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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SECOND APPELLATE DISTRICT  
DIVISION THREE

In re ZOEY T., a Person Coming  
Under the Juvenile Court Law.

B276363

ROBERT T.,  
Petitioner,

Los Angeles County  
Super. Ct. No. DK06033

v.

LOS ANGELES COUNTY  
SUPERIOR COURT,

Respondent;

LOS ANGELES DEPARTMENT  
OF CHILDREN AND FAMILY  
SERVICES,

Real Party in Interest.

ORIGINAL PROCEEDINGS in mandate, Superior Court of  
Los Angeles County, Joshua D. Wayser, Judge. Petition granted.

Los Angeles Dependency Lawyers, Inc., Law Offices of  
Marlene Furth, Nicole J. Johnson and Dennis Smeal, for  
Petitioner.

No appearance for Respondent.

Office of the County Counsel, Mary C. Wickham, County  
Counsel, R. Keith Davis, Assistant County Counsel, and Kim  
Nemoy, Principal Deputy County Counsel, for Real Party in  
Interest.

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## INTRODUCTION

Father Robert T. (father) petitions for extraordinary relief from the juvenile dependency court's order under Welfare and Institutions Code<sup>1</sup> section 366.22, subdivision (a), finding that returning his daughter Zoey T. to his care and custody would place her at substantial risk of detriment to her health, safety, or well-being. We conclude the court's finding is not supported by substantial evidence and grant the petition.

## FACTUAL AND PROCEDURAL BACKGROUND

On June 23, 2014, the Department initiated dependency proceedings under section 300, subdivisions (a) and (b) on behalf of three children—Michael (then age nine), Grace (then age six), and Zoey (then age four) after their mother Michelle G. (mother) committed suicide by shooting herself in the head while the children were home.<sup>2</sup>

Father subsequently pled no contest to four allegations—that his incoherent, paranoid behavior and visual hallucinations rendered him unable to provide consistent care for Zoey (count b5); that his history of marijuana and methamphetamine use rendered him incapable of providing Zoey with regular care (count b6); that he was under the influence of methamphetamine in the presence of the Department and law enforcement, which caused “rapid speech, inability to focus, poor hygiene, paranoia and visual hallucinations consistent with active drug use[]”

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<sup>1</sup> All undesignated statutory references are to the Welfare and Institutions Code.

<sup>2</sup> Grace and Michael are not father's children and are not the subject of this writ petition.

(count b8); and that his home was found to be in a filthy, unsanitary, and hazardous condition, with a pervasive marijuana smell, giant piles of trash, rotting food, and filth (count b9). The court sustained the four allegations, dismissed the remaining counts, and declared Zoey to be a dependent of the court. The court removed Zoey from father's custody, placed her in the care of her maternal aunt, Erin W. (caregiver), and ordered the Department to provide father with reunification services, including a drug rehabilitation program with random drug testing, parent education, individual counseling, and monitored visits.

Father consistently visited with Zoey. Department monitors observed many of their interactions, and found the visits to be of good quality. Father engaged quickly with Zoey and came prepared with snacks, drinks, games, and gifts. He read her books and taught her things.

The record does not appear to contain a complete account of father's reunification efforts, but it does reveal that at minimum, during the next two years, father completed 90 sessions (175 hours) of individual counseling, visited a psychiatrist each month, and attended a weekly suicide support group, 14 conjoint counseling sessions with Zoey, six individual sessions with the conjoint therapist, 31 parenting classes (46.5 hours) at Project Fatherhood, 52 domestic violence classes, and court-ordered probation.

Father also successfully completed a nine-month outpatient drug program, which required five meetings per week—anger management, a men's group, an individual session, and two 12-step meetings. Upon completion of that program in September 2015, father attended weekly sober living and relapse prevention

meetings. He has submitted to at least 63 drug tests, of which 58 were clean, three were dirty, and two were missed. The most recent dirty or missed test was on April 27, 2015.

