Supreme Court No. S274943
IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN THE MATTER OF N.R., Minor.	Court of Appeal No. B312001 Superior Court Nos. 20CCJP06523, 20CCJP06523A
Los Angeles Department of Children and Family Services, Petitioner and Respondent, v. O.R., Objector and Appellant.	

Appellant's Reply Brief On The Merits

After the Unpublished Decision by the Second District Court of Appeal, Division Five Filed April 29, 2022

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Table of Contents

TABLE OF AUTHORITIES----------4

APPELLANT'S REPLY BRIEF ON THE MERITS----------6

INTRODUCTION ----------6

I. THE TERM "SUBSTANCE ABUSE" IN SECTION 300 REFERS TO A SUBSTANCE USE DISORDER AS DEFINED IN THE DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (DSM). ----------10

A. THE AD HOC APPROACH PROPOSED BY THE DEPARTMENT WAS NOT INTENDED BY THE LEGISLATURE. UNDER THE DEPARTMENT'S APPROACH, THIS QUESTION OF STATUTORY INTERPRETATION WOULD BE INAPPROPRIATELY LEFT TO INDIVIDUAL SOCIAL WORKERS, TRIAL COURTS AND REVIEWING COURTS TO BE DETERMINED ON A CASE-BY-CASE BASIS. THIS COURT SHOULD REJECT THE DEPARTMENT'S REQUEST TO LEAVE THE TERM "SUBSTANCE ABUSE" UNDEFINED. ---------- 10

B. INSTEAD, JUVENILE COURTS AND SOCIAL WORKERS SHOULD BE BOUND BY THE OBJECTIVE AND SCIENTIFICALLY BASED CRITERIA IN THE DSM. ---------- 13

i. The language and structure of section 300 show the Legislature intended an objective, scientifically based definition of substance abuse. ----------**13**

ii. The relevant legislative history contradicts the Department's claim that the definition of substance abuse was intended to be determined on a case-by-case basis. ----------**18**

iii. Utilizing DSM criteria to define substance abuse is in line with the overall purpose of the dependency code not to intrude into the privacy of family life unless necessary to protect a child from imminent harm. -----**21**

C. THE DEFINITION OF "SUBSTANCE ABUSE" NEED NOT AND CANNOT FULLY ENCOMPASS THE COMPLEX QUESTIONS OF RISK AND CAUSATION NECESSARY TO DETERMINE WHETHER COURT INTERVENTION IS WARRANTED. ---------- 23

D. REVERSAL IS REQUIRED IN THE PRESENT CASE. IN ORDER TO AFFIRM, THE APPELLATE COURT UTILIZED A DEFINITION OF "SUBSTANCE ABUSE" NOT IN LINE WITH LEGISLATIVE INTENT. CONTRARY TO THE APPELLATE COURT'S HOLDING, EVIDENCE OF ONLY RECURRENT USE DOES NOT SUPPORT A FINDING OF "SUBSTANCE ABUSE" FOR THE PURPOSES OF WELFARE AND INSTITUTIONS CODE SECTION 300. ---------- 24

II. THE DEPARTMENT HAS THE BURDEN OF PROVING RISK TO A CHILD. THIS COURT SHOULD REJECT THE JUDICIALLY CREATED RULE THAT PARENTAL SUBSTANCE ABUSE IS PRIMA FACIE EVIDENCE FOR THE PURPOSE OF TAKING JURISDICTION OVER A CHILD OF "TENDER YEARS." ---------- 25

A. A FINDING OF PARENTAL SUBSTANCE ABUSE ALONE DOES NOT DETERMINE WHETHER JURISDICTION IS WARRANTED. THE DEPARTMENT CONCEDES THEY RETAIN THE EVIDENTIARY BURDEN TO PROVE THAT THE CHILD IS AT A CURRENT SUBSTANTIAL RISK OF SERIOUS PHYSICAL HARM. ---------- 26

B. EVIDENCE CODE SECTION 451, SUBDIVISION (F) DOES NOT AUTHORIZE APPELLATE COURTS TO RE-WRITE A STATUTE. FURTHER, THE NOTION THAT A FINDING OF PARENTAL SUBSTANCE ABUSE IS PRIMA FACIE EVIDENCE THAT THE PARENT IS INCAPABLE OF PROVIDING ADEQUATE CARE IS NOT UNIVERSALLY ACCEPTED. ---------- 31

C. FINDING OF PARENTAL SUBSTANCE ABUSE DOES NOT SERVE AS "PRIMA FACIE EVIDENCE" FOR THE PURPOSES OF JURISDICTION OVER A CHILD OF ANY AGE. THEREFORE, THE COURT OF APPEAL'S AFFIRMANCE OF JURISDICTION MUST BE REVERSED. ---------- 33

CONCLUSION ---------- 34

CERTIFICATE OF WORD COUNT ---------- 35

PROOF OF SERVICE ---------- 36

Table of Authorities

US SUPREME COURT CASES

Kolender v. Lawson (1983) 461 U.S. 352 ---- 12
US ex rel Attorney General v. Delaware & Hudson Co. (1909) 213 U.S. 366 ---- 12

CALIFORNIA CASES

Blanca P. v. Superior Court (1996) 45 Cal.App.4th 1738 ---- 17
In re Alexander C. (2017) 18 Cal.App.5th 438 ---- 21
In re B.E. (2020) 46 Cal.App.5th 932 ---- 30
In re Caden C. (2021) 11 Cal.5th 614 ---- 30
In re Christopher R. (2014) 225 Cal.App.4th 1210 ---- 27
In re Drake M. (2012) 211 Cal.App.4th 754 ---- 20, 27, 30
In re G.C. (2020) 48 Cal.App.5th 257 ---- 29
In re K.B. (2021) 59 Cal.App.5th 593 ---- 29
In re Kadence P. (2015) 241 Cal.App.4th 1376 ---- 27
In re Khalid D. (1992) 6 Cal.App.4th 733 ---- 16
In re L.C. (2019) 38 Cal.App.5th 646 ---- 21
In re Rocco M. (1991) 1 Cal.App.4th 814 ---- 29
Kopp v. Fair Pol. Practices Com. (1995) 11 Cal.4th 607 ---- 29
People v. Kelly (1976) 17 Cal.3d 24 ---- 25

