S187587

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In re ETHAN C. et al., Persons Coming Under Juvenile Court Law. LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff and Appellant, v. WILLIAMSON C., Defendant and Appellant.	Case No. S187587 Court of Appeal, 2d District Case No. B219894 Los Angeles County Superior Court Case No. CK78508

ANSWER BRIEF ON THE MERITS

From a Decision of the Court of Appeal, Second Appellate District, Division One

On Appeal from the Judgment of the Superior Court for the County of Los Angeles, Juvenile Division
The Honorable Sherri Sobel, Referee Presiding

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FROM A DECISION ON APPEAL FROM THE SUPERIOR COURT, LOS ANGELES COUNTY

HONORABLE SHERRI SOBEL, REFEREE

ANSWER BRIEF ON THE MERITS

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

INTRODUCTION

The Los Angeles County Department of Children and Family Services respectfully requests this Supreme Court affirm the decision of the Second District Court of Appeal entitled *In re Ethan C., et. al.* (2010) 188

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Cal.App.4th 992 ("Opinion").[1] The Second Appellate District affirmed, in relevant part, the assumption of juvenile court jurisdiction over surviving children, Ethan and Jesus, after their baby sister died in a car accident. Her death was caused in part by petitioner, her father, as he failed to secure the 18-month-old child in a child-safety seat. This act was part of a pattern of ongoing neglect that tragically led to a child's death.

The Legislature has cast a wide net to protect children whose parent has caused the death of a child through abuse or neglect. Petitioner's act was neglectful, in violation of the Vehicle Code, and without dispute substantially contributed to his daughter's death. The dependency statutes, by their plain language and legislative history, were designed to permit juvenile courts to supervise surviving children in a case such as this one, as the Second District Court of Appeal correctly recognized. The parental misconduct that causes a child's death need not be criminal as the ultimate purpose of dependency law is not to criminalize parents, but rather to protect children.

The current risk to Ethan and Jesus can be inferred from the facts. Yet, such a finding was not necessary in order for the juvenile court to provide supervision over the children. The "current risk" language is not contained in the portion of the statute relating to surviving children whose

[1] All citations to the Opinion are to the slip opinion, attached hereto.

parent caused the death of another child through abuse or neglect. Such language, however, is contained in other portions of the statute, indicating its omission in the relevant section was by design. Moreover, legislative history reveals that when a child dies as a result of parental misconduct, supervision over surviving children is warranted without an additional finding that those children are at current risk.

The reasoning of the Second District Court of Appeal was sound, consistent with the purpose of dependency law – to protect children – and heeded this Court's admonition against treating juvenile dependency matters akin to criminal cases.

Though not addressed in the Court of Appeal, this Supreme Court has asked the parties to brief the issue of causation. The approach that would produce foreseeable results and not lead to confusion, is to apply the tried and true standard used in both criminal and civil cases – a parent is found to have caused the death of a child when the parent's abusive or neglectful conduct substantially contributed to the death, and there were no unforeseeable, intervening causes. As the Vehicle Code makes clear, injuries resulting from car accidents and the failure to use proper child-safety restraints are foreseeable. Thus, petitioner's neglect in failing to secure his daughter at all, substantially contributed to her death, and the car accident did not absolve petitioner, as car accidents are foreseeable.

Ultimately, decisions of causation and foreseeability are questions for the trier of fact; the facts, here, are not in dispute.

The purpose of juvenile dependency law is not to punish parents, but rather to protect children. The interest in protecting surviving children of parents who cause the death of a child through abuse or neglect consumes all other competing interests, especially where, as here, there was evidence of ongoing parental neglect in the home. The decision of the Second District Court of Appeal should be affirmed.

COMBINED STATEMENT OF THE CASE AND FACTS

The subjects of this juvenile dependency matter are Ethan C., born January 28, 2006, and Jesus C., born November 17, 2008. (Clerk's Transcript ["CT"] 12.) Their mother is Kimberly G. ("mother") and their father is petitioner, William C. ("petitioner"). (CT 1.) Respondent is the Los Angeles County Department of Children and Family Services ("DCFS").

I. PROCEEDINGS IN THE JUVENILE COURT.

A. Detention.

On June 23, 2009, DCFS received a child abuse referral alleging then three-year-old Ethan and eight-month-old Jesus were victims of parental neglect. Two emergency response social workers from DCFS visited petitioner's home and observed 20 people, family members and

children, with no one in particular assigned to supervise the children. The home was unsanitary and did not have appropriate bedding for the children. The children found at the home had brown dirt streaks on their faces, and they were running around the yard unsupervised. (CT 14.)

One week earlier, Ethan and Jesus' sibling, 18-month-old Valerie, died in a car accident. Petitioner was driving the car, and Valerie was not secured in a car seat. (CT 14.)

When interviewed by the social worker, petitioner appeared grief-stricken and blamed himself for Valerie's death. He relayed he had left Valerie in the care of the paternal grandmother and paternal aunt. He came home and saw Valerie's arm was injured. He initially hesitated in explaining how Valerie was injured, but eventually admitted the child was left unsupervised and had fallen off a bed. Until petitioner came home, no one had paid attention to Valerie's injured arm. (CT 15.)

Petitioner sought to obtain medical treatment for Valerie. He, along with the paternal aunt and grandmother, drove in the car with Valerie, who was not restrained in any sort of belt or car seat during the ride. According to petitioner, he had a car seat, but it was in a different vehicle, which was being used by someone else. (CT 15.) Petitioner drove, the grandmother was in the front seat, and Valerie was in the back seat sitting on her aunt's

lap. The vehicle was involved in a major collision and, tragically, Valerie died. (CT 15-18.)

There is no dispute that the child was not restrained in a child-safety seat or belt, and that, as stated by petitioner's counsel at trial, "[Valerie] died from injuries sustained as a result of not being strapped in a safety seat." (Reporter's Transcript ["RT"] 18.) The police officer at the scene said he was considering seeking charges against the person who hit petitioner's car, but stressed the main factor in Valerie's death was the lack of a restraint. (CT 16 [paramedic also concluded the child was not restrained].) It was later reported that a police detective planned to ask that charges be filed against petitioner for child neglect and endangerment relating to Valerie's death.[2] (CT 18.)

At the time of Valerie's death, Jesus had been living with the maternal grandmother, who planned to bring Valerie and Ethan to her home as well, as she believed they were being neglected in the home of the paternal relatives. Jesus was doing much better since living with the maternal grandmother; when he came to her home, he presented with an infected boil. The maternal grandmother said that after Valerie's death, she retrieved Ethan; his diaper had a bowel movement so dry that she took him

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[2] It appears charges have been filed. (See letter filed by petitioner on or about July 6, 2011.)

home naked in order to bathe him. Ethan, then three, did not know how to feed himself, stayed up until the early morning, and confused day and night. His teeth were so rotten that three of them had to be extracted, and he had no language skills. (CT 17.)

At first, DCFS refrained from initiating juvenile dependency proceedings, and instead commenced voluntary services with the family, whereby the parents agreed to have the children placed outside their custody, while they participated in services. (CT 17-18.) As time went on, however, DCFS worried that the time constraints of the voluntary plan would be insufficient to ensure the children could safely return home. (CT 17.) In addition, the parents' psychological assessments revealed a history of domestic violence between mother and father, with mother being the aggressor. (CT 18, 38.) Mother admitted she had an anger management problem and cognitive limitations. (CT 18-19, 42.) The evaluator stated mother did not appear capable of taking care of children. (CT 46.)

