

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

In re BRIAN R., a Person Coming Under
the Juvenile Court Law.

B235629
(Los Angeles County
Super. Ct. No. CK85488)

LOS ANGELES COUNTY
DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,

Plaintiff and Respondent,

v.

BRIAN R.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County, D.
Zeke Zeidler, Judge. Affirmed.

Michelle L. Jarvis, under appointment by the Court of Appeal, for
Defendant and Appellant.

John F. Krattli, Acting County Counsel, James M. Owens, Assistant
County Counsel, and Peter Ferrera, Senior Deputy County Counsel, for Plaintiff and
Respondent.

INTRODUCTION

Brian Sr. appeals from the dependency court's order finding jurisdiction over his two-year-old son pursuant to subdivision (f) of Welfare and Institutions Code section 300, based on the finding Brian Sr. had "caused the death of another child through abuse or neglect." According to Brian Sr., this subdivision requires criminal negligence, and he was not criminally negligent in causing the death of his nine-month-old son. However, our Supreme Court recently determined that for purposes of a dependency adjudication under subdivision (f) of section 300, the neglect by which a parent or guardian "caused the death of another child" may include the breach of ordinary care, and need not amount to criminal negligence. (*In re Ethan C.* (2012) __ Cal.4th __ [2012 Cal. LEXIS 6358].) Accordingly, we affirm.

FACTUAL AND PROCEDURAL SUMMARY

On March 24, 2011, the Department of Children and Family Services (the Department) received a referral alleging severe neglect as to Christopher R. placing his sibling Brian Jr. at risk. According to the nursing manager at Tarzana Medical Center, Christopher (almost nine months old) was on a ventilator, the "outcome [wa]s not looking good," and "[absent a] miracle," he would be declared brain dead.

The boys' parents (Brian R. Sr. and Virginia H.) had told the hospital social worker they had spent the night at the maternal grandfather's home in Sylmar because Brian Jr. had a doctor's appointment in Sylmar the following day. Virginia said she had gotten up "to go have her car smogged." When she returned, she said, Brian Jr. was not breathing, was purple and appeared to have vomited. Brian Sr. was asleep. Brian Sr. told the hospital social worker he had gotten up to feed Christopher between 8:00 and 8:30 a.m. and went back to sleep until Virginia woke him. Both parents "appeared devastated" and were very cooperative with the police.

The Department's social worker went to the hospital. Virginia told her she had left for work at 6:30 a.m. Christopher was asleep at 6:15 a.m. when she checked on him.

He was in bed with Brian Sr. who was also asleep. She said she left work early to have her car smog checked, went to the Department of Motor Vehicles to request an extension and then came home around 9:20 a.m. to see if Brian Sr. would take her to her brother's to drop off her car as her brother is a mechanic and then take her back to work. Brian Sr. was asleep, and Christopher was lying face down on the bed which made her nervous. She flipped him over and saw that he was "bluish in color."

Brian Sr. told the Department's social worker he remembered waking up to feed Christopher around 8:30 a.m. "because [Christopher] was crying because he wanted to eat," but later said he was uncertain of the time, but it was "somewhere between the time [Virginia] left and came back home (6:30 a.m.-9:15 a.m.)." Brian Sr. said he "prepared a bottle for [Christopher] and when he fed the baby he propped the bottle up with a blanket because Christopher wasn't grasping the bottle, then went back to sleep." Brian Sr. said he was unemployed and took care of the children while Virginia worked. When she came home and woke him, they noticed Christopher was not breathing, Virginia called 911 and he started CPR. Both parents said both boys were awake and alert the night before.

Dr. Andrea Morrison, a pediatric neurologist, told the social worker Brian Sr. could not have fed Christopher that morning as he had claimed because "it would have taken 12 hours to cause that much damage." "[Given] the amount of damage to the brain," the "feeding would have had to occur 10-12 hours prior;" Christopher "could not have had this kind of trauma and [then eaten] in the morning." Dr. Morrison said the "brain trauma was non[-]accidental and that it appeared that the child was suffocated by placing [a] hand or pillow over his mouth and nose or shaken." "[O]nce she reviewed the [CT] scan[,] she immediately got a second opinion from one of the hospital[s] radiologist[s] who confirmed that the injury to the child was at least twelve hours old." After reviewing the CT scan, Dr. Morrison advised the supervising social worker Christopher's injury was "inconsistent with the parent[s'] explanation." According to Dr. Morrison, Brian Sr. could not have fed Christopher at 8:30 that morning as he claimed as

Christopher would not have been awake; it “appeared [Christopher] had been smothered.”

