

December 13, 2013

Honorable Chief Justice Tani Cantil-Sakauye and
Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-4797

**Re: *In re A.G. et al.*, Case No. S215032
Court of Appeal Case No. B248092 / Sup. Ct. No. CK96730
REQUEST FOR DEPUBLICATION**

TO THE HONORABLE CHIEF JUSTICE TANI CANTIL-SAKAUYE AND THE
HONORABLE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE
STATE OF CALIFORNIA:

Pursuant to California Rules of Court, rule 8.1125(a),¹ the California State Association of Counties (CSAC)² submits this letter in support of Los Angeles County's Request for Depublication dated December 2, 2013 ("Request"), filed in the above-captioned case.

**DEPUBLICATION IS NECESSARY BECAUSE THE A.G. COURT
OVERLOOKED RELEVANT STATUTORY LAW AND
WELL-ESTABLISHED PRINCIPLES OF DEPENDENCY LAW.**

Misguided by father's ability to protect the children, the A.G. court erroneously diverted a proceeding to the family court. Consequently, the A.G. decision thwarts the Legislative intent to provide maximum safety to children through the dependency scheme.

¹ All further rule references are to the California Rules of Court.

² The California State Association of Counties (CSAC) is a non-profit corporation whose membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program administered by the County Counsels' Association of California and overseen by the Association's Litigation Overview Committee (LOC). LOC, which is comprised of county counsels throughout the state, has determined that depublication of the opinion in this case is a matter of statewide interest because of its adverse effect on nearly all pending juvenile court dependency case throughout the state.

By mischaracterizing the case as a custody dispute, the *A.G.* court overlooked the juvenile court’s authority to assert jurisdiction based on the conduct of one parent, or due to the *risk of harm* to children. By overlooking the differences between family court and dependency court, as well as by misapplying *In re John W.* (1996) 41 Cal.App.4th 961 (*John W.*) and *In re Phoenix B.* (1990) 218 Cal.App.3d 787 (*Phoenix B.*), the court rendered meaningless the juvenile court’s authority to order removal of the offending parent from the home; or in the alternative, to first take jurisdiction, and then terminate jurisdiction and make “exit” orders regarding custody and visitation.

Put simply, as stated by Los Angeles County, the *A.G.* decision “is contrary to statutory and case law.” (See Request, p. 3.) The *A.G.* court also exceeded its duty as an appellate court.

1. By conflating the bifurcated phases of juvenile dependency proceedings, the *A.G.* decision sets a precedent for erroneously diverting cases from the juvenile court even when one parent indisputably presents a risk of harm to a child.

The *A.G.* court acknowledged that the juvenile court’s dispositional order terminated jurisdiction, awarded “sole legal and physical custody of the minors” to father, and ordered that the custody order be filed in the family court. (*In re A.G. et al.* (2013) 220 Cal.App.4th 675, 682 (*A.G.*)). Yet, the *A.G.* court framed the case as one involving only a jurisdictional issue. (*Id.* at p. 683 [setting forth substantial evidence test].) By ignoring statutory and case law, the court then reached the legally incorrect conclusion “that the [juvenile] court erred in sustaining a petition that alleged only that Mother is mentally ill and is unable to care for the minors where Father has always been, and is, capable of properly caring for them.” (*A.G.*, *supra*, 220 Cal.App.4th at p. 683.)

The *A.G.* decision blurs the distinction between jurisdictional and dispositional hearings. (See *In re Fred J.* (1979) 89 Cal.App.3d 168, 178 [recognizing that the dependency scheme contemplates a “separate, discreet” disposition hearing].)

a. The dependency scheme involves a bifurcated proceeding.

The dependency scheme involves a bifurcated proceeding. The first phase is the jurisdiction hearing on the allegations of the Welfare and Institutions Code section 300

petition.³ (§§ 300, 355, 356; rules 5.682(a)-(f) and 5.684 (a); *In re Jeffrey P.* (1990) 218 Cal.App.3d 1548, 1554.)⁴ The purpose of the jurisdiction hearing is to address the sole issue of whether the child is a person described by section 300 and thus within the juvenile court’s jurisdiction. (See § 355, subd. (a).) The court takes jurisdiction over the children, not the parents. (*In re Joshua G.* (2005) 129 Cal.App.4th 189, 202.) Thus, “[f]or jurisdictional purposes, it is irrelevant which parent created those circumstances.” (*In re I.A.* (2001) 201 Cal.App.4th 1484, 1492.) This is because the purpose of a dependency proceeding is not to prosecute the parents but to protect children. (*In re Alexis H.* (2005) 132 Cal.App.4th 11, 16.)