After considering this additional information and all of the safety concerns – lack of bedding, inappropriate supervision, and the state of petitioner's home – DCFS decided to initiate juvenile court proceedings. (CT 15.) Accordingly, on August 18, 2009, DCFS filed a Welfare and

Institutions Code[3] section 300 petition on behalf of Ethan and Jesus. (CT 1-11.) The same day, the juvenile court convened for the initial detention hearing and detained the boys in DCFS custody. (CT 69; RT 4.)

B. Jurisdiction and Disposition.

On September 8, 2009, DCFS filed its Jurisdiction/Disposition Report documenting its further investigation. (CT 75-76.) Attached to the report were copies of the Traffic Collision Report from the accident in which Valerie died. (CT 87-101.)

The social worker noted the Coroner found Valerie's death to be the result of accidental, blunt-force trauma. (CT 77.) Two cars had hit petitioner's vehicle. (CT 97.) It was undisputed that Valerie died as a result of not being restrained in a child-safety seat. (See RT 18; CT 16.)

C. Trial.

The court convened on October 22, 2009, for trial and noted the parties had reached an agreement as to almost all of the counts in the section 300 petition. The juvenile court admitted in evidence the DCFS reports and their accompanying attachments. (RT 15.) The court accepted waivers of trial rights from both parents (CT 141-144; RT 15-17), who

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[3] All unspecified statutory references are to the Welfare and Institutions Code.

submitted to juvenile court jurisdiction over Ethan and Jesus. (CT 141, 142.)

Regarding the count pled under section 300, subdivision (f), the court heard argument.[4] County counsel urged the court to sustain the section 300, subdivision (f), count based on Valerie's death, and petitioner's neglect in failing to properly restrain her. The children's attorney agreed. Father's attorney acknowledged that the facts were not in dispute. (RT 17.) He admitted that Valerie had died as a result of not being strapped in a safety seat. However, he also argued that in order for section 300, subdivision (f), to apply, the parental misconduct had to rise to the level of criminal negligence, which was not present here. (RT 18-19.) In response, county counsel noted the Vehicle Code prohibits parents from allowing a child to ride in a car without safety restraints, the purpose of which is to prevent this exact type of tragedy. (RT 19-20.)

The juvenile court agreed and sustained the section 300, subdivision (f), count, finding petitioner's failure to use a child-safety restraint caused Valerie's death.[5] (CT 5-8, 159; RT 20.) The court explained the law

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[4] Section 300, subdivision (f), permits a court to assume jurisdiction over a child where: "The child's parent or guardian caused the death of another child through abuse or neglect."

[5] The court also sustained counts under subdivision (b), based on the parents' history of domestic violence and mother's significant cognitive limitations, and (j), finding the neglect that caused Valerie's death placed

(continued...)

mandated the use of a child-safety seat, and the plain wording of section 300, subdivision (f), encompassed the failure to do so when a child died as a result. (RT 20-21.)

The court declared Ethan and Jesus dependents and found by clear and convincing evidence a substantial risk of detriment if they remained in parental custody. (RT 21.) Per DCFS's recommendation, the juvenile court ordered the parents be provided reunification services. (CT 144, 160; RT 22.)

II. PROCEEDINGS IN THE COURT OF APPEAL.

Petitioner appealed to the Second District Court of Appeal, challenging, in relevant part, the finding of jurisdiction under section 300, subdivision (f).[6] (CT 163.) In a published opinion filed on September 24, 2010, Division One of the Second Appellate District affirmed the finding of jurisdiction under section 300, subdivision (f). (See Opinion.)

(...continued)
Ethan and Jesus at risk. (CT 5-8, 159; RT 20.) The court dismissed the section 300, subdivision (a), count and the count pled under section 300, subdivision (b), relating to Valerie's death. (CT 4, 5, 159.)

[6] Petitioner challenged other findings as well, and DCFS challenged, by cross-appeal, the court's dismissal of the section 300, subdivision (b), count relating to Valerie's death. (Opinion, p. 12-14.) The Court of Appeal affirmed the juvenile court's jurisdictional findings pertaining to the parents' history of domestic violence and mother's cognitive limitations and reversed the dismissal of the section 300, subdivision (b), count. (Opinion, pp. 12-15.) Only the findings related to section 300, subdivision (f), are relevant to this discussion.

A. Majority Opinion.

The Majority Opinion, written by Justice Johnson, with Presiding Justice Mallano concurring, upheld the finding under section 300, subdivision (f), which permits a juvenile court to assume jurisdiction over a child where the "'parent or guardian caused the death of another child through abuse or neglect.'" (Opinion, pp. 8, 10-15 [citing § 300, subd. (f)].) The Majority addressed the type of parental neglect necessary for a section 300, subdivision (f), finding, specifically whether the degree of parental culpability must rise to the level of criminal negligence or if ordinary civil negligence suffices. (Opinion, p. 8.)

Focusing on legislative history, the Majority noted the 1996 amendment to section 300, subdivision (f), which deleted the requirement that the parent or guardian be convicted of causing the death of another child through abuse or neglect. (Opinion, pp. 8-9 [citing Historical and Statutory Notes, 73 West's Ann. Welf. & Inst. Code (2008 ed.) foll. § 300, p. 266; 10 Witkin, Summary of Cal. Law (10th ed. 2005) Parent and Child, § 547, p. 671].) Thus, the amendment deleted the requirement of a criminal conviction. (Opinion, pp. 8-9.)

Again, looking at the legislative history, the Majority surmised that the reason for the statutory change was twofold: (1) juvenile dependency hearings usually are held long before a related criminal proceeding is

resolved; and (2) to "'lower the standard of proof by which the parent's cause of the other child's death is found.' from the higher 'beyond a reasonable doubt' criminal standard, to the lower mere 'preponderance of the evidence' standard required in a civil action." (Opinion, p. 9 [citing Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2679 (1995-1996 Reg. Sess.) as amended May 14, 1996, § 2-E, p. o].)

Based on the canons of statutory construction, because the language of section 300, subdivision (f), is clear and unambiguous, the Majority gave deference to the statute's plain meaning. (Opinion, p. 9.) "Had the legislature intended section 300, subdivision (f) to be predicated on criminal negligence, we believe it would have expressly said so." (Opinion, pp. 9-10.) Regardless, even if the language of the statute were ambiguous, "the purpose of the 1996 revision was to *lessen* the evidentiary burden and 'expand[] [the] provision by eliminating the requirement of a conviction of the death of another child, and instead simply provide[] that the parent has caused the death of another child.'" (Opinion, p. 10, emphasis supplied [citing Analysis of Assem. Bill No. 2679, p. c].) "Nowhere is there an indication the Legislature intended to require a finding of criminal negligence[,]" nor does any case so hold. (Opinion, p. 10.) Moreover, dependency proceedings are civil, not criminal, in nature; their purpose is

to protect children, not prosecute parents. (Opinion, p. 12, citing *In re Malinda S.* (1990) 51 Cal.3d 368, 384.)