CALIFORNIA STATUTES

Health & Safety Code § 11834.015 ---- 14
Evid. Code § 451 ---- 25, 31, 32
Welf. & Inst. Code § 300 ---- passim
Welf. & Inst. Code § 300.2 ---- 21, 22
Welf. & Inst. Code § 355 ---- 23
Welf. & Inst. Code § 355.1 ---- 26, 28
Welf. & Inst. Code § 361.5 ---- 30
Welf. & Inst. Code § 366.21 ---- 22
Welf. & Inst. Code § 366.22 ---- 22
Welf. & Inst. Code § 366.26 ---- 30

OTHER

Centers for Disease Control and Prevention: Stigma Reduction 15
Johns Hopkins: Substance Use Disorder ---------- 14
Los Angeles DCFS Child Welfare Policy Manual ---------- 33
NASW Standards for Social Work Practice with Clients with Substance Use Disorders---------- 15
National Cancer Institute ---------- 14
NIDA: What is drug Addiction ---------- 15
Pergolizze et al. *Cocaethylene: When Cocaine and Alcohol Are Taken Together* (2022) ---------- 24
Seiser & Kumli on California Juvenile Courts Practice and Procedure (2020) ---------- 27
The ASAM National Practice Guideline For the Treatment of Opioid Use Disorder: 2020 Focused Update---------- 14

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Appellant's Reply Brief on the Merits

Pursuant to California Rules of Court, Rule 8.250, subd. (a)(3), Appellant O.R. (Father) submits this Reply to the Answer Brief on the Merits filed on behalf of Respondent, the Los Angeles Department of Children and Family Service (the Department) filed on February 14, 2023. Father maintains all factual assertions and legal arguments from his Opening Brief.

Introduction

The Dependency code's purpose is to allow state intervention into the privacy of the family, not to punish parents, but to protect children from imminent harm. The present case exemplifies how far, the lack of clarity in the case law regarding

parental substance use, allows us to stray from that mandate. The trial court's exercise of jurisdiction over seventeen-month-old N.R. was not based on any tangible evidence of harm or risk of harm but instead based solely on Father's past recreational use of cocaine during weekends that his child was in the exclusive care of Mother.

At the appellate level, Father requested that jurisdiction be reversed. Father identified the present split of authority on the definition of "substance abuse" for purposes of Welfare and Institutions Code section 300.[1] Father asserted that the better approach was to follow the line of cases which require evidence that the parent's substance use satisfies criteria from the Diagnostic and Statistical Manual of Mental Disorders (DSM).[2] (Appellant's Opening Brief (AOB), p. 32, Appellant's Reply Brief (ARB), p. 6.) Father of course also argued the other side of this split of authority that has left the term "substance abuse" undefined. (AOB, p. 31; ARB, p. 6.) Father asserted that at a minimum some evidence that Father's cocaine use "negatively interfered with life functions" must be required to support a finding of "substance abuse." (AOB, p. 31; ARB, p. 6.) The Court of Appeal disagreed and relied on the latter line of cases to craft a definition of substance abuse that amounts to nothing more than mere repeated use. (Opn, p. 11.)

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[1] Further statutory references will be to the California Welfare and Institutions Code unless otherwise noted.

[2] Like in Father's Opening Brief, counsel will utilize the term "DSM" to refer to the entity DSM and not a particular edition of the treatise. Counsel will specify the edition by number (i.e., DSM-III or DSM-IV) when applicable.

The Department now argues that the Court of Appeal's determination should be affirmed because in their view there is virtually no limit on how a trial or reviewing court may choose to define the term "substance abuse." The Department endorses an ad hoc approach where the definition of "substance abuse" may be chosen based on the facts available. Father maintains that the task force, comprised of experts across various disciplines, that drafted section 300 in its present form intended social workers to consult the DSM and not the various online dictionaries that the Department asks this Court to rely on. This Court should hold accordingly and avoid the type of subjective reasoning informed by individual value judgments the Department proposes.

At the appellate level, Father also acknowledged the widespread judicially created doctrine declaring a finding of parental substance abuse prima facie evidence that a child of "tender years" is at substantial risk of serious physical harm. Father explained that: "this 'prima facie case' does not exist in the statute and the Legislature is fully capable of providing for a prima facie case when it intends to." (AOB, p. 39.) Father asserted that if the appellate court followed this rule of prima facie evidence that at a minimum the evidentiary burden should not shift to him to prove the absence of risk. (AOB, p. 39; ARB, p. 11.) On this record, which shows Father was never under the influence of any substance when he had custody of N.R. and regularly provided this child adequate care, the Opinion found that Father had not "rebutted" the "prima facie evidence" of risk and therefore jurisdiction was warranted. (Opn., pp. 12-13.) The

Opinion's reasoning makes clear that the unreasonable burden was placed on Father to disprove risk. (Opn., p. 11.)

The Department now argues that this determination should also be affirmed, claiming that there is a permissible "inference" that any parental substance abuse (however a court has chosen to define the term) automatically places a child of "tender years" at risk. The Department also confusingly asserts that a trial court has discretion to determine whether or not a child of any age is of "tender years." Under the Department's view, a trial court may find that the parent is a "substance abuser" based on any available definition, then the trial court may find that the subject-child is of "tender years" no matter their age, then as a result of these two discretionary decisions the court may presume jurisdiction is warranted. This system proposed by the Department is entirely out of line with the plain language and purpose of section 300 which was enacted in its present form to stop the subjective and unwarranted state interventions permitted by its predecessor. This Court should clarify that in line with constitutional guarantees, the Department bears the burden to affirmatively prove risk, without the benefit of any presumptions or unsupported inferences.