If the court finds the allegation of the section 300 petition to be true, it must then proceed to the second, dispositional phase of the bifurcated hearing. (§§ 358, subd. (a), 360, subd. (d), 361.2; rules 5.682(g), 5.684(g) and 5.695(a).) One of the main purposes of the disposition hearing is to decide where the child will live. (§ 358, subd. (a); rule 5.695(a); see *In re Tasman B.* (1989) 210 Cal.App.3d 927, 931.)⁵

In this case, the *A.G.* court acknowledged that “the evidence supported the finding that Mother was unable to provide regular care for the minors due to her mental illness.” (*A.G.*, *supra*, 220 Cal.App.4th at p. 684; see also p. 685 [“Mother’s mental state was such that she was incapable of caring for the minors.”].) The court nevertheless found that it was erroneous for the juvenile court to sustain the section 300, subdivision (b) petition where “Father has always been, and is, capable of properly caring” for the children. (*Id.* at p. 683.) The decision is legally incorrect.

b. The A.G. court blurred the jurisdictional and the dispositional hearings.

There is no doubt the *A.G.* court conflated the issue of jurisdiction with the issue of disposition. This is evident from the court’s repeated reference to father’s fitness as a

³ All further statutory references are to the Welfare and Institutions Code.

⁴ The burden of proof at the jurisdiction hearing is a preponderance of the evidence. (*In re Matthew S.* (1996) 41 Cal.App.4th 1311, 1318; § 355, subd. (a).)

⁵ If removal of the child from parental custody is the disposition, the heightened clear-and-convincing-evidence standard is applied. (§ 361, subd. (c); see *In re Mariah T.* (2008) 159 Cal.App.4th 428, 441.)

parent. (See, e.g., *A.G.*, *supra*, 220 Cal.App.4th pp. 684, 685, 686[.] Due to its confusion regarding the bifurcated nature of dependency proceedings, the *A.G.* court erroneously held that “the matter belonged in the family court.” (*Id.* at pp. 677, 683-686.)

As we will explain below, the effect of the *A.G.* decision is to undercut the juvenile court’s dispositional options.

2. By mischaracterizing the case as a custody dispute, and by ignoring statutory and case law, the *A.G.* court overlooked the goals of the dependency scheme.

Dependency proceedings have a dual purpose of protecting a child’s safety and welfare and safeguarding parents’ right to raise their children. (*In re Jody R.* (199) 218 Cal.App.3d 1615, 1623; see also §§ 202, 300.2, 16500, 16500.1, subd. (a) and 16501.1, subd. (a).) The primary purpose of the juvenile dependency system, however, is to provide maximum protection to children who have suffered or are at substantial risk of suffering serious abuse or neglect. (*Jonathan L. v. Superior Court* (2008) 165 Cal.App.4th 1074, 1104 [“The purpose of dependency proceedings is to prevent risk, not ignore it.” [Citation.]]; see also 202, subd. (a).)

The California Supreme Court has long-recognized that “[c]hildren...have fundamental rights—including the fundamental right to be protected from neglect and to ‘have a placement that is stable [and] permanent.’ [Citations.] Children are not simply chattels belonging to the parent, but have fundamental interests of their own that may diverge from the interests of the parent. [Citation.]” (*In re Jasmon O.* (1994) 8 Cal.4th 398, 419.)

By mischaracterizing the case as a custody dispute, and by ignoring the goals of the dependency scheme, the *A.G.* court dismissed the risk of harm the mother posed to the children. (*A.G.*, *supra*, 220 Cal.App.4th at p. 684.) More specifically, the court noted that “Father slept in the bedroom with the minors and kept the door locked pursuant to the advice of the in-home counselor and temporarily moved out of the house with the minors to protect them from Mother.” (*Id.* at p. 685.) This reasoning ignores the statute prescribing that actual harm is not a predicate for juvenile court jurisdiction.⁶ It also

⁶ Section 300, subdivision (b) allows a juvenile court to assert jurisdiction when “[t]he child has suffered, or there is a substantial risk that the child will suffer, serious physical harm or illness, as a result of the failure or inability of his or her parent...to adequately supervise or protect the child, or the willful or negligent failure of the child's

overlooks the fact that in this case the children were still at a risk of harm due to their young ages (five and three years old at the time of the jurisdictional hearing). The effect of the decision leaves father with no custody order and mother with no visitation restrictions. As such, nothing prevented the mother from attempting to burn down the house while father and the children slept, or from talking the children into letting her into the children's new residence after father moved out with the children.