Similarly, citing *In re A.M.* (2010) 187 Cal.App.4th 1380, the Majority rejected the notion that subdivision (f) jurisdiction must be based on a finding that the surviving children are at current risk of harm. As the plain language of the statute makes no mention of a current-risk finding, a juvenile court may assume jurisdiction under section 300, subdivision (f), upon a finding that the parent caused the death of another child through abuse or neglect, nothing more. (Opinion, p. 11.) The language of section 300, subdivision (f), stands in stark contrast with other subdivisions of section 300, which specifically contain "risk of harm" language. (Opinion, p. 12.)

B. Dissent.

Justice Rothschild dissented. The Dissent addressed solely the issue of whether section 300, subdivision (f), jurisdiction necessitates a finding of current risk. (Opinion, Dissent, p. 1.) Despite the express language of the statute omitting such a requirement, the Dissent, relying on section 300.2, concluded the opposite. Section 300.2 provides: "'Notwithstanding any other provision of law, the purpose of the provision of this chapter relating to dependent children is to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally

abused [or] being neglected . . . and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of harm.'" (Opinion, Dissent, p. 1, emphasis deleted [citing § 300.2].)

The Dissent was not persuaded by the holding of *In re A.M., supra*, 187 Cal.App.4th 1380, because the case makes no reference to section 300.2. (Opinion, Dissent, pp. 2-3.) The Dissent further noted that there were scenarios, such as that presented in *In re A.M.*, where the parental misconduct that caused the death of a child was sufficient in itself to support an inference of current risk to the surviving children. (Opinion, Dissent, p. 3.) However, the Dissent concluded that petitioner's neglect here did not provide such an inference. (Opinion, Dissent, p. 3.)

III. ACTIONS IN THE SUPREME COURT.

Father petitioned this Court for review of issues related to section 300, subdivision (f), which this Court granted on December 21, 2010.

QUESTIONS PRESENTED

The questions presented, as directed by this Court, include those raised in the Petition for Review, as well as those enumerated by this Court when it granted the Petition for Review.

1. May a juvenile court provide supervision over a child, under section 300, subdivision (f), where a parent's neglectful conduct caused the death of another child?

2. When a parent causes the death of another child through abuse or neglect, must a juvenile court make an additional finding that the surviving children are at current risk of harm before assuming jurisdiction over them under section 300, subdivision (f)?

3. Is section 300, subdivision (f), jurisdiction limited to children whose parent was the sole cause of another child's death, or does the statute encompass protecting children whose parent contributed to another child's death through abusive or neglectful conduct?

4. When determining the application of section 300, subdivision (f), should a court consider whether, aside from the parent's misconduct, there was an intervening, superseding cause of the child's death?

STANDARD OF REVIEW

DCFS agrees with petitioner that the issues presented herein are subject to de novo review. (*Beeman v. TDI Managed Care Svcs.* (9th Cir. 2006) 449 F.3d 1035, 1038; *Mathews v. Chevron Corp.* (9th Cir. 2004) 362 F.3d 1172, 1180.)

ARGUMENT

I. PURPOSE OF DEPENDENCY LAW.

As this Court and appellate courts have declared time and again, dependency proceedings are civil, not criminal, in nature, designed to protect the child, not prosecute the parent. (*In re James F.* (2008) 42 Cal.

4th 901, 915 ["The rights and protections afforded parents in a dependency proceeding are not the same as those afforded to the accused in a criminal proceeding."]; *In re Malinda S., supra*, 51 Cal.3d 368, 384[7] [same]; *In re Kailee B.* (1993) 18 Cal.App.4th 719, 727 ["We find rather unsettling counsel's reference in her reply brief to the Blackstone's observation, 'It is better that ten guilty persons escape, than that one innocent suffer.' (Citation.) While one may accept this homily in a criminal setting, . . . we trust that few, if any, would agree it is better that 10 pedophiles be permitted to continue molesting children than that 1 innocent parent be required to attend therapy sessions . . . ."]; *In re Mary S.* (1986) 186 Cal.App.3d 414, 418-419 [A parent at a dependency hearing does not have the same rights as a criminal defendant because the paramount concern of dependency law is the child's welfare.].)

The subdivisions under section 300 describe when a juvenile court may assert jurisdiction over a child. To be clear, an assumption of jurisdiction does nothing more than permit a court to supervise a child. Once jurisdiction is established under one of the subdivisions of section 300, a court has three options: (1) without declaring the children dependents of the court, provide informal supervision for six months, when the case automatically will be dismissed unless new concerns are brought

[7] Superseded by statute.

before the court (§§ 301, 360, subds. (b) & (c)); (2) declare the children dependents and provide formal court supervision while permitting the children to remain home with the parents (§ 360, subd. (d)); or (3) declare the children dependents of the court and remove them from parental custody (§ 361, subd. (c)).

In order to remove children from parental custody, DCFS must show, by clear and convincing evidence, that the children are at substantial risk of detriment if they remain in parental custody and no reasonable means exist to ensure the children's protection absent removal. (§ 361, subd. (c).) This burden is the same regardless of which subdivision of section 300 is established. Accordingly, a finding under section 300, subdivision (f), permits a court to assume jurisdiction over a child, nothing more. To remove the child from parental custody, the court still would need to find substantial risk by clear and convincing evidence.

With these provisions in mind, the law casts a wide jurisdictional net when parental misconduct results in the death of a child. Under those circumstances, where a child dies because of a parent's abusive or neglectful conduct, the juvenile court may assume jurisdiction over the surviving children in order to provide supervision.

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II. SECTION 300, SUBDIVISION (F), ALLOWS A JUVENILE COURT TO PROVIDE SUPERVISION OVER A CHILD WHEN THE PARENT CAUSED THE DEATH OF ANOTHER CHILD THROUGH NEGLECTFUL CONDUCT.

Petitioner urges that section 300, subdivision (f), jurisdiction may be established when a child dies as a result of a parent's conduct, but only if the parental misconduct is either abusive or criminally negligent. (Petitioner's Brief on the Merits ["Petitioner's Brief"], pp. 6-7.) But as the statute makes clear, jurisdiction may be established when the death was caused by parental neglect. (§ 300, subd. (f).)

A. The Plain Language of the Statute and the Legislative History Indicate Juvenile Court Jurisdiction Is Warranted When a Parent's Neglect Caused the Death of Another Child.

"The objective of statutory interpretation is to ascertain and effectuate legislative intent. To accomplish that objective, courts must look first to the words of the statute, giving effect to their plain meaning. If those words are clear, [courts] may not alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history." (*In re Jerry R.* (1994) 29 Cal.App.4th 1432, 1437.) As the Majority noted, the plain language of section 300, subdivision (f), is clear and simple. For a child to come under section 300, subdivision (f), the parent or guardian must have caused the death of a another child through abuse or neglect. (Opinion, pp. 9-11; § 300, subd. (f).)

Under Federal law, "child abuse and neglect" is defined as: "[A]t a minimum, any recent act or failure to act on the part of a parent or caretaker, which results in death, serious physical or emotional harm, sexual abuse or exploitation, or an act or failure to act which present an imminent risk of serious harm[.] (42 U.S.C. § 5106g.) Similarly, the Child Abuse and Neglect Reporting Act defines "child abuse or neglect" to include the definition of "neglect" as codified by Penal Code section 11165.2. (Pen. Code § 11165.6.) Penal Code section 11165.2 defines "neglect" as the negligent treatment or maltreatment, through act or omission, of a child by a person responsible for the child's welfare, under circumstances that could harm or threaten the child's health or welfare. (Pen. Code § 11165.2.)

