness," "developmental disability," and "substance abuse" in section 300, subdivision (b)(1).

In 1987, when the Legislature revised section 300, the DSM had been in publication for 35 years and was in its third edition. (JN-B, pp. 17-32.) Despite this, the Legislature did not narrowly define the term "substance abuse" for purposes of assessing risk and protecting children by requiring juvenile courts to only consult the DSM's clinical definition.

Based on a whole-text reading of the various section 300 provisions where the Legislature expressly defined some forms of abuse but not others, it must reasonably be inferred that the Legislature did not intend to narrowly define "substance abuse" according to the DSM's clinical definition of that term. (See *In re Ethan C., supra,* 54 Cal.4th at p. 638 ["When language is included in one portion of a statute, its omission from a different portion addressing a similar subject suggests that the omission was purposeful."].)

C. Giving "Substance Abuse" Its Ordinary and Plain Meaning is Consistent with the Dependency Statutes' Overall Purpose of Providing Maximum Safety and Protection to Children.

In 1996, the Legislature added section 300.2,[14] titled "Purpose of chapter." That statute states in relevant part, "Notwithstanding any other provision of law, the purpose of the provisions of this chapter relating to dependent children is to *provide maximum safety and protection for children* who are currently being physically, sexually, or emotionally abused, being

[14] The statute was amended in January 2023; the amendments do not affect this appeal.

neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm. . . ." (§ 300.2, italics added.) The statute goes on to state, "*The provision of a home environment free from the negative effects of substance abuse is a necessary condition* for the safety, protection and physical and emotional well-being of the child. Successful participation in a treatment program for substance abuse may be considered in evaluating the home environment. . . ." (*Ibid.*, italics added.) It follows that the Legislature would put in place measures to achieve that stated purpose, not frustrate it.

Broadly defining the term "substance abuse" is consistent with the statutory purpose to protect children. The DSM was developed for use in a clinical setting, not to assess child safety issues. Although the DSM may be helpful to assess the ability of a parent to safety care for a child, particularly a child of tender age, it is not determinative and should not be used to restrict the Department's and the juvenile courts' ability to assess risk.

D. The History of Juvenile Dependency Laws Confirms the Legislature did Not Intend to Restrict the Term "Substance Abuse" to the Definition Provided in the DSM.

As discussed above, nothing in the statue's plain words suggests "substance abuse" means anything more than the ordinary meaning of the word. However, any ambiguity can be resolved by the legislative history of section 300. (See *In re Ethan C., supra,* 54 Cal.4th at p. 622.)

In *In re Rocco M.* (1991) 1 Cal.App.4th 814 (*Rocco M.*), the First District Court of Appeal discussed how the Legislature in 1987 intended to narrow the grounds on which juvenile court

jurisdiction could be invoked. (*Id.* at p. 821.) Prior to 1987, "a child could be declared dependent if he or she was 'in need of proper and effective parental care or control and ha[d] no parent or guardian ... willing to exercise or capable of exercising such care or control, or ha[d] no parent or guardian actually exercising such control.' (Former § 300, subd. (a), repealed 1987 Stats. ch. 1485, § 3, p. 5603.)" (*Rocco M., supra,* 1 Cal.App.4th at p. 821.)

"The 1987 revisions to section 300 were proposed by a task force established by the Legislature in 1986. (1986 Stats., ch. 1122, § 24, p. 3995.) According to one member of the task force, the purpose of the revisions was 'to replace the general provisions of the former statute with more specific and narrowly drawn requirements that would eliminate the wide discretion given to courts and child welfare workers under the old provisions, while continuing to allow assumption of dependency in all situations in which the minor is at risk.' (Brandt, 2 Cal. Juvenile Court Practice Supp. (Cont.Ed.Bar 1990), § 15.1, p. 4.)" (*Rocco M., supra,* 1 Cal.App.4th at p. 821.) The Executive Summary of the task force report states the "task force was to examine existing statutes and practices and make recommendations for any changes needed to ensure maximum continuity of protection for children at risk of abuse, neglect, and exploitation." (Sen. Select Com. On Children & Youth (1195 Task Force, Rep. on Child Abuse Reporting Laws, Juvenile Court Dependency Statutes, and Child Welfare Services (Jan. 1988) p. i [Task Force Report]; JN-C, p. 39.)

"Similarly, the consultant's report for the Assembly Committee on Human Services stated that the revised section 300 would '[c]larif[y] the definition of abuse. . . . The decision to *remove* a child from his or her home and/or terminate parental rights would be based on the immediate danger or "substantial risk" of danger to the child. . . . The bill would more clearly define the conditions under which a child could be *removed* from the family.' (Consultant's Report on Senate Bill 243, Assembly Committee on Human Services (July 8, 1987), p. 1.)" (*Rocco M., supra,* 1 Cal.App.4th at p. 821, italics added.)

The *Rocco M.* Court criticized the remarks of the consultant's report as "troubling" because they either misunderstood or misstated the law by confusing the assertion of dependency jurisdiction with a separate disposition hearing where the juvenile court considers possible removal of a child from the parent's custody. (*Rocco M., supra,* 1 Cal.App.4th at p. 821, fn. 5; see also *In re Ethan C., supra,* 54 Cal.4th at p. 617.)

The task force also noted that "'[o]pponents of the legislation believe that there will be children who under current statute would be served by the system, and will not be eligible under the provision of Senate Bill 243. Given this is the only child welfare system available, they believe statute [*sic*] should be left as vague as possible to allow a judge to make the appropriate decision.' (Consultant's Rep. on Senate Bill No. 243, supra, at p. 4.)" (*Rocco M., supra,* 1 Cal.App.4th at p. 822.)

Ultimately, the Legislature struck a balance by abandoning the catch-all[15] ability for juvenile courts to assert its jurisdiction and narrowing that authority to 10 grounds. (See § 300, subds. (a)-(j).) However, within the 10 grounds, juvenile courts were given some discretion to determine when jurisdiction is warranted based on the particular facts of each case and accounting for the specific needs of the child involved. (See Task Force Report, *supra*, p. 1; JN-C, p. 44 ["Because the entry of a child and his/her family into the dependency court system is a critical and imposing step, the task force sought to balance protections afforded to the family with the needs of the child. And the ability of the family to protect the child from harm."].)