Because the *A.G.* decision thwarts the Legislative intent to provide maximum safety to children through the dependency scheme, the decision should be depublished.

3. By overlooking the distinct roles of the family court and dependency court, and by incorrectly relying on *John W.* and *Phoenix H.*, the *A.G.* decision dismissed the juvenile court's authority to make custody determinations.

Los Angeles County's Request describes the distinct functions of family court and dependency court, emphasizing the limited ability of family court to protect children who are at risk of serious abuse or neglect. (See Request, pp. 5-6.) Here, we will focus on why the juvenile court is better situated to make custody and visitation orders involving children who have been or are at risk of being seriously abused or neglected.

The differences between the two aforementioned courts bear re-emphasizing. "It is one thing for a family law court to determine the best interests of the child as between two parents under title 4 of the Family Law Act [Citation]. It is quite another for a juvenile court to determine the best interests of the child in a proceeding where there is the possibility both parents could lose custody or visitation rights." [Citation.]" (*In re Roger S.* (1992) 4 Cal.App.4th 25, 31 (*Roger S.*))

"In the context of juvenile dependency, weighing the best interests of the dependent child is always the court's paramount concern." (*In re Christopher I.* (2003) 106 Cal.App.4th 533, 550.) Dependency law is designed to provide "juvenile courts with

parent...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...to provide the child with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent...to provide regular care for the child due to the parent's...mental illness, developmental disability, or substance abuse." (300, subd. (b), italics added for emphasis; see also *In re I.J.* (2013) 56 Cal.4th 766, 733.)

the necessary tools and guidelines, as well as broad discretion, to make appropriate orders regarding dependent children consistent with this foundational principle.” (*In re A.J.* (2013) 214 Cal.App.4th 525, 536; see, e.g., § 245.5, ital. added for emphasis [“In addition to all other powers granted by law, the juvenile court may direct all such orders to the parent, parents, or guardian of a minor who is subject to any proceedings...as the court deems necessary and proper for the best interests of...the minor. These orders may concern the care, *supervision, custody, conduct, maintenance, and support of the minor....*”].)

In Phoenix B., supra, 218 Cal.App.3d 787, when a noncustodial father came forward to assume custody, the department moved to dismiss the dependency petition. (*Id.* at p. 790.) The juvenile court eventually granted the motion and urged the parents to take their custody dispute to family law court. (*Id.* at p. 791.) In that case, the juvenile court did not make a determination as to whether mother’s mental illness rendered her incapable of caring for the child. Thus, the A.G. court incorrectly relied on *Phoenix B., supra*, to support the conclusion that it should order the same kind of referral here.

In contrast to the facts in *Phoenix B., supra*, 218 Cal.App.3d 787, in *A.G., supra*, 220 Cal.App.4th 675, the juvenile court declared the minors dependents of the court and ordered them removed from mother’s custody. (*Id.* at p. 682 [After finding by “clear and convincing evidence danger exists to the [minors], and there is no reasonable means to protect them without removing them from [Mother's] custody,” the court ordered father to have “sole legal and physical custody.”].)

In *John W., supra*, 41 Cal.App.4th 961, superseded on other grounds by statute as noted in *In re Marriage of David & Martha M.* (2006) 140 Cal.App.4th 96, 102–103, the parents were involved in a bitter custody battle over their son. (*John W., supra*, at p. 964.) There, the petition simply alleged that John was at risk of ““serious emotional damage”” because the parents’ ““ongoing custody disputes [had] created a tense, hostile and unpredictable environment.”” (*John W., supra*, at p. 966; cf. *A.G., supra*, 220 Cal.App.4th at pp. 681-682 [petition included allegations of mother’s mental illness, including diagnosis of schizophrenia, her incapacity to care for the children, and the danger she presented to them].) The juvenile court ultimately terminated jurisdiction, but went on to split physical custody between the parents. (*Id.* at p. 964.) The Court of Appeal reversed the custody order and remanded to the family court, not the juvenile court, because “no basis for juvenile court jurisdiction existed.” (*Id.* at p. 965.)

