SUPREME COURT OF THE STATE OF CALIFORNIA

In re N.R., A Person Coming Under the Juvenile Court Law.	Case No. S274943 Second Appellate District, Division Five No. B312001 Los Angeles Superior Court No. 20CCJP06523A
THE LOS ANGELS COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Plaintiff/Respondent, v. O.R., Defendant/Appellant.	

[PROPOSED]BRIEF OF AMICUS CURIAE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES

The Honorable Martha Matthews, Judge Presiding

JENNIFER HEARING
Litigation Counsel
CALIFORNIA STATE ASSOCIATION OF COUNTIES
State Bar # 193915
1100 K Street, Suite 101
Sacramento, CA 95814
Telephone: (916) 327-7535
Facsimile: (916) 443-8867
mail: jhenning@counties.org

DAVID CHIU, State Bar #148542
San Francisco City Attorney
KIMIKO BURTON
Lead Attorney, State Bar #148173
ELIZABETH McDONALD MUNIZ
Deputy City Attorney
State Bar #285578
1390 Market Street, 7th Floor
San Francisco, CA 94102
Telephone: (415) 554-3829
Facsimile: (415) 554-6939
E-Mail: Elizabeth.Muniz@sfcityatty.org

Attorneys for California State Association of Counties

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Introduction

This Court granted review to answer the following questions that have statewide importance to child welfare practitioners and juvenile courts alike: [1] one, what is the definition of "substance abuse" for purposes of declaring a child a dependent under Welfare and Institutions Code section 300, subdivision (b)(1) and, two, where a child is under the age of six, does a finding of parental substance abuse alone provide sufficient evidence to warrant juvenile court jurisdiction? [2]

Proposed amicus curiae, California State Association of Counties ("CSAC"), argues the answer to the first question is that the California Legislature left the term "substance abuse" in section 300 undefined without a more specific definition and this Court should too. The language of section 300, subdivision (b)(1)(D) speaks for itself. (§ 300, subd. (b)(1)(D) [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 inability of the parent or guardian *to provide regular care* for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse].) The focus of the Legislature at the time this subdivision was added, the focus of child welfare workers in determining whether a dependency case needs to be initiated, and

[1] Due to the significant impact the answers to these questions will have on the everyday practice of child welfare practitioners, California State Association of Counties focuses this brief on answering the Court's questions directly, rather than by focusing its answers only as they are related to the case below.

[2] All further statutory references are to the Welfare and Institutions Code, unless otherwise specified.

the focus of case law in assessing whether a parent's conduct brings their child within section 300, is whether the parent has abused legal or illegal substances to extent that his/her actions or caregiving abilities is impaired. The critical inquiry in defining substance abuse for dependency jurisdiction is by looking at its effect on the child.

Petitioner, father, urges this Court to narrow the definition to that contained in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM"), stating the Legislature intended to utilize an objective and scientific definition of "substance abuse."[3] (Opening Brief on Merits ("OBM") at p. 10.) There are several problems with tying the definition of "substance abuse," as that term is used in section 300, subdivision (b)(1)(D), to the criterion in the current DSM. There is no evidence the Legislature intended to define substance abuse by the criteria for a medical diagnosis in a manual designed, by its own terms, for the clinical practice in the mental health field. The term "substance abuse" does not exist in the latest version of the manual—which changes frequently—because it was replaced by a myriad of more specific disorders under the heading: "substance use disorders." Moreover, the subjective nature of the now-11 criteria in the DSM-V-TR that constitute "substance use disorder," makes most of the criteria difficult, if not impossible, to prove without candid self-reporting from the parent. Thus,

[3] CSAC refers to the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders as "DSM," and, where relevant, will specify the particular edition. The current edition is the DSM-V-TR.

tethering the definition of substance abuse to the diagnostic criteria in the DSM would effectively write the term out of the statute.

CSAC answers this Court's second question in the negative. But answering the question in the negative does not mean ignoring a child's age when assessing risk. A finding of parental substance abuse in a case involving a child of tender years raises the inference that the child is at a higher risk of abuse or neglect. Young children require almost constant supervision, are less verbal, less able to protect themselves from harm, and have less capacity to retain memory of events. Infants are particularly vulnerable, as they are completely dependent on others for care and protection. Further, empirical evidence demonstrates young children are at a higher risk of abuse or neglect if their parent abuses substances.

Petitioner asks this Court to reject the tender years inference, suggesting a finding of parental substance abuse in a case involving a young child is outcome determinative. (OBM, at p. 10.) Not so. Dependency cases are fact-specific, each case is unique, and no one fact is conclusive. In any given case, there will be additional facts that either amplify or mitigate risk to a child. Thus, the fact of parental substance abuse has to be given slightly more weight when assessing the risk it poses if the child involved is of tender years.

Statement of Facts and Procedural History

California State Association of Counties[4] has not had access to the record on appeal in this case. As such, references to the facts or procedural history set forth in this brief will be with citation to the unpublished decision of the Second District Court of Appeal, Division Five at *In re N.R.* (April 29, 2022, B312001) [nonpub. opn.]. Further, for clarity and consistency, CSAC joins in the presentation of facts and procedural history as set forth by the Los Angeles County Department of Children and Family Services ("Department").

Argument

I. The Child Welfare System is Designed to Assess Risk and Ensure Children are Safe, but Intervene Only in the Least Restrictive Manner.

Answering the Court's questions in this case necessitate consideration of where the issues arise in the dependency scheme.

A child welfare case begins with a referral that is screened by a child welfare worker. (See Pen. Code, § 11166; Cal. Department of Social Services Manual of Policies and Procedures, Division 31-101, p. 53 (effective 10/1/2016) (hereafter "CDSS Manual".).) From there, there are several disposition options. The referral could be evaluated out with no referrals to community agencies, "evaluated out" with referrals to community agencies,

[4] The California State Association of Counties is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties. San Francisco County has been designated to write this amicus curiae brief on behalf of CSAC.

assigned for an immediate in-person investigation, or assigned for an in-person investigation initiated within 10 days from the date of the referral. (CDSS Manual, Div. 31-105.116, at p. 57-58.)

In assessing what intervention is warranted, child welfare workers make decisions that balance the important values of child safety and family integrity. The social worker initially investigating a referral shall determine the potential for, or the existence of, any conditions which "places the child at risk and in need of services" and which would cause the child to be a person described by section 300. (CDSS Manual, Div. 31-125.1, at p. 60.) Social workers are required to conduct a safety assessment to determine if it is safe for a child to remain home or what actions need to be taken to assure safety, to conduct a risk assessment to support decisions about opening a case for court-ordered supervision, and to conduct a family strength and needs assessment to determine the underlying caregiver needs and services that would benefit the family. (Structured Decision Making Policy and Procedures Manual by California Department of Social Services, p. 47, 92, 112 (pub. July 2021) (hereafter "SDM Manual").)

If a referral is investigated, the social worker will determine whether the referral is unfounded, inconclusive, or substantiated. (See Pen. Code, § 11165.12.) Even a substantiated referral may not result in a child welfare case if referrals to community agencies or outside factors mitigate the risk posed by the abuse or neglect that was found to have occurred. If the social worker determines court intervention is warranted because safety threats cannot be

mitigated or supervision is warranted to avoid future maltreatment, the child will either be removed from parental custody or a family maintenance case will be initiated. (See Cal. Rules of Ct., rule 5.670, subd. (a).)

