Legislature; however, the assertion is misguided. (Appendix, Exhibit 5, at p. 141.)

In fact, dependency cases are intertwined with civil codes. (See *In re M.B.* (2011) 201 Cal.App.4th 1057, 1063 ["the better view is that application of a statute outside the Welfare and Institutions Code (and not expressly made applicable) is not necessarily barred from dependency proceedings." (Code of Civ. Proc., § 527.8).]; *In re Joshua G.* (2005) 129 Cal.App.4th 189; *In re Daniel S.* (2004) 115 Cal.App.4th 903; *In re Christopher L.* (2006) 143 Cal.App.4th 1326.)

II.

Father is Entitled to a Jury Trial.

A. *Introduction*

"[T]he trial by jury…is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbours and equals." 3 William Blackstone, COMMENTARIES at 379, quoted in Reid v. Covert (1956) 354 U.S. 1, 9-10.

This Court should establish the right of parents to secure a jury trial in jurisdictional dependency hearings, wherein the finder of fact determines the truth or falsity of allegations which threaten the deprivation of a fundamental liberty interest in child custody. A number of cases within the last 150 years have denied minors in juvenile delinquency proceedings the right to a jury trial, yet courts have not yet addressed the

jury trial rights of parents in dependency proceedings. As will be shown, the right to a jury trial must be established in light of the oldest fundamental liberty interest at stake, the quasi-prosecutorial nature of dependency proceedings, and the residual "scarlet letter" attached to parents when custody is lost.

The California Constitution unambiguously provides that "[t]rial by jury is an inviolate right and shall be secured to all…." (Cal. Const. Art. I. sec. 16.)

No case since the initial adoption of the State Constitution in 1849 has characterized this provision as ambiguous, such that resort to extrinsic evidence or legislative history must be utilized to divine meaning and application beyond its plain language. Further, in recent decades, the United States and California Supreme Courts, as well as the Ninth Circuit Court of Appeals, have explicitly recognized a "fundamental liberty interest" all parents have in the "custody" of their children. This "fundamental liberty interest" is rooted in the 14th Amendment of the United States Constitution, as well as Article I sections 1 and 7 of the California Constitution, and thus takes precedent over inconsistent statutes.

There are other reasons why this Court should ensure parental right to a jury trial in jurisdictional dependency hearings. Late 19th Century and early 20th Century California cases which denied jury trial rights to minors

in delinquency proceedings did so on a foundation of factually unsupported assumptions regarding the relevance of common law at the time of passage of the California Constitution in 1849. Regrettably, these faulty assumptions have passed down through several generations of cases which have addressed the question of the right to a jury trial in other contexts. It is time for a re-evaluation of these factually unsupported assumptions and their relevance to the custodial rights of parents. As the California Supreme Court stated in *Cianci v. Superior Court* (1985) 40 Cal.3d 903, 924: "'[a]lthough the doctrine [of *stare decisis*] does indeed serve important values, it nevertheless should not shield court-created error from correction.'" (*Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 296).

This re-evaluation must be undertaken in the context of jurisdictional dependency proceedings, which are quasi-prosecutorial in nature. Just as criminal defendants are accorded the right to a jury trial, so to must parents who have been accused of inflicting an "injury" or serious harm on their children. Not only that, parents who lose custody of their children may carry with them a "scarlet letter" which includes identification in a Child Abuse Central Index, little different than that of the convicted sexual offender. Dependency social workers are also granted immunity for filing juvenile abuse petitions, with courts characterizing their work product

"quasi-prosecutorial." With stakes of this magnitude, coupled with the fundamental liberty interest at issue, parents must be afforded the right of a jury of peers.

Finally, as "injury" to a child is more often than not the basis for dependency proceedings (and is the basis for the proceeding at issue in this appeal), the California Legislature confirmed the right to a jury trial in C.C.P. section 592, which provides in part that "[i]n actions…for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived." This is an independent statutory basis for the right to a jury trial.

If Californians can be afforded the right to a jury trial to determine liability for a dog bite or an improperly constructed patio deck, they should be afforded the right to a jury trial when they face the loss of custody of their own children.

For these reasons, the Dependency Court's jurisdictional findings and dispositional orders should be reversed, or, in the alternative, the matter should be remanded to the trial court for a new jurisdictional hearing so that a jury may consider the factual allegations upon which the Department's Petition is based. "Denial of the right to trial by jury is an act in excess of the court's jurisdiction and is reversible error per se." (*Van de Kamp v. Bank of America* (1988) 204 Cal. App. 3d 819, 863.)

B. *Standard of Review*

The question of whether Father was constitutionally entitled to a jury trial is a "pure question of law" that this Court reviews de novo. (*Caira v. Offner* (2005) 126 Cal.App.4th 12, 23.) In cases of doubt, this question is to be resolved in favor of the right to a jury trial. (*Cohill v. Nationwide* (1993) 16 Cal.App.4th 696, 699.)

C. *The California Constitution, Adopted in 1849, Unambiguously Secures to All the "Inviolate" Right to a Jury Trial.*

The California Constitution was adopted and ratified in 1849. (*Price v. Superior Court* (2001) 25 Cal. 4th 1046, 1071; *Taylor v. Madigan* (1975) 53 Cal. App. 3d 943, 953 ["[t]he Constitution of 1849 was ratified by the people in November 1849, and the first session of the new Legislature commenced on December 15, 1849, and ended on April 22, 1850. (Sen. & Assem. J. (1850 First Sess.) pp. 3, 390, 575, 1289.)"].)