Argument

I. The term "substance abuse" in section 300 refers to a substance use disorder as defined in the Diagnostic and Statistical Manual of Mental Disorders (DSM).

This Court should reject the ad hoc approach endorsed by the Department which would allow a juvenile court or reviewing court to decide which definition of "substance abuse" must be satisfied based on the facts available to support the finding. (*Infra,* I.A., pp. 10-12.) Instead, juvenile courts and social workers should be bound by the objective and scientifically based criteria in the DSM. (*Infra,* I.B., pp. 13-23.) It is irrelevant that the DSM does not assess risk to children because it is the Department's job to answer this separate question. (*Infra,* I.C., p. 23.) Father maintains that because the appellate court utilized a definition of substance abuse not in line with legislative intent reversal is required. (*Infra,* I.D., pp. 24-25.)

A. The ad hoc approach proposed by the Department was not intended by the Legislature. Under the Department's approach, this question of statutory interpretation would be inappropriately left to individual social workers, trial courts and reviewing courts to be determined on a case-by-case basis. This Court should reject the Department's request to leave the term "substance abuse" undefined.

The Department argues that "substance abuse" should not be defined by objective and scientifically based criteria but instead its "plain" and "ordinary" meaning. (Respondent's Answer

Brief on the Merits (AB), pp. 26-28.) The Department does not provide one cogent articulation of what "substance abuse" is though, and instead lists several different possible lay understandings of the term. (AB, pp. 27-28.) One of these is the "use of a drug without medical justification." (AB, p. 27.) Therefore, under the Department's view any and all recreational cannabis use qualifies as "substance abuse." Another definition proposed by the Department is the "habit" of "drinking too much alcohol." (AB, p. 27.) A trial court would then be within its right to declare a mother who has a "habit" of drinking with friends after work a "substance abuser" if the court believes her consumption is just "too much." The various other definitions proposed by the Department also use vague terms such as "inappropriate" or "excessive" which will easily lead to inconsistent interpretations based on individual value judgments. (AB, p. 27.) These "ordinary" definitions will inevitably lead to *extraordinary* results that are entirely out of line with "the intent of the Legislature [] not [to] disrupt the family unnecessarily." (§ 300.)

The Department asserts that juvenile courts and social workers may choose among any of these definitions and are also not confined to only these definitions. (AB, pp. 27-28, 42.) Under this view, there is no single definition of substance abuse, no overriding principles, no specific line between use and abuse, and no requirement for any consistency. In fact, the Department informs this Court: consistency is not their standard. (AB, p. 48.)

This impermissibly expansive view of the term "substance abuse" is not in line with the plain language or purpose of section 300.

The Department wishes to leave the task of statutory interpretation up to individual social workers, judges and reviewing courts based on their preferred online dictionary. (AB, pp. 26-30, 36, 46.) This encourages an ad hoc approach where a specific definition can be chosen to fit the facts of the case – instead of "you'll know it when you see it," it becomes "you'll know it when you *want* to see it." The social worker may in her mind have one definition of "substance abuse" when filing a petition, then the juvenile court may have a different definition of "substance abuse" in her mind when sustaining that same petition. For that matter, the trial court may even change what definition it is utilizing during the evidentiary hearing. Then the reviewing court may utilize yet another definition when affirming. There is no requirement for any specific definition, or source, to be recorded at any level. Consequently, a decision that is meant to be evidence-based is then ensnared in several layers of unfettered and unreviewable discretion. This cannot be what the Legislature intended. (Cf. *Kolender v. Lawson* (1983) 461 U.S. 352, 358 [to comport with due process, the Legislature must provide "minimal guidelines" and a statute may not permit "a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections"].)[3]

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[3] Father maintains that the Legislature intended the term "substance abuse" to refer to DSM criteria but even if the Department's approach is also a reasonable interpretation of the relevant statutes, this Supreme Court should choose the

B. Instead, juvenile courts and social workers should be bound by the objective and scientifically based criteria in the DSM.

Utilization of the objective and scientifically based criteria in the DSM is in line with legislative intent based on a review of the plain language of section 300, the purpose of dependency, and relevant legislative history materials.

i. The language and structure of section 300 show the Legislature intended an objective, scientifically based definition of substance abuse.

As explained in Father's Opening Brief on the Merits (OBM), the plain language of section 300 supports utilization of DSM criteria. (OBM, pp. 25-31.) Substance abuse has long been understood to be a brain disorder, and therefore the term is best understood by consulting the dictionary of brain disorders: the

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construction that is constitutionally permissible. (*US ex rel Attorney General v. Delaware & Hudson Co.* (1909) 213 U.S. 366, 408 ["where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter"].) Father asserts that the Department's approach would render section 300, subd. (b)(1)(D) impermissibly vague. A parent would have no notice of what exactly the Department must prove at an evidentiary hearing. The court would even have discretion to determine whether or not the Department has to affirmatively prove risk; there would also be no requirement that the parent be given advanced notice that the Department's evidentiary burden is relieved or eased. (AB, pp. 59-60 [asserting that the court determines whether the "tender years" doctrine may apply and there is "no precise age limit"].)