In its 12-month review report in September 2015, the Department acknowledged this progress and noted that “it is evident that father has made every effort to comply with all the court ordered programs and has completed a drug and alcohol program. Father continues to attend parenting and individual counseling. Father has also been consistent with his monitored visits with child Zoey and has maintained an open line of communication with the Department. Father has also ensured to voice all his opinions and concerns.” Nevertheless, the Department pointed to the positive test from April 2015 and father’s long emails as reasons not to liberalize visits.<sup>3</sup>

In July 2016, two years after the Department filed its initial petition, the court conducted a contested 18-month permanency review hearing under section 366.22. The court limited the proceedings to one day and heard testimony from three witnesses called by father: Zoey, father, and father’s primary therapist. The Department called no witnesses. After considering the testimony, the Department’s prior reports, and counsel’s arguments, the court terminated reunification services and set the matter for a permanency planning hearing under section 366.26. The court concluded that returning Zoey to father’s custody would create a substantial risk of detriment to her safety and well-being. Specifically, the court concluded that father continued to have problems with time management,

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<sup>3</sup> We note that one of the emails addressed father’s concern that Zoey was falling behind in school—a concern the Department shared.

interacting with authority, and verbosity. The court also believed father had not taken sufficient responsibility for his relationship with his stepson Michael, was underemployed, and lacked stable housing. Finally, the court emphasized that the Department had not previously liberalized father's visits. The court set the section 366.26 hearing for November 6, 2016.

On October 11, 2016, father filed the instant petition for extraordinary relief. We issued an order to show cause and stayed the permanency planning hearing pending our decision in this matter.<sup>4</sup>

## DISCUSSION

Father challenges the court's finding that returning Zoey to his care would create a substantial risk of detriment to her.

### 1. Standard of Review

"In reviewing the sufficiency of the evidence on appeal we consider the entire record to determine whether substantial evidence supports the court's findings. [Citation.] We do not pass on the credibility of witnesses, attempt to resolve conflicts in the evidence or weigh the evidence. Rather, we draw all reasonable inferences in support of the findings, view the record favorably to the juvenile court's order and affirm the order even if other evidence supports a contrary finding. [Citations.]

"Substantial evidence, however, is not synonymous with any evidence. [Citation.] 'A decision supported by a mere scintilla of evidence need not be affirmed on appeal.' [Citation.]

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<sup>4</sup> Although Zoey's counsel and the Department's counsel were duly served with the writ petition, only the Department filed an answer.

Although substantial evidence may consist of inferences, those inferences must be products of logic and reason and must be based on the evidence. Inferences that are the result of mere speculation or conjecture cannot support a finding. The ultimate test is whether a reasonable trier of fact would make the challenged ruling considering the whole record. [Citations.]” (*In re James R.* (2009) 176 Cal.App.4th 129, 134–135.)

**2. The Department has the burden of proving substantial risk of detriment.**

“At the dispositional hearing, and at each review hearing prior to permanency planning, there is a statutory presumption that the child will be returned to parental custody.” (*In re Marilyn H.* (1993) 5 Cal.4th 295, 308.) Thus, the court in this case was required to return Zoey to father’s custody unless the Department could prove by a preponderance of the evidence that doing so would “create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child.” (§ 366.22, subd. (a)(1).)

“That standard, while vaguely worded to be sure, must be construed as a fairly high one. It cannot mean merely that” a parent “is less than ideal” or less capable than another option, as we arguably see here. (*David B. v. Superior Court* (2004) 123 Cal.App.4th 768, 789 (*David B.*)) Rather, the finding must reflect some actual, non-speculative danger to the child. (*In re Yvonne W.* (2008) 165 Cal.App.4th 1394, 1400 (*Yvonne W.*); § 300.2 [risk of detriment is risk of physical, sexual or emotional abuse, neglect, or exploitation].) To determine if there is such a danger, the juvenile court must consider the case as a whole, the parent’s participation in reunification services, and his or her progress in eliminating the conditions that led to the child’s

removal. (*Yvonne W.*, *supra*, at p. 1400; § 366.22, subd. (a) [court must “consider the efforts or progress, or both, demonstrated by the parent or legal guardian and the extent to which he or she availed himself or herself of services provided”].)

This is a fact-bound inquiry in which the court’s views forecasting that detriment will follow a child’s return to his or her parent “must be tethered to supporting evidence.” (*In re E.D.* (2013) 217 Cal.App.4th 960, 966.) “When we are considering whether to deprive a parent of custody, we are concerned only about his or her grasp of the important parenting concepts—things such as a child’s need for security, adequate nutrition and shelter, freedom from violence, proper sanitation, healthcare, and education.” (*David B.*, *supra*, 123 Cal.App.4th at p. 790.) Simply put, at this stage in the proceedings, parents are entitled to parent their child unless there is evidence of harm to the child from their parenting. Unless the Department can prove a substantial risk of such detriment, the court is required to return the child to parental custody. (*Rita L. v. Superior Court* (2005) 128 Cal.App.4th 495, 505.)