Article I sec. 16 provides that *"[t]rial by jury is an inviolate right and shall be secured to all…."* [6] (Emphasis added.) Trial by jury is a basic and fundamental aspect of jurisprudence and is to be "zealously guarded." (*Cohill v. Nationwide, supra,* 16 Cal.App.4th at 699.)

---

[6] The original 1849 Constitutional provision, at Article I sec. 3, was substantially identical: "The right of trial by jury shall be secured to all, and remain inviolate forever;..." (See *County of Sutter v. Davis* (1991) 234 Cal.App.3d 319, 322 [Article I, sec. 3 and Article I, sec. 16 (adopted in 1974) "contain the same substantive language"].)

Only if a Constitutional provision is "ambiguous" may courts examine extrinsic evidence to carry out the "intent and objective of the drafters of the provision and the people by whose vote it was adopted." (*Mosk v. Superior Court* (1974) 25 Cal.3d 474, 495.) (See also *California Bldg. Industry Assn. v. Governing Bd.* (1988) 206 Cal.App.3d 212, 230 ["'Where a provision in the Constitution is ambiguous, a court must ordinarily adopt that interpretation which carries out the intent and objective of … the people by whose vote it was adopted. …' [Citations]".)

Since its adoption in 1849, no Court has found an ambiguity in Article sec. 16, or the original Article I sec. 3, such that resort to extrinsic evidence was necessary to carry out the "intent" of the drafters. Yet ambiguity in other Constitutional provisions has required examination of extrinsic evidence. (See, e.g., *Carter v. Commission on Qualifications of Judicial Appointments* (1939) 14 Cal.2d 149 [ambiguity in Article IV, sec. 20 prompted consideration of the provision's "contemporaneous interpretation"].

As will be addressed below, even if it is assumed, *arguendo*, that an ambiguity in Article I, sec. 3 requires resort to extrinsic evidence to divine the "intent" of the drafters of the Constitution in 1849, the "common law" of England regarding jury trial rights was not relevant.

D. *English Common Law Was Not Applicable in California at the Time of Adoption of the State Constitution in 1849.*

California did not incorporate English common law until 1850, after adoption and ratification of the California Constitution. California Civil Code section 22.2 provides:

> "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State."

This section was added in 1850 by Stats. 1951, c. 655 p. 1833, Sec. 1. (See *Credit Managers Ass'n v. Nat'l Indep. Bus. Alliance* (1984) 162 Cal. App. 3d 1166, 1169: "The Mexican system was superseded in this state by the adoption of the common law on the 13th of April, 1850 (Acts 1850, page 219)" [citing *People ex rel. Vantine v. Senter* (1865) 28 Cal. 502, 505].)

The adoption of Civil Code section 22.2 confirms that the common law cannot be "inconsistent" with State Constitutional provisions (such as the due process protections in Article I, sections 1 and 7). As will be discussed below, late 20th Century United States and California Supreme Court precedent recognizes the fundamental liberty interest parents have in the custody of their children, which mandates the right to a jury trial.

E. *Despite the Unambiguous, Plain Meaning of Article I, Sec. 16, Courts Have Denied Juveniles in Delinquency Proceedings the Right to a Jury Trial Based upon Improper Application of English Common Law to Divine the "Intent" of the Drafters.*

In the late 19th Century (1876), the California Supreme Court first addressed the issue of the right to a jury trial for a minor child accused of leading an "idle and dissolute life" and "not subject to any parental control." (*Ex Parte Ah Peen* (1876) 51 Cal.280.) The matter was brought before a San Francisco police judge, who committed the minor to the authorities of a local industrial school. On appeal, the minor contended that the proceeding resulting in his detention was contrary to the State Constitutional right to a jury trial. In response, the California Supreme Court held that the action of the police judge did not amount to a "criminal prosecution" or a proceeding against the minor according to the course of the "common law." A jury trial was therefore denied. Reformation, and not punishment for offenses done, was the purpose of the proceeding against the minor. The reference to the "course of the common law" was conclusory with no citation to authority or to the factual record, and no discussion of whether the Constitutional language was ambiguous in the first instance.

Although *Ex Parte Ah Peen* is a delinquency case, as opposed to the dependency judgment at issue herein, the reference to the course of the

"common law" has become the false foundational predicate for subsequent cases relied upon by the trial court for denying Father's motion for a jury trial. Nothing in the 1849 State Constitution delimited the "inviolate" right to a jury trial to those matters falling within the course of the "common law." As noted above, the "common law" had no relevance in California until the adoption of Civil Code section 22.2 in 1850.

Fifty years later, in *In Re Application of Daedler* (1924) 194 Cal.320, the California Supreme Court cited *Ex Parte Ah Peen* as the foundational authority for again denying a minor the right to a jury trial in a juvenile delinquency proceeding. Yet, as with *Ex Parte Ah Peen* there is no discussion of whether the Constitutional language was ambiguous in the first instance, and it addresses only the right of a minor to a jury trial as opposed to the right of a parent facing loss of custody of a child. It is simply assumed that the drafters of the Constitution intended to delimit the scope of the right to a jury trial beyond the plain language of Article I, sec. 16.

More recently, the California Court of Appeal in *In Re T.R.S.* (1969) 1 Cal.App.3d 178, and the California Supreme Court in *People v. Superior Court of Santa Clara County* (*Carl W.*) (1975) 15 Cal.3d 271, both held that minors do not have a Constitutional right to a jury trial in juvenile delinquency proceedings. Both courts cited *In Re Daedler*, which as explained above cited in turn the foundational case *Ex Parte Ah Peen*.

