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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

D.M., Petitioner, v. SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Real Party in Interest.	B278396 (Los Angeles County Super. Ct. No. DK05918)

ORIGINAL PROCEEDINGS; petition for extraordinary writ. Robin R. Kesler, Temporary Judge. (Pursuant to Cal. Const., art. VI, §21.) Petition granted.

Law Offices of Katherine Anderson, Jennifer Pichotta, under appointment by the Court of Appeal, for Petitioner.

No appearance for Respondent.

Mary C. Wickham, County Counsel, R. Keith Davis, Assistant County Counsel, and Aileen Wong, Deputy County Counsel, for Real Party in Interest

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INTRODUCTION

Five-year-old M.J. was detained after her father, C.J. (father), and his girlfriend were involved in a physical altercation. M.J.'s mother, D.M. (mother), lived in Texas and requested that M.J. be placed with her. After dependency proceedings began, father became disabled and was unable to care for M.J. At a contested hearing under Welfare and Institutions Code section 366.26,[1] the court denied mother's request to place M.J. with her in Texas, terminated reunification services, and set a hearing to terminate parental rights. Mother filed a petition for an extraordinary writ.

We grant the petition. The evidence does not support the juvenile court's finding that placing M.J. in mother's care would pose a risk of detriment to the safety, protection, or physical or emotional well-being of M.J.

FACTUAL AND PROCEDURAL BACKGROUND

A. Detention and jurisdiction

M.J. was born in October 2008. In September 2014, sheriff's deputies responded to a domestic violence call at the residence of M.J. and father. Father and his girlfriend had been in a physical altercation, resulting in a minor injury to the

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[1] All further statutory references are to the Welfare and Institutions Code unless otherwise indicated.

girlfriend. M.J. was in the home at the time, as were father's and the girlfriend's young twins. The twins are not at issue in this case.

M.J. was taken to the sheriff's station, and a social worker interviewed her there. M.J. appeared healthy, spoke intelligently, and did not show signs of abuse or neglect. M.J. said she had witnessed other physical altercations between father and his girlfriend, and recently father had "whopped" M.J. with a belt when he was angry at her. M.J. told the social worker that she wanted to remain living with father and his girlfriend. DCFS took M.J. into protective custody, and placed her in foster care.

Father told the social worker that M.J.'s mother lived in Texas, and provided her phone number. The social worker called mother. The detention report states that mother "appeared to be crying when she spoke to CSW. Mother sounded heartbroken over the domestic violence issue in which father . . . was arrested. Mother stated that she recently sent father . . . about $1800 dollars [sic] in order for him to send child [M.J.] over to her in Texas." Mother told the social worker that she lost custody of M.J. when she was jailed "due to an injury to a child case."

The juvenile court found a prima facie case for detaining M.J. under section 300, subdivisions (a) and (b). A few days later, M.J. was moved from foster care to the home of a paternal cousin.

A November 2014 jurisdiction/disposition report includes information about mother's prior conviction in Texas. Mother reported that she when was eight months pregnant with M.J., "she spanked her nephew with a belt and left marks and bruises on the child." She was convicted of child abuse/endangerment, and sentenced to two years in prison. She began serving her sentence when M.J. was about two-and-a-half years old.

The first year mother was in prison, M.J. lived with an aunt and had visits with father. Then M.J. went with her father to California for a visit and "he never brought her back." Mother was released from prison in January 2013. Mother's parole was set to expire in December 2015. Mother said M.J. initially came to live in Texas after mother was released, but mother's living situation was too unstable at the time so mother sent M.J. back to father in California. At the time of the jurisdiction report, mother worked as a server in a restaurant, and said she was able to provide for herself and her children. Shortly before the domestic violence incident involving father and his girlfriend, mother and father had agreed that M.J. would return to Texas again to live with mother. Mother made clear to the social worker that she wanted M.J. to come live with her. DCFS stated in the jurisdiction report that it was not considering placing M.J. with mother due to mother's conviction for child abuse. However, DCFS requested monitored visitation and reunification services for mother.

Father said that throughout M.J.'s life, he and mother had "a positive relationship and they were able to co-parent" M.J. Father said mother called M.J. regularly, and M.J. went to Texas for visits.