Here, though the parties and the court agreed that father had successfully completed his extensive case plan, it was not enough. The court explained, “The Court applauds [father]’s efforts. He clearly has grown in the two years the case has been pending and is more self-aware and clearly loves and is devoted to Zoey (and she to him). But the self-awareness has not yet stopped the problematic behavior. Time management, interacting with authority, lashing out, minimization, respecting boundaries and sending diatribes continue to present as issues. And this is after two years of intensive therapy.

“Zoey has been through quite a lot. Her mother committed suicide in her presence. Before that, she faced in her home domestic violence, drug use and unsanitary and deplorable living conditions. In the last two years since her mother’s death, she has been the subject of an understandable quest by her father to have her returned to him. The Court is sympathetic to [father]’s plight, and impressed with his efforts and growth, but in seeking return, the Court believes more detriment has unintentionally and unfortunately been caused to Zoey.

“The Court has significant and non-conclusory evidence, including from Zoey herself, from her therapists, and from a Court neutral expert, that return to [father] would create the substantial risk of detriment Section 22 requires this Court to avoid. DCFS has met its burden here.”

**3. Concerns about Zoey’s best interests do not constitute detriment.**

What is initially striking about the court’s reasoning—apart from its conclusion that the reunification process itself damaged Zoey—is that the court effectively shifted the hearing’s focus from father’s interest in reunification to Zoey’s need for stability and permanency, and required *father* to show there was *no* substantial risk in order to regain custody of his child. In fact, it was up to the Department to prove that some danger existed. (See *Yvonne W.*, *supra*, 165 Cal.App.4th at p. 1400.)

This problem occurred throughout the proceedings. For example, at the prehearing status conference, the court explained it was “painfully aware of that impact and its import to the child and people who are in effect struggling over the child.” Thus, the court’s “focus [was] on the detriment to the child. And, of course, *one of the issues* is what’s the father’s situation like. But I am



laser-focused on the situation as it relates to Zoey. So I certainly understand that the father's situation is important, and I'm not ruling out anything. I'll listen to all the evidence. But I am very focused on Zoey."

The court instructed father that the Department would "marshal their evidence and so that evidence needs to be rebutted. ... That's what I want you to focus on." These instructions appear to clash with the court's repeated admonitions that the hearing had to be completed in one day, however. Thus, even as the court required more from father, the time restrictions prevented him from calling at least four additional witnesses—his grief counselor, his counselor at Project Fatherhood, his conjoint therapist, and the initial assessor in the case. The court also refused to take a brief recess to allow father's attorney to speak with Zoey's therapist, and cut some testimony short—including Zoey's.

At the contested hearing, the parties attempted to comply with the court's directives. For example, Zoey's attorney explained that it was "painfully" and "abundantly" clear that father "cares and he loves his daughter." "This man loves his child and his child loves this father. And this man has tried his best to comply and do everything he needs to get his child back and I applaud him for it. I think his efforts have been great and I want him to keep trying. ... I think he's dedicated. I think he's proven he's dedicated and I hope he stays dedicated." Nevertheless, counsel concluded that "currently, right now *as close a call as it may be*, the risk still exists by a preponderance of the evidence." (Emphasis added.) It was not enough for father to follow the social worker's instructions, counsel explained. "What's required of a parent is to develop the skill-set and the

tools to recognize that if I do this in front of my daughter, who has her own special unique needs, in that she was diagnosed with PTSD, I've got to behave a certain way. I've got to control my impulses. I've got to get here on time."

The proceedings concluded as they had begun, with the court opining, "we need to focus on [Zoey], and her needs and her best interest." But Zoey's best interests should not have been the focus of those proceedings. The focus during the reunification period is to preserve the family whenever possible. Here, reunification services had not been terminated, and family reunification remained the goal. Father was therefore "entitled to every presumption in favor of returning" Zoey to his care. (*Tracy J. v. Superior Court* (2012) 202 Cal.App.4th 1415, 1423.)<sup>5</sup>

**4. The Department's decision not to liberalize father's visits does not constitute detriment.**

The court not only shifted the Department's burden to father, however. It also unduly deferred to the Department by relying heavily on its decision not to liberalize father's visits with Zoey.