True, the *John W.* court found that the family court, rather than the juvenile court, is the proper forum to adjudicate child custody disputes. (*John W.*, *supra*, 41 Cal.App.4th at p. 975.) That case, however, involved “two functional parents fighting for custody.” (*Id.* at p. 976.) None of mother’s repeated accusations of sexual abuse against her ex-husband were substantiated. (*Id.* p. at 964.) Furthermore, father moved out of the family home with the minors; and he subsequently filed a request for an order restricting mother’s visits and an order requiring her to vacate the family home. (*Id.* at p. 680.)

Acknowledging factual differences with *John W.*, *supra*, the *A.G.* court nevertheless remanded this matter to the family court. (*A.G.*, *supra*, 220 Cal.App.4th at p. 686 [“[T]he wisdom to be gleaned from *John W.* is that matters such as this one belong in family court.”]) But that case *is* distinguishable.

The *John W.* court explained: “Child custody disputes between divorced parents, neither of whom pose a risk of real detriment to the child, should not be waged at taxpayers’ expense in the juvenile courts.” (*John W.*, *supra*, 41 Cal.App.4th at p. 965.) The *John W.* court made this comment in a case where the juvenile court found jurisdiction when the parents *stipulated* to emotional harm caused by their misdeeds during the custody battle. (*Id.* at pp. 965–966.) The parents’ allegations of child abuse against each other were never sustained and thus there were no grounds for jurisdiction or removal, much less restrictions on custody and visitation. (*Id.* at pp. 964-965.)⁷

The *A.G.* court itself properly characterized *John W.*, *supra*, as “a bitter child custody case” between “two functional parents fighting over custody.” (*A.G.*, *supra*, 220 Cal.App.4th at p. 686.) In stark contrast, the present case involves only *one* fit parent,

⁷ In *John W.*, *supra*, 41 Cal.App.4th 961, the court also held that an exit order that included a provision making the order non-modifiable by the family court for 11 months exceeded the juvenile court’s jurisdiction. (*Id.* at p. 970.) For this additional reason, *John W.* has no application to this case. First, the order in the *A.G.* case contained no comparable provision making the exit order non-modifiable by the family court for a designated period. Second, in 2000 the Legislature enacted section 302, subdivision (d), which stated that a juvenile court order terminating jurisdiction “shall remain in effect after that jurisdiction is terminated”; and specifically authorized modification of a juvenile court exit order in the family court. (§ 302, subd. (d), Stats.2000, c. 921 (A.B.2464), § 1.)

and has *everything* to do with mother's unfitness or inability to care for the children. (*A.G., supra*, 220 Cal.App.4th at pp. 677-692.) In fact, the appellate court expressly found that "Mother's mental health is such that the minors would be at substantial risk if they were in Mother's custody." (*Id.* at p. 677; cf. *John W., supra*, 41 Cal.App.4th 961 [no showing that custody with *either* parent posed continued risk to the children warranting juvenile court supervision].) In other words, this case, unlike *John W., supra*, is not a mere child custody case.

In *A.G., supra*, the record showed that mother was experiencing auditory hallucinations, which were witnessed by the children. (*A.G., supra*, 220 Cal.App.4th at p. 677.) The occurrences resulted in her hospitalization because officers and the County Department of Children and Family Services "determined she was a danger to herself or others." (*Ibid.*) In fact, she had multiple hospitalizations prior to and during juvenile court proceedings. (*Id.* at pp. 677-678, 680.) Further, the mother claimed she was Jesus; failed to keep her psychiatric appointments and to take her medications; and dismissed her mental illness as a mere "problem with insomnia." (*A.G., supra*, 220 Cal.App.4th at p. 677.) She reported that she had conversations with President Obama, President Lincoln, the Kennedys, Marilyn Monroe and Michael Jackson. (*Id.* at pp. 678, 681; see also p. 680.)