M.J. was interviewed in October 2014. She "appeared to be a sweet, intelligent child who was able to understand . . . questions and provide answers to the best of her ability." She discussed her home life with her father and his girlfriend. In October 2014, the cousin taking care of M.J. asked to have M.J. removed from her home. According to the cousin, M.J. "displayed inappropriate sexual behavior" to a child the cousin was

babysitting at her home. M.J. was placed with a paternal great aunt.

At the jurisdiction hearing on November 10, 2014, the court sustained two counts against father under section 300, subdivision (b). The remaining allegations against father were dismissed. The court ordered DCFS to evaluate mother under the Interstate Compact for the Placement of Children (ICPC) (Fam. Code, § 7900 et seq.). The court ordered family reunification services, monitored visitation with father, and monitored visitation with mother in the state of California.

B. Proceedings and investigation following jurisdiction

A January 2015 progress report noted that M.J. was doing well in her placement with her paternal great aunt. Mother called M.J. "often." Father visited M.J. and they got along well, but father was not in compliance with court-ordered requirements regarding parenting classes and drug testing.

A status review report dated May 11, 2015 again noted that M.J. was doing well with her great aunt; "[s]he is a very pleasant child, always smiling, giving hugs, and polite." Father had stopped visiting or calling M.J., and he had not provided verification that he was in compliance with court orders. M.J. spoke with mother often, and mother sent her a box of clothes and toys. Mother again told the social worker that she wanted M.J. placed in her custody. Mother provided documentation relating to her criminal conviction and parole. One condition of mother's parole was that she was not allowed to have "unsupervised contact with children under 17 years if [*sic*] age."

A status review report dated November 12, 2015 stated that M.J. continued to do well in her great aunt's care. M.J.

spoke with mother on the phone often, and "[M.J.] does look forward to returning to Texas with her mother and other siblings." Mother's parole was scheduled to end on December 3, 2015. The report stated that because one condition of parole is that mother was not to have unsupervised contact with children, the ICPC evaluation would be done after her parole expired. The parole officer noted that mother was in compliance with her parole. The report noted that father was hospitalized with meningitis; he "can barely walk and take care of himself" and was legally blind. Father had not completed court-ordered requirements as a result of his illness.

A 17-page ICPC home evaluation report from Texas was completed in January and February 2016. The report stated that mother understood why M.J. was removed from father's care, and the assessor believed that mother "knows why it is important to protect [M.J.] and believes [mother] will protect [M.J.]." The report stated that mother "appears to have the ability to provide a safe environment for her children as demonstrated by the cleanliness of her home and the demeanor of" her 13-year-old daughter, who was present for the home assessment. The 13-year-old said she was happy to be back with her mother following the termination of mother's parole, and that mother was a good parent. The assessor said that mother and the 13-year-old had an appropriate parent/child relationship. Mother said her five-year-old son was living at his father's house, but that he would be coming to live with mother as soon as he completed the school year. Mother said she spoke with her son three or more days a week, and she saw him on weekends and holidays.

Mother and the 13-year-old lived in a one-bedroom apartment that was clean and adequately furnished, with an

outdoor play area. The assessor found the home to be a safe environment for children. Mother was looking for a larger apartment to accommodate her son and M.J. Mother was employed, and said she was working on getting her driver's license and a car. She also stated that her aunt and brothers offered her a lot of support, and she was comfortable asking them for help when needed. Mother said she dealt with stress by praying. The assessor said it appeared that mother "will be able to assist [M.J.] have [*sic*] a smooth transition. She is willing to handle behaviors that may occur or seek out professional help when needed."

The assessor spoke with mother's brother, aunt, and three long-term friends. Each said that mother is a good parent and recommended that M.J. be placed with mother. The report listed no negative references.

Mother's conviction was discussed in the ICPC report. In the incident that led to the conviction, mother spanked her nephew with a belt, which left welts. She was arrested but did not go to jail at the time, because she was eight months pregnant with M.J. Child protective services took custody of mother's children, and the children were returned to mother after she successfully completed anger management and parenting classes. Mother was later convicted and sentenced to five years in prison, and served two years of that sentence. Mother said she regretted the incident, and learned from her parenting classes how to discipline children without using corporal punishment.