If a child welfare agency removes a child, it must file a section 300 petition within 48 hours or release the child back to parental custody. (§ 313, subd. (a).) If the agency files a petition, the juvenile court conducts a detention hearing within 72 hours. (§ 315.) At the detention hearing, the juvenile court must determine whether a prima facie case has been made that the child is described by section 300, that "reasonable efforts" were made to prevent or eliminate the need for physical removal of the child from the home, and whether there were "reasonable means" other than removal to protect the child's physical or emotional health. (§ 319.) This requires the juvenile court and the child welfare agency to continue to identify whether there are circumstances that mitigate the risk posed by the parent's behavior which would avoid removal. (Cal. Rule of Ct., rule 5.678, subd. (c).)

By the time the jurisdiction hearing is held shortly thereafter, if the parent denies the allegations of the petition, the court must hold a contested hearing and determine whether the allegations in the petition are true by a preponderance of the evidence. (§ 355.) In acting to protect children, section 300, subdivision (b)(1), allows a child to be adjudged a dependent of the juvenile court when, for example, "[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the . . . [t]he 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 jurisdiction finding under section 300, subdivision (b)(1), requires the intervening agency to prove: (1) the parent's neglectful conduct or failure or inability to protect the child; (2) causation; and (3) serious physical harm or illness or a substantial risk of serious physical harm or illness. (*In re L.W.* (2019) 32 Cal.App.5th 840, 848; *In re Joaquin C.* (2017) 15 Cal.App.5th 537, 561; see *In re R.T.* (2017) 3 Cal.5th 622, 624, 634 [section 300 authorizes dependency jurisdiction without a finding that a parent is at fault for failure or inability to supervise or protect teenager from her own self-destructive behavior that mother could not control].) By this Court's own description, the focus of dependency jurisdiction is on "ongoing risk of harm." (*Id.* at p. 634-635.)

After finding that a child is a person described by section 300, the court shall hear evidence on the question of the proper disposition to be made of the child. (§ 358, subd. (a).) Without declaring dependency, the court can consider dismissing the case under a program of informal supervision. (§ 360, subd. (b).) The court can also declare dependency but then terminate jurisdiction and issue custody orders determining custody of, or visitation with, the dependent child, when court and agency supervision are not required. (§ 362.4; *In re Destiny D.* (2017) 15 Cal.App.5th 197, 205.) Alternatively, the court can declare dependency pursuant to section 360, subdivision (d), and continue the case for a family maintenance review hearing pursuant to section 364 in which case

the juvenile court determines at disposition what services the child and family need to be free from court supervision. (§ 362.) These family maintenance services are "activities designed to provide in-home protective services to prevent or remedy neglect, abuse, or exploitation, for the purposes of preventing separation of children from their families." (§ 16501, subd. (g).)

In contrast, section 361, subdivision (c) applies to out of home cases and provides that, a dependent child shall not be taken from the physical custody of his or her parents unless the juvenile court finds clear and convincing evidence of any of the following circumstances listed in section 361, subdivision (c) exist, including if "[t]here is or would be a substantial danger to the physical health, safety, protection, or physical or emotional well-being of the minor if the minor were returned home, and there are no reasonable means by which the minor's physical health can be protected without removing the minor from the minor's parent's, guardian's, or Indian custodian's physical custody." (§ 361, subd. (c)(1).)

In sum, the dependency system through jurisdiction and disposition, is designed to intervene in a family's life only to the extent absolutely necessary to protect a child from risk of harm. Not every young child with a parent abusing a substance will require juvenile court intervention in order for their safety to be protected, but some will. Whether intervention is required and, if so, what intervention is warranted is case specific and the checks and balances woven into each hearing ensure that a finding of substance abuse is not outcome determinative. The juvenile court

hearing all of the evidence and assessing credibility remains in the best position to determine whether the agency has proven there is substantial risk of physical harm to the child.

II. Juvenile Courts Should Not be Required to Narrowly Define "Substance Abuse" by the Medical Definition Provided by the Latest Version of the DSM.

In answering the first question, petitioner asks this Court to use the latest criteria of "substance use disorder" in the DSM to define "substance abuse" for purposes of section 300, subdivision (b)(1). (OBM at p. 25-39.) Petitioner's suggested rule is narrow, unworkable, and should be rejected as proposed. CSAC does not dispute that the DSM's current definition of substance use disorder is useful, but the criteria should not be controlling for purposes of assuming jurisdiction under section 300, subdivision (b)(1)(D) for the reasons set forth in this brief and respondent's Answer Brief on the Merits.

A. *In re Drake M.* is an Outlier, was Wrongly Decided, and Should be Rejected.

Courts of Appeal have not struggled to determine whether a parent's use of a substance constitutes abuse that places a child at substantial risk of harm for purposes of section 300, subdivision (b)(1)(D). Petitioner suggests there is a conflict among the Courts of Appeal related to the definition of substance abuse, relying on *In re Drake M.* (2012) 211 Cal.App.4th 754 ("*Drake M.*") (disapproved of on other grounds by *In re D.P.* (2023) 14 Cal.5th 266). But *Drake M.* is an outlier, rejected by the vast majority of courts dealing with the issue, and should not be followed by this Court to define the phrase "substance abuse."

In *Drake M., supra,* 211 Cal.App.4th 754, Division Three of the Second District reversed the juvenile court's finding that a father's marijuana use constituted sufficient evidence to find a substantial risk that Drake would suffer serious physical harm or illness at the time of the jurisdictional hearing. (*Id.* at p. 763-764.) The court concluded there was no evidence father was a substance abuser, the child had food and shelter, and there was no evidence of an issue with father's ability to supervise his son. (*Id.* at p. 764, 767.) In so finding, the court held section 300 clearly uses the word "abuse," "use" alone is not sufficient to warrant juvenile court jurisdiction, and the trial court had confused "use" with "abuse." (*Ibid.* citing section 300, subd. (b).)

Drake M. then addressed what constitutes abuse. (*Id.* at p. 765.) After observing section 300 does not define substance abuse, *Drake M.* considered the reference to the DSM in *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, a case that considered whether a mother's marijuana use constituted detriment for purposes of an 18-month review finding. *Drake M.* concluded a finding of substance abuse for purposes of section 300, subdivision (b), must be based on evidence sufficient to:

> (1) show that the parent or guardian at issue had been diagnosed as having a current substance abuse problem by a medical professional; or
>
> (2) establish that the parent or guardian at issue has a current substance abuse problem as defined in the DSM–IV–TR. The full definition of "substance abuse" found in the DSM–IV–TR describes the condition as "[a] maladaptive pattern of substance use leading to clinically significant impairment or distress, as manifested by one (or more) of the following, occurring within a 12–month period: [¶] (1)

> recurrent substance use resulting in a failure to fulfill major role obligations at work, school, or home (e.g., repeated absences or poor work performance related to substance use; substance-related absences, suspensions, or expulsions from school; neglect of children or household)[; ¶] (2) recurrent substance use in situations in which it is physically hazardous (e.g., driving an automobile or operating a machine when impaired by substance use)[; ¶] (3) recurrent substance-related legal problems (e.g., arrests for substance-related disorderly conduct)[; and ¶] (4) continued substance use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance (e.g., arguments with spouse about consequences of intoxication, physical fights)." (DSM–IV–TR, at p. 199.)

(*Id.* at p. 766.) *Drake M.* did not further explain why it so held, other than to state, in a conclusory manner, a definition was needed to avoid unspecified inconsistencies. (*Id.* at p. 767.)

