

health experts, they are trained to recognize the nuance of a defendant's presentation and explain how it affects various aspects of cognition, ultimately providing the court with the information material to addressing the ultimate problem.

Evaluators must take care to be clear and precise in their explanations. In this case, there was noted ambiguity in the interpretation of Mr. Mitchell's need for "coaching and support" in relation to his competence abilities. When providing such recommendations, evaluators should be specific regarding what supports are needed, how often, and how the court may accommodate them. For example, a defendant may be easily overwhelmed and benefit from short breaks. In a system that puts the burden on the defendant and the attorney to prove incompetence, a forensic evaluator serves a crucial role in protecting a defendant's constitutional rights.

## Parental Substance Abuse and Harm to Child in California Dependency Law

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**In Child Welfare Cases in California, Substance Abuse Not Determined by DSM or Professional Diagnosis; Substance Abuse Alone Insufficient as Basis for Dependency Finding**

DOI:10.29158/JAAPL.240058-24

**Key words:** dependency proceeding; substance abuse; tender years; child abuse; neglect

In *In re N.R.*, 539 P.3d 417 (Cal. 2023), the California Supreme Court reviewed a challenge to the definition of substance abuse delineated in the state's Welfare and Institutions Code § 300 (2019) brought by a father whose infant was removed from his custody. The court defined "substance abuse" in the more general sense of meaning excessive use of alcohol or drugs and additionally held that substance

abuse alone is not sufficient evidence of a parent's inability to provide regular care to a child.

### Facts of the Case

In November 2020, N.R., a 12-month-old, was transferred to the care of his father after a Los Angeles Department of Children and Families (DCFS) social worker had safety concerns about the conditions at N.R.'s mother's home. The father allowed the social worker to tour his residence and agreed to submit to a drug test, which returned positive for cocaine. He denied he was a regular user of the substance and stated that he had used cocaine recently for several days to celebrate his birthday. N.R. remained in his father's care with no other concerns noted by social workers.

In December 2020, DCFS filed a petition in Los Angeles County Superior Court alleging that N.R. was in danger of physical harm as a result of inappropriate supervision or care by his father because of his father's substance abuse. Specifically, the petition alleged that the father had a history of substance abuse, noting the positive toxicology result, and as a result was unable to provide regular care for N.R. The child was subsequently removed from his father's custody.

The father reported to social workers that he did not regularly use drugs and never used drugs while taking care of N.R. He agreed to submit to drug testing and had three negative drug tests between January and March 2021.

In April 2021, the district court ordered that N.R. be removed from his father's custody because of the father's "substantial drug abuse history" (*In re N.R.*, p 424). The father was granted monitored visitation and ordered to participate in drug treatment services.

The father appealed, arguing that his cocaine use did not amount to substance abuse. Noting discrepancies in the definition of the term "substance abuse," the father asked the court to utilize the definition provided in *In re Drake M.*, 149 Cal. Rptr. 3d 875 (Cal. Ct. App. 2012)). There, the appeals court clarified that the term "substance abuse" must be based on evidence that "(1) show[s] that the parent or guardian at issue had been diagnosed as having a current substance abuse problem by a medical professional or (2) establish that the parent or guardian at issue has a current substance abuse problem" as defined in the current edition of the DSM (*In re Drake M.*, p 885). The father also argued against the *prima facie* finding in *Drake M.*, which found that substance abuse itself was "evidence of the inability

of a parent or guardian to provide regular care resulting in substantial risk of harm. . . to a child of ‘tender years.’” (*In re Drake M.*, p 886). The term “tender years” has been used to refer to children of a young age who are unable to care for themselves.

The appeals court affirmed. The court concluded there was substantial evidence of substance abuse and that the father had not rebutted the *prima facie* argument, citing that N.R. was of tender years. The court ordered that N.R. be removed from his father’s custody “to mitigate the substantial danger to the very young child from Father’s cocaine abuse” (*In re N.R.*, p 425). The case was appealed to the California Supreme Court.

#### Ruling and Reasoning

In a unanimous decision, the California Supreme Court reversed and remanded the case to the appeals court. The court clarified that the term “substance abuse” should be defined by its ordinary meaning of “excessive use of drugs or alcohol” (*In re N.R.*, p 428). The court explained that the common meaning of “substance abuse” should be applied because it was not clearly defined in the legislation. Although this is a broader interpretation of this term, the statute itself places limits on when substance abuse qualifies for a jurisdictional finding.

The court also ruled that substance abuse can be established without a diagnosis of a medical professional and without satisfying criteria outlined in the Diagnostic and Statistical Manual (DSM). The court noted that DSM criteria were not created for legal purposes but are rather used clinically and in research. The statutory text does not mention the DSM, and it is unlikely that the California legislature would have intended to rely upon the DSM, in which changes are out of the legislature’s control. A finding of substance abuse also does not require a medical diagnosis because of the court’s limited ability to order a medical examination before dependency jurisdiction has been established, and a medical diagnosis of substance abuse may not adequately describe how a parent is unable to provide regular care for a child. Additionally, individuals in the dependency process may be unwilling to reveal pertinent information necessary for an accurate diagnosis.