The ICPC report noted that due to the conviction, the Texas Child Protection agency was required to "seek Program Director's approval." On the signature page, the program director checked

a box stating, "Placement not approved due to the criminal and CPS history."

A status review report dated May 18, 2016 noted that M.J. had been placed with a paternal aunt due to the illness of her previous caregiver; she adjusted well to the change. Father continued to be unable to care for M.J. due to the lasting effects of his illness. The report stated that M.J. "has indicated to CSW on several occasions that she misses her mother and wants to reunify with her. [M.J.] speaks with her mother telephonically on a weekly basis." The report noted that mother was living with her 13-year old daughter and 5-year-old son, and wanted M.J. to come live with them. The report stated, "Mother is adamant about reunifying with her child. Mother states she is willing to do whatever it takes to have her child returned to her care." The report also stated, "Although mother received a favorable Report from Kinship Caregiver Home Assessment, the Department of Family and Protective Services for Texas, Compact Office denied her ICPC 100A." DCFS recommended that reunification services for mother and father be terminated, and a permanent plan with M.J.'s current caregiver be established.

C. Contested section 366.22 hearing

Mother filed a motion on June 21, 2016, arguing that under section 366.22, M.J. should be placed in mother's custody. Mother argued that because she is a non-offending parent who lives in another state, an ICPC approval is not required. She also argued that there was no evidence that returning M.J. to mother's custody would be detrimental to M.J.

A contested section 366.22 hearing was held on August 29, 2016. The court took judicial notice of the court file, and admitted as evidence the jurisdiction/disposition report, and the

May 18 interim report. Counsel for mother argued that ICPC approval was not required for an out-of-state, non-offending parent, and there was no evidence that placement with mother would be detrimental to M.J. Mother's counsel also argued that mother's conviction was past history and presented no danger to M.J.

Counsel for DCFS stated that DCFS was concerned that M.J. "has little relationship with the mother" and "mother's home is not a safe place." DCFS also argued that California social workers would not be allowed to supervise M.J. in Texas. DCFS asked the court to terminate family reunification services. Counsel for M.J. joined DCFS's arguments, and said mother's conviction for child abuse presented a safety issue for M.J. M.J.'s counsel also argued that if M.J. were to move to Texas, her relationship with father would be impacted because she could not visit him as often.

The court held that continued jurisdiction under section 300 was necessary. The court said that mother's conviction was "significant" and "relevant" because it was "a child cruelty, child endangerment charge." Although mother's other children were living with her, the court concluded that M.J. was "differently situated than the children in Texas. This child under my jurisdiction does not have a substantial relationship with this mother. And we need to have ongoing eyes on this case if I was to return the child to the state of Texas. Texas has denied the ICPC. For that reason I cannot place the child with the mother in the state of Texas." The court terminated reunification services and set a date for a hearing under section 366.26.

Mother filed a petition for an extraordinary writ and requested a stay of the section 366.26 hearing. (See § 366.26,

subd. (*l*)(1)(A).) We issued an order staying the juvenile court proceedings and directing DCFS to show cause as to why the relief requested by mother should not be granted. DCFS filed an answer to the petition; neither father nor M.J. filed a brief.

APPLICABLE STANDARDS

The parties agree that under section 366.22, at a permanency review hearing "the court shall order the return of the child to the physical custody of his or her parent or legal guardian unless the court finds, by a preponderance of the evidence, that the return of the child to his or her parent or legal guardian would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child. The social worker shall have the burden of establishing that detriment. . . ."[2] (§ 366.22, subd. (a)(1).)

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[2] Because the statute discusses the "return" of a child to his or her parent, it is unclear whether this statute applies to a noncustodial parent, as opposed to a parent who had custody at the time the dependency case began. Generally, section 361.2 applies to a noncustodial parent, and is considered at the disposition phase of a dependency case. To protect the parent's fundamental, constitutional liberty interest in the right to the care, custody and management of a child, section 361.2 requires a court to place a child with a noncustodial parent who requests custody unless the court finds, by clear and convincing evidence, that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child. (§ 361.2, subd. (a); *In re C.M.* (2014) 232 Cal.App.4th 1394, 1400; *In re Abram L.* (2013) 219 Cal.App.4th 452, 460-461; *In re A.A.* (2012) 203 Cal.App.4th 597, 605.) We find it troubling that the court made no such finding as to mother at any point in the proceedings. Nevertheless, neither party has asserted that the requirements of 361.2 should be applied in the context of this writ petition. We therefore assume without deciding that the