This error has carried over to court consideration of the right to a jury trial in other contexts. For example, in *County of Sutter v. Davis, supra*, 234 Cal.App.3d 319 (a case cited by the Department in its trial court opposition brief), the Court of Appeal errantly referenced 1850 as the date of adoption of the State Constitution, and not 1849. As such, the Court of Appeal premised its decision denying the right to a jury trial in paternity actions on the "common law respecting trial by jury as it existed in 1850...." (*Id.* at 322, citing *People v. One 1941 Chevrolet Coupe* (1951) 37 Cal. 2d 283, 286-287.) It was simply assumed that the English common law had been incorporated into California notwithstanding the adoption of Civil Code sec. 22.2 in 1850, *after* adoption and ratification of the State Constitution in 1849.

In light of the foregoing, historical juvenile delinquency cases should have no bearing on Father's right to a jury trial in a dependency proceeding, which is a case of first impression. Equally inapplicable are cases such as *County of Sutter v. Davis*, which errantly assumed that English common had relevance in 1849, and which errantly referenced 1850 as the date of adoption of the California Constitution.

F. *Father Has a Fundamental Liberty Interest in the Custody of His Children, and Is Therefore Entitled to a Jury Trial under the Due Process Clauses of the State and Federal Constitutions.*

Irrespective of the issue of applicability of English common law,[7] Father in this appeal has an independent right to a jury trial based upon the Due Process clauses of the State and Federal Constitutions. Article I, sec. 1 of the State Constitution provides:

> "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy."

Article I, sec. 7 of the State Constitution provides in part: "A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws..." The 14th Amendment to the United States Constitution in turn provides: "...nor shall any state deprive any person of life, liberty, or property, without due process of law...."

In *Santosky v. Kramer* (1982) 455 U.S. 745, 753, the United States Supreme Court confirmed the "fundamental liberty interest of natural parents in the care, custody, and management of their child...." In that case, the Court held that before a state could sever completely and irrevocably the rights of parents in their natural child, due process required that the state support its allegations by at least clear and convincing

---

[7] As noted in Section II, *supra*, common law cannot be "inconsistent" with State Constitutional provisions. (Civil Code sec. 22.2.)

evidence. The court found that the "fair preponderance of the evidence" standard was inconsistent with due process because the private interest in parental rights affected was substantial and the countervailing governmental interest favoring the preponderance standard was comparatively slight.

More recently, the United States Supreme Court addressed the issue of grandparent visitation in *Troxel v. Granville* (2000) 530 U.S. 57. In that case, the Court considered a Washington statute that permitted "[a]ny person " to petition the superior court for visitation rights "at any time, " and authorized the court to grant such visitation if it would "serve the best interest of the child." The paternal grandparents petitioned for visitation with their two granddaughters after their son committed suicide and the children's mother notified them she wished to limit their visitation with her daughters to one short visit a month. The parents had never married and had separated two years before the father died. Before his death, the father had lived with the paternal grandparents and had regularly brought his daughters to his parents' home for weekend visits.

Justice O'Connor's plurality opinion in *Troxel*, in which Chief Justice Rehnquist, and Justices Ginsburg and Breyer joined, observed that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control

of their children." (*Troxel v. Granville, supra,* 530 U.S. 57, 66.) The plurality opinion concluded that the Washington statute, as applied in that case, violated that fundamental liberty interest. (*Id.* at p. 67.)

California Courts have expressly acknowledged the "fundamental liberty interest" all parents have in the custody of their children as articulated in *Santosky v. Kramer*, and have further recognized that this liberty interest "may not be extinguished without due process. [Citation.]" (*In re James Q.* (2000) 81 Cal.App.4th 255, 263.) (See also *In Re Marriage of Harris* (2004) 34 Cal.4th 210; *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242.) `

As is the case herein, parental claims that children were unlawfully removed from their custody "should properly be assessed under the Fourteenth Amendment standard for interference with the right to family association." (*Hardwick v. County of Orange* (9th Cir. 2019) 980 F.3d 733. The Ninth Circuit in *Hardwick* further emphasized the parental right of custody as the "oldest" fundamental right recognized by the United States Supreme Court:

> '[T]he interest of parents in the care, custody, and control of their children— is perhaps the oldest of the fundamental liberty interests recognized by [the Supreme Court].' *Troxel v. Granville*, 530 U.S. 57, 65, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000); see e.g., *Pierce v. Soc'y of the Sisters*, 268 U.S. 510, 530, 534-35, 45 S. Ct. 571, 69 L. Ed. 1070 (1925) (requiring parents to send their children to public school 'unreasonably interferes

> with the liberty of parents and guardians to direct the upbringing and education of children under their control'). Thus, parents have both a constitutional interest in 'the companionship of their children' and a 'constitutionally protected interest in raising their children.' *Smith v. City of Fontana*, 818 F.2d 1411, 1418 (9th Cir. 1987), overruled on other grounds by *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037 (9th Cir. 1999).