Since *Drake M.* was decided over a decade ago, Courts of Appeal have widely declined to follow the narrow formulation in both published and unpublished cases.[5] (See e.g., *In re Christopher R.* (2014) 225 Cal.App.4th 1210 ("*Christopher R.*") [DSM is useful but not exclusive]; *In re Rebecca C.* (2014) 228 Cal.App.4th 720, 726 [diagnosis by medical professional not required to find substance abuse under section 300, subd. (b)]; *In re Alexander C.* (2017) 18 Cal.App.5th 438, 448 [under criteria outlined in *Drake M.* or *Christopher R.* substantial evidence showed father had a methamphetamine abuse disorder]; *In re L.W.* (2019) 32 Cal.App.5th 840, 850 [court did not focus on definition of substance abuse, but on nexus between mother's substance abuse,

[5] In a search conducted on March 30, 2023, there are 124 published and unpublished California Court of Appeal opinions that have either rejected or have declined to follow *Drake M.*

which mother did not challenge, and risk, which mother did challenge, finding mother's substance abuse endangered L.W. due to driving under the influence twice]; *In re J.M.* (2019) 40 Cal.App.5th 913, 923 [trial court erred in dismissing the petition where substantial evidence showed mother's drug use was continuing, inhibiting her judgment, and interfering with her ability to care for and protect the minors—reviewing court did not focus on definition of substance abuse]; *In re K.B.* (2021) 59 Cal.App.5th 593, 601 [rejected *Drake M.* in favor of *Christopher R.* and found substantial evidence mother abused methamphetamines and marijuana, but she tried to hide it].) Indeed, the only published case to wholly follow *Drake M.*'s narrow holding is *In re Natalie A.* (2015) 243 Cal.App.4th 178—a decision from the same division of the same district.

The *Christopher R.* court examined the *Drake M.* rule tying section 300, subdivision (b)'s definition of substance abuse to the DSM's definition of substance abuse, which at the time was the fourth edition of the DSM manual, the DSM-IV-TR.[6] (*Christopher R., supra,* 225 Cal.App.4th at p. 1217.) The *Christopher R.* court was unwilling to accept that "only someone who has been diagnosed by a medical professional or who falls within one of the specific DSM-IV-TR categories can be found to be a current substance abuser." (*Id.* at p. 1218.)

[6] Based on a search conducted on March 30, 2023, there are only seven published and unpublished California Court of Appeal opinions that have declined to follow *Christopher R., supra,* 225 Cal.App.4th 1210.

It then held the DSM is a generally useful and workable definition of substance abuse, but it is not a comprehensive or exclusive definition for purposes of section 300, subdivision (b). *Christopher R., supra,* 225 Cal.App.4th at p. 1217.) In so holding, the court explained that between the time *Drake M.* was decided and *Christopher R.* was decided, the American Psychiatric Association revised its Diagnostic and Statistic Manual of Mental Disorders, expanding the definition relied upon by *Drake M.* The manual eliminated the word "abuse" in favor of "substance use disorder." And, instead of four criteria indicating a problem, the Association expanded the definition to include 11 criteria. (*Id.* at p. 1218, fn. 6.) Moreover, instead of abuse being evidenced by one or more of the criteria, the DSM's new definition stated the "presence of two or three of the 11 specified criteria indicates a mild substance use disorder; four or five indicate a moderate substance use disorder; and six or more a severe substance use disorder." (*Ibid.*) The *Christopher R.* court concluded mother's conduct fell within DSM-IV-TR's definition of substance abuse, but even if it did not, mother's cocaine use "while in the final stage of her pregnancy, combined with her admitted use of the drug in the past and her failure to consistently test or enroll in a drug abuse program, justified the juvenile court's exercise of dependency jurisdiction over her children." (*Id.* at p. 1218-1219.)

A review of the published decisions regarding the definition of substance abuse and use of the DSM criteria makes clear there is not in fact a split of authority related to the definition of substance abuse. *Drake M.* is an exception. As explained below,

infra I.C., the DSM–IV–TR has been replaced by DSM–V and now by the DSM-V-TR. For that reason alone, *Drake M.* cannot espouse the hard and fast rule. Also as explained below, *infra* II, each dependency case is fact specific, dynamic, and unique. The fact-specific nature of each dependency case necessitates that juvenile courts have latitude to intervene to protect children who are abused or neglected or at risk of such abuse or neglect based on the unique needs of each family before it. Thus, juvenile courts, and by extension Courts of Appeal, must be able to determine based on the facts of a particular case whether a child is at substantial risk of harm due to a parent's abuse of substances.

B. The Plain Language of Section 300 is not Ambiguous and there is No Evidence the Legislature Intended to Utilize the DSM to Define Substance Abuse in Section 300, Subdivision (b).

There is no basis in decisional law, the plain language of section 300, or in legislative history to read into section 300 a requirement that the Agency prove a parent's actions or issues bring them within the meaning of the latest version of the DSM manual's diagnostic criteria of a substance use disorder. Contrary to petitioner's suggestion, there is no evidence the Legislature intended to utilize the DSM to define substance abuse. (See OBM at p. 29-31.)

The plain language of section 300 considers whether parental substance "abuse" rather than "use" places a child at substantial risk of harm because that abuse impairs a parent's ability to supervise or care for the child. (§ 300, subd. (b).) The distinction between "use" and "abuse" is not seriously in dispute,

as the language of the statute is clear that abuse is required. In interpreting statutes, this Court has made clear a reviewing court's only task is "to ascertain and declare what the statute contains, not to change its scope by reading into it language it does not contain or by reading out of it language it does." (*Vasquez v. State of California* (2008) 45 Cal.4th 243, 253; see also *People v. Raybon* (2021) 11 Cal.5th 1056, 1065; *Professional Engineers in California Government v. Kempton* (2007) 40 Cal.4th 1016, 1037 [same]; *Doe v. City of Los Angeles* (2007) 42 Cal.4th 531, 545 [same].) It would thus defy the cannons of statutory interpretation to read into the statute a requirement to prove the diagnostic criteria outlined in the DSM of a "substance use disorder" in order to satisfy section 300.

Petitioner asks this Court to determine the statute does not mean what it says simply because it does not say more about how it is to be implemented. This is an unreasonable request. If the Legislature meant to tether the definition of substance abuse to an additional definition such as that in the DSM, it would have done so, as it did when it explained what "serious physical harm" does and does not mean for subsection (a), when it defined "sexually trafficked" by the Penal Code section for subsection (b)(3), when it defined "serious emotional damage" as severe anxiety, depression, withdrawal, or untoward aggressive behavior for subsection (c), when it defined sexual abuse by various sections of the Penal Code in subsection (d), and when it defined "severe physical abuse" for subsection (e). (See *Doe v. City of Los Angeles, supra*, 42 Cal.4th at p. 543 [statutory language is construed in the context of the

entire law]; *In re R.T., supra,* 3 Cal.5th at p. 630 ["Because the Legislature has made parental culpability (based on either willful or negligent conduct) a requirement in some, but not all, grounds for asserting dependency jurisdiction under section 300, we may conclude that the omission of a culpability requirement in the first clause of section 300(b)(1) was purposeful."].)

Reading into section 300, subdivision (b)(1)(D) a requirement to prove the criteria of the DSM for substance use disorder would run contrary to the Legislature's clear intent to leave the term undefined. This is further confirmed by the Legislative Task Force who proposed the revisions to section 300 that were adopted in 1987. (Sen. Select Com. on Children & Youth/1195 Task Force, Rep. On Child Abuse Reporting Laws, Juvenile Court Dependency Statutes, and Child Welfare Services (Jan 1988) (hereafter "Task Force Report"); see RJN-C.)[7] The Task Force Report acknowledged the section 300 stakeholders had "different visions of who needs protection, as well as how such protection should be provided," so section 300's amendments reflected the Tasks Force's belief that "these judgments should be made within the context of clear legislative guidelines." (Task Force Report, at p 4; RJN-C at p. 47.) The Task Force went on to explain it had thus defined the types of harms that would justify intervention in the revisions made to section 300 at that time, which included addition of the clause at issue in this case. (*Ibid.*) If the Legislature had intended to further define substance abuse

[7] We refer to the request for judicial notice filed by petitioner as "RJN."

with any more specificity, it would have done so then, at any point in the intervening 35 years since the language at issue was added, or in the more than seven revisions to section 300 that have occurred to the statute since that time.