The Legislature accomplished its goal by "outlining jurisdictional grounds for dependency to clarify areas of uncertainty and enhance the court's ability to protect abused and neglected children." (Task Force Report, *supra*, p. 2; JN-C, p. 45.) The task force report noted "there was substantial disagreement over specific definitions among members of the task force and among many of the individuals and groups participating in the

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[15] Prior to the 1987 amendments, juvenile courts could assert dependency jurisdiction where a child was not "provided with the necessities of life" or "[w]hose home is an unfit place." (Stats. 1986, c. 1122, § 2; Task Force Report, *supra*, p. 3; JN-C, p. 46.)

Legislature's hearings demonstrates the need for legislative guidance."[16] (Task Force Report, *supra*, p. 4; JN-C, p. 47.)

Furthermore, the task force report commented on the deference given to the juvenile courts even within the specific grounds adopted, noting, "The question of whether the particular definitions of harms provided in SB 243 are too narrow or too broad is separate from the question of whether the law should be left vague or made more specific. Many definitions are possible, the task force spent a great deal of time on the wording of each section and several legislative committees reviewed the specific language in lengthy hearings. [¶] In arriving at definitions, the task force was concerned with identifying situations where intervention is reasonably necessary." (Task Force Report, *supra*, pp. 4-5; JN-C, pp. 47-48.)

This comment, as well as additional findings from the task force report, supports the Department's position the Legislature did not want to be too restrictive when defining "substance abuse" for purposes of invoking dependency jurisdiction. (See Task Force Report, *supra*, p. 5; JN-C, p. 48 ["Although the legislation defines the harms more specifically than current law, it is not possible to give a highly specific definition to the phrase "serious" without being too restrictive. . . ."].)

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[16] Defining the term "physical abuse" was a controversial part of the legislation. (Task Force Report, *supra*, p. 6; JN-C, p. 49.)

1. *There Is No Authority to Deviate from the Plain Language of Section 300, Subdivision (b)(1).*

Drake M., the first case to utilize the DSM definitions of substance abuse for asserting dependency jurisdiction, noted, "The Legislature included no definition of the term "substance abuse" when it rewrote section 300 in 1987. And a review of the legislative history surrounding the revisions has revealed no specific discussion of how such term should be defined in practice. Dependency cases have varied widely in the kinds of parental actions labeled 'substance abuse.'" (*Drake M., supra,* 211 Cal.App.4th at p. 765.)

Regardless, the *Drake M.* Court then declared, "Thus, we find a workable definition is necessary to avoid any resulting inconsistencies" and adopted the definition of "substance abuse" as defined in the then-current edition of the DSM (DSM–IV–TR). (*Id.* at pp. 765-766.)

The *Drake M.* Court held, "a finding of substance abuse for purposes of section 300, subdivision (b), must be based on evidence sufficient to (1) show that the parent or guardian at issue had been diagnosed as having a current substance abuse problem by a medical professional; or (2) establish that the parent or guardian at issue has a current substance abuse problem as defined in the DSM–IV–TR." (*Drake M., supra,* 211 Cal.App.4th at p. 766.)

By requiring juvenile courts to consult the DSM's definition of "substance abuse," the *Drake M.* Court improperly acted as the Legislature by inserting new language into the statute and restricting courts' otherwise broad discretion to assume

dependency jurisdiction over children. (*Greyhound Lines, Inc. v. County of Santa Clara, supra,* 187 Cal.App.3d at p. 487 [it is the judiciary's role to interpret statutes, not insert into a statute what the Legislature has omitted]; Calif. Code Civ. Proc., § 1858 [same].)

2. *The Christopher R. Court Correctly Rejected Limiting the Definition of "Substance Abuse" to the DSM.*

The *Christopher R.* Court criticized the *Drake M.* Court for limiting the definition of "substance abuse" to the DSM, finding, "We recognize the *Drake M.* formulation as a generally useful and workable definition of substance abuse for purposes of section 300, subdivision (b)[1]. But it is not a comprehensive, exclusive definition mandated by either the Legislature or the Supreme Court, and we are unwilling to accept [a parent's] argument that only someone who has been diagnosed by a medical professional or who falls within one of the specific DSM-IV-TR categories can be found to be a current substance abuser." (*Christopher R., supra,* 225 Cal.App.4th at p. 1218.) Similarly, other Courts of Appeal have rejected the *Drake M.* mandate. (See, e.g., *In re Rebecca C.* (2014) 228 Cal.App.4th 720, 725 and *In re K.B., supra,* 59 Cal.App.5th at pp. 601-602.)

Based on the plain meaning words of section 300, subdivision (b)(1), combined with a whole-text reading that supports defining "substance abuse" broadly, further reinforced by the stated purpose of section 300, and given the legislative history provides no basis to restrict the term "substance abuse" to a definition in the DSM, this Court should follow *Christopher R.'s*

holding and disapprove of *Drake M.* and its progeny insofar as they hold that juvenile courts are limited to the DSM's definition of "substance abuse" when adjudicating section 300 dependency petitions. (See *In re Alexzander C.* (2017) 18 Cal.App.5th 438, 447 and *In re L.C.* (2019) 38 Cal.App.5th 646, 652.) Nothing in *Drake M.* or Father's brief provides authority for rewriting the statute and restricting the juvenile courts' ability to assess the child's safety.

E. Father's Arguments for Narrowly Defining the Term "Substance Abuse" According to DSM Lack Merit.

Father contends that "juvenile courts should be bound by the objective and scientifically based criteria in the DSM" (OMB 25) because "the Legislature intended the term 'substance abuse' to be defined by DSM criteria" (OBM 31). No evidence backs this assertion.