In light of indisputable fundamental liberty interest at issue, Father in this appeal is entitled to a jury trial. The California Supreme Court has historically required a jury trial in a number of civil cases implicating fundamental liberties and State Constitutional Due Process protection, irrespective of English common law. For example, in *In Re Gary W*. (1971) 5 Cal.3d 296, the California Supreme Court addressed the question of whether persons subject to confinement proceedings under the Welfare and Institutions Code are entitled, upon request, to a jury trial. The Court concluded that the right applies, as "interests involved in civil commitment proceedings are no less fundamental than those in criminal proceedings and that liberty is no less precious because forfeited in a civil proceeding than when taken as a consequence of a criminal conviction." (*Id.* at 307.) (See also *People v. Smith* (1971) 5 Cal.3d 313, 317 [due process requires jury trial in proceedings to extend commitment to California Youth Authority].)

In this case, the threat of involuntary loss of custody of a child—the oldest fundamental liberty interest recognized by the United States

Supreme Court—cannot be undertaken without the right of a jury of peers. Courts which have denied the right to a jury trial in civil cases have done so by expressly rejecting assertion of a fundamental liberty interest. For example, in *County of Sutter v. Davis, supra*, 234 Cal.App.319, the Court of Appeal addressed the question of whether the appellant was entitled to a jury trial on the issue of paternity and payment of child support. The Court denied the request not because of English common law, but because the issue of paternity did not implicate a fundamental liberty interest. On the contrary, the "only direct consequence of an adjudication of paternity is an obligation to pay money." (*Id.* at 328, citing *County of El Dorado v. Schneider* (1987) 191 Cal.App.3d 1263, 1270.) That is quite different than the involuntary loss of custody of a child. Indeed, the appellant in *County of Davis v. Sutter* was seeking to avoid custody and the child support payments which would flow from a finding of paternity. In the case herein, Father is seeking to retain custody.

G. *The Prosecutorial Nature of Dependency Proceedings, Coupled with the Fundamental Liberty Interest in Child Custody, Establishes the Right to a Jury Trial at the Jurisdictional Fact Finding Hearing.*

Courts have uniformly characterized the initiation of dependency proceedings against parents as "prosecutorial." In *Miller v. Gammie* (9th Cir. 2003) 335 F.3d 889, the Ninth Circuit en banc addressed the question of whether a social worker had absolute immunity in a civil rights action in

connection with the placement of a minor with prior sexual abuse history into a private home without disclosing that history to the parents. Citing *Myers v. Contra Costa County Dept. of Social Services* (9th Cir. 1987) 812 F.2d 1154, 1157, the Court recognized that "*the initiation and pursuit of child-dependency proceedings were prosecutorial in nature* and warranted absolute immunity on that basis." (*Id.* at 896; emphasis added.) The Court elsewhere confirmed "immunity for social workers only for the discretionary, quasi-prosecutorial decisions to institute court dependency proceedings to take custody away from parents." (*Id.* at 899, citing *Myers v. Contra Costa County*, supra, 812 F.2d at 1157.) Subsequent Ninth circuit cases have confirmed the prosecutorial nature of dependency proceedings. (See. e.g., *Hardwick v. County of Orange* (9th Cir. 2017) 844 F.3d 1112, 1115.)

California cases are in accord with the Ninth Circuit. (See, e.g., *Jacqueline T. v. Alameda County Child Protective Services* (2007) 155 Cal. App. 4th 456, 467 ["a social worker's decision to initiate dependency proceedings is a quasi-prosecutorial decision immunized by [Government Code] section 821.6"]; *McMartin v. Children's Institute International* (1989) 212 Cal. App. 3d 1393, 1404 ["Child services social workers are entitled to absolute immunity in performing quasi-prosecutorial functions such as initiating and pursuing dependency petitions in cases of suspected child abuse or neglect"].)

As a result of the prosecutorial nature of the initiation and pursuit of child-dependency proceedings, social workers have immunity from civil liability, just as criminal prosecutors have immunity. The immunity is not "absolute" as in California it does not extend to wrongdoing such as perjury, fabrication of evidence, and failure to disclose exculpatory evidence with malice. (See Government Code section 820.21, which applies specifically to dependency court social workers.)

There are other aspects of dependency proceedings which illustrate its prosecutorial nature. For example, indigent parents are afforded the right to have counsel appointed, as to indigent defendants in criminal prosecutions. (Welfare and Institutions Code sec. 317.)

H. *Parents Such as Father Who Are Subject to Jurisdictional and Dispositional Orders Carry with Them the Risk of Identification in the "Child Abuse Central Index," No Different from Convicted Criminal Defendants.*

In the present appeal, not only has Father lost custody of his child—the loss of a fundamental liberty interest—he is subject to the power of the government to impose the residual penalty of identification in a "Child Abuse Central Index" (CACI) pursuant to the Child Abuse and Neglect Reporting Act (CANRA), Penal Code section 11164 et seq. CANRA authorizes persons to report suspected child abuse or neglect to certain public agencies, including a county welfare department. (Pen.

Code, §§ 11165.7, 11165.9, 11166.) The CANRA defines child abuse or neglect to include "physical injury or death inflicted by other than accidental means upon a child by another person" (Pen. Code, § 11165.6) and "the negligent treatment or the maltreatment of a child by a person responsible for the child's welfare under circumstances indicating harm or threatened harm to the child's health or welfare" (*Id.*, § 11165.2).