Section 300, subdivision (f), contemplates death caused by "neglect," not criminal negligence – a "'flagrant,' 'aggravated' or 'reckless' sort of act." (Opinion, p. 9.) "[C]riminal negligence is of a higher order of culpability than ordinary civil negligence . . . ." (*Sea Horse Ranch, Inc. v. Superior Court* (1994) 24 Cal.App.4th 446, 454; *People v. Penny* (1955) 44 Cal.2d 861, 879.) Nowhere does section 300, subdivision (f), use the term "criminal negligence."

On the other hand, elsewhere in the dependency statutes criminal law terminology is used. For example, under section 361.5, subdivision

(b)(12), a juvenile court may deny a parent reunification services if the parent "has been convicted of a violent felony, as defined in subdivision (c) of Section 667.5 of the Penal Code." Section 300, subdivision (d), defines sexual abuse by the Penal Code section 11165.1 definition. Section 361.4 prohibits placing dependent children with relatives who have convictions for certain crimes. "Where a statute on a particular subject omits a particular provision, the inclusion of such a provision in another statute concerning a related matter indicates an intent that the provision is not applicable to the statute from which it was omitted." (*Marsh v. Edwards Theatres Circuit, Inc.* (1976) 64 Cal.App.3d 881, 891.)[8] "When different language is used in the same connection in different parts of a statute it is to be presumed the Legislature intended a different meaning and effect." (*Charles S. v. Board of Education* (1971) 20 Cal.App.3d 83, 95, internal quotation marks and citation omitted.)

This tenet of statutory construction is bolstered by the fact that in 1996 the Legislature modified the statute by deleting the requirement of a criminal conviction. (Opinion, pp. 8-9 [citing Historical and Statutory Notes, 73 West's Ann. Welf. & Inst. Code (2008 ed.) foll. § 300, p. 266; 10 Witkin. Summary of Cal. Law (10th ed. 2005) Parent and Child, § 547, p. 671].) Petitioner urges that by negating the requirement of a criminal

[8] Superseded on other grounds.

conviction, the Legislature nonetheless contemplated that the parental misconduct that caused the death of a child, must still be criminal in nature. (Petitioner's Brief, p. 11.) Petitioner misconstrues the statute's legislative history.

The Senate Judiciary Committee Analysis specifically states, "The impact of this provision is to lower the standard of proof by which the parent's cause of the other child's death is found, and to require the juvenile court make the determination as to whether the parent caused the other child's death. A criminal conviction requires proof beyond a reasonable doubt, while the standard of proof in a civil action is mere preponderance." (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2679 (1995-1996 Reg. Sess.) § 2-E, p. o.) The Senate's analysis' stated purpose is to expand the number of children who can be protected. (*Id.* at p. c ["This bill expands this provision by eliminating the requirement of a conviction of the death of another child and instead simply provides that the parent has caused the death of another child."].)

Petitioner argues that the purpose of the statute was to allow juvenile court jurisdiction where a parent is found to be criminally liable for the death of a child. He claims the deletion of the need for an actual conviction was designed merely to promote efficiency in applying the provision. (Petitioner's Brief, pp. 10-11.) He claims support in portions of the

legislative history. Specifically, he cites to a section stating, "'care must be taken that the juvenile court action does not create a bar (collateral estoppel) as to any issues of fact.' [Citation]." (Petitioner's Brief, p. 11.) He reasons that if a juvenile court were able to assume jurisdiction under section 300, subdivision (f), based on ordinary negligence, there would be no concern about creating a bar on factual issues because ordinary negligence cannot support a criminal conviction. (Petitioner's Brief, p. 11.)

DCFS reads the legislative history differently. The discussion petitioner cites from expresses concern about the impact of the juvenile court's causation determination, not parental misconduct, on later criminal proceedings. In relevant part, the legislative analysis states:

> [R]equiring something other than a conviction raises concerns about the effect of any finding made by the juvenile court on the criminal prosecution for the death. Care must be taken that the juvenile court action does not create a bar (collateral estoppel) as to any issues of fact. [¶] Further, where a conviction is required, it is clear that the issue of the other child[']s death must be resolved before the determination as to the current child[']s status. By changing to a mere causation requirement, the timing is changed so that the issue of the other child[']s death may be unresolved and currently ongoing. Will this mean the court cannot apply this limitation until after a final decision on the causation? Is the issue of causation with regard to the other child[']s death going to be heard in both cases at once?

(Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2679 (1995-1996 Reg. Sess.) § 2-E, pp. o-p.)

Thus, the legislative concern appears to be with a juvenile court making causation determinations prior to the criminal proceeding that could preclude prosecution for the death of a child. (*Ibid.*) Because of the different evidentiary burdens in juvenile and criminal proceedings, a finding in the juvenile court could create a bar for the prosecution, not the defense. Even if a juvenile court found a parent's criminal conduct caused the death of the child, that finding by a preponderance of the evidence, still would need to be proven by beyond a reasonable doubt in the criminal arena. (See *In re James F., supra*, 42 Cal.4th at p. 915.) Thus, the only time a juvenile court's findings may serve as a bar in criminal proceedings is when a juvenile court determines the parent is not culpable, which is true regardless of whether the act is criminal or civil in nature.

Petitioner next highlights that other subdivisions of section 300, provide for jurisdiction when "'the parent or guardian knew or reasonably should have known'" that another household member abused or neglected the child. (Petitioner's Brief, p. 12.) He reasons that because that phrase connotes civil negligence and is not included in section 300, subdivision (f), ordinary negligence does not apply to that subdivision. (Petitioner's Brief, p. 12.) DCFS disagrees.

Section 300, subdivision (d), defines children who are victims of sexual abuse perpetrated by the parent or a member of the household. That

subdivision also protects children from parents who fail to protect them from sexual abuse when the parent knew or reasonably should have known of the risk. Subdivision (e) of section 300 protects children under the age of five from severe physical abuse perpetrated by a parent or any person known by the parent if the parent knew or reasonably should have known the person was physically abusing the child. Likewise, subdivision (i) protects children from acts of cruelty by a parent or member of the household or from a parent who fails to protect the child from acts of cruelty when the parent knew or reasonably should have known of the risk.

True, section 300, subdivision (f), does not contain similar language; but it does not need to. The plain language of subdivision (f), expressly encompasses a parent's neglectful conduct that causes the death of a child. The "knew or reasonably should have known" language would be superfluous. Its addition in the other subdivisions mentioned above, permits a court to assume jurisdiction over a child under section 300, subdivisions (d), (e), or (i), where either the parent commits the abusive act or neglectfully fails to protect the child from it. Subdivision (f), on its face, applies to neglectful as well as abusive conduct that causes a child's death.

Petitioner attempts to bolster his argument by noting a court may deny reunification services to a parent based on true findings under section 300, subdivision (f). (Petitioner's Brief, p. 13, citing § 361.5, subd. (b)(4).)

He urges that because reunification services may be denied only if the parental misconduct is "'serious'" or "'too shocking to ignore,'" that a denial of services based on subdivision (f) jurisdiction must mean the parental misconduct went beyond ordinary negligence. (Petitioner's Brief, p. 13, citing *Mardardo F. v. Superior Court* (2008) 164 Cal.App.4th 481, 488; *In re Alexis M.* (1997) 54 Cal.App.4th 848, 851.)