Under section 366.22, subdivision (a), a juvenile court cannot "presume that [the Department's] judgments about the propriety of returning children to their parents' custody [we]re correct"; rather, the court must "independently" evaluate that judgment "in accordance with the proper standards of proof."

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<sup>5</sup> The court's burden shifting remarks do not appear to have been mere misstatements. Its other actions supported its view of the governing standard—such as when the court made father's attorney give the first closing argument, then interrupted him throughout, frequently remarking that it had its "civil hat" on.

(*David B.*, *supra*, 123 Cal.App.4th at p. 797.) Thus, in *David B.*, the court reversed a risk-of-detriment finding because the record “clearly reflect[ed]” that the juvenile court had “deferred to [the agency’s] ‘discretion’ ” when assessing the risk of harm to the child. (*Id.* at p. 796, alteration in *David B.*; see *In re E.D.*, *supra*, 217 Cal.App.4th at pp. 964–967 [no substantial evidence of detriment where court-appointed special advocate opposed return and testified to risk of emotional detriment from transition from grandmother to father].)

Here, the court emphasized the Department’s decision not to liberalize visitation, including its decision not to change father’s visits from monitored to unmonitored. “Going from monitored visitation to return in the home is quite a gap to bridge[.]” the court explained, and the fact “there was such a gap to be bridged, after two years, is itself telling and further supports the Court’s ruling and finding of substantial risk of detriment[.]”

Such deference was particularly problematic here. The conclusions the court found most persuasive—those in Zoey’s therapist’s report and, in turn, in the Department’s reports—were based on statements from Zoey’s caregiver, but the court declined to consider the caregiver’s credibility. Neither the caregiver, the therapist, nor the social worker testified, and the court would not allow father’s attorney to argue about their credibility.<sup>6</sup>

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<sup>6</sup> Nor did the court address the Department’s other rationales for not liberalizing visits. For example, in February 2016, the Department declined to liberalize visits because 10 months earlier, two of father’s drug tests had come back positive—out of a total of 39. On March 31, 2016, the Department again relied on those tests, which were then

**5. The evidence does not support the court’s findings that father’s tardiness and verbosity posed a substantial risk of detriment to Zoey.**

The court did not identify what detriment might befall Zoey if she were to return to father’s care, and did not identify any “important parenting concepts” in which father was deficient. (*David B.*, *supra*, 123 Cal.App.4th at p. 790.) The court did not conclude that father continued to struggle with the conditions that led to Zoey’s removal. It did not find that any of father’s formerly serious problems posed a continuing risk to Zoey. (See *In re Dustin R.* (1997) 54 Cal.App.4th 1131, 1141–1142 [court must consider the advances the “parent has made towards eliminating the conditions leading to the children’s placement out of home.”].) For example, the court did not conclude father had a current substance abuse problem. (See *Jennifer A. v. Superior Court* (2004) 117 Cal.App.4th 1322, 1343 [no substantial risk of detriment where mother tested negative 84/95 times, did not display clinical substance abuse, and drug use did not affect her parenting skills].) To the contrary, it was undisputed below and in these proceedings that father had completed his extensive case plan.

What, then, was the basis of the court’s decision? “Time management, interacting with authority, lashing out,

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nearly a year old—this time as a reason to terminate reunification services even though father’s 30 most recent drug tests had been clean. Then, on April 22, 2016, the Department explained that “[a]t this point, due to the fact that the Department has not liberalized father’s visits it would be detrimental to return child Zoey home.” Finally, on July 8, 2016, the Department pointed to father’s tardiness and verbosity as reasons to terminate reunification services.

minimization, respecting boundaries and sending diatribes continue to present as issues.” Of these issues, only time management and minimization arguably impacted Zoey. The other four concerns stemmed from father’s interactions with the Department—interactions in which he advocated for his parental rights in a way the Department found tedious.

The court regularly referred to father as prolix, particularly in his email correspondence with the Department. Prolix does not have a specialized meaning in dependency law; as in regular speech, it means long-winded or verbose. But the emails in this case, while sometimes lengthy, were rational, coherent, and expressed reasonable concerns. For example, father asked the Department what decision-making rights he retained over Zoey’s education, whether the Department would provide him with specific guidance about additional steps he could take to reunify with Zoey, and why the Department refused to provide him with information about an out-of-town trip Zoey was taking with caregiver. The Department has not pointed to any case finding a substantial risk of detriment where a parent expressed his concerns in writing—even when he does so at length—and our research has revealed none. We disagree with the court below that concision is an “important parenting concept[]” (*David B.*, *supra*, 123 Cal.App.4th at p. 790), and conclude it is unjust to use a father’s legitimate, if irritating, questions and expressions of concern as a reason to terminate reunification services and deny him custody of his daughter.