Section 300, subdivision (b)(1)(D) sets out two other bases for jurisdiction—mental illness and developmental disability—and in neither case did the Legislature require a finding under the DSM that a parent suffers from the impairment. While there may be, in some cases, information in the record about a specific diagnosis, in others some or all of the information about a mental illness or developmental disability may come from a parent's self-reporting (e.g. *In re A.G.* (2013) 220 Cal.App.4th 675 [mother told agency she was diagnosed with persecutory delusion and schizophrenia]), a collateral's self-reporting (e.g. *In re A.L.* (2017) 18 Cal.App.5th 1044, 1046 [father explained to the mother had previously been diagnosed with schizophrenia]), case history (e.g. *T.J. v. Superior Court* (2018) 21 Cal.App.5th 1229, 1234 [diagnosis in prior case of low IQ and with depressive disorder not otherwise specified, mild "mental retardation," and personality disorder not otherwise specified]), or a combination thereof. Again, in these scenarios, the focus is whether there is a definable risk of harm to the child rather than on a formulaic approach to categorizing a parent's behavior or challenges. (See e.g., *In re A.L., supra,* 18 Cal.App.5th 1044 [there is no question mother suffered from a mental illness, but the children suffered no actual harm as a consequence of it]; *In re R.T., supra,* 3 Cal.5th at p. 635 [dueling theories of causation underscore

the complexity of family dynamics, and the difficulty of assigning responsibility].)

C. Tethering the Definition of Substance Abuse Exclusively to a Manual Used in the Clinical Practice of Mental Health is Problematic.

1. The Purpose of the DSM Manual is Different from the Purpose of the Child Welfare System.

The DSM manual was not designed for the practice of child welfare.[8] It was designed by the American Psychiatric Association, in their own terms, to classify "mental disorders" with criteria designed to "facilitate more reliable diagnoses of these disorders." (See RJN at p. 5; American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders: Fifth Edition Text Revision DSM-5-TR* (2013) <https://ebooks.appi.org/epubreader/diagnostic-statistical-manual-mental-disorders-fifth-edition-text-revision-dsm5tr> (hereafter "DSM Manual").) The Association explained it is a manual for "clinical practice in the mental health field." (*Ibid.*) The "criteria are . . . intended to facilitate an objective assessment of symptom presentations in a variety of clinical settings—inpatient, outpatient, partial hospital, consultation-liaison, clinical, private practice, and primary care—as well in general community epidemiological studies of mental disorders." (*Ibid.*)

Nothing in the stated purpose of the manual or in its intended usage in clinical settings demonstrates the manual should apply to child welfare cases as an exclusive basis to define

[8] The purpose of juvenile court jurisdiction is to protect the child, rather than prosecute the parent. (§ 300.2; *In re A.J.* (2022) 77 Cal.App.5th 7, 14.)

substance abuse. However, petitioner focuses on a statement from the manual that "[t]he information [in the manual] is of value to all professionals associated with various aspects of mental health care, including psychiatrists, other physicians, psychologists, social workers, nurses, counselors, forensic and legal specialists, occupational and rehabilitation therapists, and other health professionals." (*Ibid.*) CSAC does not dispute the DSM may be of value generally to social workers or practitioners alike for a variety of reasons. That does not mean the manual should encompass the exclusive definition of substance abuse that juvenile court judges must look to before asserting jurisdiction over a child.

2. It is Problematic to Fasten Section 300, Subdivision (b)'s Definition of Substance Abuse to the Medical Diagnostic Criteria of Substance Use Disorder in the Latest Version of the DSM, as the DSM Manual Changes Often.

There have been five editions of the DSM in the last seventy-plus years since the manual has been in existence. The DSM-V manual was first published in 2013, but the newest edition of the DSM-V is called the DSM-V-TR and was published in March of 2022, with multiple revisions to diagnostic criterion. (See DSM Manual, at p. xxi.) Prior to the DSM-V, the DSM-IV was published in 1994, and prior to that, the DSM-III was published in 1980. (American Psychiatric Association "DSM History" <https://www.psychiatry.org/psychiatrists/practice/dsm/about-dsm/history-of-the-dsm#section_2> (as of 3/30/2023).) The first edition of the DSM was published in 1953. (*Ibid.*)

The DSM-V-TR now breaks up substance use disorders into more than 10 different types of disorders including alcohol use disorder, cannabis use disorder, stimulant use disorder, and opioid use disorder. (DSM Manual, at p. 554-555, 575-576, 632-633, 609-610.) Only the criteria for stimulant use disorder is encompassed in petitioner's request for judicial notice. (See RJN at p. 14.) The manual explains whether particular symptoms qualify as a particular disorder for a *medical* diagnosis. While the criteria is largely the same for all of the disorders, petitioner's rule would require the juvenile court to consult with the latest edition of the DSM about how many of the diagnostic criteria for any one of the disorders a parent meets.

Because the DSM changes often, exclusively linking the definition of substance abuse to DSM's diagnostic criteria, which no longer even uses the phrase "substance abuse," is untenable and will produce confusion. The American Psychiatric Association will not consult with the California Legislature or this Court before it issues another version of the DSM, nor would that be practicable. This is why the manual may be a useful starting point in assessing whether a parent's substance use amounts to abuse, especially in a close case, but it cannot encompass the exclusive definition of substance abuse for section 300.

Section 300, subdivision (b), by its terms, does not require a medical diagnosis and also does not require identification of a particular substance use disorder before jurisdiction can be asserted. Nor should it. A person could easily have a medical diagnosis of a substance use disorder per the DSM, but be able to

safely parent their child. Similarly, a parent's substance use disorder may be chronic or lifelong, but dependency cases are limited in duration to either six months if in-home, per section 364, or no longer than two years if in reunification, per section 361.5. Accordingly, children are often returned to their parents in spite of an addition because a substantial risk of detriment no longer remains or their cases are closed because conditions do not still exist that would justify initial assumption of jurisdiction.

A social worker's investigation, and a juvenile court's evidentiary task, is a fact-driven assessment of whether a parent's presenting issues renders them unable to safely supervise or provide regular care of their child. (See § 300, subd. (b)(1)(D).) The inquiry is about risk to a child, rather than about qualifying for a medical condition under the DSM.

3. Utilizing the DSM is Additionally Problematic Because the Diagnostic Criteria of Substance Use Disorders are Subjective and Difficult to Prove.

Utilizing the DSM criteria as the exclusive means of defining substance abuse for purposes of section 300, subdivision (b) is problematic for the additional reason that most, if not all, of the 11 criteria are based on self-reporting. Would petitioner's proposed rule require child welfare agencies to prove two or more of the criteria listed in the current DSM by a preponderance of the evidence in order to prove substance abuse for purposes of section 300, subdivision (b)? (See § 355, subd. (a).) Three or more? (See DSM Manual, at p. 547 [mild substance use disorder is suggested by the presence of two to three symptoms, moderate by four to five

symptoms, and severe by six or more symptoms].). If so, gathering evidence on many of these very subjective elements like cravings, tolerance, and antisocial behavior would be difficult, if not impossible, in the case of an uncooperative parent. (See e.g., *In re K.B., supra,* 59 Cal.App.5th 593, 601-602 [mother's transparent dissembling led the trial court to draw the reasonable inference mother was trying to hide her addiction as evidenced by mother's initial denial of all drug use despite one positive test, mother changing her story about her use of methamphetamine, claiming it had been three days—and then revised to a few weeks—before the drug test, did not admit to her marijuana use, and denial of a history of use despite an arrest for possession of a controlled substance].) This proof requirement would also alter the way section 300 petitions are pled and what information must be gathered and reported to the juvenile court at the front end of a case. Moreover, many of the criteria like tolerance and cravings are simply not relevant to a child welfare worker's initial investigation regarding safety of the child.