DSM. (JN-B, p. 30[4]; OBM, p. 26.) The Department argues that "not all medical communities define 'substance abuse' as a 'brain disorder.'" (AB, p. 42.) The Department relies on the search function of the "National Cancer Institute" website to support this claim. (AB, p. 42 [citing National Cancer Institute at < https://www.cancer.gov/search/results?swKeyword+substance+abuse>.) "This website offers free, credible, and comprehensive information about ***cancer*** prevention and screening, diagnosis and treatment, research across the ***cancer*** spectrum, clinical trials, and news and links to other NCI websites." (National Cancer Institute: About This Website, *available at* https://www.cancer.gov/about-website [as of March 6, 2023] [emphasis added].) Certainly, this is a valuable resource for cancer-related research but not where this Court should turn for the medical definition of "substance abuse." Johns Hopkins[5], the American Society of Addiction Medicine (ASAM)[6], the Centers for

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[4] Concurrent with Father's Opening Brief, Counsel filed a request for judicial notice and accompanying exhibits. Like in Father's Opening Brief, counsel will cite to these exhibits as "JN," and specify the particular exhibit and page number.

[5] Johns Hopkins: Substance Use Disorder, *available at* https://www.hopkinsmedicine.org/health/conditions-and-diseases/substance-abuse-chemical-dependency#:~:text=Substance%20use%20disorder%2C%20as%20a,%2C%20nicotine%2C%20or%20prescription%20medicines [as of March 6, 2023]. As the Department notes, Johns Hopkins has eliminated reference to "substance abuse" and replaced the term with "substance use disorder" in keeping with the DSM. (AB, p. 40 fn18.)

[6] The California Legislature requires licensed drug and alcohol treatment centers to adopt the American Society of Addiction Medicine treatment criteria or an equivalent evidence-based

Disease Control[7], the National Institute on Drug Abuse (NIDA)[8], and National Association of Social Workers (NASW)[9] would all be more relevant and authoritative resources. These organizations all define a substance use disorder, which has replaced the term "substance abuse" in medical and other professional nomenclature, as a disease of the brain.

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standard. (Cal. Health & Safety Code § 11834.015.) American Society of Addiction Medicine defines addiction as "a treatable, chronic, medical disease involving complex interactions among brain circuits, genetics, the environment, and an individual's life experiences." (The ASAM National Practice Guideline For the Treatment of Opioid Use Disorder: 2020 Focused Update, *available at* https://sitefinitystorage.blob.core.windows.net/sitefinity-production-blobs/docs/default-source/guidelines/npg-jam-supplement.pdf?sfvrsn=a00a52c2_2 [as of March 6, 2023], p. 3.

[7] Centers for Disease Control and Prevention: Stigma Reduction, *available at* https://www.cdc.gov/stopoverdose/stigma/index.html?s_cid=DOP_Stigma_Search_Paid_001 [as of March 6, 2023] ["Addiction is a disease, not a character flaw"].

[8] NIDA: What is drug Addiction, *available at* https://nida.nih.gov/publications/drugs-brains-behavior-science-addiction/drug-misuse-addiction [as of March 6, 2023] ["addiction" or a "severe substance use disorder" is defined as "a chronic, relapsing disorder characterized by compulsive drug seeking and use despite adverse consequences. It is considered a brain disorder, because it involves functional changes to brain circuits involved in reward, stress, and self-control"].).

[9] NASW Standards for Social Work Practice with Clients with Substance Use Disorders, *available at* https://www.socialworkers.org/LinkClick.aspx?fileticket=ICxAggMy9CU%3D&portalid=0 [as of March 6, 2023], p. 7 ["For assessment purposes, social workers shall be familiar with the criteria for assessment of substance use disorders in the DSM-5].)

The Department next argues that if "substance abuse" was meant to refer to a brain disease, then the Legislature would not have listed "mental illness" and "substance abuse" separately. (AB, p. 43.) This argument is unpersuasive. While mental illness, developmental disability and substance abuse may all concern the brain, their treatment is distinct and therefore it would make sense to list them separately. As explained in Father's Opening Brief, the terms "developmental disability" and "mental illness" have clinical significance and connote the necessity for professional assessment and diagnosis opposed to a lay understanding. It follows that the Legislature intended the same treatment of the next listed term "substance abuse." (OBM, pp. 30-31.)

The Department argues against this reasoning by asserting that they actually have no responsibility to even professionally assess whether a parent has a "mental illness" or "developmental disability." (AB, p. 44.) For support, the Department relies upon *In re Khalid D.* (1992) 6 Cal.App.4th 733 (*Khalid D.*). In *Khalid D.*, the parent asserted that a civil code requirement for two expert witnesses should be read into section 300 and must be satisfied to support a finding of parental mental illness. (*In re Khalid H.* (1992) 6 Cal.App.4th 733, 735.) The *Khalid D.* court did not hold as the Department appears to argue that a lay understanding of mental illness should be utilized by social workers and juvenile courts. The Fourth District Court of Appeal, Division One held only that this "formal procedure" requiring two expert witnesses was not required by section 300. The

Department relies on the narrow holding of *Khalid D.* to make what is quite frankly a disturbing claim that "nothing in section 300 requires professional assessment or diagnosis." (AB, p. 44.)

Counsel is unsure exactly what the Department believes a social worker's role is in determining the specific protective issues at play if professional assessment is not required. (AB, p. 44.) The Department's position is apparently that a Department social worker may label a parent developmentally disabled without any "professional assessment." Under the Department's precarious view, apparently "colloquial jargon" may apply. (AB, pp. 43, 44 [disagreeing with Father's assertion that professional assessment and diagnosis are expected opposed to colloquial jargon or assumptions (OBM, p. 30)].) Therefore, a parent who seems slow has a developmental disability, a parent who seems crazy has a mental illness, and a parent who "drinks too much alcohol" is a substance abuser. (AB, p. 27.) Families in California deserve at the very least "professional assessment" before the government takes on the role of substitute parent. (Contra AB, pp. 43-44.) "[T]o hold otherwise would come perilously close to allowing legal decisions of monumental importance to the persons involved to be based on nebulous ideas more appropriate to an afternoon talk show than a court of law." (Cf. *Blanca P. v. Superior Court* (1996) 45 Cal.App.4th 1738, 1751.) For the foregoing reasons the Department is incorrect and the plain language and structure of section 300 supports the utilization of DSM criteria to define "substance abuse."

ii. The relevant legislative history contradicts the Department's claim that the definition of substance abuse was intended to be determined on a case-by-case basis.