The court also found “minimization to be a theme in the case.” In particular, the court emphasized that father had failed to take sufficient responsibility for his stepson Michael’s decision not to continue their relationship. But Michael was not father’s

child, and the Department has not explained why Michael's decision should undermine father's right to parent his daughter Zoey.<sup>7</sup>

The court's biggest apparent concern, however, was defendant's time management skills. It seems father was frequently more than 10 minutes late to appointments. Regardless of whether an ability to anticipate Los Angeles traffic can, as a general matter, place a child at substantial risk, the Department impliedly concedes that father's tardiness is insufficient to sustain the detriment finding in this case. (See *Yvonne W.*, *supra*, 165 Cal.App.4th at p. 1403 [mother's lack of supervision plan, her lack of organizational skills, and the child's incomplete IEP assessment did not constitute substantial risk of detriment].)

Finally, the court appears to have improperly considered father's poverty as a factor when it noted that father "admitted that he is currently under-employed, receiving general assistance and has no housing of his own with no definitive stable housing plans in sight." Though the weight the court accorded father's poverty is unclear, evidence of his struggle was not a reason to decline to return Zoey to him, absent evidence that being with him would cause Zoey harm—and there was no such evidence. (*Yvonne W.*, *supra*, 165 Cal.App.4th at p. 1401 [where mother was living in shelter and child expressed "fear, anxiety, and unhappiness" about living there, insufficient showing of detriment]; see also *David B.*, *supra*, 123 Cal.App.4th at pp. 789,

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<sup>7</sup> To the extent father's relationship with Michael was germane to the detriment finding, it does not appear that the Department provided father with notice of that fact.

792 [court could not properly consider that parent was too poor to afford housing to support its detriment finding]; *In re G.S.R.* (2008) 159 Cal.App.4th 1202, 1213 [agency cannot “bootstrap” the fact that parent was too poor to afford housing to support a detriment finding].) In fact, father works as a handyman and tattoo artist, earning \$300–\$400 per week. He and Zoey would live with his sister in her Department-approved home.

We also note that even if the success of Zoey’s transition to father’s care were “contingent on addressing the deficiencies the [Department] cites, there are less drastic means by which this could be accomplished. The court has the authority to return a minor to parental custody at an 18-month hearing and, at the same time, order family maintenance services under court supervision. [Citation.]” (*Yvonne W.*, *supra*, 165 Cal.App.4th at p. 1403.) Here, the court declined to provide father with such services.

We conclude that there is no substantial evidence to support the court’s detriment finding in this case. Accordingly, as set forth in the disposition, the court is directed on remand to hold a new section 366.22 hearing. The Department is directed to prepare a supplemental 18-month status review report. The sole purpose of the hearing is to consider evidence since July 8, 2016, the date of the prior hearing. In the absence of new evidence of *substantial* risk of detriment, the court is directed to return Zoey to father’s physical custody. If appropriate, the court may order family maintenance services under court supervision.

In all respects, the Department, Zoey's counsel, and the court should proceed with due regard to the Legislature's directive that the focus of this hearing "shall be on the preservation of the family as well as the safety, protection, and physical and emotional well-being of the child." (§ 300.2.)



## **DISPOSITION**

The petition for extraordinary relief is granted. The juvenile court is directed to vacate its July 13, 2016 order terminating reunification services, finding that returning Zoey to father would create a substantial risk of detriment to her, and setting a hearing under section 366.26. The court is directed to hold a new hearing under section 366.22 no later than 60 days from the date of this opinion for the sole purpose of considering evidence since July 8, 2016. The court shall require the Department to prepare a supplemental 18-month status review report addressing events since July 8, 2016. In the absence of new evidence of substantial risk of detriment to Zoey's physical or emotional well-being, Zoey shall be returned to father's physical custody. This opinion shall become final immediately upon filing. (Cal. Rules of Court, rule 8.490(b)(2)(A).)

## **NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

LAVIN, J.

WE CONCUR:

ALDRICH, Acting P. J.

GOSWAMI, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.