A closer look at the DSM criteria makes this clear. Criterion one through four deal with impaired control. (DSM Manual, at p. 545.) Criterion one states "[t]he individual may take the substance in larger amounts or over a longer period than was originally intended." (*Ibid.*) This would be known only if the parent cooperated with several drug tests over a period of time, if the parent disclosed the amount they intended to take and the amount they actually took, or if a parent signed a release of information allowing a social worker to speak with a prescribing professional

or a therapist to whom the parent has reported information supporting this criterion. Criterion two exists if the parent expresses a persistent desire or unsuccessful effort to cut down or regulate substance use. (*Id.* at p. 545-546.) This would likely only be known if the parent self-reported this effort, if the parent failed at a prior substance abuse program, or if a parent signed a release of information allowing a social worker to speak with a doctor or therapist to whom the parent had reported information supporting this criterion. Regarding the third criteria, the child welfare worker would likely only know whether the individual spent a great deal of time obtaining the substance, using the substance, or recovering from its effects if there are other collateral individuals who know the parents that report the information or the parent self discloses it. (*Id.* at p. 546.) The fourth criterion is manifested by an intense desire or urge for the drug. (*Ibid.*) This generally subjective element would only be known to a child welfare worker if a parent disclosed this. (*Ibid.*)

Criterion five through seven deal with social impairment. (DSM Manual, at p. 546.) Criterion five looks at recurrent substance use, which results in a failure to fulfill major role obligations at work, school, or home. (*Ibid.*) This criterion is likely the easiest for social workers to gather evidence regarding, given the probable overlap with the reasons a child welfare agency is involved with the family. Criterion six considers whether the individual continues using despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance. (*Ibid.*) This will only be known to a child

welfare agency if the parent self-reports this issue or if there is a partner or family member willing to disclose this to the agency. Criterion seven looks at whether important social, occupational, or recreational activities are given up or reduced because of substance use. (*Ibid.*) Like six, this criterion would only be known to a child welfare worker if the parent was willing to disclose they have withdrawn from activities and hobbies in order to use the substance or if there is a partner or family member willing to share this.

Criterion eight and nine deal with risky use of the substance. (DSM Manual, at p. 546.) Criterion eight assesses whether there is recurrent use in situations in which it is physically hazardous. (*Ibid.*) The child welfare agency would know this if the parent was found doing this by authorities, if a collateral reported this, or if the parent so disclosed. Criterion nine involves the individual using the substance despite knowledge of having a persistent or recurrent physical or psychological problem that is likely to have been caused or exacerbated by the substance. (*Ibid.*) "The key issue in evaluating this criterion is not the existence of the problem, but rather the individual's failure to abstain from using the substance despite the difficulty it is causing." (*Ibid.*) The social worker would only know this if the parent self-reported the physical difficulty, if the parent had a medical condition so extreme the issue could not go unnoticed, or if the parent signed a release of information allowing a social worker to speak to their physician.

The last two criterion are pharmacological. (DSM Manual, at p. 546.) Criterion 10 is tolerance of the drug. (*Ibid.*) The

manual explains "[t]olerance may be difficult to determine by history alone, and laboratory tests may be helpful (e.g., high blood levels of the substance coupled with little evidence of intoxication suggest that tolerance is likely)." (*Ibid.*) Tolerance would be almost impossible for a child welfare worker to assess without candid self-reporting from a parent likely coupled with drug testing. Finally, the last criterion is withdrawal, which "occurs when blood or tissue concentrations of a substance decline in an individual who had maintained prolonged, heavy use of the substance." (*Ibid.*) This, again, would be difficult to assess unless the parent was cooperative and/or in a drug treatment program, something which many parents resist.

As can be seen from the foregoing discussion, requiring the child welfare agency to meet its burden of proof to demonstrate substance abuse at the early stage of a dependency case while at the same time limiting its ability to do so by requiring it to prove multiple elements almost entirely based on a parent's self-reporting would all too often deprive the agencies of the ability to protect children from the substantial risk of harm created by a parent's substance abuse. Tying the definition of "substance abuse," as that term is used in Section 300, subdivision (b)(1)(D), to the criterion in the current DSM would effectively write the term out of the statute.

D. The Critical Inquiry Under Section 300, Subdivision (b)(1)(D) is Whether a Parent's

Actions or Behaviors Render Them Unable to Safely Care or Supervise their Child.

Having explained how the term "substance abuse" should not be defined, CSAC turns to how the term should be defined. This Court should follow the reasonable, fact-driven approach taken by *Christopher R., supra,* 171 Cal.App.4th 1210. Substance abuse is a changing concept, and consultation to the DSM—a clear reference source—may be useful, but it is not a comprehensive or exclusive definition for purposes of section 300, subdivision (b).

Indeed, a similar reference source is more instructive, as it was designed for the child welfare system. Child welfare agencies are required by the State Department of Social Services to utilize a standardized assessment tool, called Structured Decision Making ("SDM"), to identify whether there is a safety threat, whether the risk posed by that threat can be mitigated, to evaluate information relevant to the case situation, and to appraise case service needs. (All County Letter 09-31, Safety and Risk Assessments (Aug. 17, 2009) p. 2;[9] SDM Manual.)

The SDM manual was developed in 1998 and as of July 2016, all 58 counties use SDM to assess the risk and safety of vulnerable children. (See California Department of Social Services, "Structured Decision Making"

[9] All county letters issued by the State Department of Social Services are entitled to judicial deference as official acts of the state's executive department. (*In re Social Services Payment Cases* (2008) 166 Cal.App.4th 1249, 1272; accord, *Sharon S. v. Superior Court* (2003) 31 Cal.4th 417, 436 [court deferred to the DSS's interpretation of adoption law expressed in an All County Letters]; *Megrabian v. Saenz* (2005) 130 Cal.App.4th 468, 486 [evidence of long-standing DSS interpretation of regulation entitled to deference].)

<https://www.cdss.ca.gov/inforesources/child-welfare-protection/structured-decision-making> (accessed on 4/2/2023).) The State Department of Social Services explains that SDM has helped social workers accurately classify families according to level of risk, leading to better outcomes for families and fewer cases of child maltreatment. (*Ibid.*)

The SDM Manual states that caregiver substance abuse is a complicating behavior. (SDM Manual, at p. 60.) The SDM Manual defines substance abuse under its Safety Assessment Definitions as the "[c]aregiver has abused legal or illegal substances or alcoholic beverages in this incident to the extent that control of his/her actions or caregiving abilities is significantly impaired, or information is available that past abuse of legal or illegal substances has impaired the parent's caregiving capabilities in the past." (SDM Manual, at p. 53, 60.) Like the focus of section 300, subdivision (b)(1)(D)'s language itself and the focus of *Christopher R.* and *In re Rocco M.* (1991) 1 Cal.App.4th 814 ("*Rocco M.*"), see *infra* III.A., the critical inquiry in defining substance abuse for dependency jurisdiction is by looking at its effect on the child—whether a parent's actions or issues render them unable to safely care or supervise a child.

The Legislature left the term "substance abuse" undefined without a more specific definition and this Court should too, allowing the language of section 300, subdivision (b)(1)(D) to speak for itself. To the extent a particular juvenile court struggles with what constitutes substance abuse in any given case, the reference sources of the SDM Manual or the DSM may be consulted, but

courts should not be bound by criteria not explicitly outlined in section 300 before jurisdiction can be assumed.