As mentioned in Argument I, above, a true finding under section 300, subdivision (f), allows a court to supervise a child, nothing more. (§ 300.) In order to even contemplate the reunification and non-reunification statutes, DCFS first must show, by clear and convincing evidence, that the children would be at substantial risk of harm if they remained in parental custody and no reasonable means exist to protect the children absent removal. (§ 361, subd. (c).) Then, and only then, does a juvenile court contemplate the provision of reunification services. Yes, a true finding under section 300, subdivision (f), coupled with a child's removal from parental custody, triggers the non-reunification statutes. (§ 361.5, subd. (b)(4).) But, as evidenced by the case at bar, that does not mean that DCFS necessarily will pursue a denial of reunification efforts. (CT 114, 160.) Further, barring reunification services is not automatic; rather, a parent who meets the non-reunification requirements may still be offered services if he/she can show that offering services would promote the children's best

interests (§ 361.5, subd. (c)). Thus, while denying a parent reunification services is possible after a finding under section 300, subdivision (f), it is not automatic. This gives a court the flexibility to deny services in a case where, for example, a parent has murdered a child, but offer services in a case such as this one.

The purpose of the 1996 modification of section 300, subdivision (f), was to expand the number of children who could be protected. (Sen. Com. on Judiciary, Analysis of Assem. Bill No. 2679 (1995-1996 Reg. Sess.) § 2-E, p. c.) To limit the statute only to include criminal behavior would promote precisely what this Court and appellate courts have warned against – treating dependency proceedings as criminal, not civil, in nature. (*In re James F., supra*, 42 Cal.4th 901, 915; *In re Malinda S., supra*, 51 Cal.3d 368, 384; *In re Kailee B.* (1993) 18 Cal.App.4th 719, 727; *In re Mary S.* (1986) 186 Cal.App.3d 414, 418-419.)

B. Violations of Public Welfare Laws That Cause the Death of a Child, Trigger Application of Section 300, Subdivision (f).

It is undisputed that by failing to secure Valerie in a child-safety restraint, petitioner violated Vehicle Code section 27360, added in 1982. In enacting the law, the Legislature declared:

> [A]utomobile accidents claim the lives of more children than any other cause and that, last year, over one hundred children died and over thirteen thousand children were seriously injured. The Legislature further finds and declares that 85

> percent of the deaths and most of the injuries could be prevented by the use of crash-tested safety seats for children, but only 9 percent of parents use proper restraints on their children, and sudden braking, even without a collision, causes a third of the deaths of all children from automobile accidents.

(Sen. Bill. No. 537 (1981-1982 Reg. Sess.) § 1.) In its present form, the provision requires parents to ensure their child is restrained in a child-safety seat if the child is under six years or 60 pounds. (Veh. Code § 27360.) Those who violate the law may be subjected to fines, mandated to participate in education programs, and reported to the Department of Motor Vehicles. (Veh. Code §§ 290, 1803, 27360, subd. (d).)

In *In re Jorge M.* (2000) 23 Cal.4th 866, this Court analyzed the Assault Weapons Control Act ("AWCA" or "Act"), which restricts possession of unregistered assault weapons. (*Id.* at p. 869.) At issue was the requisite mens rea required for a violation of the Act. (*Ibid.*) This Court observed that certain laws, referred to as public welfare offenses, require no proof of wrongful intent for a conviction. "'Such offenses generally are based upon the violation of statutes which are purely regulatory in nature and involve widespread injury to the public.'" (*Id.* at p. 872, citing *People v. Matthews* (1992) 7 Cal.App.4th 1052, 1057-1058.) These include statutes enacted to protect the public's health and safety, such as traffic and food and drug regulations. Violations of public welfare offenses result in criminal sanctions regardless of intent, penalties usually

are light, a conviction does not necessarily result in damage to reputation, and the primary purpose of the statute is regulation, not punishment. (*Ibid.*) "The offenses are not crimes in the orthodox sense, and wrongful intent is not required in the interest of enforcement." (*Ibid.*, internal quotation marks and citations omitted.)

It appears that Vehicle Code section 27360 is a public welfare act, the violation of which does not require a showing of mens rea or criminal negligence. (*Ibid*; see also Petitioner's Brief, p. 20.) Thus, guilt is established without proof of scienter. (*In re Jorge M., supra*, 23 Cal.4th at pp. 872-873.) Petitioner surmises, therefore, that because a violation of Vehicle Code section 27360 does not equate to criminal negligence, it cannot be used as a basis for section 300, subdivision (f), findings. DCFS disagrees.

In finding the AWCA akin to a public welfare offense, not subject to a showing of mens rea or criminal negligence, this Court found that given the presumption that a penal law requires criminal intent or negligence, the severity of the punishment for violating the Act, and the significant possibility that innocent gun possessors will be subjected to weighty sanctions, the statute was not intended to be a strict liability offense. However, given the grave threat to public safety that the AWCA seeks to address, coupled with the large number of expected prosecutions and

potential difficulty in proving actual knowledge, this Court imparted the civil negligence standard – the defendant knew or reasonably should have known the firearm fell within the purview of the AWCA. (*Id.* at p. 887.)

This Court readily acknowledged its conclusion departed from the usual definition of criminal negligence. (*Ibid.*, fn. 11 [citing *People v. Peabody* (1975) 46 Cal.App.3d 43, 47.) But, because the AWCA shared some of the key traits of a public welfare offense, guilt was established by showing a mental state lower than ordinarily required for criminal liability. (*Ibid.*) Violations of the AWCA can subject defendants to jail time, yet this Court determined civil culpability was enough of a showing to establish guilt. (*Ibid.*) Following that logic, when a parent causes the death of a child in violation of Vehicle Code section 27360, a juvenile court need not find a parent was criminally negligent in order to assume jurisdiction over a child under section 300, subdivision (f).

III. WHEN A PARENT CAUSES THE DEATH OF ANOTHER CHILD THROUGH ABUSE OR NEGLECT, SECTION 300, SUBDIVISION (F), JURISDICTION IS ESTABLISHED WITHOUT THE ADDITIONAL FINDING THAT THE SURVIVING CHILDREN ARE AT CURRENT RISK OF HARM.

Unlike other section 300 subdivisions, subdivision (f) does not require a finding that the surviving children are at risk before assuming jurisdiction over them based on the death of another child caused by parental abuse or neglect.

A. The Plain Language of the Statutes and Legislative History Indicate Section 300, Subdivision (f), Has No "Current Risk" Requirement.