According to the Department, the legislative history materials show that "some of the grounds for dependency jurisdiction were not narrowly defined but instead gave juvenile courts *discretion* to determine…whether jurisdiction is warranted: 'substance abuse' is one of those grounds." (AB, p. 46 [emphasis added]; see also AB, p. 36.) This assertion is problematic for several reasons. First, "substance abuse" *alone* is not now and never has been a ground for jurisdiction. (§ 300, subd. (b)(1)(D).)[10] Second, nothing in the plain language of section 300 or the legislative history materials suggests that the decision to take jurisdiction over a child for any reason was intended to be *discretionary*. Third, the Department appears to argue that juvenile courts are provided discretion to define the term "substance abuse"; statutory interpretation cannot be a discretionary determination.

In support of this claim that courts were provided *discretion* to define substance abuse, the Department selectively quotes the task force report. For example, the Department, in support of this assertion, quotes the following language:

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[10] Effective January 1, 2023 section 300 was modified so that the relevant clause of section 300, subdivision (b)(1) is now listed separately as section 300, subdivision (b)(1)(D). The language was otherwise not modified.

> Because the entry of a child and his/her family into the dependency court system is a critical and imposing step, the task force sought to balance protections afforded to the family with the needs of the child and the ability of the child and the ability of the family to protect the child from harm.

(AB, p. 36 [quoting JN-C, p. 44].) The Department leaves out any mention of the text following that statement which explains how the child abuse and neglect reporting standards "remain broad, thereby permitting the opportunity for evaluation and [the provision of appropriate services]." (JN-C, p. 45.) "But, when the family cannot provide protection, the court is asked to assume the role of substitute parent – a critical intervention into the normal role of the family. When this happens, the description of harm to the child must be *clearly articulated* so that all involved parties understand the problems and what must change if the family is to function on its own again." (JN-C, p. 45.) In other words, the task force struck a "balance" by leaving open the opportunity for the Department to provide voluntary services or other assistance to families where court intervention is not warranted or can be avoided. This text provides no support for the Department's claim that the Legislature intended individual *judges* to have discretion over what definition of "substance abuse" to utilize. Instead, a determination of whether a child is described by section 300 was intended to be evidentiary and not discretionary.

Also as explained in Father's Opening Brief, the term "substance abuse" was not included in the earliest drafts of

proposed language for section 300. (OBM, p. 34.) The words "use of drugs, alcohol" were replaced with "substance abuse." (OBM, p. 34; JN-D, p. 81.) The task force's understanding was that "substance abuse" meant more than the mere use of even illegal drugs. (JN-D, p. 81.) The Department agrees the Legislature was removing a "catch-all phrase and narrowed the risk factor from substance *use* to substance *abuse*." (AB, p. 47.) Paradoxically, the Department proposes several definitions that do nothing to differentiate between *use* and *abuse* though. Under the Department's view, "substance abuse" may be defined as any "illegal" or "inappropriate" "use of a substance" or any "use of a drug without medical justification." (AB, p. 27.) It is plainly apparent that the task force did not have these various lay meanings in mind that provide no clear distinction between *use* and *abuse*. It makes much more sense to assume these professionals had a clinical understanding of the distinction between *use* and *abuse*. (JN-B, p. 31 ["Three criteria distinguish nonpathological substance use from Substance Abuse…"].)

Finally, the Department argues that the mere passage of time without legislative correction supports their position. (AB, pp. 46, 47.) This argument cuts both ways though. *Drake M.* was decided over ten years ago and declared that a finding of substance abuse must be based on a medical diagnosis or evidence sufficient to "establish that the parent [] at issue has a current substance abuse problem as defined in the DSM-IV-TR." (*In re Drake M.* (2012) 211 Cal.App.4th 754, 766, *abrogated on other grounds in In re D.P.* (2023) 14 Cal.5th 266 (*Drake M.*)) The

Legislature has not acted to stop appellate courts from requiring these medical criteria be satisfied in order to exert jurisdiction over a child. (E.g., *In re Alexander C.* (2017) 18 Cal.App.5th 438, 447; *In re L.C.* (2019) 38 Cal.App.5th 646, 652.) The *Drake M.* formulation is the only cogently stated definition of substance abuse in case law and therefore, it could be just as easily argued that the Legislature must agree with it. In the end, it cannot be true that there is both no specific definition *and* that medical criteria must be satisfied; therefore, this Court should determine which approach is most in line with legislative intent and the overall purpose of the dependency code.

iii. Utilizing DSM criteria to define substance abuse is in line with the overall purpose of the dependency code not to intrude into the privacy of family life unless necessary to protect a child from imminent harm.

The Department relies heavily on section 300.2 to supports its view. (E.g., AB, pp. 10, 32, 33, 47.) Section 300.2 states: "The provision of a home environment free from the negative effects of substance abuse is a necessary condition for the safety, protection and physical and emotional well-being of the child." (§ 300.2, subd. (a).) Essentially, the Department argues that because of this special interest, the Legislature chose to cast a wide net to ensure that the children they had in mind would be protected, even if this meant that the lives of other children would be unnecessarily disrupted. (AB, p. 33.) Under the Department's view, the Legislature was not concerned with the families who

would inevitably be subjected to unwarranted state control as a result of the subjective views of individual social workers and judges. (Contra JN-C, p. 47 ["resolution of these value conflicts and differences in professional judgment, should not be left to the many individual workers"].) To the contrary, the Legislature intended to target a specific risk – "the negative effects of substance abuse." (§ 300.2.) An objective and medically based definition of substance abuse was intended to serve this goal, by ensuring that resources would be utilized for the children in need of protection and not wasted on unwarranted interventions. Further, this approach ensures children not at risk are protected from unwarranted state control. This understanding is in keeping with the complementary stated "intent of the Legislature…not [to] disrupt the family unnecessarily or intrude inappropriately into family life…" (§ 300; see also JN-C, p. 46 ["inappropriate intervention can be harmful to children and parents"].)