III. Where a Child is of Tender Years, a Finding of Parental Substance Abuse Alone Does Not Provide Sufficient Evidence to Warrant Juvenile Court Jurisdiction.

CSAC would answer the court's second question as follows: for a child of tender years, a finding of parental substance abuse alone does not by itself provide sufficient evidence to warrant juvenile court jurisdiction under section 300, subdivision (b).[10] But answering the Court's question in the negative does not mean ignoring a child's age when assessing risk. It is the child welfare agency's burden to prove substantial risk of harm before a court can assume jurisdiction over a child. And contrary to petitioner's contention, a finding of parental substance abuse alone is not outcome determinative when the child for whom the dependency petition has been filed is young. (RBM at p. 27.) Nor does a finding of parental substance abuse in a case involving a young child shift the burden to a parent to disprove that risk. A finding of parental substance abuse in a case involving a child of tender years raises the inference that the children involved are at a higher risk of abuse or neglect. Put differently, the fact of parental substance abuse is given slightly more weight when assessing the risk it poses if the child involved is of tender years because of the

[10] CSAC asserts a child of tender years is generally a child six or under, but acknowledges there will be the rare instance where a four-year-old is more mature than a six-year-old, or a developmentally delayed 12-year old-may be more vulnerable than a five-year-old. This is why, as explained more fully below *infra,* substance abuse and the child's age alone will bring a child under the juvenile court jurisdiction.

particular vulnerabilities young children face. This common-sense inference is something Courts of Appeal have correctly acknowledged.

A. The Tender Years Inference.

There are three cases generally cited for the inference that children of tender years are at a higher risk for abuse or neglect due to parental substance abuse: *In re Rocco M., supra,* 1 Cal.App.4th 814, *Drake M., supra,* 211 Cal.App.4th 754, and *In re Christopher R., supra,* 225 Cal.App.4th 1210.

The inference originated in *In re Rocco M., supra,* 1 Cal.App.4th 814. The case addressed the standard to assert juvenile court jurisdiction after the 1987 amendments to section 300. (*Id.* at p. 824, abrogated by *In re R.T.* (2017) 3 Cal.5th 622 on other grounds not at issue here.) The First District Court of Appeal explained that a finding of substantial danger to children falls into two categories: (1) where there is an identified hazard in the child's environment and (2) where children are of such tender years that the absence of adequate supervision and care poses an inherent risk to that young child's physical health and safety. (*Ibid.*) The focus of *Rocco M.* was on the risk posed to young children by inadequate supervision and care. (*Ibid.*) In addressing this second group of children at risk, the *Rocco M.* court cited five cases addressing risk to children three and under posed by parental substance abuse. (*Ibid.*) The *Rocco M.* court did not further discuss this inference of risk raised by a young child and a parent abusing substances, as the child at issue in the case was 11. The reviewing court found that Rocco was at risk because due to

the identified hazard created by mother, he would ingest hazardous drugs (cocaine) left around the home, and because she left him home alone for prolonged periods. (*Id.* at p. 817-818, 824.) The *Rocco M.* court noted its holding did not conflict with *In re Jeannette S.* (1979) 94 Cal.App.3d 52, which observed that father's alcoholism and reliance on welfare would not, by themselves, warrant a finding of dependency jurisdiction. Nor did the *Rocco M.* court disagree with *Jeannette S.*'s holding. (*Id.* at p. 825-826.)

Following *Rocco M.*, in *Drake M., supra,* 211 Cal.App.4th 754, seemed to expand on *Rocco M.*'s explanation of substantial danger to children of tender years posed by inadequate supervision and care, holding that for children of tender years, a finding of substance abuse is prima facie evidence of the inability of a parent or guardian to provide regular care resulting in a substantial risk of physical harm. (*Id.* at p. 767.) Following this holding, in dicta the *Drake M.* court stated "DCFS needed only to produce sufficient evidence that father was a substance abuser in order for dependency jurisdiction to be properly found. DCFS failed to do so."[11] (*Ibid.*) Even though Drake was only 14-months old at the time, because father's marijuana use did not amount to substance abuse within DSM's diagnosis of substance abuse, the *Drake M.* court found there was insufficient evidence the toddler was described by the applicable section of 300, subdivision (b). (*Id.* at p. 767-768.)

[11] CSAC disagrees with *Drake M.* to the extent it sought to expand the inference by stating only two things need to be true—substance abuse plus a young child.

In *Christopher R., supra,* 225 Cal.App.4th at p. 1220, employed *Rocco M.*'s tender years inference in finding that the mother and father's conduct brought their child within section 300, subdivision (b). (*Id.* at p. 1215, 1218, 1120.) Mother and father's newborn child tested positive for methamphetamines and cocaine at birth. (*Id.* at p. 1213.) Mother's three older children, ages six, five, and two, were also removed from mother at the time. (*Id.* at p. 1214.) The court went on to employ the tender years inference, finding mother's substance abuse was prima facie evidence she was unable to provide regular care of her children. (*Id.* at p. 1219.) The court based its finding of jurisdiction, however, on the risk posed by her poor judgment and use of cocaine during the last months of her pregnancy. (*Ibid.*) With respect to the newborn's father, the court took into consideration that newborn was only three months old at the time of the jurisdiction hearing and held that father's persistent and illegal use of marijuana demonstrated an inability to provide regular care for the infant. (*Id.* at p. 1220.) In reaching this holding, the court noted that marijuana use, without more, would not have justified the juvenile court's exercise of jurisdiction. (*Id.* at p. 1219-1220.)

B. The Fact of Parental Substance Abuse is Given More Weight When a Child of Tender Years is Involved. It is Not, However, Outcome Determinative.

A finding of substance abuse in a case involving a child of tender years does not, as petitioner suggests, make dependency jurisdiction under section 300, subdivision (b) self-evident. (OBM at p. 47-50; RB at p. 27.) Dependency cases are fact specific. Each

case is unique and no one fact is determinative. The two cases petitioner relies on for the opposite proposition are cases in point: *Christopher R., supra,* 225 Cal.App.4th 1210 and *In re Kadence P.* (2015) 241 Cal.App.4th 1376. (See OBM at p. 50; RB at p. 27.)

In *Christopher R., supra,* 225 Cal.App.4th 1210, there were many facts the Court of Appeal cited about the mother and father in finding substantial evidence supported jurisdiction. Regarding the mother, the record demonstrated she admitted use of cocaine for seven years, admitted using the drug in final stages of pregnancy, failed to consistently drug test, failed to enroll in a drug treatment program, was not caring for two of her older two children who resided with mother's cousin (for whom mother did not know the address or telephone number), was not caring for her third older child who resided with a maternal aunt, and the baby was born one month premature which was just three days after mother admitted to using cocaine. (*Id.* at p. 1213, 1214, 1218-1219.) Regarding father, he admitted using marijuana daily, had been smoking marijuana for seven or eight years and had increased his use over time, was a former gang member, he was unemployed, did not complete the substance abuse program that was a probation requirement, was not able to obtain a medical marijuana card in spite of saying he used the drug to relax, and the baby was born one month early with respiratory issues. (*Id.* at p. 1220, 1213-1214.)

In *In re Kadence P., supra, 241 Cal.*App.4th 1376, mother challenged the jurisdictional findings, but the Court of Appeal affirmed, finding substantial evidence supported the juvenile

court's orders. Kadence was four months old when the Agency first investigated. (*Id.* at p. 1379.) In the case, mother's drug use had led to the removal of her three older children in a different county, mother's services had recently been terminated in the sibling case, she had a long history of methamphetamine and marijuana use, mother had recently relapsed on the drugs, she was hiding her drug use, she did not appear at Kadence's detention hearing, appeared under the influence at visits with her older children, and she failed to drug test and became angry after being caught trying to tamper with her test. (*Id.* at p. 1379-1381.) In explaining the laws governing jurisdiction, the reviewing court acknowledged the absence of adequate supervision and care poses an inherent risk to children of tender years. (*Id.* at p. 1384.) The court did not rely on the inference for its holding though, and found there was substantial evidence that Kadence was at substantial risk of harm. (*Id.* at p. 1379-1380.)