Subdivision (a), the physical abuse statute, requires a finding that the "child has suffered, *or* there is a substantial risk that the child will suffer, serious physical harm . . . ." (Emphasis supplied.) Identical language is found in subdivisions (b) – the neglect statute, (c) – the emotional abuse statute, (d) – the sexual abuse statute, and (j), which protects children whose siblings are abused. The "substantial risk" language, therefore, allows courts to protect children who have not yet been physically, sexually, or emotionally abused or neglected, but who are at risk of such abuse. (See generally, § 300.) The use of the word "or" indicates court jurisdiction is allowed when children are abused/neglected *or* at risk of abuse/neglect. (*In re J.K.* (2009) 174 Cal.App.4th 1426, 1434-1435.) The "substantial risk" language, therefore, is not an added proof requirement, but rather an alternative finding a court may make to protect children who have not yet been abused/neglected, but who are at substantial risk thereof. (See *Ibid.*)

The other subdivisions of section 300 do not have a "substantial risk" requirement. They include subdivision (e), where a child under five suffers severe abuse with specified injuries, subdivision (f), where parental misconduct causes the death of a child, subdivision (g), where the parent

has abandoned the child or is incarcerated, and subdivision (h), when a child had been freed for adoption but has yet to be adopted. Under subdivisions (g) and (h), the "substantial risk" language makes no sense, and under subdivision (e), the child must have suffered specified injuries, so it would be difficult, if not impossible, to show a child at "substantial risk" of sustaining such injuries; he or she either suffered them or did not. (§ 300, subd. (e).)

Thus, the inclusion of "substantial risk" language in some, but not all, of the section 300 subdivisions, was not an accident, but done by design. As stated, when a significant phrase is contained in some subdivisions of a statute, omission of it in other subdivisions generally shows a different legislative intent. (See *In re Reeves* (2005) 35 Cal.4th 765, 786; *In re Young* (2004) 32 Cal.4th 900, 907.)

Petitioner, and the Dissent, rely upon section 300.2, added to the statutes in 1996:

> Notwithstanding any other provision of law, the purpose of the provision 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 neglect, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm. This safety, protection, and physical and emotional well-being includes provision of a full array of social and health services to help the child and family and to prevent reabuse of children. This safety and protection shall focus on the preservation of the family whenever possible and the safety of every child.

(300.2.) With due respect to petitioner and the Dissent, DCFS asserts the language of section 300.2, rather than supporting a contrary interpretation, is wholly consistent with a finding of jurisdiction over children whose parent caused the death of another child through abuse or neglect, without an additional finding that the surviving children are at current risk.

Section 300.2 does nothing to change the limited requirements for subdivision (f) jurisdiction. The legislative history makes clear that the 1996 revisions to the dependency statutes, including the addition of section 300.2, were made in light of alarming statistics about children injured and dying at the hands of their parents. (Analysis of Sen. Bill. No. 1516 (1995-1996 Reg. Sess), p. 2 [Nationwide statistics reveal that every year 2,000 children are killed, and an additional 140,000 are seriously injured, by a parent or caretaker.].) The revisions sought to provide further protection for children and ensure against premature reunification and the recurrence of abuse. (*Ibid.*)

"In order that legislative intent be given effect, a statute should be construed with due regard for the ordinary meaning of the language used and in harmony with the whole system of law of which it is a part." (*Cal. State Restaurant Assn. v. Whitlow* (1976) 58 Cal.App.3d 340, 347.) Section 300.2 makes clear that the purpose of the dependency statutes is to "provide maximum safety and protection for children who are currently being

physically, sexually, or emotionally abused, being neglect, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm . . . ." Section 300, subdivision (f), allows a court to supervise children whose parent caused the death of another child through abuse or neglect. Read together, the death of a child caused by parental abuse or neglect, triggers protection for the surviving children through supervision by juvenile court. Nothing in section 300.2 limits the plain meaning of section 300, subdivision (f).

B. Even If Section 300, Subdivision (f) Requires a "Current Risk" Finding, that Finding Can be Inferred from the Instant Facts.

The Dissent reasoned that certain parental misconduct, which caused the death of a child, could infer risk to the surviving children, but the petitioner's misconduct here did not supply such an inference. (Opinion, Dissent, p. 3.) The Dissent cited to *In re A.M., supra*, 187 Cal.App.4th 1380, as an example of parental misconduct that inferred current risk to the surviving children. (Opinion, Dissent, p. 3.)

In *In re A.M.,* a newborn died from suffocation while co-sleeping in the same bed as the parents and an older sibling. The father heard the infant cry and struggle to breathe, but did nothing and went back to sleep. (*In re A.M., supra*, 187 Cal.App.4th at p. 1385.) The San Diego County Health and Human Services Agency ("Agency") thereafter provided

voluntary services to the family. Five years later, the Agency received allegations that the mother was depressed and suicidal, that one of the children was extremely anxious, and that the father physically abused the children. (*Id.* at p. 1385.) Based on information from the mother, the medical examiner changed the cause of the infant's death from "accidental" to "undetermined." (*Id.* at pp. 1385-1386.) The juvenile court assumed jurisdiction over the children finding, in part, that the father caused the death of a child through abuse or neglect. (*Id.* at p. 1387.) The Fourth District Court of Appeal affirmed. (*Id.* at p. 1391.)

The Dissent in the instant matter found the circumstances surrounding the infant's death in *In re A.M.*, inferred risk to the surviving children. (Opinion, Dissent, p. 3.) DCFS agrees, even though the death of the infant occurred five years before the juvenile dependency proceedings were initiated, and the surviving children were older, not infants. (*In re A.M., supra*, 187 Cal.App.4th at pp. 1385-1385.) In the case at bar, DCFS's involvement began shortly after Valerie's death, and dependency proceedings were initiated within a few months. (CT 14, 69.)

Like in *In re A.M.*, here, there were other concerning factors about the parents that brought the family to the attention of DCFS. In *In re A.M.*, the Agency was alerted by mother's suicidal ideation and depression, a child's anxiety, and later allegations of physical abuse. (*In re A.M., supra*,

187 Cal.App.4th at p. 1385.) In the instant matter, DCFS received allegations of neglect and found the family home filthy, overcrowded, and without adequate bedding. (CT 14-15.) Jesus had been living in the home of the maternal grandmother because she believed the child had been neglected in petitioner's home. (CT 17.) Ethan appeared to have delays and had not reached milestones typical of a three-year-old child. (CT 17.) Valerie had injured her arm after not being supervised properly. (CT 14-17.) Mother had notable cognitive limitations. (CT 38, 42.) And, the parents had a history of domestic violence. (CT 38, 42.) Thus, under the instant facts, risk to the surviving children also could have been inferred.

In light of these facts, petitioner's failure to secure Valerie in a car seat was not a "single lapse in judgment . . . ." (Opinion, Dissent, p. 3.) Petitioner's home was filthy, unsanitary, and overcrowded, the children living in the home were not supervised, Ethan needed to have three teeth extracted and did not exhibit age-appropriate developmental skills, and Valerie had injured her arm while unsupervised. (CT 14-18.) But even if the lacking safety restraint were a single lapse in judgment, appellate courts have held that prior serious harm, standing alone, is sufficient to assume jurisdiction under section 300, subdivision (b). (See, e.g., *In re J.K., supra,* 174 Cal.App.4th at pp. 1435-1436; *In re Adam D.* (2010) 183 Cal.App.4th 1250, 1261, fn. 7; but see *In re Carlos T.* (2009) 174 Cal.App.4th 795, 803;

In re J.N. (2010) 181 Cal.App.4th 1010.) It follows then that when a single act of parental misconduct causes the death of a child, jurisdiction under section 300, subdivision (f), is established.