Further, the next sentence in section 300.2 states that "a *treatment* program for substance abuse may be considered in evaluating the home environment." (§ 300.2, subd. (a) [emphasis added].) The reference to *treatment* further evidences a clinical understanding of the term "substance abuse" opposed to a lay understanding from the various online dictionaries the Department cites to. (AB, p. 27; see also § 366.21, subd, (e)(1) ["certified substance abuse treatment facility"; § 366.22, subd. (a)(1) [same].) The Legislature understands the term "substance abuse" to refer to a medical condition that requires treatment and

the term was not meant to refer to any parent who has ingested cannabis or drinks "too much alcohol." (Contra AB, p. 27.)

C. The definition of "substance abuse" need not and cannot fully encompass the complex questions of risk and causation necessary to determine whether court intervention is warranted.

The Department critiques the DSM-V-TR criteria as not "assess[ing] risk to a third party, much less a child." (E.g., AB, pp. 48-49.) First, none of the "ordinary" definitions provided by the Department mention "third parties" or "children." (AB, pp. 27-28, 42.) Regardless, the definition of substance abuse need not and cannot fully encompass the complex and separate questions of risk and causation necessary to determine whether court intervention is warranted. The Department inappropriately conflates the definition of "substance abuse" with these separate inquiries, essentially removing the rest of the language in section 300, subd. (b)(1)(D). (E.g., AB, pp. 9, 49.) Respectfully, it is the Department's job to assess risk to the child and then prove that state intervention is warranted. If a child is truly at risk, regardless of the reason, the Department simply must prove it. (§300, § 355, subd. (a); see *infra,* II, pp. 25-33, for further discussion.)

D. Reversal is required in the present case. In order to affirm, the appellate court utilized a definition of "substance abuse" not in line with legislative intent. Contrary to the appellate court's holding, evidence of only recurrent use does not support a finding of "substance abuse" for the purposes of Welfare and Institutions Code section 300.

This record contains no evidence Father ever cared for N.R. under the influence of any substance, and no evidence he had ever jeopardized N.R.'s safety in any way or ever would. Father had no drugs or drug paraphernalia in his home, no criminal history, and no history of violent or otherwise inappropriate behavior. (CT 12, 14.) There was also no evidence Father's recreational cocaine use had ever negatively impacted his schooling or employment. (CT 14, 72-73.) Additionally, Father was able to stop using cocaine as soon as the Department intervened. (CT 158.)

On this record, the Department argues that Father meets medical criteria for a severe substance use disorder. (AB, pp. 49-52.) To make this argument the Department relies on an unjustifiably expansive view of the record and DSM-V-TR criteria. For example, the Department satisfies criteria 4 – craving, or a strong desire or urge to use the stimulant – by referencing a comment from Mother that Father's eyes were "open" and he was "hyper" while they were dating and before they had N.R.; this has nothing to do with "urges" or "cravings." (AB, p. 51; JN-A, p. 14.) As another example the Department satisfies "criteria 7" – important social, occupational, or recreational activities are given up or reduced because of

stimulant use – because Father used cocaine socially. (AB, p. 51; JN-A, p. 14.) In addition, the Department's assertion regarding the dangers of cocaethylene is nowhere near settled science. (E.g., Pergolizze et al. *Cocaethylene: When Cocaine and Alcohol Are Taken Together* (2022) [explaining that while higher cardiotoxic effect has been found in animals "the acute cardiotoxic effects of cocaethylene in humans are not known", assumptions regarding neurological effects rely on a study of mice]; Cf. *People v. Kelly* (1976) 17 Cal.3d 24, 30 [requiring general acceptance by the relevant scientific community].) This record clearly does not support the conclusion that Father suffers from a severe substance use disorder. Regardless, the Court of Appeal used the incorrect definition of substance abuse and crafted a definition amounting to nothing more than repeated use and therefore, reversal is required. (Opn., p. 11.)

II. The Department has the burden of proving risk to a child. This Court should reject the judicially created rule that parental substance abuse is prima facie evidence for the purpose of taking jurisdiction over a child of "tender years."

This Court should clarify that the Department must affirmatively prove risk without relying on any judicially created presumptions or inferences. (*Infra,* II.A., pp. 26-30.) Evidence Code section 451 offers no support for the Department's position; the notion that parental substance abuse (however a court chooses to define the term) automatically places a child at risk, is not universally accepted. (*Infra,* II.B., pp. 31-33.) For these

reasons and those explained in Father's Opening brief, the appellate court's affirmance of jurisdiction based on the conclusion that Father did not "rebut" this rule of prima facie evidence must be reversed. (*Infra,* II.C., p. 33.)

A. A finding of parental substance abuse alone does not determine whether jurisdiction is warranted. The Department concedes they retain the evidentiary burden to prove that the child is at a current substantial risk of serious physical harm.

The Department concedes that a finding of parental substance abuse does not shift the evidentiary burden on to the parent to disprove risk. (AB, pp. 56-57.) The Department argues that nevertheless this rule developed by appellate courts declaring parental substance abuse "prima facie evidence" that jurisdiction is warranted in cases involving a child of "tender years" should not be disturbed by this Court. (AB, pp. 52-62.) The Department argues this "presumption that dependency jurisdiction is warranted" created by appellate courts is different from the "presumption[s] affecting the burden of producing evidence" identified by the Legislature in section 355.1. (AB, pp. 54, 55, 57; § 355.1, subds. (a), (c), (d).) The Department argues that under the "tender years" doctrine, "a juvenile court must still weigh all the relevant evidence before making a final determination regarding jurisdiction." (AB, p. 56.) The point here is unclear; the Department appears to assume that if section 355.1 applies then a juvenile court would not "weigh all the relevant evidence before making a final determination regarding

jurisdiction." (See AB, pp. 56-57.) In the end, this is at most a distinction without a difference.