An agency reviewing a report of alleged child abuse or neglect must forward to the Department of Justice "a report in writing of every case it investigates of known or suspected child abuse or severe neglect" after the agency "has conducted an active investigation and determined that the report is not unfounded … ." (Pen. Code, § 11169, subd. (a).) The reporting agency must notify the known or suspected child abuser that he or she has been reported to the CACI. (Id., § 11169, subd. (b).) The DOJ is required to "maintain an index of all reports," called the CACI. (Pen. Code, § 11170, subd. (a)(1); see id., § 11169, subd. (b).) The DOJ acts only as "a repository" of reports to be maintained in the CACI, while the reporting agencies are "responsible for the accuracy, completeness, and retention of the reports … ." (Id., § 11170, subd. (a)(2).) The DOJ must retain reports for a period of 10 years from the date the most recent report is received. (*Id.*, § 11170, subd. (a)(3).)

Of significance herein, identification in the CACI is not restricted to parents accused or convicted of criminal offenses against their children. Parents who are subject to loss of custody of their children in dependency proceedings are likewise subject to identification in the CACI. For example, in *In Re C.F.* (2011) 198 Cal.App.4th 454, the appellant (mother) was identified in the CACI after having been charged with infliction of serious physical harm and failure to protect her infant daughter. Criminal charges were not brought, but the mother was subject to a dependency petition for loss of custody. Several months before the jurisdictional hearing the agency reported the allegations to the Department of Justice and mother was identified in the CACI. At the hearing, the mother was not found culpable for infliction of serious physical harm, she was found culpable for failure to protect. Although the failure to protect count was reversed on appeal, identification in the CACI remained and mother had to petition the court for removal.

The foregoing illustrates the importance of the right to a jury trial. Not only is the "oldest" fundamental liberty interest at stake, but parents face the risk of inclusion in a government database with no assurance of removal until the parent reaches the age of 100. (Pen. Code § 1169 (f).) Thus not only is the loss of custody at stake, so is the residual "scarlett

letter" of inclusion in a Department of Justice database. In perpetuity, that parent must disclose if asked that he or she is a "child abuser." That this punishment, in addition to loss of custody, can still occur in the 21st Century without the right of trial by peers is a travesty.

I. *C.C.P. Section 592 Is an Independent Statutory Basis for Father's Right to a Jury Trial.*

Independent of the Constitutional basis of Father's right to a jury trial, there is a State statutory basis in C.C.P. section 592. That section provides:

> In actions for the recovery of specific, real, or personal property, with or without damages, or for money claimed as due upon contract, or as damages for breach of contract, or for injuries, an issue of fact must be tried by a jury, unless a jury trial is waived, or a reference is ordered, as provided in this Code. Where in these cases there are issues both of law and fact, the issue of law must be first disposed of. In other cases, issues of fact must be tried by the Court, subject to its power to order any such issue to be tried by a jury, or to be referred to a referee, as provided in this Code.

This section confirms that in "actions for...injuries ...an issue of fact must be tried by a jury..." The petition at issue in this appeal alleges, among other things, a "Serious Physical Harm" charge pursuant to Welfare and Institutions Code sec. 300(a) that Father "intentionally poured hydrogen peroxide into his son's ingrown toenail, with the intention to cause pain." (1CT 3.) The petition also contains "Failure to

Protect" and "Serious Emotional Damage" charges pursuant to Welfare and Institutions Code sections 300, subdivision(b)(1) and (c). This is an action for an "injury" which establishes Father's right to a jury trial.

The word "action" is separately defined in C.C.P. section 22: "An action is an ordinary proceeding in a court of justice by which one party prosecutes another for the declaration, enforcement, or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense." C.C.P. section 23 provides that "[e]very other remedy is a special proceeding."

As the petition seeks "redress or prevention of a wrong," namely Father's alleged abuse of child with the penalty of loss of custody, the Department's prosecution of the petition is an "action" and not a "special proceeding." The petition also seeks to punish Father with loss of custody for alleged violation of "public offenses" (Welfare and Institutions Code section 350 A, B, and C), which likewise characterizes the Department's prosecution of the petition as an "action." Indeed, Division 4, part 3 of the C.C.P. (section 1063, *et seq*.) addresses and itemizes "Special Proceedings of a Civil Nature." Yet juvenile dependency proceedings are not identified as special proceedings. (Included are

special proceedings such as tribal injunctions, arbitrations, and unclaimed property.)

For this reason, Father has an independent statutory basis for the right to a jury trial. The confidentiality of the jury trial proceedings can be assured through compliance with Welfare and Institutions Code section 827.

III.

Sufficient Evidence Was Lacking to Support Dependency Jurisdiction on Behalf of Adam Under Any Subdivision of Section 300.

A. *Governing Law*

The dependency court has jurisdiction over a minor if the Department establishes by a preponderance of the evidence that allegations made pursuant to section 300 are true. (§ 355, subd. (a); *In re I.J.* (2013) 56 Cal.4th 766, 773; *In re Jonathan B.* (2015) 235 Cal.App.4th 115, 118-119.)

Section 300, subdivision (a),[8] requires the Department to prove "The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm inflicted non-accidentally (i.e., intentionally or purposefully) upon the child by the child's parent[.]" (*In re Isabella F.* (2014) 226 Cal.App.4th 128, 138; *In re D.P.* (2014) 225 Cal.App.4th 898, 902-903.)

[8] Furthermore, section 300, subdivision (a), provides:

> "A court may find there is a substantial risk of serious future injury based on the manner in which a less serious injury was inflicted, a history of repeated inflictions of injuries on the child or the child's siblings, or a combination of these and other actions by the parent or guardian which indicate the child is at risk of serious physical harm." (§ 300, subd. (a).)