In *In re Natalie A.* (2015) 243 Cal.App.4th 178, another published case that cited the tender years inference, a five-year-old, two-year-old, and one-year-old were in the care of father after they had been removed from mother. (*Id.* at p. 180.) Father lived with the paternal grandparents but left often. At one point, the father left the one year old unattended, and the child burned his hand on an iron. When the social workers responded, the one and two-year-old were home without adult supervision, father had left the kids with the grandparents without specifying a return date, and admitted using marijuana while away. (*Id.* at p. 181-182.) After a meeting with the Agency, father agreed to drug test but

failed to do so, and again left the two youngest children home alone after agreeing not to. (*Id.* at p. 182.) Father had a history of drug use, his single drug test was dilute, he had a criminal history that included charges for drug possession and disorderly conduct and alcohol intoxication, and he did not enroll in a drug treatment program after being asked. (*Id.* at p. 182-183, 184.) The reviewing court held father's marijuana abuse *contributed* to his failure to adequately supervise his children. (*Id.* at p. 185-186.) The court explained "the record amply supports the juvenile court's finding that father is an abuser of marijuana *and* that his abuse of the drug has affected his ability to adequately care for his very young children. [emphasis added]." (*Id.* at p. 186.)

The published cases citing the tender years inference demonstrate it is just that: an inference that is not outcome determinative because, in any given case, there are additional facts that either amplify or mitigate risk to a child. To the extent petitioner suggests a child's young age and a finding of parental substance abuse alone automatically qualify a child for dependency jurisdiction, the hypothetical is an incomplete one. Those will be just two facts amongst many that either demonstrate a parent's abuse of substances places the child at risk, or it does not. The young age of a child is one that, for the reasons explained below *infra*, carries more weight when the parent involved abuses substances.

C. Children of Tender Years are Considered More Vulnerable, Less Able to Protect Themselves

from Harm, and are Completely Dependent on Others for Care and Protection.

The inference explained above is well grounded. It is indisputable young children are almost entirely dependent on a caretaker for regular supervision, care, and nourishment. For example, a newborn is completely dependent on a caretaker, needing to be fed between eight and twelve times per day. (American Academy of Pediatrics, "Newborn and Infant Breastfeeding" (5/31/2022) <https://www.aap.org/en/patient-care/newborn-and-infant-nutrition/newborn-and-infant-breastfeeding/> (as of 3/27/2023).) For the first six months of life, the American Academy of Pediatrics recommends that a parent sleep in the same room with an infant, but not in the same bed in order to diminish the risk of Sudden Infant Death Syndrome. (American Academy of Pediatrics, "American Academy of Pediatrics Updates Safe Sleep Recommendations: Back is Best" (6/21/2022) <https://www.aap.org/en/news-room/news-releases/aap/2022/american-academy-of-pediatrics-updates-safe-sleep-recommendations-back-is-best/> (as of 3/27/2023).) Young children have many routine doctor's appointments, as evidenced by the fact that between birth and one years of age babies have a minimum of seven routine well-child exams. (American Academy of Pediatrics, "Your Child's Checkups" (2023) <https://www.healthychildren.org/English/ages-stages/Your-Childs-Checkups/Pages/default.aspx> (as of 3/28/2023).)

Young children also require close supervision because they like to explore by putting things in their mouth. As soon as a child begins crawling or walking, parents and caregivers need to take

steps to make sure harmful items are out of reach. (American Academy of Pediatrics, "Childproofing Your Home" (2021) <https://publications.aap.org/patiented/article-abstract/doi/10.1542/peo_document605/80379/Childproofing-Your-Home?redirectedFrom=fulltext> (as of 3/28/2023).) Moreover, young children cannot be left alone, as a child should be at least 12-years-old before being left home alone. (American Academy of Pediatrics, "At What Age is it Considered Neglect to Leave a Child Home Alone?" (10/25/2019) <https://www.aap.org/en/news-room/news-releases/aap/2019/at-what-age-is-it-considered-child-neglect-to-leave-a-child-home-alone/> (as of 3/27/2023).) Young children are more vulnerable because they are also less verbal. Children around two years of age typically only have about 50 words and are just beginning to put words together to make phrases, making them dependent on parents to read their nonverbal cues and gestures. (Mayo Clinic, "Child Development: Know What's Ahead" (3/24/2021) <https://www.mayoclinic.org/healthy-lifestyle/childrens-health/in-depth/child-development/art-20045155> (as of 3/27/2023).) Younger children also have less capacity to retain memory of events. For example, four-year-olds do not accurately judge the time of day, month, or season of the events, whereas six-year-olds and eight-year-olds can. (Pathman et al., "Young Children's Memory for the Times of Personal Past Events" (2013), *Journal of Cognition and Development*, 14(1), p. 120-140. <https://doi.org/10.1080/15248372.2011.641185> (as of 3/27/2023).)

D. Child Welfare Agencies Must Consider a Child's Young Age in Responding to Child Abuse and Neglect Referrals.

Not only is age a commonsense consideration courts and practitioners cannot ignore for the non-exhaustive reasons set forth above, but also age is considered a risk factor that child welfare workers are required to take into consideration when investigating a child abuse referral. (CDSS Manual, Div. 31-105.112, p. 56.) Child welfare regulations on emergency response to a child welfare referral, direct child welfare workers to consider the precipitating incident, the child's characteristics (such as age), caretaker characteristics (such as substance abuse), and family factors (such as environmental conditions or support systems). (*Ibid.*)

California's SDM Manual considers the child's age, developmental status, and other child vulnerabilities when assessing how to act on a referral for allegations of abuse or neglect and thus whether court intervention through detention or a family maintenance case is warranted. (SDM Manual, at p. 18.) A child is considered more vulnerable between the ages of zero to five years old. (*Id.* at p. 47.) The manual explains age is the first factor to be considered when assessing a child's vulnerabilities because children zero to five years of age "are less verbal and less able to protect themselves from harm. Younger children also have less capacity to retain memory of events. Infants are particularly vulnerable, as they are nonverbal and completely dependent on others for care and protection." (*Id.* at p. 53.)

For the foregoing reasons, just by virtue of their age, a child of tender years is more vulnerable than an older child.

E. Because Children of Tender Years are More Vulnerable, they are at a Higher Risk of Abuse and Neglect.

As a result of a young child's need for close supervision and their inability to protect themselves, they are at a higher risk of abuse and/or neglect. The SDM Manual explains that while a caregiver's complicating behavior of substance abuse does not by itself "create a safety threat," it does make it more difficult to create safety for a child. (See SDM Manual, at p. 50.) The evidence supports this conclusion.

Physiological dependence on opioids may occur in about half of the infants born to females with opioid use disorder, which can "produce a severe withdrawal syndrome in the neonate requiring medical treatment and has increased markedly in prevalence." (DSM Manual, at p. 614.) Almost a quarter of children of mothers with identified substance use disorders do not receive routine child health maintenance services in their first two years of life. (Smith et al., "Families Affected by Parental Substance Abuse," *Pediatrics* (Vol. 138, Aug. 2016) p. 2.) The American Academy of Pediatrics has proffered that "[t]he neonatal period, when infants are the most vulnerable," is the period of highest risk of harm with parents abusing substances. (*Id.* at p. 4.) Some of these increased risks to young children of parents who abuse substances include lack of appropriate childproofing due to transience or distraction; burns and fires due to use of lighters or other paraphernalia; increased risks of diseases and infections for young children due to accessible

paraphernalia, inhalation of toxic ingredients used to make drugs; risks posed in living conditions that are hazardous including clutter, garbage, vermin, or human and animal waste; and being injured while playing in the house or yard or wandering off. (*Id.* at p. 4-5.)