Mother presented a risk of harm to herself and to the children in that on one occasion, she convinced the nanny to leave early and the children were left alone with the mother for three hours before the father arrived home. (*A.G., supra*, 220 Cal.App.4th at p. 677.) She also had a suicidal episode when "auditory hallucinations ordered her to take pills and kill herself." (*Id.* at p. 678.) Furthermore, in the presence of the children, she "attempted to stuff a piece of paper down Father's throat." (*Ibid.*)

The juvenile court sustained the section 300, subdivision (b) petition in *A.G., supra*, 220 Cal.App.4th 675. (*Id.* at p. 681.) And as noted earlier, at the dispositional hearing, the juvenile court found by "clear and convincing evidence" that removal of the minors from mother's custody was necessary for their protection, declared the minors dependents of the court, and ordered father to have custody. (*Id.* at p. 682.)

In short, this case indisputably involved facts that gave rise to the juvenile court's jurisdiction. The *A.G.* court erroneously relied on *Phoenix B., supra*, and on *John W., supra*—a case which the *A.G.* court itself acknowledged was one in which "there was no

finding of abuse.” (*A.G., supra*, 220 Cal.App.4th at p. 686). Consequently, the *A.G.* court disregarded the fact that the juvenile court is the proper forum for resolving cases that involve serious child abuse or neglect and erroneously overruled the juvenile court’s correct jurisdictional finding

a. The juvenile court has a special responsibility to the child as *parens patriae*.

In *In re Chantal S.* (1996) 13 Cal.4th 196 (*Chantal S.*), the Supreme Court stated:

...When...a juvenile court hears a dependency case..., the court deals with children who have been seriously abused, abandoned, or neglected. The juvenile court has a special responsibility to the child as *parens patriae* and must look to the totality of a child's circumstances when making decisions regarding the child.” (*Id.* at p. 201, italics in original.)

Because the juvenile court “has been intimately involved in the protection of the child,” it is “best situated” to make custody and visitation orders based on the child’s best interests. (*Id.* at p. 206.)

The *A.G.* court disregarded the juvenile court’s special relationship with a dependent child. As applied to cases involving a non-offending parent, the effect of the *A.G.* decision is to divest the juvenile court of its jurisdiction in such cases and to render meaningless the legislative grant of authority for juvenile court to exercise dispositional options that serve a child’s best interests.

b. The *A.G.* court disregarded the juvenile court’s authority to award custody to a non-offending parent.

One effect of the *A.G.* decision is take away the juvenile court’s authority to award custody to a non-offending parent. (See § 361, subd. (c)(1) [authorizing juvenile court to order “nonoffending parent...to retain physical custody as long as that parent ...demonstrat[es] that he or she will be able to protect the child from future harm.”].)

c. The *A.G.* court disregarded the juvenile court’s authority to make exit orders regarding custody and visitation.

The juvenile court is also authorized to issue “an order determining the custody of, or visitation with, the child” upon termination of dependency proceedings. (§ 362.4;

(*John W.*, *supra*, 41 Cal.App.4th at p. 970 [noting that orders under section 362.4 are also known as “‘exit’ orders.”].) Such orders are transferred to an existing family court file and remain in effect until modified or terminated by the superior court. (*Chantal S.*, *supra*, 13 Cal.4th at p. 203; *A.C.*, *supra*, 197 Cal.App.4th at p. 799.) “By empowering the juvenile court to issue custody and restraining orders, the Legislature has expressed its belief that ‘the juvenile court is the appropriate place for these matters to be determined and that the juvenile court’s orders must be honored in later superior court proceedings.’” (*Roger S.*, *supra*, 4 Cal.App.4th at p. 31.) This point was overlooked by the A.G. court.

The decision disregards the fundamental rights of children and the underlying purpose of the child protection statutory scheme. By giving undue emphasis to the father’s ability to care for and protect the children, the A.G. court overstepped its duty as an appellate court. (See *In re Stephanie M.* (1994) 7 Cal.4th 295, 318-319 [Custody determinations in a dependency proceeding are reviewed for abuse of discretion, and will not be disturbed unless the juvenile court’s ruling is arbitrary, capricious, or patently absurd.”].)

CONCLUSION

The decision is incorrectly decided and sets a bad precedent. It will impede the achievement of maximum protection for dependent children who are at risk of serious abuse or neglect. For this reasons, CSAC requests that the opinion in this case be depublished.

Respectfully submitted,

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Proof of Service Attached