Section 300, subdivision (b)(1),[9] requires the Department to prove: "(1) one or more of the statutorily specified omissions in providing care for the child; (2) causation; and (3) 'serious physical harm or illness' to the minor, or a 'substantial risk' of such harm or illness." (*In re Joaquin C.* (2017) 15 Cal.App.5th 537, 561; see also *In re R.T.* (2017) 3 Cal.5th 622, 624 [dependency court need not find "that a parent is at fault or blameworthy for her failure or inability to supervise or protect her child"].)

The third element 'effectively requires a showing that at the time of the jurisdictional hearing the child is at substantial risk of serious physical harm in the future, e.g., evidence showing a substantial risk that

---

[9] Section 300, subdivision (b)(1) provides, in relevant part, that a child who comes within the following description is within the jurisdiction of the dependency court:

"(b) (1) The child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent or guardian to adequately supervise or protect the child, or the willful or negligent failure of the child's parent or guardian to adequately supervise or protect the child from the conduct of the custodian with whom the child has been left, or by the willful or negligent failure of the parent or guardian to provide the child with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse...The child shall continue to be a dependent child pursuant to this subdivision only so long as is necessary to protect the child from risk of suffering serious physical harm or illness."

past physical harm will reoccur. (*In re Jesus M.* (2015) 235 Cal.App.4th 104, 111; accord, *In re Roger S.* (2018) 31 Cal.App.5th 572, 582 ["'While evidence of past conduct may be probative of current conditions, the question under section 300 is whether circumstances *at the time of the hearing* subject the minor to the defined risk of harm.'"].)

Pursuant to section 300, subdivision (c), a child comes under the jurisdiction of the dependency court if "[t]he child is suffering serious emotional damage, or is at substantial risk of suffering serious emotional damage, evidenced by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others, as a result of the conduct of the parent or guardian or who has no parent or guardian capable of providing appropriate care. No child shall be found to be a person described by this subdivision if the willful failure of the parent or guardian to provide adequate mental health treatment is based on a sincerely held religious belief and if a less intrusive judicial intervention is available." (§ 300, subd. (c); *In re Roxanne B.* (2015) 234 Cal.App.4th 916.)

Here, insufficient evidence supports the allegations in the current petition, neither can stand and reversal is required.

B. *Standard of Review*

Jurisdictional findings are reviewed on appeal under the substantial evidence standard. (*In re Jonathan B.* (1992) 5 Cal.App.4th 873, 875.) It is well settled that whenever "the sufficiency of the evidence to support a finding or order is challenged on appeal, the reviewing court must determine if there is any substantial evidence to support the conclusion of the trier of fact. [Citation.]" (*In re Savannah* M. (2005) 131 Cal.App.4th 1387, 1393.) It is also well settled that "[i]n making this determination, all conflicts [in the evidence and reasonable inferences from the evidence] are to be resolved in favor of the prevailing party, and issues of fact and credibility are questions for the trier of fact. [Citation.]" (*Ibid*.)

"However, substantial evidence is not synonymous with any evidence. [Citation]." (*Ibid*.) Substantial evidence means evidence that is reasonable in nature, credible and of solid value and ponderable legal significance. (*In re Matthew S.* (1996) 41 Cal.App.4th 1311, 1318.) Moreover, "[w]hile substantial evidence may consist of inferences, such inferences must be 'a product of logic and reason' and 'must rest on the evidence' [citation]; inferences that are the result of mere speculation or

conjecture cannot support a finding. [Citation.]" (*In re Savannah M.*, *supra*, 131 Cal.App.4th at p. 1393.)

The Court of Appeal "was not created...merely to echo the determinations of the trial court." (*Bowman v. Board of Pension Commissioners* (1984) 155 Cal.App.3d 937, 944.) Thus, "[t]he ultimate test is whether it is reasonable for a trier of fact to make the ruling in question in light of the whole record." (*Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 652.)

C. *The Dependency Court's Findings as to the Allegations Made Pursuant to Sections 300, Subdivisions (a) and (b-1), Are Not Supported by Substantial Evidence.*

Briefly, the sustained petition alleged Adam was subject to dependency court jurisdiction pursuant to section 300, subdivisions (a) and (b)(1), because:

> (a-1, b-1) Father grabbed the teen by the shirt and forcefully placed the teen's face onto the ground; on a prior occasion, Father screamed on the child's face and ear and once grabbed and spanked the teen, causing him to fall onto a drum set. (1CT 3.) On a prior occasion, Father forcefully pulled the teen into the car while Father raced through traffic intersections, not heeding stop signs or red lights. (*Ibid*.) On another occasion, Father pushed the teen into the car and once against the hood of the car. Father intentionally poured hydrogen peroxide to the teen's ingrown toenail with the intention to cause pain.

(1CT 3-4.)

If the evidence supported the entirety of these allegations, then dependency jurisdiction would be proper. But it does not.

The allegation regarding Father having grabbed the teen and forcing the teen's face onto the ground was investigated in the prior case, as reflected in the Department's detention report dated September 19, 2018. (B296458: 1CT 6, 26.) Adam re-interviewed about the 2018 incident; he said Father picked him up and grabbed the front of his shirt. (B296458: 1CT 8.)

The alleged incident alleging "Father screamed directly on the child's face and into the child's ear" was likewise addressed in the prior detention report dated September 19, 2018. (B296458: 1CT 8.) The drum set detail was missing from this account, but was otherwise the same incident. The Department likely did not file on this count and the dependency court did not so amend the petition because Mother said Father was "not a physical fighter." (B296458: 1CT 6.)