1. *Father Fails to Consider the Ordinary Meaning of the Term "Substance Abuse."*

Instead of looking at the ordinary or lay definition of "substance abuse," Father consults John Hopkins Medicine's definition of "substance abuse"[17] as a "brain disorder." (OBM 26.) But the definition is more extensive.[18] (OBM 26.) Father then

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[17] As of February 10, 2023, John Hopkins Medicine no longer defines "substance abuse" but instead uses the term "substance use disorder."

[18] The full definition provided by John Hopkins Medicine is as follows: "Substance abuse is the medical term used to describe a pattern of using a substance (drug) that causes significant problems or distress. This may be missing work or school, using

jumps to the conclusion the DSM must be used to define "substance abuse" for purposes of section 300 dependency jurisdiction. (OMB 26-31.) This argument runs contrary to the undisputed first step in statutory interpretation, which Father acknowledges at the outset of his argument: "We start with the statute's words, which are the most reliable indicator of legislative intent. We interpret relevant terms in light of their ordinary meaning. . . ." (OMB 25, citing to *In re R.T., supra,* 3 Cal.5th at p. 627.)

Furthermore, while John Hopkins Medicine references the criteria outlined in the DSM as being the "most common behaviors that mean a person is having a problem with drug or alcohol abuse. . . . each person may have slightly different symptoms." (John Hopkins Medicine <https://www.hopkinsmedicine.org/heal/conditions-and-diseases/substance-abuse-chemical-dependency> [as of January 10, 2023].)

(…continued)
the substance in dangerous situations, such as driving a car. It may lead to substance-related legal problems, or continued substance use that interferes with friendships, family relationships, or both. Substance abuse, as a recognized medical brain disorder, refers to the abuse of illegal substances, such as marijuana, heroin, cocaine, or methamphetamine. Or it may be the abuse of legal substances, such as alcohol, nicotine, or prescription medicines. Alcohol is the most common legal drug of abuse." (John Hopkins Medicine <https://www.hopkinsmedicine.org/heal/conditions-and-diseases/substance-abuse-chemical-dependency> [as of January 10, 2023].)

Also, not all medical communities define "substance abuse" as a "brain disorder." For example, the National Cancer Institute defines "substance abuse" as "[t]he use of illegal drugs or the use of prescription or over-the-counter drugs or alcohol for purposes other than those for which they are meant to be used, or in excessive amounts. Substance abuse may lead to social, physical, emotional, and job-related problems." (National Cancer Institute at <https://www.cancer.gov/search/results?swKeyword=substance+abuse> [as of February 10, 2023].) This definition, as well as reading the full definition provided by John Hopkins Medicine, is more in line with the ordinary meaning of the term "substance abuse."

Father acknowledges that during the first 25 years after the 1987 amendments to section 300 no juvenile court consulted the DSM when defining the term "substance abuse" for purposes of asserting dependency jurisdiction. (OMB 20; cf. *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1346 [Court of Appeal consulted the DSM in determining whether a parent's marijuana use qualified as "substance abuse" sufficient for a detriment finding and basis to keep child out of parental custody at a review hearing].) Father also fails to provide evidence that Courts of Appeal refer to "substance abuse" as a "brain disorder." (OBM, generally.) These facts further indicate the Legislature never intended to limit juvenile court supervision to only when a parent's substance abuse qualifies as a mental disorder.

2. *Father's Interpretation of the Term "Substance Abuse" Disregards the Statute's Surrounding Text.*

Next, Father asserts the surrounding language of section 300, subdivision (b)(1), shows the Legislature intended to utilize the DSM to define "substance abuse." (OBM 30.) Specifically, Father notes "substance abuse" is listed alongside "mental illness" and "developmental disability." (OBM 30.) He posits that because "mental illness" and "developmental disability" both "have clinical significance and connote the necessity for professional assessment and diagnosis opposed to colloquial jargon or assumptions", so must "substance abuse." (OBM 30.) Father's argument has two critical flaws.

Firstly, if "substance abuse" for purposes of section 300 jurisdiction is limited to the medical definition provided by the DSM's manual of mental disorders, then including "substance abuse" beside the term "mental illness" would be surplusage. In addition to providing diagnostic criteria for substance-related and addictive disorders, the DSM provides diagnostic criteria for mental illnesses such as anxiety disorders, depressive disorders, personality disorders, and other psychotic and mental disorders. (See DSM-V at <https://cdn.website-editor.net/30f11123991548a0af708722d458e476/files/uploaded/DSM%2520V.pdf> [as of February 10, 2023].) "It is a maxim of statutory interpretation that courts should give meaning to every word of a statute and should avoid constructions that would render any word or provision surplusage." (*Tuolumne Jobs &*

Small Business Alliance v. Superior Court (2014) 59 Cal.4th 1029, 1038.)

Secondly, nothing in section 300 requires professional assessment or diagnosis of a parent's "mental illness" or "developmental disability" before asserting dependency jurisdiction to protect a child. (OBM 30.) Father provides no citations to support his assertion otherwise (OBM, generally), and a similar argument was rejected just a few years after the Legislature rewrote section 300 in 1987.

In *In re Khalid H.* (1992) 6 Cal.App.4th 733, a mother argued that dependency jurisdiction based on a parent's "mental illness" had to be supported by expert witnesses. (*Id.* at p. 735.) The mother contended the term "mental illness" for purposes of section 300 jurisdiction should mirror the detailed definition of "mental illness" found in the Civil Code. (*Ibid.*) The Court of Appeal disagreed, stating, "We conclude that the mother's proposed definition of "mental illness" within section 300 defies the rules of statutory construction and is contrary to the legislative intent of section 300, which is to protect minors who face the risk of abuse and neglect by their parents." (*Id.* at pp. 735-736.) The *In re Khalid H.* Court noted the Civil Code was in existence when the Legislature enacted the 1987 revisions, and the Legislature utilized the Civil Code's definition of "mental illness" in a different portion of the dependency statutes to

bypass family reunification services.[19] (*Id.* at p. 736.) For purposes of asserting dependency jurisdiction, however, the Court stated, "Since section 300, subdivision (b), does not contain a described formal procedure to determine if a parent suffers from a mental illness, we will not borrow one from another statute. The Legislature is presumed to have meant what it said, and the plain meaning of the language will govern the interpretation of the statute."[20] (*Ibid.*)

A full reading of the statutes in conjunction with the reasoning in *In re Khalid H., supra,* 6 Cal.App.4th 733, requires a similar holding here. If the Legislature required expert evidence or consultation with professionals before asserting dependency jurisdiction under section 300, subdivision (b)(1), due to a parent's "mental illness, developmental disability, or substance abuse" it would have said so. (*In re Khalid H., supra,* 6 Cal.App.4th at pp. 735-736; § 300.)