The parties also agree that we should review the juvenile court's decision for substantial evidence. "Appellate justices review a respondent court's decision after a section 366.22 ruling as follows: 'Evidence sufficient to support the court's finding "must be 'reasonable in nature, credible, and of solid value; it must actually be "substantial" proof of the essentials which the law requires in a particular case.'" [Citation.] "Where, as here, a discretionary power is inherently or by express statute vested in the trial judge, his or her exercise of that wide discretion must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]" [Citations.]' [Citations.] In the presence of substantial evidence, appellate justices are without the power to reweigh conflicting evidence and alter a dependency court determination. [Citations.]" (*Constance K. v. Superior Court* (1998) 61 Cal.App.4th 689, 705.)

DISCUSSION

A. ICPC compliance is not required for placement with a parent.

The trial court erred by finding that the lack of ICPC approval in Texas was a bar to placing M.J. with mother. It is well established that the ICPC does not apply to the placement of a child with an out-of-state parent. The ICPC states, "No sending agency shall send, bring, or cause to be sent or brought into any other party state any child *for placement in foster care or as a preliminary to a possible adoption* unless the sending agency" complies with the terms of the ICPC. (Fam. Code, § 7901, subd.

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standards of section 366.22 apply to the circumstances before us, as asserted by both mother and DCFS.

(a), emphasis added.) By its own terms, therefore, compliance with the ICPC is not required when considering the placement of a child with an out-of-state parent. (See, e.g., *In re B.S.* (2012) 209 Cal.App.4th 246, 254 ["the juvenile court need not comply with the notice provisions of the ICPC to place a California child with a parent living in another state."]; *In re C.B.* (2010) 188 Cal.App.4th 1024, 1032 [ICPC "notice provisions do not apply to a placement with a parent"]; *In re John M.* (2006) 141 Cal.App.4th 1564, 1575 ["compliance with the ICPC is not required for placement with an out-of-state parent"]; *In re Johnny S.* (1995) 40 Cal.App.4th 969, 977 ["we are persuaded that the ICPC is intended to apply only to interstate placements for foster care and preliminary to a possible adoption, and not to placements with a parent."]; *Tara S. v. Superior Court* (1993) 13 Cal.App.4th 1834, 1837 [ICPC is limited "to foster care and possible adoption—neither of which would involve natural parents"].)

This is not to say that a court cannot take into account another state's investigation and findings relating to an out-of-state parent when considering whether to place the child with that parent. For example, in *In re B.S., supra*, 209 Cal.App.4th 246, the child's father lived in Texas, and the Texas ICPC liaison reported that the child's father was a registered sex offender, had a history of sexually abusing the child's sister, and was a recovering alcoholic who did not regularly attend treatment meetings. Relapse was therefore a "'major concern.'" (*Id.* at p. 251.) The Texas liaison also never met the father's live-in fiancée and had no information about her background or suitability to care for the child. (*Ibid.*) Texas twice denied father's ICPC requests. (*Ibid.*) The Court of Appeal held that the trial court properly considered this evidence along with other information in

finding that "the child continued to require the juvenile court's protection." (*Id.* at p. 254.)

Here, by contrast, the ICPC report did not raise any such concerns. The ICPC report discussed the conviction arising from events before M.J. was born, and made clear that the assessor felt that mother had learned from her mistakes and posed no threat to M.J. Mother's 13-year-old daughter, who was back in mother's custody, and arrangements had been made for mother's five-year-old son to live with mother as well. (By the time of the section 366.22 hearing, the five-year-old was in mother's custody.) Mother was steadily employed and providing for herself and her family; their home was clean and safe. She had strong family relationships and a good support system in place. Each of mother's references said she would be a good mother to M.J.; there were no negative references. Other than information about mother's conviction, discussed more fully below, nothing in the ICPC assessment supports the court's finding that placing M.J. in her mother's custody could be detrimental to M.J. The mere fact that the program director did not approve ICPC placement does not support a finding that placing M.J. with mother would create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of M.J. (See, e.g., *In re Z.K.* (2011) 201 Cal.App.4th 51, 67 ["The department cannot, however, use Ohio's denial of placement under the ICPC as a proxy for the constitutionally required finding of detriment supported by clear and convincing evidence. To support the termination of mother's parental rights, the department must point to specific evidence from which we can reasonably imply a finding by the juvenile court that it would be detrimental to place the minor with mother."].)