Petitioner highlights a hypothetical situation where a one-time lapse of judgment that led to the death of a child may trigger dependency jurisdiction over children born years later. (Petitioner's Brief, pp. 24-27.) This concern is overstated. A one-time incident of parental misjudgment, even one leading to a child's death, would not likely come to the attention of DCFS and, if it did, it is unrealistic to assume that DCFS would initiate juvenile dependency proceedings. For instance, in *In re A.M.*, upon initially learning about the baby's death, the Agency provided services to the family without initiating dependency proceedings. Court proceedings were initiated only when other disturbing allegations arose five years later. (*In re A.M., supra*, 187 Cal.App.4th at pp. 1385-1386.) Similarly, in the instant matter, it was Ethan and Jesus' neglect, not just Valerie's death, that brought the matter to DCFS's attention. Still, after learning of Valerie's death, DCFS did not initiate dependency proceedings until other concerning facts came to light. (CT 1-11, 14-17.)

Juvenile courts should not be hamstrung, unable to protect children whose parents caused the death of another child through abuse and neglect, out of an exaggerated fear of unwarranted government intrusion. The death

of a child through abuse or neglect swallows up competing concerns. Safeguards are in place, and as stated above, juvenile court jurisdiction warrants supervision over a child, nothing more. When a child has died, wide latitude should be given to the juvenile court to protect surviving children.

IV. JUVENILE COURTS MAY PROTECT A CHILD WHOSE PARENT SUBSTANTIALLY CONTRIBUTED TO THE DEATH OF ANOTHER CHILD THROUGH ABUSE OR NEGLECT.

In addition to parental abuse or neglect, section 300, subdivision (f), requires a causal connection between the parent's misconduct and the child's death. According to Black's Law Dictionary, "cause" is "[s]omething that produces an effect or result." (Black's Law Dict. (8th ed. 2004) p. 234, col. 1.) In criminal law, "the death must be the probable consequence naturally flowing from the commission of the unlawful act or the criminal negligence." (*People v. Wong* (1973) 35 Cal.App.3d 812, 830 [citations omitted].) In other words, the criminal defendant's actions must be a substantial contributing factor to the death. (*People v. Caldwell* (1984) 36 Cal.3d 210, 220.) Principles of causation are the same in criminal and civil law. (*People v. Jennings* (2010) 50 Cal.4th 616, hn. 8; *People v. Schmies* (1996) 44 Cal.App.4th 38, 46-47.)

In accord, in *In re A.M., supra*, 187 Cal.App.4th 1380, the Fourth District Court of Appeal concluded a causal connection exists "when the

acts of an individual are a substantial factor contributing to a death or injury." (*Id.* at p. 1388.) The Court found such a connection between the father's conduct of going back to sleep after hearing his infant cry and struggle to breathe, and the child's death. (*Ibid.*)

Similar holdings were made in *In re Ethan N.* (2004) 122 Cal.App.4th 55, and *Patricia O. v. Superior Court* (1999) 69 Cal.App.4th 933, where the mothers were found to have caused the death of their children who were murdered by someone else, and the mothers should have been aware of the risk. (*In re Ethan N.* (2004) 122 Cal.App.4th 55, 61-62, 69 [finding justification to deny a mother reunification services based on the murder of her baby by a boyfriend]; *Patricia O. v. Superior Court* (1999) 69 Cal.App.4th 933, 935-936, 941-942 [same].) The same should apply here.

A. Petitioner's Neglect In Failing to Secure Valerie in a Safety Restraint Was a Substantial Contributing Cause of Her Death.

"There may be more than one proximate cause of a death. When the conduct of two or more persons contributes concurrently as the proximate cause of the death, the conduct of each is a proximate cause of the death if that conduct was also a substantial factor contributing to the result. A cause is concurrent if it was operative at the time of the death and acted with another cause to produce the death." (*People v. Sanchez* (2001) 26 Cal.4th

834, hn. 6.) "Substantial cause" is defined as a factor that a reasonable person would consider contributed to the harm: it may not be trivial, but does not need to be the sole cause. (*Vanderpol v. Starr* (2011) 194 Cal.App.4th 385, 395.)

Petitioner attempts to downplay the role the lack of child restraints played in Valerie's death, claiming it was the car accident, not the failure to provide restraints, that killed the child. He posits that as he was not responsible for the car accident, he did not cause Valerie's death. (Petitioner's Brief, pp. 29-30.) True, the car accident was a cause of Valerie's death, but so was the lack of safety restraints. This Court need not endeavor in a fact-finding pursuit because petitioner, at trial, readily admitted his lapse in judgment caused Valerie's death. (RT 18.) The police officer at the scene of the accident stated the same. (CT 16.) This fact was never in dispute.

Petitioner focuses on the level of his misconduct, rather than on the resulting death, in urging a one-time misjudgment cannot be a basis for juvenile court jurisdiction. He highlights cases so holding where the parental misconduct was more severe than petitioner's. (Petitioner's Brief, pp. 33-35 [citing *In re J.N., supra*, 181 Cal.App.4th at pp. 1023-1036; *In re Nicholas B.* (2001) 88 Cal.App.4th 1126, 1128].) But as stated above, juvenile courts are split on whether a single act of parental misconduct can

justify an assumption of jurisdiction over children. (See *In re J.K., supra*, 174 Cal.App.4th at p. 1436.) More importantly, section 300, subdivision (f), which was not at issue in any of the above-cited cases, is premised not just on parental misconduct, but also on the fact that a child died as a result. In the cases holding that a single act of misconduct is not enough to justify juvenile court intervention, no child died. (See *In re J.N., supra*, 181 Cal.App.4th at pp. 1023-1036; *In re Nicholas B., supra*, 88 Cal.App.4th at p. 1130.) Those cases were premised on section 300, subdivision (b), which permits jurisdiction upon a finding that the child has suffered or is at risk of suffering serious physical harm or illness, not subdivision (f). (*Ibid.*) Put simply, when a child dies, a single act of misconduct causing the death may warrant section 300, subdivision (f), jurisdiction.

B. Petitioner's Neglect Did Not Need to Be the Sole Cause of Valerie's Death.

This Court presents the question of whether the parental misconduct needs to be the sole cause of death in order to warrant section 300, subdivision (f), jurisdiction. Following both criminal and civil law, and in light of the purpose of the dependency statutes, limiting the causation element of section 300, subdivision (f), to "sole cause" is too restrictive. Under a "sole cause" analysis, subdivision (f) jurisdiction would not have been warranted in the case of *In re A.M., supra*, 187 Cal.App.4th 1380, where the infant's suffocation was due to his placement on a bed and the

surrounding bedding. The father's inaction certainly was a substantial cause, but not the sole cause. (*Id.* at p. 1388.)

A "sole cause" requirement would have excluded the mothers in *In re Ethan N.* and *Patricia O. v. Superior Court*, where their children suffered repeated injuries at the hands of the mothers' boyfriends, but the mothers did nothing to protect the babies. (*In re Ethan N., supra,* 122 Cal.App.4th at pp. 61-62, 69; *Patricia O. v. Superior Court, supra,* 69 Cal.App.4th at pp. 935-936, 941-942.)

Petitioner advocates the "sole cause" approach when arguing that his failure to utilize a car seat could not have caused the death without the ensuing car accident caused by a third person. (Petitioner's Brief, p. 37.) Petitioner asks that the parental misconduct required in section 300, subdivision (f), "be of such a nature that death or serious injury is probable even in the absence of any other culpable actions by third parties or other actions by the parent himself/herself." (Petitioner's Brief, p. 37.)