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[19] Under current law, the reunification bypass provision requires showing the parent is suffering from a mental disability that is described in the Family Code and that renders the parent incapable of utilizing those services. (§ 361.5, subd. (b)(2).) The corresponding Family Code sections defines "disability" and "mentally disabled" as requiring evidence submitted by experts (e.g., "shall be a physician and surgeon, certified either by the American Board of Psychiatry and Neurology or . . . a licensed psychologist . . . ." (Family Code §§ 7824-7827.)

[20] Importantly, a parent's medical records are generally confidential and not admissible at jurisdictional hearings. (See, e.g., § 5328; Civ. Code § 56.106; Evid. Code §§ 990-995, 1010-1015.)

Certainly, the Legislature could have defined the term "substance abuse" according to the DSM, but it did not. Nor do the nearly 1000 pages of legislative history surrounding the 1987 amendments to section 300 reference the DSM even once. The absence of a single reference to the DSM in the statute or legislative history supports the conclusion that the Legislature did not contemplate, much less intend, for the term "substance abuse" in section 300, subdivision (b)(1), to be defined only by DSM. "It is a well-established principle of statutory construction that when the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction." (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734.)

3. *The Legislative History Further Weakens Father's Position.*

Father correctly notes the Legislature wanted to restrict a "catch all" basis for dependency jurisdiction by removing the previous vague language of the statute and replacing section 300 with 10 specific grounds for declaring a child a dependent of the juvenile court. (OBM 33-34; *In re Marilyn H.* (1993) 5 Cal.4th 295, 303.) However, as noted above, *supra*, II., B., some of the grounds for dependency jurisdiction were not narrowly defined but instead gave juvenile courts discretion to determine, based on the particular facts of each case and the needs of the child involved, whether jurisdiction is warranted; "substance abuse" is one of those grounds.

Father argues the Legislature's decision to change the language of section 300, subdivision (b)(1), from "use of drugs, alcohol, or mental illness or developmental disability" to "mental illness, developmental disability or substance abuse" confirms the Legislature warranted jurisdiction only when a parent's "substance abuse" met the definition provided by the DSM. (OBM 34-35.) Instead, by replacing "use of drugs, alcohol" with "substance abuse" the Legislature consistently removed a catch-all phrase and narrowed the risk factor from substance use to substance abuse.

4. *The Legislature's Stated Purpose of Section 300 Contradicts Father's Policy Argument.*

Father argues, "An objective scientifically based definition of 'substance abuse' best serves families and children." (OBM 36.) This arguments ignores (1) the Legislature never defined "substance abuse" according to a clinical definition (§ 300); (2) the Legislature declared the purpose of dependency law "is to provide maximum safety and protection for children. . . ." and the "provision of the home environment free from the negative effects of substance abuse is a necessary condition for the safety, protection and physical and emotional well-being of the child" (§ 300.2); (3) there were 25 years of case law where juvenile courts were interpreting the term "substance abuse" on a case-by-case basis, and the Legislature declined to amend the statute; and (4) the *Drake M.* Court acknowledged it was inserting its own definition of "substance abuse" in an attempt to avoid inconsistences (*Drake M., supra,* 211 Cal.App.4th at pp. 765-766).

Perhaps Father's most appealing policy argument is that of the *Drake M.* Court: utilizing the DSM criteria to determine parental substance abuse might provide more consistent results. (OBM 35-36.) But achieving the most consistent results is not the standard, and using a broader definition of "substance abuse" has not led to absurd results during the 35 years since the 1987 amendments to section 300.[21] Father acknowledges as much, noting when appellate courts uphold dependency jurisdiction by applying a broader definition of "substance abuse" the Courts often note their finding of substance abuse overlaps with the definition of "substance use disorder" found in the DSM. (OBM 24, 35; *Christopher R., supra,* 225 Cal.App.4th at pp. 1218-1219.)

In addition, the DSM focuses on diagnosing and treating patients, which inherently relies on cooperation and truthful information provided by the individual (e.g., amount of drug used (criteria 1); desire to cut down (criteria 2); amount of time spent in activities necessary to obtain stimulant, use the stimulant, or recover from its effects (criteria 3); cravings (criteria 4); tolerance (criteria 10); and withdrawal (criteria 11).) It does not assess risk to a third party, much less a child. Furthermore, in the dependency context, parents may be in denial about their substance abuse, may not be truthful, or may not want to disclose

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[21] The Department has the burden of proving by a preponderance of the evidence that a child is described by section 300. (§ 355, subd. (a).) And a juvenile court's jurisdictional findings are not without review. (*In re Heather A.* (1996) 52 Cal.App.4th 183, 193 [jurisdictional findings reviewed for substantial evidence on appeal].)

potentially negative information, which may expose them to criminal liability, when being investigated for child abuse or neglect. In contrast, someone actively seeking treatment for a "substance use disorder" is more likely to provide the information necessary to evaluate the needs of the patient under the DSM criteria.

The DSM does not directly assess any correlation between substance abuse and risk of harm to children, and there is no evidence it was intended for that purpose. For example, a juvenile court may find a parent who uses marijuana daily but waits at least four hours before interacting with children does not have a "substance abuse" problem. (See *Drake M., supra,* 211 Cal.App.4th at 767.) Whereas, by slightly altering the facts to where a parent's drug use causes the parent to routinely disappear from the children's lives from 5:00 p.m. until the next day does constitute "substance abuse" for purpose of section 300, subdivision (b)(1). (*In re K.B., supra,* 59 Cal.App.5th at pp. 600-601.)