The court also found that dependency jurisdiction requires more than just identification of substance abuse by a parent or guardian. There must also be a finding that the parent or guardian is unable to

provide regular care for the child and that, as a result, the child has suffered serious physical harm or illness or is at risk of such harm or illness. Additionally, the court rejected the argument that substance abuse alone is evidence of an inability of the parent to provide sufficient care for a child of tender years and noted that this “tender years rule amounts to a presumption” that “threatens to oversimplify the analysis required” (*In re N.R.*, p 441). It also wrongly assumes that the negative impact of parental substance abuse is greater to younger children. The court held that “an inability to provide regular care and a substantial risk of serious physical harm or illness must be established on the facts of each case” and must be applied regardless of the age of the child (*In re N.R.*, p 441). It is within the court’s purview to weigh all facts and evidence in making a decision and not consider one established fact as “always amounting to sufficient proof of other facts” (*In re N.R.*, p 441). As the court outlined in its opinion, this portion of the law is lacking in clear and specific definitions and allows the court to exercise its own judgment in determining the conditions under which a child could be removed from the home.

#### Discussion

The ruling by the California Supreme Court in this case clarified and broadened the definition of substance abuse from its previous definition in *Drake*. The rejection of a requirement for a professional diagnosis or satisfaction of DSM criteria reduces the role of expert testimony in establishing a finding of substance abuse as it applies to dependency proceedings in the state and may reflect the court’s unease with becoming too reliant on expert testimony at the expense of the fact-finders, in this case, the juvenile court system. The court’s opinion indicates that, although experts’ opinions may be helpful to the finder of fact, they are not necessary. Regarding psychiatric experts, the court points out the limitations and imperfections of the field, such as the subjective interpretation of diagnostic criteria and changes in DSM criteria over time.

Additionally, the court’s rejection of the tender years rule forces courts to consider how a parent or guardian’s substance abuse affects a child, regardless of the child’s age. Although maltreatment that occurs before the age of five leads to lifelong negative outcomes, parental substance abuse can negatively affect children of all ages. In rejecting this tender years rule,

the court avoids having to define the age at which a child is dependent on a parent or guardian. The court's ruling rejects the notion that the presence of substance abuse can be equated with child neglect and provides parents with a chance to rebut arguments that their substance abuse results in an inability to provide regular care for a child.

By rejecting the notion that the mere presence of a parent's substance abuse is enough to conclude that a child is in danger, this decision by the California Supreme Court echoes the landmark Supreme Court finding in *Robinson v. California*, 370 U.S. 660 (1962), where the Court determined that the mere status of being addicted to drugs could not be criminalized. In a similar way, the holding in the current case works to soften the stigma of drug abuse as evidence of wrongdoing in and of itself.

Dependency laws should balance both parental rights and the state's interest in protecting vulnerable individuals. Here, the court appears to have attempted to maintain such balance in its decision by broadening the definition of substance abuse while at the same time rejecting the notion that the presence of substance abuse is *prima facie* evidence of child neglect or abuse.

## Confinement and Treatment of Sexually Dangerous Persons

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**Illinois' Sexually Dangerous Persons Act Is Constitutional; the Prison Litigation Reform Act Determines Limitations of Injunction Against Program**

DOI:10.29158/JAAPL.240058L1-24

**Key words:** sexually dangerous persons; Prison Litigation Reform Act; civil commitment; sex offenders; dangerous offenders

In *Howe v. Hughes*, 74 F.4th 849 (7th Cir. 2023), the U.S. Court of Appeals for the Seventh

Circuit evaluated an injunction ordered by the federal court for the Southern District of Illinois regarding the state's Sexually Dangerous Persons (SDP) Act, which allows for the civil commitment of sex offenders who are considered too dangerous for release. The director of the Illinois Department of Corrections (currently Ms. Latoya Hughes) has the authority to commit and indefinitely detain individuals who have been charged with a crime and found to have a mental illness as well as the propensity to commit future sexual offenses, including sexual assault and child molestation. The Act stipulates that individuals committed under its authority must receive treatment "to effect recovery" and be discharged once they are determined to be "no longer dangerous." The question brought before the court in this case regards whether the Illinois SDP Act meets these constitutional requirements as enacted at the Big Muddy River Correctional Center and where the limitations lie in the district court's injunction to correct any violations.

### Facts of the Case

James Howe, Jacob Kallal, and George Needs were each civilly committed and held at Big Muddy River Correctional Center under the SDP Act of Illinois, which mandates treatment for individuals determined to be likely to commit future sexual crimes. The SDP Act requires the state to prove that an individual has committed a sexually violent offense and may benefit from sex offender treatment; the individual may then be held indefinitely to undergo this treatment. Mr. Howe was incarcerated from 2013 to May 2023 (when he obtained a conditional release) after being charged with aggravated criminal sexual assault, following a sexually dangerous persons petition hearing that included testimony from three psychiatrists who examined Mr. Howe, four women who previously had relationships with Mr. Howe, and two police officers who had investigated past incidents for which Mr. Howe had been convicted. He had previously been convicted for felony violation of order of protection in 2003, misdemeanor criminal sexual abuse by the use of force in 2004, and felony unlawful restraint and failure to register as a sex offender in 2009. Mr. Kallal was civilly committed in 2001 after being charged with sexual abuse of an eight-year-old girl. Mr. Needs was committed in 1980 after being charged with sexually assaulting a four-year-old girl.