The allegation regarding Father having forcefully pulled the teen into his vehicle and racing through intersections was described on multiple occasions in both the 2018 detention and jurisdiction reports. (B296458: 1CT 144, 177.) The incident was investigated in 2017 and revisited in 2018 — the facts that were known to the Department and the

dependency court. (*Ibid.*) The Department did allege, nor did the dependency court amend the petition at the time of trial.

The allegation concerning Father having put Adam against the hood of a vehicle was also taken from the teen's statements in 2018, prior to the first trial, when he said Father "put him up against a car." Asked to recall when these things happened, the teen thought it was when he was about twelve. (B296458: 1CT 179.)

The allegation regarding Father having poured hydrogen peroxide on the teen's ingrown toenail "with the intention to cause pain" was described by the teen's elder sister in the Department's 2018 jurisdiction report; she said Adam had done something to his toe or foot and "my dad took him to the pharmacist and wanted Adam to take off his shoe and let the pharmacist see his foot." (B296458: 1CT 177.) But when Adam was interviewed for the current case, he that the hydrogen peroxide was poured on his foot when they got home, and it did not hurt or cause him any pain. (1CT 196.)

Quite simply, there is no evidence that there were *any* injuries sustained by Adam, much less injuries constituting serious physical harm; nor was there a substantial risk he would suffer serious physical harm in the future based on the manner in which the alleged injuries

were inflicted. (§ 300, subd. (a).) Although section 300, subdivision (a), does not define the term serious physical harm, the term has a sufficiently well-established meaning and is akin to serious bodily injury. (*In re Isabella F.*, *supra*, 226 Cal.App.4th at p. 138.)

Serious bodily injury is defined as "a serious impairment of physical condition, including, but not limited to, the following: loss of consciousness; concussion; bone fracture; protracted loss or impairment of function of any bodily member or organ; a wound requiring extensive suturing and serious disfigurement." (CALJIC No. 9.12.)

Moreover, serious physical harm generally includes broken bones, dislocated body parts, deep bruising, welts, red marks, and broken skin. (e.g. *In re J.K.* (2009) 174 Cal.App.4th 1426, 1433; *In re David H.* (2008) 165 Cal.App.4th 1626, 1645; *In re Mariah T.* (2008) 159 Cal.App.4th 428, 436-437.) It does not include scratches and other insignificant injuries. (See e.g. *In re Isabella F.*, *supra*, 226 Cal.App.4th at pp. 132, 138-139; *In re Joel H.* (1993) 19 Cal.App.4th 1185, 1202.)

Likewise, there is no evidence to support a finding that the teen suffered serious physical harm as a result of the allegations set forth in count (a-1), mirrored in count (b-1), or that the teen was at risk of

suffering serious physical harm as a result of similar incidents in the future.

If there is one well-settled principle in dependency law, it is that mistakes made by a parent, even serious mistakes, do not warrant dependency court jurisdiction under section 300, subdivision (b)(1), unless there is evidence that those same mistakes are likely to reoccur in the future and that a repeated mistake would present a risk of serious physical harm to the minor. (*In re J.N.* (2010) 181 Cal.App.4th 1010, 1023-1025; *In re David M.* (2005) 134 Cal.App.4th 822, 829; *In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1397.)

In sum, there is no evidence that any injury by Father to the teen amounted to serious physical harm, nor in any way supported an inference of a risk of serious physical harm in the future. Therefore, the dependency court's finding that Adam is a person described by section 300, subdivisions (a) and (b-1), must be reversed.

D. *The Dependency Court's Findings as to the Allegations Made Pursuant to Section 300, Subdivision (c), Are Not Supported by Substantial Evidence.*

Pursuant to section 300, subdivision (c), a minor comes under the jurisdiction of the dependency court where:

> "[t]he child is suffering serious emotional damage, or is at substantial risk of suffering serious emotional damage, evidenced

> by severe anxiety, depression, withdrawal, or untoward aggressive behavior toward self or others, as a result of the conduct of the parent or guardian or who has no parent or guardian capable of providing appropriate care. No child shall be found to be a person described by this subdivision if the willful failure of the parent or guardian to provide adequate mental health treatment is based on a sincerely held religious belief and if a less intrusive judicial intervention is available."

(§ 300, subd. (c); see *In re Daisy H.* (2011) 192 Cal.App.4th 713, 717-718.)

In capsule form, the conformed petition provided Adam was subject to dependency court jurisdiction pursuant to section 300, subdivision (c), because:

> (c-1) Father emotionally abused Adam by making frequent demeaning comments to the teen and threatened to physically harm the teen. On numerous prior occasions, Father's use of demeaning words caused the teen to become frustrated and depressed. The teen refused any visitation with Father, due to his continued emotional abuse by Father, whose emotional abuse resulted in the teen demonstrating anxiety and emotional distress requiring psychological therapeutic services. The therapists described the teen as having anxiety, and depression and anger. More recently, the therapist stated that forcing a relationship with Father without Father having addressed his own issues in therapy would lead to increased conflict and increased distance. Such emotional abuse of the child on the part of the father places the child at substantial risk of suffering serious emotional damage as evidenced by severe anxiety, depression, withdrawal and aggressive behavior toward himself or others.

(1CT 4-5 [10/9/20 minute order, p. 3].)