The trial court erred by finding that the lack of ICPC approval in Texas was a bar to placing M.J. with mother.

B. Mother's relationship with M.J.

The juvenile court also found that although mother's two other children were in her custody in Texas, M.J. was "differently situated than the children in Texas" because she "does not have a substantial relationship with this mother." The record does not support this finding.

Mother had custody of M.J. for the first two-and-a-half years of her life. While mother was incarcerated, father took M.J. to California. Mother maintained a relationship with M.J. through phone calls and visits. Mother said that before the dependency proceedings began, mother and father planned to have M.J. return to Texas to live with mother. M.J. said she wanted to live with mother and her siblings, and mother wanted M.J. to live with them. Mother made clear to DCFS that she was willing to take any steps needed to get M.J. back in her custody. The record does not support a finding that M.J. and mother did not have a substantial relationship.

Even if M.J. was closer to father than mother because of her living situation immediately before the dependency case was initiated, "a lack of contact between the child and the nonoffending noncustodial parent, alone, is not a basis for finding detriment." (*In re K.B.* (2015) 239 Cal.App.4th 972, 981; see also *In re Abram L.*, *supra*, 219 Cal.App.4th at p. 464 ["an alleged lack of a relationship between father and the children is not, by itself, sufficient to support a finding of detriment for purposes of section 361.2, subdivision (a)."]; *In re C.M.*, *supra*, 232 Cal.App.4th at

p. 1403 ["alleged lack of an established relationship with father [is not] sufficient to constitute substantial evidence of the high level of detriment required under section 361.2(a)."].)

In *In re K.B.*, the noncustodial father was in the Air Force stationed outside of California. He maintained a relationship with his son through phone and video calls and social media. (*Id.* at p. 976.) The juvenile court and Court of Appeal held that this contact was sufficient to establish a substantial relationship between the father and son. (*Id.* at p. 981.) Here, the relationship between mother and M.J. was stronger than that in *In re K.B.*, because mother raised M.J. for the first two-and-a-half years of her life. Mother and M.J. spoke regularly on the phone, and both said they wanted to live together. The court's findings that M.J. and mother did not have a substantial relationship, and that the lack of such a relationship would be detrimental to M.J.'s safety or well-being if she were to live with mother, were not supported by substantial evidence.

C. Mother's conviction.

The court said that mother's conviction was "significant" because it involved child abuse. However, under the standard in section 366.22, the court was required to find that mother's criminal history posed a substantial risk of detriment to the safety, protection, or physical or emotional well-being of M.J. The evidence did not support such a finding.

Mother's conviction arose from an incident that occurred before M.J.'s birth. A conviction relating to the abuse of a minor is certainly concerning, and the court was correct to consider it. But standing alone, a conviction is not sufficient to deprive a parent of custody. (See, e.g., *In re C.M.*, *supra*, 232 Cal.App.4th at p. 1403 [placement of a child with father was appropriate

despite father's 20-year-old conviction for domestic violence, given the lack of any evidence of recent domestic violence].)

The effect of past convictions as they relate to a current risk of harm to a child is often considered under the standards in section 300. The standards are somewhat different, because under section 300 the court focuses on a substantial risk of serious physical or emotional harm to a child (§ 300, subds. (a),(b),(c), (j)), rather than a "substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child," as required by section 366.22. Nonetheless, cases involving section 300 provide guidance about how criminal convictions and other past behavior can impact a determination as to whether placing a child in his or her parent's care puts the child at risk, or whether a parent/child relationship requires continued supervision because of a risk of potential harm.