The *Drake M.* court explicitly stated that under this prima facie rule: "DCFS needed only to produce sufficient evidence that father was a substance abuser in order for dependency jurisdiction to be properly found." (*Drake M., supra,* 211 Cal.App.4th at p. 767.) The *Drake M.* court understood a finding of "substance abuse" to require that DSM criteria be met. (*Id.* at p. 766.) Appellate courts and practitioners have since consistently viewed the question of "substance abuse," regardless of how the term is defined, as outcome determinative. (E.g., *In re Christopher R.* (2014) 225 Cal.App.4th 1210, 1219 (*Christopher R.*); *In re Kadence P.* (2015) 241 Cal.App.4th 1376, 1384; *Seiser & Kumli on California Juvenile Courts Practice and Procedure* (2020), § 2.84[3].) It is clear that in practice, this judicially created rule places the unreasonable burden on the parent to prove the absence of risk.

We need look no further than the present case for an example of how this rule encourages inappropriate intervention. The Department argues without citing any authority that courts applying this rule still consider various factors such as service engagement, steps taken to ameliorate the risk, and whether there was a responsible adult able to protect the child. (AB, p. 56.) Here, Father consistently provided care for his child before Department intervention, without incident. (CT 74.) Father had exclusive custody of N.R. for three weeks after the Department intervened and the social worker noted absolutely no concerns

regarding the care N.R. received during that time. (CT 12, 21.) Father also stopped using cocaine as soon as the Department intervened and consistently tested negative. (CT 152.) Nevertheless, the Court of Appeal determined that he did not "rebut" the prima facie evidence of risk. (Opn., p. 15.)

Section 355.1 lists specific well-defined requirements that must be satisfied before the evidentiary burden may be shifted on to the parent. Subdivision (a) requires "competent professional evidence" that an injury or detrimental condition would not ordinarily occur without unreasonable or neglectful acts or omissions. (§ 355.1, subd. (a).) Section 355.1, subdivision (d) specifies instances where past sexual abuse by a parent or someone living in the home may serve as "prima facie evidence" for the purposes of jurisdiction. (§ 355.1, subd. (d).) Subdivision (d) specifies the type of evidence which is sufficient for these purposes; this includes a criminal conviction, or a sustained juvenile dependency petition. (*Ibid.*) By contrast, the Department proposes that this "inference" should be triggered by an ad hoc determination that the parent abuses a substance. Under the Department's view, jurisdiction will be presumed whenever a parent recreationally uses cannabis or "drinks too much alcohol." (AB, pp. 27, 55.)

If a parent's substance use or abuse places a particular child at risk, the Department simply must prove it. Father agrees with the Department that a child's age is a factor, it is not determinative though. (AB, p. 61.) The Department must prove *risk* not *substance abuse*. (§ 300, subd. (b)(1)(D).)

This point is illustrated by drawing on one of the Department's examples. The Department used an example of a parent's drug use causing the parent to "routinely disappear from the children's lives from 5:00 p.m. until the next day." (AB, p. 49 [citing *In re K.B.* (2021) 59 Cal.App.5th 593, 600-01].) Replace "drug use" with any other parental conduct or omission. Quickly it becomes obvious that no matter the reason, *neglect* is the issue and that is what must be proven. Parental neglect, and not substance abuse, is what the *Rocco M.* court held would place a child of "tender years" at risk. (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 825.) This approach is in keeping with the concern expressed by child welfare agencies across the state back in 1987: that the former statute needed to be revised to focus on the harm to the child opposed to the action of the parent. (JN-E, pp. 92-102.)

Finally, the Department argues that this "inference" must be permitted because the Legislature has not acted to correct it. (AB, p. 54.) "[T]he judicial role in a democratic society is fundamentally to interpret laws, not to write them." (*Kopp v. Fair Pol. Practices Com.* (1995) 11 Cal.4th 607, 675.) The legislative process cannot be bypassed by the mere passage of time. "Mere repetition does not, [] convert falsehood into truth." (*In re G.C.* (2020) 48 Cal.App.5th 257, 278 [Diss. Opn. Menetrez J.] [correcting a wide-spread misunderstanding of the law dating back to 2012 that any jurisdictional finding is prima facie evidence in support of removal].) The law does not state that the Department's burden is shifted or even eased based only on a finding of parental substance abuse. To the contrary, the plain

language of section 300 requires a finding that the child is at a "substantial risk of serious physical harm." (§ 300, subd. (b)(1).)

Further, this misunderstanding of the law began in 2012. (*Drake M., supra,* 211 Cal.App.4th at p. 76.) Recently, the Legislature acted to clarify a similarly wide-spread misinterpretation of the law dating back to 1998. (§ 361.5, subd. (b)(13) [modified statute clarifies that the judicially created doctrine of "passive resistance" is insufficient to support an order denying a parent reunification services]; *In re B.E.* (2020) 46 Cal.App.5th 932, 939-40 [explaining that this widespread misinterpretation of the statute dated back to 1998].) This would also certainly not be the first time that a long-standing mis-understanding of law in dependency needed correction from this Court. (E.g., *In re Caden C.* (2021) 11 Cal.5th 614, 638 [reversing a line of cases dating back to 2012 that had read into section 366.26, subd. (c)(1)(B)(i) a requirement that the parent must have made sufficient progress toward remedying the reasons for dependency in order to avoid the termination of parental rights].) This Court should intervene to clarify that in line with constitutional guarantees, the Department must affirmatively prove risk in cases involving parental substance abuse without relying on any presumption or unsupported inference.