At the detention hearing held on May 11, 2020, the dependency court asked the teen whether "...your father made demeaning comments

to you and he threatened you with physical harm. Can you tell me, Adam, whether those incidents of conduct occurred prior to September of 2018?" (RT 114.) The teen replied "I believe so, Yes. I don't think I've seen him for about two years. So, I would say so." (RT 115.)

Seemingly dissatisfied with the teen's response, the dependency court again asked: "Okay. All right. And just like the last area — I want to ask you if anything like that — demeaning comments or threatening physical harm — if anything like that has happened more recently than September 2018?" Again, Adam replied "No. I don't believe so." (RT 115.) On July 14, 2020, Father moved to strike the section 300 petition on grounds of issue preclusion as to count (c-1). (1CT 143.) His motion was denied on July 31, 2020. (1CT 210.)

The Department asserted "the reason no more recent incidents have occurred is because Adam has been detained from Father during the pendency of the earlier case..." (1CT 91.) The CSW believed the teen was justifiably afraid were he returned to Father's care because a physical altercation might happen where Father was the aggressor. (*Ibid.*)

The CSW continued, "the court does note that several of the incidents of physical violence alleged in the petition involved violent efforts by Father to force Adam into his car and at least one is alleged to

involve Father's reckless driving (e.g. he is alleged to have 'raced through traffic intersections, not stopping at stop signs and red lights.')." (1CT 91.) The alleged "several incidents" occurred before September 2018 and were known to the Department — yet, it did not allege them in the prior petition — perhaps the Department assessed the "several incidents" did not rise to the level required by subdivision (c).

On October 7, 2020, the dependency court conformed to proof the allegations in count (c-1). The court reasoned that Adam's disclosure to CSW Luna that he did not think Father would attempt to hurt him, "...that was because Adam was under DCFS supervision. Moreover, that does not address the Court's fundamental concern that the relationship between Adam and Father is so fraught with conflict and that Father lacks the insight and control necessary to avoid creating a situation in which, without necessarily intending to do so, Adam and Father's interactions would be very likely to spiral into violence." (2CT 357-358.)

Furthermore, the dependency court found Father's visitation monitor had been present at two events: "the road trip that Adam was forced by Father to attend and the dinner at a restaurant when Father tried to force Adam to remove his hoodie resulting in a physical confrontation between Adam and Father." (2CT 357-359.) The monitor

did not observe Father to be violent in these incidents, "but it is clear that [the monitor] is sympathetic to Father's efforts to control Adam. He reported that when they arrived at school to pick Adam up for the road trip and had the door open Adam 'bolted' and Father ran after him, grabbed him in a 'bear hug' and put him in the car." (2CT 357-359.)

Father contends there is insufficient evidence to support the dependency court's jurisdictional findings under section 300, subdivision (c). At the Mulligan restaurant, Father asked the teen to remove his hoodie. The monitor did not view Father's frustration as violent. (1RT 824-825.) The court finding "that Father lacks the insight and control necessary to avoid creating a situation in which, without necessarily intending to do so, Adam and Father's interactions would be very likely to spiral into violence," is not supported by the evidence. (2CT 357-359; see *Marriage of Heath* (2004) 122 Cal.App.4th 444 ["Hunches of judges do not suffice."].)

Notably, in the prior case, Adam said he knew Father cared about him, but believed he went about it in the wrong way. (B296458: 1CT 179.) A prior conjoint counselor who had seen Adam and Father expressed concern about Adam acting out in the future, but the Department confirmed that although Adam was struggling with his relationship with

Father, there was no evidence to support any emotional abuse. (B296458: 1CT 20.)

Subdivision (c) exceeds "run-of-the-mill flaws in our parenting styles;" it encompasses "abusive, neglectful and/or exploitative conduct toward a child which causes any of the serious symptoms identified in the statute." (*In re Alexander K.* (1993) 14 Cal.App.4th 549, 559; accord, *In re Tyler R.* (2015) 241 Cal.App.4th 1250, 1264.) Here, the dependency court erred when it found Adam was a child described by section 300, subdivision (c). Reversal of the jurisdictional finding on count (c-1), is appropriate.

As to disposition, the dependency court based its determination on the facts as found true in the sustained petition "against" Father. (2CT 367-370.)

For the above reasons, the "evidence" adduced in support of the petition was inadequate; moreover, the "incidents" occurred prior to September 2018, known to the Department who determined not to plead them in the prior case and outdated.

Therefore, the teen's removal from Father's custody was improper. (*In re Destiny S.* (2013) 210 Cal.App.4th 999, 1003, 1004.) Additionally,

reversal of the dependency court's jurisdiction findings renders its disposition orders moot. (*In re Janet T.* (2001) 93 Cal.App.4th 377, 392.)

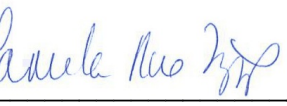
Conclusion

For the reasons set forth above, Father respectfully requests that this Court consider his challenge to the dependency court's assertion of dependency jurisdiction pursuant to subdivisions (a), (b-1) and (c), of section 300 on behalf of Adam and reverse the dependency court's jurisdictional findings and dispositional orders as to him, or, in the alternative, the matter should be remanded to the trial court for a new jurisdictional hearing so that a jury may consider the factual findings on which the Department's section 300 petition is based.

Dated: February 17, 2021

Respectfully Submitted,

Pamela Rae Tripp, Esq.
Ernesto Paz Rey, Esq.
Timothy V. Kassouni, Esq.

By 
Pamela Rae Tripp, Esq.