Here, Father is asking this Court to step in the role of the Legislature and define the term "substance abuse" in order to provide more clarity to dependency law. If Father thinks clarity is needed, that would be a job for the Legislature, not the courts.

F. Father Abused Cocaine Under Any Definition of Substance Abuse.

In the juvenile court proceedings, counsel for Father admitted Father "did abuse cocaine" during his four-day birthday binge but claimed the cocaine abuse was a "one-time incident." (RT 28.)

Secondly, the *Christopher R.* Court correctly noted the definition of "substance abuse" provided by the DSM is a generally useful and workable definition but not a comprehensive, exclusive definition mandated by either the Legislature or the Supreme Court for purposes of section 300, subdivision (b)(1). (*Christopher R., supra,* 225 Cal.App.4th at p. 1218.)

Although not required for purposes of section 300, subdivision (b)(1), Father's abuse of cocaine constituted a "substance use disorder" pursuant to the DSM-V definition, which requires meeting two or more of the listed criteria; Father met six of them:

- Criteria 1: drug taken in larger amounts or over a longer period of time than was intended. Father frequently consumed cocaine over the previous five years, once or twice every two weeks as well as "raving" and using cocaine with friends at big parties, including a recent four-day cocaine binge. (Opinion, at pp. 4-6; CT 13.)
- Criteria 3: great deal of time spent in activities using or recovering from the drug. Father binged on cocaine, alcohol, and possibly other drugs over a four-day period where Father was unsure how much cocaine he used and what other drugs were ingested. (Opinion, at pp. 4-6; CT 13, 66.)
- Criteria 4: strong cravings to use the drug. Father used cocaine once or twice every two weeks for five

years. (Opinion, at pp. 5-6.) Mother noted Father used cocaine since before N.R.'s birth until recently, stating Father's eyes were always opened and Father was very hyper. (CT 63.)

- Criteria 7: neglecting important social activities because of drug use. Father's social activities involved using cocaine, alcohol, and possibly other drugs over a four-day binge, regular use of cocaine, using drugs at big parties, and "raving" with friends. (Opinion, pp. 4-6.)
- Criteria 8: recurrent drug use in situations that are physically hazardous. Father mixed alcohol with large amounts of cocaine and possibly other drugs over four consecutive days, the combination of which could create cocaethylene, which increases the addictiveness of each individual substance and the risk of violent behavior, paranoia, anxiety, depression, seizures, intense drug cravings, and sudden death. Opinion, at pp. 6-7; CT 13.)
- Criteria 10: tolerance defined as needing increased amounts of the drug to achieve intoxication or desired effect. Father mixed large amounts of cocaine with alcohol and possibly other drugs four straight days in order to achieve a desired intoxication level. (Opinion, at pp. 6-7; CT 13.).

(See JN-A, pp. 14-15.)

Thus, although the Court of Appeal did not limit the definition of "substance abuse" to the criteria found in the DSM, the Court's conclusion – substantial evidence supported the juvenile court's finding that Father was a substance abuser, warranting dependency jurisdiction over N.R. – would have been the same if analyzed using the DSM criteria. (See Opinion, at pp. 10-13.)

III. The Well-Accepted Inference that a Parent's Substance Abuse Places Children of Tender Years at Risk of Harm Is Commonsense and Consistent with the Stated Purpose of Dependency Law.

A. Providing Heightened Protection to Children of Tender Years Is Not a New Concept in California or Dependency Proceedings.

In 1858, this Court recognized the need to determine the competency of an eight-year-old before allowing testimony in a criminal trial. (*People v. Bernal* (1858) 10 Cal. 66, 66-67 [citing to an 1839 New York Supreme Court opinion where a "lad of eleven years" was a child of "tender years" requiring extra protective steps before being permitted to testify in court].)

In 2000, this Court recognized the need to "'safeguard the welfare of children of extremely tender years'" in the context of dependency proceedings. (*In re Lucero L.* (2000) 22 Cal.4th 1227, 1256, conc. opn. of Chin, J, citing *In re Kailee B.* (1993) 18 Cal.App.4th 719, 725.)

More recently, the term "tender years" appeared in a concurring opinion from this Court, noting "California's 'strong public policy to protect children of tender years.'" (*Hoffmann v.*

Young (2022) 13 Cal.5th 1257, conc. opn. of Kruger, J., citing *People v. Olsen* (1984) 36 Cal.3d 638, 646.)

B. The *Rocco M.* Court Recognized Children of Tender Years Are Uniquely Vulnerable to Substantial Physical Danger.

In 1991, the *Rocco M.* Court noted "[c]ases finding a substantial physical danger tend to fall into two factual patterns. One group involves an *identified, specific hazard* in the child's environment — typically an adult with a proven record of abusiveness. [Citations.] The second group involves children of such tender years that the absence of adequate supervision and care poses an inherent risk to their physical health and safety." (*Rocco M., supra,* 1 Cal.App.4th at p. 824, disapproved on another ground in *In re R.T., supra,* 3 Cal.5th at pp. 628-630.)

In 2017, this Court acknowledged the *Rocco M.* "tender years" rule. (*In re R.T., supra,* 3 Cal.5th at p. 629.)

C. Parental Substance Abuse is Prima Facie Evidence a Child of Tender Years Falls Under Section 300, Subdivision (b)(1).

Under section 300, subdivision (b)(1)'s fourth clause, the *Drake M.* Court noted that a finding of parental "substance abuse" does not always mean the parent is unable to provide regular care resulting in a substantial risk physical harm to the child. (*Drake M., supra,* 211 Cal.App.4th at p. 766.) Instead, "[t]he trial court is in the best position to determine the degree to which a child is at risk based on an assessment of all the relevant factors in each case." (*Ibid.*) However, when the trial court is making the risk assessment, the *Drake M.* Court held in cases involving children of tender years, "the finding of substance

abuse is prima facie evidence of the inability of a parent or guardian to provide regular care resulting in a substantial risk of physical harm." (*Id.* at p. 767.)