B. Evidence Code section 451, subdivision (f) does not authorize appellate courts to re-write a statute. Further, the notion that a finding of parental substance abuse is prima facie evidence that the parent is incapable of providing adequate care is not universally accepted.

The Department relies upon Evidence Code section 451, subdivision (f) as authority for this "inference" that parental substance abuse automatically places a child at risk. (AB, p. 58.) Evidence Code section 451, subdivision (f) is intended to allow courts to judicially notice things like dates, geographic locations and other indisputable "facts and propositions" that are "universally accepted." It is most certainly not intended for the purpose of excising the necessary requirements of causation and risk out of section 300.

The Department claims "the risk of harm is obvious and universally accepted." (AB, p. 58 [citing Evid. Code § 451, subd. (f).) This premise is entirely untenable. Under the Department's view a court may find "substance abuse" based on the "use of a drug without medical justification." (AB, p. 27.) The Department therefore contends that it is "universally accepted" that any parent who recreationally uses cannabis cannot safely care for their child. The Department also proposes various vague definitions of substance abuse that depend on individual value judgments. For example, what qualifies as "too much alcohol" or "inappropriate use" is entirely subjective. The Department then contends that it is "universally accepted" that whatever an individual judge determines to be "too much" or "inappropriate" automatically places a child at risk. The Department even argues

that there is "some discretion" in the determination of what qualifies as "substance abuse." (AB, p. 36.) It is paradoxical to contend that a discretionary determination by a particular judge can be "universally accepted" as "prima facie evidence" of risk.

Further, the Department confusingly argues that "there is no precise age limit" for the "tender years" doctrine. The Department argues that the application of the tender years doctrine is "a determination made by the juvenile court, based on the age and specific needs of the child involved in the case." (AB, pp. 59-60.) Therefore, the court can decide based on the facts of the case which definition of substance abuse should be utilized then decide based on the facts of the case whether "there is a presumption that dependency jurisdiction is warranted." (AB, p. 55.) The Department then argues that the result of multiple layers of discretionary decisions is "universally accepted." The Department's arguments stretch Evidence Code section 451 well beyond its limits.

Also, as explained in Father's Opening Brief, this "inference" is actually not supported by empirical evidence and it is most definitely not "universally accepted." (AB, p. 53.) The Department does not cite one scientific or other authoritative source to support the claim that this "inference" is in fact universally accepted by the general public. (See AB, pp. 52-62.) The Department also does not cite to one appellate decision which relied upon Evidence Code section 451, subdivision (f) for this presumption. (AB, pp. 52-62.) For these reasons, Evidence Code section 451, subdivision (f) does not authorize juvenile

courts or reviewing courts to relieve or even ease the Department's burden to affirmatively prove risk.

C. finding of parental substance abuse does not serve as "prima facie evidence" for the purposes of jurisdiction over a child of any age. Therefore, the Court of Appeal's affirmance of jurisdiction must be reversed.

The Opinion clearly relied on this notion of "prima facie evidence" and looked to Father to "rebut" a de facto presumption of risk. (Opn., pp. 12-13.) Therefore, reversal is required. As explained in Father's Opening Brief, there is not substantial evidence in this record that this child was at substantial risk of serious physical harm at the time of the jurisdictional hearing. (OBM, pp. 58-60.) By pointing to Father's recreational cocaine use outside the presence of this child, the Department does not provide a basis for the "critical and imposing" step of state intervention into the privacy of this family. (AB, pp. 62-64; JN-C, p. 40.) Instead, the Department emphasizes the problems with a mechanical response to any and all parental substance use. (Compare CT 13 ["CSW will request a removal order from him as a result of the positive drug test"] with Los Angeles DCFS Child Welfare Policy Manual, available at <https://policy.dcfs.lacounty.gov/#Assessment_of_Drug_Alc.htm?Highlight=substance%20use%20disorder> [ss of March 6, 2023] ["The mere fact that a parent is abusing drugs or alcohol does not mean that a child should be removed from the home"].)

Conclusion

For the foregoing reasons, Father requests this Court hold that "substance abuse" for purposes of section 300 is defined by the current edition of the DSM. Because the Court of Appeal utilized a definition of "substance abuse" not in line with legislative intent, the Court of Appeal's order affirming jurisdiction should be reversed. In keeping with the plain language of the statute, a finding of parental substance abuse cannot be relied upon as prima facie evidence that a child of any age is at substantial risk of serious physical harm. Because the Court of Appeal relied on this rule of prima facie evidence in affirming jurisdiction, the finding of substantial evidence to support jurisdiction should be reversed and the matter should be remanded to the Court of Appeal with instructions to reverse jurisdiction or in the alternative to reconsider. If jurisdiction is reversed then all subsequent orders must be reversed as well.

DATED: March 6, 2023

Respectfully submitted by,

/S/

Sean Burleigh, Attorney for Petitioner

CERTIFICATE OF WORD COUNT

The foregoing petition contains 6,990 words, including footnotes according to the word count in the computer program utilized to create this brief Microsoft Word for Mac 2019 version 16.67.

Executed on March 6, 2023 at Tucson, AZ.

Respectfully submitted by,

/S/

Sean Burleigh, Attorney for Petitioner

PROOF OF SERVICE
IN THE SUPREME COURT OF CALIFORNIA

In re N.R.,
Supreme Court Case No: S274943
Appellate Court Case No.: B312001

I, Sean Burleigh, declare and state:

That I am not a party to the within action; that I am an attorney admitted to practice law in the State of California appointed by this Court to represent Appellant.

That on March 6, 2023, I served the following:

Appellant's Reply Brief On The Merits

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Appellate Court, through truefiling

Upon the persons or organizations listed below, by placing this document in the mail addressed to:

O.R. - Appellant, Address on file

I declare under penalty of perjury of the laws of the State of California that the foregoing is true and correct and that this declaration was executed on March 6, 2023 at Tucson, Arizona.

/S/
Sean
Burleigh

STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

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

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