In the section 300 context, "past infliction of physical harm by a caretaker, standing alone, does not establish a substantial risk of physical harm; '[t]here must be some reason to believe the acts may continue in the future.' [Citation.]" (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824.) The court's guidelines in *In re J.N.* (2010) 181 Cal.App.4th 1010 are instructive: "In evaluating risk based upon a single episode of endangering conduct, a juvenile court should consider the nature of the conduct and all surrounding circumstances. It should also consider the present circumstances, which might include, among other things, evidence of the parent's current understanding of and attitude toward the past conduct that endangered a child, or participation in educational programs, or other steps taken, by the parent to address the problematic conduct in the interim, and probationary support and supervision already being provided through the

criminal courts that would help a parent avoid a recurrence of such an incident. The nature and circumstances of a single incident of harmful or potentially harmful conduct may be sufficient, in a particular case, to establish current risk depending upon present circumstances." (*In re J.N., supra,* 181 Cal.App.4th at pp. 1025-1026.)

In *In re J.N.*, the parents and their three children were in a car accident; the father was driving while intoxicated when he crashed into a light pole. (*In re J.N.*, *supra*, 181 Cal.App.4th at pp. 1014-1015.) Two of the children were injured in the accident; one child's injuries were serious. (*Id*. at pp. 1016-1017.) The parents had no history of legal issues involving their children, said they rarely drank alcohol, and recognized that they had used poor judgment on the night of the accident. (*Id*. at pp. 1018-1019.) The trial court found that the children came within the description of section 300, subdivision (b). (*Id*. at p. 1021.) The Court of Appeal reversed, stating, "In this case, the question is whether evidence of a single episode of parental conduct was sufficient to bring the three children within the juvenile court's jurisdiction." (*Id*. at p. 1022.) The court noted that "the evidence showed that the parents' actions with regard to the drinking and driving incident had placed all their children at substantial risk of serious physical harm and was a cause of serious physical harm to" one child. (*Id*. at p. 1022.) However, "[d]espite the profound seriousness of the parents' endangering conduct on the one occasion in this case, there was no evidence from which to infer there is a substantial risk such behavior will recur." (*Id*. at p. 1026.) Instead, "[t]he evidence consistently indicated that the children were healthy, well adjusted, well cared for, bonded with each other, and developing appropriately. . . . Significantly, both

parents were remorseful, loving, and indicated that they were willing to learn from their mistakes." (*Ibid.*) The court therefore concluded that despite the parents' serious lapse in judgment that endangered their children, there was insufficient evidence to show that the children were at risk of future harm.

The court reached a similar conclusion in *In re Savannah M.* (2005) 131 Cal.App.4th 1387. There, the parents of twins discovered a family friend, David, in the act of attempting to sexually assault their 19-month-old daughter, Savannah. (*Id.* at p. 1391.) Savannah and her twin sister were detained, and the trial court held that Savannah was a child described under section 300, subdivision (b). The Court of Appeal reversed, holding that there was insufficient evidence to support the court's finding. Although there was a risk of harm to Savannah on the day the parents left her in David's care, there was no evidence that the parents would leave the twins in David's care again. The court said that upon discovering David's attempted abuse of Savannah, "Mother's and Father's reaction was entirely appropriate. They immediately removed David from their home and contacted the police to report the incident. Thereafter, Mother confirmed she would never trust David or anyone else to care for her daughters. Although Agency does not (and could not reasonably) argue Mother and Father would ever allow David to care for their daughters in the future, Agency argues Mother and Father . . . might allow another person like David to manipulate them into caring for their daughters. However, that argument is mere speculation and is unsupported by reasonable inference from the evidence at the time of the January 5, 2005 hearing." (*Id.* at p. 1397.)

Another case with insufficient evidence of potential future harm is *In re B.T.* (2011) 193 Cal.App.4th 685. In that case, the child at issue, B.T., was conceived while the 38-year-old mother, Debra, was having a sexual relationship with a 14- or 15-year-old neighbor, Miguel. (*B.T., supra*, 193 Cal.App.4th at p. 688.) Debra was arrested for molesting Miguel, and DCFS removed B.T. and Debra's older children from her care. (*Id*. at 689.) In finding that the detention of B.T. was appropriate, the trial court discussed Debra's "'lapses in judgment and impulse control'" that led to Debra's relationship with Miguel. (*Id*. at p. 693.) The Court of Appeal, however, held that because Debra had no prior criminal record and there was no evidence that her children were not cared for properly, any suggestion that the children were at risk in Debra's care was "purely speculative." (*Ibid*.) The court said, "B.T. was not yet born, in fact, did not even exist, when Debra began having lapses of judgment and impulse control with Miguel . . . . For these lapses to endanger B.T., there had at a minimum to be some evidence that Debra either habitually had them in the past and so was very likely to have them in the future or was likely to have them in the future for some other reason. There was no such evidence. Moreover, these lapses had to threaten serious harm to B.T., not Miguel or someone else. There was no evidence of that either." (*Ibid*.)