The Department assessed the potential for future risk to the children’s safety to be “very high.” A hospital hold was placed on Christopher who was showing signs of decline, and Brian Jr. was taken into protective custody and placed in foster care.

On March 29, the Department filed a petition on behalf of both boys pursuant to subdivisions (a), (b), (e) and (j) of Welfare and Institutions Code section 300. (All further statutory references are to the Welfare and Institutions Code.) The Department alleged Christopher was hospitalized in a detrimental and endangering condition, including cardiopulmonary arrest, severe brain edema at least 12 hours old and a retinal hemorrhage in his right eye; his injuries were consistent with non-accidentally inflicted trauma such as smothering and/or violent shaking; and his parents failed to obtain timely medical attention.

On March 30, the hospital advised the Department nine-month-old Christopher had been pronounced dead the preceding day and the coroner had been notified. That day, the Department filed a first amended petition as to Brian Jr. pursuant to subdivisions (a), (b), (f) and (j), indicating Christopher had died of his injuries which were consistent with non-accidentally inflicted trauma. The dependency court detained Brian Jr. from his parents’ custody, ordering supervised visitation. Two days later, Brian Jr. was placed with his paternal aunt and uncle.

According to the Department’s May report for the jurisdiction and disposition hearing, Virginia told the social worker, when the family arrived in Sylmar the night before Christopher’s hospitalization, she told Brian Sr. she would sleep on the floor because the bed hurt her back, and he and the baby could sleep in the bed. She said her alarm went off at 4:30 because she would usually get up to work out at that time, but she went back to sleep. She got up at 6:00 and was running late for work. She checked on Christopher, and he was “fine . . . facing up with his head to the left but nothing was wrong and to [her] he looked fine.” When she got back to the house after the DMV,

everyone was sleeping. She checked on Brian Jr. and he was fine, then she looked at Brian Sr. She was “shaking him to wake him up and [she] didn’t see the baby because the cover was over him and he was faced down next to his dad in his arm ([Virginia] indicated . . . Christopher was lying with his face nuzzled underneath [Brian Sr.’s] arm, under the covers) and so [she] took the blanket off and [Christopher] didn’t look right.” She called her brother and was yelling and he told her to call 911 and Brian started pushing on his chest. She said she felt Christopher’s death was “accidental.”

Brian Sr. told the social worker he did not know what time Virginia left for work that morning, but she came back around 9:20 a.m. Between 6:00 and 9:00 a.m., Brian Sr. said, Christopher was “being a little fussy so I made him a bottle and I used the blanket to prop it and I saw him sucking on the milk and I dozed off and I fell asleep. [He] was right next to me side[]ways[,] indicat[ing] Christopher was facing towards him.” Brian Sr. said when he started breathing in Christopher’s mouth, “it was like white coming out” and his own shirt was “covered in fluids” so he thought Christopher was breathing and would be okay. Brian Sr. said he “had never been informed that sleeping with an infant in the bed could be harmful to the child and possibly cause death.”

Both Virginia and Brian Sr. said they would do whatever was necessary to regain custody of Brian Jr. One maternal uncle who lives in the maternal grandfather’s home in Sylmar said he “want[ed] to find out the truth[;] it’s not fair to the baby. I’m scared that my sister knows something and she’s trying to protect him. It seems like they are more in love with each other than with the kids.” According to this uncle, he had no idea Virginia and Brian Sr. were going to be staying at the house that night. He left for work between 4:00 and 4:15 a.m. When he was getting ready to leave, he saw the formula and bottle in the kitchen. He heard the baby wake up and thought Virginia “was going to get up and get a bottle for him but she never did and then the baby was quiet.” He said he “heard the baby just make a cry like when you startle him. So I have suspicion of [Brian Sr.] because I asked him what happened and he didn’t really have a straight answer . . .” He

said he did not know Brian Sr. very well. “They had the first baby and then they had the second baby. He lost his job and it seemed kind of strange.”