D. No Court of Appeal in California Has Rejected the Commonsense Inference Surrounding Substance Abuse and Children of Tender Years.

In the Court of Appeal below, Father acknowledged, without challenging, the substance abuse/tender years provision. (AOB 39-41.) And the soundness of this rule is highlighted by the fact Father fails to cite a single Court of Appeal opinion that criticizes, much less rejects, it. (OBM, generally).

Furthermore, the Department did not find any California Court of Appeal opinion that disapproves of the doctrine. (See, e.g., *In re K.B., supra,* 59 Cal.App.5th at p. 603; *In re J.A.* (2020) 47 Cal.App.5th 1036, 1049-1050; *Christopher R., supra,* 225 Cal.App.4th at p. 1219.)

Also, the Legislature has never taken action to alter the common-sense inference utilized for over 10 years.

E. The Substance Abuse/Tender Years Provision is a Commonsense Inference, Follows the Legislative Intent, and Should be Approved by This Court.

The reasoning behind the judicially created "tender years" and "substance abuse" provision is relatively simple. "The overarching goal of dependency proceedings is to safeguard the welfare of California's children." (*In re Nolan W.* (2009) 45 Cal.4th 1217, 1228.) This is particularly important when it comes to vulnerable children of "tender years." (See, e.g., *In re Lucero L., supra,* 22 Cal.4th at p. 1256, conc. opn. of Chin, J.) This makes

sense, because many children of tender years are unable to speak, much less report, abuse or neglect from a parent. In addition, children of tender years are often unable to avoid danger on their own, walk, feed themselves, or change a diaper. (See Evid. Code, § 451, subd. (f) ["Facts and propositions of generalized knowledge that are so universally known that they cannot reasonably be the subject of dispute."].) As one Court noted, "Children are immature, inquisitive, clever about escaping, and inexperienced with life's hazards. With impulsive urges and without much judgment about what could go wrong, children need supervision. A speeding car, a fire, a fall, a predator: disasters can strike swiftly and without warning." (*In re K.B., supra,* 59 Cal.App.5th at p. 602.)

If a parent is abusing drugs and/or alcohol, a presumption that the parent is unable to regularly care for a vulnerable child of tender years is a commonsense, workable rule that still requires juvenile courts to look at all the evidence to determine if the child, based on the particular facts of the case, is adequately protected despite the parental substance abuse. The provision is simply an inference that when starting with these two facts (i.e., [1] a finding of parental substance abuse [2] involving a child of tender years), there is a presumption that dependency jurisdiction is warranted.

The Legislature has already expressed its intention regarding the negative effects "substance abuse" has on children in the home. (§ 300.2.) The rule is sound, consistent with the Legislature's broad statutory language regarding dependency

jurisdiction, and this Court should take the opportunity to affirm that a finding of parental substance abuse provides prima facie evidence that a child of tender years needs the protection of the juvenile court. (See *People v. Cross* (2015) 61 Cal.4th 164, 179.) The Department is unaware of any statutory provision that would preclude this Court from recognizing the substance abuse/tender years inference.

F. Father's Arguments that this Court Should Disapprove the Substance Abuse/Tender Years Inference Lack Merit.

1. *The Tender Years Provision is a Commonsense Inference that Vulnerable Children of Tender Years are at Risk of Serious Physical Harm or Illness When There is a Finding of Parental Substance Abuse.*

During the proceedings in the Court of Appeal, Father acknowledged the substance abuse/tender years provision was a non-conclusive presumption that does not shift the burden on the parent to present contrary evidence, and Father did not question or challenge the inference below. (AOB 39.) However, Father now overstates the rule, wrongly claiming the burden was placed on him to rebut the substance abuse/tender years inference. (OBM 10.) Not so. Even with the inference, a juvenile court must still weigh all the relevant evidence before making a final determination regarding jurisdiction. For example, the courts look at the type of substance being abused, what makes the child particularly vulnerable (e.g., young age, special needs), whether the parent engaged in services, whether the parent had taken any steps to ameliorate the risk, and whether there was a responsible adult able to protect the child. These and other

factors must be considered by the juvenile court when making a determination whether a child is described by section 300. The burden does not shift to the parent to produce evidence rebutting the inference.

Comparatively, the section 355.1 presumptions do affect the burden of producing evidence. (See § 355.1.) For example, if the Department provides evidence the parent previously sexually abused a child pursuant to section 300, subdivision (d), or was convicted of sexual abuse as defined by the Penal Code, a juvenile court can assume jurisdiction without looking at additional evidence. (§ 355.1, subd. (d).) The same is true when a juvenile court "finds, based upon competent professional evidence, that an injury . . . or detrimental condition sustained by a minor is of a nature as would ordinarily not be sustained except as the result of the unreasonable or neglectful acts or omissions of either parent." (§ 355.1, subd. (a).) Once the presumption is established, it is the parent's burden to present evidence to rebut and overcome the presumption that the child is described by section 300. (§ 355.1.)

Under section 355.1, the Legislature declared a presumed risk of harm where it may not otherwise be obvious. For example, section 355.1, subdivision (a) includes situations where the perpetrator of the child abuse could be unknown due to multiple adults living in the home. It would not be obvious, absent the Legislature's stated intent, that jurisdiction could be asserted over that child without identifying the perpetrator. Similarly, it may not be obvious that a parent previously convicted of sexual

abuse necessarily poses a risk of harm to their newborn child. In these situations, where there may be a lack of evidence that a parent poses a risk, the Legislature expressly created presumptions in favor of juvenile court jurisdiction unless the parent can rebut them. (§ 355.1.)

Whereas, the substance abuse/tender years presumption is a reasonable inference made by the judiciary where the risk of harm is obvious and universally accepted. (See Evid. Code § 451, subd. (f).) The Legislature did not need to separately declare that vulnerable children of tender years should be protected from parental substance abuse, especially when sections 300, subdivision (b)(1) and 300.2 encompass those children.