Here, the evidence is similarly lacking. Unlike *In re J.N.* and *In re Savannah M.*, there is no evidence that mother ever endangered M.J. or her other children. Instead, before M.J's birth, mother spanked a nephew, leaving marks. While such an incident involving another child is certainly concerning, the evidence here does not show that mother was at risk of similarly abusing M.J. To the contrary, the ICPC report from Texas

showed that mother successfully completed parenting and anger management classes, and that the Texas authorities placed mother's other children back into her care. Mother said she recognized the error of her past mistakes that led to her conviction, and said she would never repeat that behavior. Mother had good family support, and she did not hesitate to ask for help when needed. All references included in the ICPC report stated that mother was a good mother, and there were no negative references. The 13-year-old was happy, well-cared for, and enjoyed living with mother. The five-year-old was also in mother's care at the time of the 366.22 hearing. There was no evidence that mother's care for these two children was lacking.

In short, the evidence does not support a finding that placing M.J. with mother would create a substantial risk of detriment to M.J.'s safety, protection, or physical or emotional well-being. Although mother's past conviction was serious, nothing in the record supported a finding that, as mother was currently situated, placing M.J. with mother would be detrimental to M.J.

DCFS argues that several factors could lead to mother abusing M.J. as she did her nephew, but these arguments are purely speculative. For example, DCFS argues that placing M.J. with mother "would cause an undue amount of stress, especially with [mother's] finances already strained." Because mother's "only way to handle stress was to pray," DCFS argued that it would be detrimental to place M.J. with mother. However, nothing in the record suggests that mother is financially unable to care for M.J., nor does the record suggest that mother might respond to financial stress by harming M.J. To the contrary, the ICPC stated that mother's expenses were "realistic" and noted

that mother had several financial resources available, including support from M.J.'s father. In addition, the record indicated that when mother found that her living situation following her release from prison was too unstable for M.J., mother arranged for appropriate care for M.J.

DCFS also argues that mother must have violated her parole because mother said she visited with M.J. and asked for M.J. to be returned to her custody before her parole was complete. According to DCFS, "mother's willingness to violate the terms of her parole meant she was willing to risk being incarcerated again leading to [M.J.] having unstable placement." There is no evidence, however, that mother violated her parole. On parole, mother was not allowed to have *unsupervised* contact with children under the age of 17. Nothing in the record suggests that mother's visits with her children were unsupervised. To the contrary, mother's parole officer reported that mother was in compliance with her parole. DCFS also argues that because one of M.J.'s four caregivers suggested that M.J. exhibited sexual behavior toward another child, M.J.'s "inappropriate sexual behavior would place her siblings at risk of harm." Other than the one caregiver's concerns about M.J., there is nothing in the record suggesting that M.J. typically exhibited sexualized behavior. Even if she did, no evidence suggests that M.J. might place mother's other children at risk, or that mother would be incapable of adequately supervising M.J. and her other children. In short, DCFS's arguments on appeal that placing M.J. with mother would be detrimental to M.J. are purely speculative and unsupported by the record.

Overall, the court's holding under section 366.22 was not supported by substantial evidence, because the evidence does not

support a finding that placing M.J. with mother in Texas would pose a substantial risk of detriment to M.J.'s safety, protection, or physical or emotional well-being.

DISPOSITION

The petition for extraordinary relief is granted. The juvenile court is directed to vacate its August 29, 2016 order terminating reunification services and setting a section 366.26 hearing, and the court is directed to issue a new order placing M.J. in the physical custody of mother in accordance with section 366.22. Nothing in this opinion precludes the entry of appropriate joint custody orders. 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

COLLINS, J.

We concur:

WILLHITE, Acting P. J.

MANELLA, J.