Dr. Morrison said, “I think the father did it and the mother knows.” She told the social worker Christopher’s injuries were inconsistent with the time frame in which they were reported and were therefore “highly suspicious of child abuse.” The social worker further reported Brian Sr. was unemployed and the primary caretaker while Virginia was the sole financial provider, commenting Brian Sr. may have become overwhelmed and smothered Christopher. The parents’ account was found to be inconsistent. Virginia initially reported she and Brian Sr. had been sleeping in the bed with Christopher but later said she had slept on the floor which “seems unlikely,” and Brian Sr.’s report of feeding Christopher on the day of his hospitalization was “medically impossible based on the doctor’s findings. Additionally[,] it seems highly unlikely that the infant would not have stirred or been awoken when [Virginia] awoke in the morning and prepared herself for work.” The social worker indicated the “Department feels the parents are not being forthcoming and they are hiding the truth,” and the “lack of emotion with regard to the death of the infant” was viewed as “an indicator of their willingness to further cover up or mislead the Department as to the true account of the event.” “The Department considers both parents highly culpable in the death of their infant,” recommending against reunification services and requesting pursuit of adoption by a relative as soon as possible to minimize trauma to Brian Jr.

According to the autopsy report, Christopher died of acute anoxic encephalopathy, “cause not established.” It was noted that Brian Sr. had reported feeding Christopher on the morning of March 24 while the hospital physicians “felt strongly that this was impossible, based on CT scan of the brain which showed changes of longer duration than three hours. They suggested that overlaying or other suffocation was possible.” When paramedics arrived, Christopher was “pulseless and apneic without any bystander CPR.” He was “successfully resuscitated” but “without return of brain function” and “survived five days with brain death.” “Because of the prolonged interval between the original

event and the autopsy, it was not possible to evaluate the accuracy of the physicians' opinion that the injury must have occurred earlier than related by the father."

The Office of the County Counsel retained Dr. Carol Berkowitz, Executive Vice-Chair of the Department of Pediatrics at Harbor-UCLA Medical Center and Professor of Clinical Pediatrics at UCLA, to review Christopher's medical records and imaging studies and render an opinion as to the timing and nature of the medical findings. Based on her review and after consultation with the neuroradiologist, she concluded Christopher died "as a result of an anoxic event such as suffocation, and that the event could have occurred within 2-3 hours prior to the CT scan which was obtained on 03/24/11 at 11:23 a.m."

At the adjudication hearing on August 10, Virginia pled no contest to the petition as amended to include the following allegations pursuant to subdivisions (b) and (f) of section 300: On March 29, 2011, Brian's sibling Christopher was medically pronounced brain dead after suffering acute anoxic encephalopathy on or about March 24, as a result of a lack of oxygen to his brain while co-sleeping with his father. "The sibling's death [w]as a result of negligence and sustained while in the care and supervision of his parents, endangers the child's physical health and safety and places the child at risk of harm, damage, danger and death." Brian Sr. pled no contest to the allegation pursuant to subdivision (b) but submitted the issue of whether the allegation satisfied subdivision (f) on the basis of the Department's exhibits (which included the coroner's report, Christopher's medical records and the letter from Dr. Berkowitz) and arguments of counsel. The dependency court also admitted into evidence a policy statement from the American Academy of Pediatrics regarding sudden infant death syndrome, addressing the risks associated with bed sharing, pillows and soft bedding which can cover an infant's mouth and/or put the child into a face down position. In addition, a 1999 article from the United States Consumer Product Safety Commission addressed hazards such as suffocation for babies in adult beds. The dependency court also advised it would consider the case of *In re A.M.* (2010) 187 Cal.App.4th 1380.