2. *A Failed Proposal to Include a "Substance Abuse" Provision in Section 355.1 Does Not Undermine the Reasonable Inference as it Applies to Children of Tender Years.*

In 1989, the Legislature rejected a "substance abuse" provision under section 355.1. (OBM 47; see *In re Troy D.* (1989) 215 Cal.App.3d 889, 898, fn. 1.) However, the failed proposal is different from the commonsense inference in three important aspects.

Firstly, the failed legislation would have created a rebuttable presumption, shifting the burden of providing evidence of an absence of risk on the parent. (See § 355.1.)

Secondly, the failed legislation would have applied the "substance abuse" prima facie provision to all minors (e.g., a 17-year-old child), not just children of tender years.

Lastly, the failed legislation used the nearly identical vague language the Legislature previously excised out of the

dependency statutes as being overly broad and vague. Namely, under the failed proposal, dependency jurisdiction would be presumed when a parent "is unable to provide the *basic necessities of life* for himself or herself because of his or her substance abuse." (JN-F, p. 106, italics added.) Just one year prior, the task force noted, "The language of the prior Section 300 is extremely broad and vague. Court jurisdiction is authorized if a minor is . . . 'not provided with the *necessities of life*' . . . ." (Task Force Report, *supra*, p. 3; JN-C, p. 46, italics added.) This language was precisely what the Legislature wanted removed from dependency statues.

3. *There is No Arbitrary Age Cut-Off Regarding Children of "Tender Years."*

Father incorrectly asserts the "tender years" provision arbitrarily applies to children under the age of six. (OBM 51.) Father claims the *Drake M.* and *Christopher R.* Courts defined "tender years" as a child under the age of six. (OBM 49.) Not so. The ages of the children in those cases happened to be ages six and under, but there was no arbitrary rule created that vulnerable children ages seven, eight, or older cannot also be of "tender years." (*Drake M., supra,* 211 Cal.App.4th at p. 767 [child was 14 months old]; *Christopher R., supra,* 225 Cal.App.4th at p. 1219 [children were ages six years and younger at the time of the jurisdiction hearing].) As the *Rocco M.* Court noted, children of "tender years" are of a state and age that leaves them particularly vulnerable to danger absent near-constant supervision and care by a responsible adult. (*Rocco M., supra,* 1 Cal.App.4th at p. 824.) There is no precise age limit, but a

determination made by the juvenile court, based on the age and specific needs of the child involved in the case. (See *In re K.B., supra,* 59 Cal.App.5th at pp. 595, 602 [children ages 14, 10, and seven are immature, inexperienced with life's hazards, and at risk of serious physical harm when parental substance abuse results in the children being left alone for long periods of time].)

4. *There Is No "Tender Years" Rule Regarding Mental Illness and Developmental Disability.*

Father states, "With 'mental illness' or 'developmental disability' the same concerns articulated by courts regarding parental substance abuse exist: children of 'tender years' are especially vulnerable to harm when not adequately supervised." (OBM 52.) The Department disagrees and is not asking this Court to infer a parent's "mental illness" or "developmental disability" is prima facie evidence they are unable to provide regular care for a child of tender years. No Court of Appeal has held such a rule. (See *In re Matthew S.* (1996) 41 Cal.App.4th 1311, 1318 [harm may not be presumed from the mere fact of mental illness of a parent].)

In addition, Father is incorrect in stating that neither the "words of the statute" or "any overriding policy" provides a reason for the prima facie inference regarding parental "substance abuse" but not parental "mental illness" or "developmental disability." (OMB 52.) As discussed above, *supra*, II., E., the Legislature, indeed, expressed its intention regarding "substance abuse" but not "mental illness" or "developmental disability." (§ 300.2.) Also, this Court has held that dependency jurisdiction is authorized when a parent is not at fault under the fourth

clause of section 300, subdivision (b)(1), based on a parent's "mental illness" or "developmental disability" but was silent as to whether parental fault was required regarding parental "substance abuse." (*In re R.T., supra,* 3 Cal.5th at p. 630 [implying parental fault required when analyzing jurisdiction based on parental substance abuse].) In short, both the Legislature and this Court have treated parental "substance abuse" differently than a parent's "mental illness" or "developmental disability" regarding dependency jurisdiction.

5. *The Age of the Child Must be a Factor Regardless of the Prima Facie Rule.*

Father asserts the Opinion wrongly required him to "rebut" the prima facie rule regarding substance abuse and children of tender years. (OBM 58-59.) But that misstates the Opinion. Father never challenged the soundness of the prima facie rule but instead argued he "rebutted" the presumption. (AOB 39-40.) The Court of Appeal responded to Father's argument, finding the child's young age was simply a factor in asserting dependency jurisdiction when taking into account Father's longstanding and regular cocaine habit, Father's attempt to hide his cocaine abuse, Father's four-day alcohol and cocaine binge, Father's positive drug test for a high level of cocaine metabolites while he was responsible for caring for N.R., Father's missed drug tests, Father's inability to recognize the problematic nature of his drug abuse, as well as Father's refusal to engage in services and meet with the Department to discuss safety issues. (Opinion, at pp. 10-13.) In considering whether a child is at risk of harm, a juvenile court must consider the child's age and physical condition. (See

Rocco M., supra, 1 Cal.App.4th at p. 824.) Here, the Court of Appeal weighed all the evidence and found father's "occasional negative tests" and "the passage of time since the last positive drug test" were insufficient to overcome dependency jurisdiction. (Opinion, at p. 13.)

IV. Father's Substance Abuse Brought 16-Month-Old N.R. Within Section 300, Subdivision (b)(1).

A juvenile court's jurisdictional findings are reviewed for substantial evidence. (*In re Heather A., supra,* 52 Cal.App.4th at p. 193.) "Substantial evidence is relevant evidence which adequately supports a conclusion; it is evidence which is reasonable in nature, credible and of solid value." (*In re R.C.* (2012) 210 Cal.App.4th 930, 941.) "In brief, the appellate court ordinarily *looks only at the evidence supporting the successful party, and disregards the contrary showing*." (*In re I.W.* (2009) 180 Cal.App.4th 1517, 1527, citing *Campbell v. Southern Pacific Co.* (1978) 22 Cal.3d 51, 60 [emphasis in original].)