This heightened risk to young children with caretakers who abuse substances is underscored by the dangers posed to users of the drugs that most commonly warrant juvenile court intervention—stimulants such as cocaine and methamphetamines or opioids such as fentanyl. (See e.g., *In re K.B.* (2021) 59 Cal.App.5th 593, 601 [methamphetamines]; *In re Yolanda L.* (2017) 7 Cal.App.5th 987, 994 [same]; *In re R.R.* (2010) 187 Cal.App.4th 1264, 1281 [same]; *In re L.W.* (2019) 32 Cal.App.5th 840, 851 [cocaine]; *In re J.M.* (2019) 40 Cal.App.5th 913, 923 [cocaine and methamphetamines]; *In re J.J.* (Aug. 19, 2022, No. G061099) 2022 WL 3571092 [fentanyl]; *In re A.W.* (Sept. 27, 2022, No. A165735) 2022 WL 4479971 [same]; *In re B.K.* (June 25, 2021, No. B309564) 2021 WL 2621151 [same]; *In re I.M.* (Feb. 19, 2019, No. A153446) 2019 WL 667910 [same].)[12]

Cocaine is a powerfully addictive stimulant drug. (National Institute on Drug Abuse, "Cocaine," <https://nida.nih.gov/research-topics/cocaine> (as of 4/4/2023).) Although cocaine may be used for valid medical purposes, such as local anesthesia, cocaine is an illegal drug. (*Ibid.*) As a street drug,

[12] CSAC could not locate a published child welfare case addressing parental fentanyl use at jurisdiction. CSAC cites these unpublished cases to demonstrate only by way of example the prevalence of fentanyl in current dependency cases.

cocaine looks like a white, crystal powder. (*Ibid.*) The primary effects of the drug include restlessness, irritability, anxiety, paranoia, dilated pupils, insomnia, and loss of appetite. (United States Drug Enforcement Administration, "Cocaine," <https://www.dea.gov/factsheets/cocaine> (as of 4/3/2023).) After a high, there is a crash that includes exhaustion and depression leading users to crave the drug again. (*Ibid.*) With increasing doses or higher frequency of use, the risk of adverse psychological or physiological effects increases and includes psychosis. (National Institute on Drug Abuse, "What are the long-term effects of cocaine use?" <https://nida.nih.gov/publications/research-reports/cocaine/what-are-long-term-effects-cocaine-use> (as of 4/4/2023).)

Methamphetamines are a highly addictive psychoactive stimulant that produces a euphoric high, followed by a "crash" that causes depression, irritability, insomnia, nervousness, and paranoid aggressive behaviors, which present a risk of serious neglect and abuse to the children of methamphetamine-dependent parents. (Messina et al., "Children exposed to methamphetamine use and manufacture" (2014) *Child Abuse & Neglect*, 38(11), p. 1872-1883 <https://doi.org/10.1016/j.chiabu.2006.06.009> (as of 3/27/2023).) Methamphetamine use can also induce psychosis with acute symptoms such as agitation, violence, and delusions. (Glasner-Edwards & Mooney, "Methamphetamine Psychosis: Epidemiology and Management" (2014) *CNS Drugs*, 28(12), p. 1115-1126. <https://doi.org/10.1007/s40263-014-0209-8> (as of 3/27/2023.)

The National Institute on Drug Abuse explains that fentanyl is a "powerful synthetic opioid that is similar to morphine but is 50 to 100 times more potent." (National Institute on Drug Abuse, "What is Fentanyl?" (June 2021) <https://nida.nih.gov/publications/drugfacts/fentanyl> (as of 3/28/2023).) Synthetic fentanyl's primary effects include confusion, sedation, problems breathing, and unconsciousness. (*Ibid.*) Per Centers for Disease Control and Prevention, synthetic opioids are the leading cause of drug overdose deaths in the United States. (Centers for Disease Control and Prevention, "Drug Overdose Deaths Remain High" <https://www.cdc.gov/drugoverdose/deaths/index.html> (as of 3/28/2023).) In particular, fentanyl is the leading driver of drug overdose deaths in San Francisco. (City and County of San Francisco, "Accidental Overdose Deaths Decline in San Francisco For the Second Consecutive Year as Fentanyl/Opioid Epidemic Rages Nationwide" (1/18/2023) <https://sf.gov/news/accidental-overdose-deaths-decline-san-francisco-second-consecutive-year-fentanylopioid> (as of 3/28/2023).) The serious effects of fentanyl cannot be ignored. Ingestion of fentanyl poses a very real risk of death to young children—a risk that occurs when it is left unsecured. (The Wall Street Journal, "The Youngest Victims of the Fentanyl Crisis" (12/30/2023) <https://www.wsj.com/articles/children-victims-of-the-fentanyl-crisis-11672412771> (as of 3/31/2023).)

Conclusion

CSAC respectfully asks this Court to affirm the decision of the Second District Court of Appeal.

Dated: April 5, 2023

Respectfully submitted,

JENNIFER HENNING,
Litigation Counsel
California State Association of Counties

DAVID CHIU
City Attorney
KIMIKO BURTON
Lead Attorney
San Francisco County

By: */s/ Elizabeth McDonald Muniz*
ELIZABETH MCDONALD MUNIZ
Deputy City Attorney
Attorneys for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Century Schoolbook typeface. According to the "Word Count" feature in my Microsoft Word for Windows software, this brief contains 11037 words.

I declare under penalty of perjury that this Certificate of Compliance is true and correct and that this declaration was executed on April 5, 2023.

DAVID CHIU
City Attorney
KIMIKO BURTON
Lead Attorney
San Francisco County

By: */s/ Elizabeth McDonald Muniz*
ELIZABETH MCDONALD MUNIZ
Deputy City Attorney
Attorneys for Amicus Curiae

PROOF OF SERVICE

I, Elizabeth Kerrisk, declare as follows:

I am a citizen of the United States, over the age of eighteen years and not a party to the above-entitled action. I am employed at the City Attorney's Office of San Francisco, Fox Plaza Building, 1390 Market Street, Seventh Floor, San Francisco, CA 94102.

On April 5, 2023, I served the attached:

[PROPOSED] BRIEF OF AMICUS CURIAE CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES

on the following persons and/or representatives of the court as addressed below.

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

Sean Burleigh, Esq.
saburleigh@gmail.com
(Counsel for Appellant Father)

Andrew Tippin, Esq.
LADL4
tippina@ladlinc.org
dec4@ladlinc.org
(Trial Counsel for Mother)

Hon. Martha Matthews
Dept. 424
c/o Clerk of the Superior Court
Edelman Children's Court
JuvJoAppeals@lacourt.org

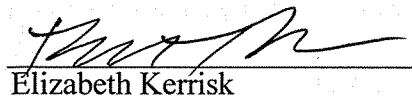
California Appellate Project
Capdocs@lacap.com

Samantha Bhuiyan, Esq.
Children's Law Center 3
Bhuiyans@clcla.org
Appeals3@clcla.org
(Trial Counsel for Minor)

David Michael Miller, Esq.
Senior Depty County Counsel
dmiller@counsel.lacounty.gov

Court of Appeals
(Service Copy filed w/TrueFiling)

I declare under penalty of perjury pursuant to the laws of the State of California that the foregoing is true and correct. Executed April 5, 2023, at San Francisco, California.



Elizabeth Kerrisk