Brian Sr.'s attorney argued the evidence led to one conclusion: "[T]hat is the unfortunate incident was a mere accident." He said Dr. Berkowitz's letter as well as the uncle's statement that he heard Christopher cry around 4:15 a.m. refuted Dr. Morrison's statement that Christopher's brain injury had to have occurred earlier. He argued "bed sharing" was "a highly controversial topic which certainly connotes the fact . . . the jury is still out whether it should be prohibited or not." While "it can be hazardous under certain conditions," deaths at Christopher's age are "a very rare thing." Finally, he argued the facts in the *A.M.* case were distinguishable because the father knew of the child's distress and did nothing.

The court observed that the baby in *A.M.* was a newborn, not an eight-month-old, which was a problem with Brian Sr.'s argument given the "highly unusual circumstance" that a parent smothers a child of that age and the "concerns regarding how it all came about."¹

Brian Jr.'s counsel argued the facts demonstrated by a preponderance of the evidence that subdivision (f) was satisfied because Christopher's death was "caused by the negligence of a parent, and sleeping with an eight month old who would or should be able to turn their head or move out of the way if there was some type of something covering their breathing passages and the fact that it did not happen in the case, rises to a level of neglect. Also, sleeping in a bed with a baby and giving the baby a bottle, propping the bottle up with a blanket and then falling asleep on the baby as it is eating could cause a choking issue. It could cause smothering with that, not just the smothering with the father's arm or his body." The dependency court noted that the pediatric recommendation "regarding loose bedding, pillows, quilts, none of those things should be around the infant and if you do have a blanket, it should be tucked in around the crib mattress so the face is less likely to be covered by it" also supported the argument. Brian Jr.'s counsel concluded that Virginia said she found Christopher covered with the blanket

¹ Christopher was days short of nine months at the time of his hospitalization and nine months old when he was pronounced dead.

and covering the baby also constituted neglect. The court added that Virginia was “aware of this pattern of sleeping.”

Counsel for the Department joined with Brian Jr.’s counsel and said the case was analogous to the *A.M.* case—the child was co-sleeping, the cause of death was undetermined, we do not know how the suffocation occurred, but we do know that the child died from suffocation. Brian Sr. propped the bottle with Christopher drinking but fell asleep, Christopher was found under the blanket and he was in a prone position, making suffocation more likely. Two-year-old Brian Jr. was in the playpen; Christopher could have been placed there instead as it would have been safer. Given the evidence, counsel argued, as in *A.M.*, subdivision (f) of section 300 was satisfied.

The dependency court found the amended allegations (as quoted above) under both subdivisions (b) and (f) true (and dismissed the remaining allegations). “[M]ost likely [this] was a very unfortunate accident from what we’re seeing in terms of the time and all of the other information, but it was pretty severe for this to happen to a child of this age and it appears that the parents, both the mother’s awareness of this sleeping pattern and the fact that this was able to occur without the father having any awareness of it with an eight month old, is [a] grave concern and while it’s a shame for something so unfortunate to cause the parents to end up in the court system, it does appear to fall within Welfare and Institutions Code section 300 [(a) (sic, b)(1)] and [(f)],” and Brian Jr. was declared a dependent child under subdivisions (b) and (f). He was to remain placed with his maternal great aunt and uncle, with monitored visitation and reunification services for Brian Sr. and Virginia.²

Brian Sr. appeals.

² According to subsequent minute orders, Brian Jr. has been placed with his parents on condition that they continue to reside with their relatives and comply with and cooperate in family preservation services, with the next report from the Department to address the possibility of termination of jurisdiction. The next review hearing is scheduled for August 22, 2012.

DISCUSSION

Under section 300, “Any child who comes within any of the following descriptions is within the jurisdiction of the juvenile court which may adjudge that person to be a dependent child of the court: . . . (f) The child’s parent or guardian *caused the death of another child through abuse or neglect.*” (Italics added.) According to Brian Sr., subdivision (f) requires that a parent be “*criminally* negligent or abusive in causing the death of a child before a petition under that subdivision may be sustained.” (Italics added.) Prior to January 1, 1997, he observes, dependency jurisdiction under subdivision (f) was authorized when the child’s parent or guardian “‘ha[d] been *convicted* of causing the death of another child through abuse or neglect.’” (Italics added.) In his view, the Legislature’s decision to amend subdivision (f) to eliminate the need for a criminal conviction merely lowered the standard of proof but “principles of criminal law” still apply, necessitating a finding of “at least criminal negligence.”