An unresolved drug problem can "compromise[]" a parent's "ability to care for his [or her] child, thus justifying the assumption of jurisdiction[.]" (*In re R.R.* (2010) 187 Cal.App.4th 1264, 1284.) Here, jurisdiction was asserted over 16-month-old N.R. after Father's four-day cocaine and alcohol binge, lying about his substance abuse, trying to hide it from the Department, and thereafter denying he ever had a problem. (Opinion, at pp. 4, 11-13; see *In re Gabriel K.* (2012) 203 Cal.App.4th 188, 197 ["One cannot correct a problem one fails to acknowledge."]; see also *In re A.F.* (2016) 3 Cal.App.5th 283, 293 ["'[D]enial is a factor often

relevant to determining whether persons are likely to modify their behavior in the future without court supervision.'"].)

It is undisputed Father tested positive for cocaine metabolite at more than 14 times the cut-off detection limit on the day he received N.R. in his full-time care. (Opinion, at pp. 10-13; CT 12, 21-22.) Thereafter, Father had an opportunity to try to resolve his longstanding substance abuse problem by participating in a Child Family Team program, enrolling in a substance abuse program, and submitting to random drug testing. (Opinion, at pp. 6-8; CT 21-22, 158.)[22] Yet, Father refused services, requested only to submit to random drug tests, provided three negative drug tests, and missed two drug tests during the months leading up to the jurisdictional hearing. (Opinion, at pp. 6-7; RT 7, 9-10; *Christopher R., supra,* 225 Cal.App.4th at p. 1217 [a missed drug test properly considered the equivalent of a positive test result].) Therefore, it was reasonable for the juvenile court to infer Father's substance abuse would continue and placed N.R. at risk. (*In re L.W.* (2019) 32 Cal.App.5th 840, 850.)

"'Although the harm or risk of harm to the child must generally be the result of an act, omission or inability of one of

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[22] Father incorrectly asserts the juvenile court did not order him into a substance abuse program "[b]ecause Father was no longer using cocaine or any other substance. . . ." (OBM 17.) The court instead stated, "If [Father] currently is claiming he's not using and he goes to try to enroll in a program, they'll just tell him he's not eligible. . . ." (RT 33.)

the parents or guardians, the central focus of dependency jurisdiction is clearly on the child rather than the parent.' [Citation]." (*Ibid.*) The Legislature has impressed the necessity of a child's home environment free from the negative effects of substance abuse (§ 300.2.) The fact N.R. had not yet been harmed by Father's substance abuse is not dispositive of the question whether dependency jurisdiction and court supervision was warranted. *Risk* of harm means just that: A juvenile "court need not wait until a child is seriously abused or injured to assume jurisdiction and take steps necessary to protect the child." (*In re I.J.* (2013) 56 Cal.4th 766, 773, quoting *In re R.V.* (2012) 208 Cal.App.4th 837, 843.)

Taken all together, substantial evidence supports the that Father was a substance abuser, which placed N.R., a child of tender years, at risk of harm. By weighing the relevant evidence, the Court of Appeal found Father's "occasional negative tests" and "the passage of time since the last positive drug test" were insufficient to overcome dependency jurisdiction given Father's "substantial history with cocaine," his attempt to hide his cocaine abuse, his inability to recognize the problematic nature of his drug abuse, his admission of regular use, and his four-day binge prior to accepting custody of N.R. (Opinion, at pp. 11-13; see *In re K.B., supra,* 59 Cal.App.5th 593 [a mother's positive drug test, years-long history with drug use, a prior arrest for possession, and the mother's attempts to conceal her drug use were enough to establish jurisdiction under 300, subdivision (b)].)

For these reasons, the Opinion should be affirmed.

Conclusion

The Department requests this Court reject Father's invitation to step in the role of the Legislature and insert into section 300, subdivision (b)(1), that a finding of "substance abuse" requires a diagnosis by a medical professional or a finding that the parent meets the criteria medical professionals would rely on to make that diagnosis (e.g., DSM-V).

Furthermore, the Department requests this Court recognize the long-standing, commonsense inference that children of tender years are vulnerable, require near constant care and supervision, and when there is a finding of parental substance abuse, there is a non-conclusive presumption the parent is unable to provide regular care for a child of tender years.

For all the reasons stated, the Department respectfully requests the Supreme Court affirm the Opinion.

DATED: February 13, 2023 Respectfully submitted,

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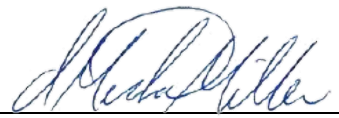
By 
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DATED: February 13, 2023 Respectfully submitted,

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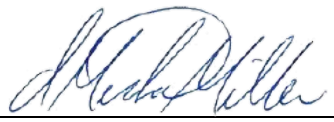
By 
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Declaration Of Service

STATE OF CALIFORNIA, County of Los Angeles:

CONNIE CHUNG states: I am employed in the County of Los Angeles, State of California, over the age of eighteen years and not a party to the within action. My business address is 648 Kenneth Hahn Hall of Administration, 500 West Temple Street, Los Angeles, California 90012.

On February 13, 2023, I served the attached **ANSWER BRIEF ON THE MERITS IN THE MATTER OF N.R., SUPREME COURT NO. S274943, 2d JUVENILE NO. B312001, LASC NO. 20CCJP06523A,** to the persons and/or representative of the court as addressed below.

BY ELECTRONIC SERVICE. I served via TrueFiling, and no error was reported, a copy of the document(s) identified above:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on February 13, 2023, at Los Angeles, California.

Connie Chung
CONNIE CHUNG

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **IN RE N.R.**
Case Number: **S274943**
Lower Court Case Number: **B312001**

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Date

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Signature

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