But there are far too may situations where a parent's misconduct contributes to, but is not the sole cause of, death that should warrant juvenile court protection of surviving children – the mother who knowingly leaves children in the care of an abusive father (*In re Ethan N., supra,* 122 Cal.App.4th 55), the father who does not respond to his baby's distress (*In re A.M., supra,* 187 Cal.App.4th 1380).

Instead, this Court should apply the long tried principles of causation and foreseeability. The first inquiry, then, is whether the parental abuse or neglect was "a substantial factor in bringing about [a child's death.]" (*Hardison v. Bushnell* (1993) 18 Cal.App.4th 22, 26 [citing Rest.2d Torts, § 431, subd. (a)].) The second question is whether the parent is relieved from responsibility because of the manner in which his or her misconduct resulted in harm. (*Ibid.* [citing Rest.2d Torts, § 431, subd. (b)].) In other words, and in answer to this Court's inquiry, may an intervening cause absolve the parent of responsibility? (*Ibid.*) The answer turns on the question of foreseeability.

"The general test of whether an independent intervening act, which operates to produce an injury, breaks the chain of causation is the foreseeability of that act." (*Ibid.*, internal quotation marks omitted.) If an intervening cause brings about an unforeseeable result and an unforeseeable injury, then it becomes a superseding cause, absolving the parent from responsibility. This is an issue for the trier of fact. (*Akins v. County of Sonoma* (1967) 67 Cal.2d 185, 199; *Pappert v. San Diego Gas & Electric Co.* (1982) 137 Cal.App.3d 205, 210.)

DCFS implores this Court to utilize the standard employed in both civil and criminal cases. To establish section 300, subdivision (f), jurisdiction, a parent must have substantially contributed to a child's death

through abusive or neglectful conduct; subdivision (f) jurisdiction is not triggered, however, if an intervening factor produced an unforeseeable result and injury. This definition would allow juvenile courts to protect surviving children from parents who substantially contributed to the death of a child through abuse or neglect. At the same time, it would protect parents in situations where unforeseeable factors caused the child's death. Then, jurisdiction over surviving children would need to be based on facts, if any, supporting another subdivision of section 300.

As presented here, when a parent fails to secure his child in a car seat, a car accident ensues, and death results, the parent's neglect is a substantial contributing factor to the death. The accident, even if not the fault of the parent, does not serve as a superseding cause. The enactment of Vehicle Code section 27360 exemplifies the foreseeability of car accidents, and children dying as a result of not being secured in a child-safety restraint. (Sen. Bill. No. 537 (1981-1982 Reg. Sess.) § 1.) Thus, because petitioner substantially contributed to Valerie's death, jurisdiction over Ethan and Jesus was warranted under section 300, subdivision (f).

CONCLUSION

The purpose of juvenile dependency law is not to punish parents, especially those who already have suffered tremendous grief. DCFS does not question petitioner's grief over Valerie's death. But the death of a child

and the need to protect surviving children swallows all other competing interests, especially where, as here, there was evidence of ongoing parental neglect in the home.

The Legislature has spoken clearly through the plain language of the statute and by its legislative history – a juvenile court may assume jurisdiction over surviving children under section 300, subdivision (f), where the parent has caused the death of another child through abuse or neglect. The term "neglect" simply is not defined as "criminal negligence" and encompasses violations of child-safety seat laws. Subdivision (f), unlike other subdivisions of section 300, does not require a finding that the surviving children are at current risk. The law casts a wide protectoral net over children when their parents' misconduct has caused the death of a child.

The causation required to trigger subdivision (f) jurisdiction has its roots in long-standing definitions applied equally to criminal and civil cases. A parent who substantially contributes to the death of a child through abuse or neglect has caused the death of the child. The parental misconduct need not be the sole cause, only a substantial cause, unless an unforeseeable act supersedes it. Applying these tried principles here will lead to less confusion and predictable results. It will also protect surviving children, but not hold parents accountable for unforeseeable events.

Dated: July 8, 2011

Respectfully submitted,

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CERTIFICATE OF WORD COUNT PURSUANT TO RULE 8.360

The text of Answer Brief on the Merits consists of 10,046 words as counted by the Microsoft Office Word 2003 program used to generate this brief.

Dated: July 8, 2011

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ATTACHMENT

Filed 9/24/10

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

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

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

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

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

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

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

FACTUAL AND PROCEDURAL BACKGROUND

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

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

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

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

[2] Unspecified date references are to 2009.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

DISCUSSION

1. William's appeal

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

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

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

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

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

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

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

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

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

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

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

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

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

We find this reasoning to be sound.

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

b. Remaining allegations

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

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

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

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

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

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

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

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

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

DISPOSITION

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

CERTIFIED FOR PUBLICATION.

JOHNSON, J.

I concur:

MALLANO, P. J.

ROTHSCHILD, J., Dissenting.

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

I. JURISDICTION BASED ON DEATH CAUSED BY NEGLECT

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

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

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

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

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

3 Stats. 1996, ch. 1084, § 2.

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

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

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

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

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

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

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

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

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

II. JURISDICTION BASED ON DOMESTIC VIOLENCE

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

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

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

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

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

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

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

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

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

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

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

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

ROTHSCHILD, J.

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

DECLARATION OF SERVICE (Mail)

STATE OF CALIFORNIA, County of Los Angeles:

LINDA C. KAPPELER states: I am and at all times herein mentioned have been a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen years and not a party to nor interested in the within action; that my business address is 201 Centre Plaza Drive, Suite 1, City of Monterey Park, County of Los Angeles, State of California; that I am readily familiar with the business practice of the Los Angeles County Counsel for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence would be deposited within the United States Postal Service that same day in the ordinary course of business.

That on July 11, 2011, I served the attached **ANSWER BRIEF ON THE MERITS IN THE MATTER OF ETHAN C. et al., SUPREME COURT NO. S187587, 2d JUVENILE NO. B219894, LASC NO. CK78508** upon Interested Parties by depositing copies thereof, enclosed in a sealed envelope and placed for collection and mailing on that date following ordinary business practices in the United States Postal Service, addressed as follows:

Christopher Blake, Esq.
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Los Angeles, California 90071

I declare under penalty of perjury that the foregoing is true and correct. Executed on July 11, 2011, at Monterey Park, California.

LINDA C. KAPPELER

DECLARATION OF SERVICE (Personal)

STATE OF CALIFORNIA, County of Los Angeles:

LINDA C. KAPPELER 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 201 Centre Plaza Drive, Suite 1, Monterey Park, California 91754-2142.

On July 11, 2011, I personally served the attached **ANSWER BRIEF ON THE MERITS IN THE MATTER OF ETHAN C. et al., SUPREME COURT NO. S187587, 2d JUVENILE NO. B219894, LASC NO. CK78508** to the persons and/or representative of the court as addressed below:

For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents, in an envelope or package clearly labeled to identify the attorney being served, with a secretary or an individual in charge of the office, between the hours of 9:00 a.m. and 5:00 p.m.

For the court, delivery was made to the Clerk of the Superior Court by leaving the documents in an envelope or package, clearly labeled to identify the hearing officer being served, with the counter clerk in that office, between the hours of 8:30 a.m. and 4:30 p.m.

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I declare under penalty of perjury that the foregoing is true and correct. Executed on July 11, 2011, at Monterey Park, California.

LINDA C. KAPPELER