The Department argues Brian Sr.’s challenge is moot as jurisdiction is proper based on the uncontested allegations as to both Virginia (both subdivisions (b) and (f)) and Brian Sr. (subdivision (b)). “When a dependency petition alleges multiple grounds for its assertion that a minor comes within the dependency court’s jurisdiction, a reviewing court can affirm the juvenile court’s finding of jurisdiction over the minor if any one of the statutory bases for jurisdiction that are enumerated in the petition is supported by substantial evidence. In such a case, the reviewing court need not consider whether any or all of the other alleged statutory grounds for jurisdiction are supported by the evidence.” (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 451; see also *In re Alexis H.* (2005) 132 Cal.App.4th 11, 16 [“‘a jurisdictional finding good against one parent is good against both. More accurately, the minor is a dependent if the actions of either parent bring her within one of the statutory definitions of a dependent. [Citation.] This accords with the purpose of a dependency proceeding, which is to protect the child, rather than prosecute the parent’”].)

Although not anticipated, Brian Sr. says, should he ever have another case pending with the Department, the true subdivision (f) finding could be used to deny him reunification services pursuant to subdivision (b)(4) of section 361.5.

We proceed to the merits. In their briefing, the parties noted that the issue raised in this appeal—“whether at least criminal negligence need be established before jurisdiction under subdivision (f) is appropriate”—was pending before our Supreme Court in *In re Ethan C.*, review granted, December 21, 2010, S187587. On July 5, 2012, our Supreme Court issued its opinion in *Ethan C.* (2012) __ Cal.4th __ [2012 Cal. LEXIS 6358, 52-53].

As the *Ethan C.* court determined, “the Legislature could rationally conclude that when a parent’s or guardian’s negligence has led to the tragedy of a child’s death, the dependency court should have the power to intervene for the safety and protection of children remaining in the parent’s or guardian’s custody, even if the parent’s lethal carelessness cannot necessarily be characterized as sufficiently ‘gross,’ reckless, or culpable to be labeled ‘criminal.’ Indeed, the very purpose of the 1996 amendment was to promote the child-protective purposes of the juvenile dependency scheme by allowing such intervention, in the case of a child fatality, without the necessity of a criminal conviction.” (*In re Ethan C.*, *supra*, __ Cal.4th __ [2012 Cal. LEXIS 6358, 52-53].) [¶] The dependency scheme in general, and section 300(f) in particular, leaves ample room for discretionary treatment that allows for the equities of particular situations. . . . [N]o inherent unfairness arises from applying the plain words of section 300(f). . . . [F]or purposes of a dependency adjudication under section 300(f), the neglect by which a parent or guardian ‘caused the death of another child’ may include the parent’s or guardian’s breach of ordinary care, and need not amount to criminal negligence.” (*Id.* [2012 Cal. LEXIS at p. 53].)

In this case, by his own admission, Brian Sr. gave Christopher a bottle, propped it up with a blanket and went to sleep beside him, with a blanket over his infant son. He concedes the facts of this case support a finding of “civil negligence.” “[I]t is “[t]he

enormity of a death” of a child arising from parental inadequacy that invokes the provisions of sections 300 [Citations.] The Legislature has clearly provided that when one’s abuse or neglect has had this tragic consequence, there is a proper basis for a finding that his or her surviving child may be made a dependent of the juvenile court” (*Ethan C.*, *supra*, __ Cal.4th __ [2012 Cal. LEXIS at p. 46]; and see *In re A.M.* (2010) 187 Cal.App.4th 1380.) Accordingly, the dependency court’s findings based upon subdivision (f) of section 300 do not fail on the ground Brian Sr.’s conduct “failed to meet the statutory standard of ‘abuse or neglect.’” (*Ethan C.*, *supra*, __ Cal.4th __ [2012 Cal. LEXIS at p. 55].)

DISPOSITION

The order is affirmed.

WOODS, Acting P. J.

We concur:

ZELON, J.

JACKSON, J.