IN THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIFTH APPELLATE DISTRICT

[CLIENT NAME], Petitioner, v. THE SUPERIOR COURT OF KERN COUNTY, Respondent; KERN COUNTY DEPARTMENT OF HUMAN SERVICES, et al. Real Parties in Interest.	F_____ Kern County Juvenile Court Nos. J_____ J_____

PETITION FOR WRIT IN THE NATURE OF MANDATE OR PROHIBITION

INTRODUCTION

A. Nature of the Case

This matter involves the disposition orders made in a juvenile court dependency action. The issue concerns the court's findings and orders that out-of-home placement was appropriate and necessary for the children.

B. Why Extraordinary Relief Is Warranted

Extraordinary relief is warranted in this matter because: (1) the family relationship of petitioner and the dependent children may be irreparably harmed by the challenged order denying placement of the children with petitioner, a non-

offending parent; and (2) an appellate remedy is inadequate because it is too slow to achieve the needed result of placement of these children in the home of petitioner (their mother). Instead of working on building a permanent and secure relationship with their mother, the children, who are placed in separate foster placements, are being placed "on hold" in the foster care system and potentially harmed further, emotionally and/or physically, during the months they are forced to live in out-of-home placement.

C. Timeliness

The challenged order denying placement of petitioner's children with petitioner with family maintenance services was entered on October 20, 2004. The Notice of Appeal from the October 20, 2004 order was filed on October 25, 2004. A transcript for that appeal was filed with this court on or about November 20, 2004. Petitioner filed a motion to treat the appeal as a writ on December 15, 2004. On December 22, 2004, this court granted petitioner's motion and invited petitioner to file her writ petition on or before December 30, 2004.

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PETITION

TO JAMES A. ARDAIZ, THE HONORABLE PRESIDING JUSTICE, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIFTH APPELLATE DISTRICT:

Petitioner, [CLIENT NAME], alleges the following:

1. Petitioner is the biological mother of the minor children [minor-X] (date of birth 7-11-91) and [minor-Y.] (date of birth 8-11-92), two children whose custody status was the subject of the underlying dependency action.

2. Respondent is the Superior Court in and for Kern County, sitting in session as the juvenile court. Said tribunal is and at all times herein has been a tribunal exercising judicial functions in the subject actions, case numbers J_____ (*In re Minor-X.*) and J_____ (*In re Minor-Y.*).

3. Real parties in interest include the Kern County Department of Human Services (the Department), [father's name], presumed father of both [minor-X.] and [minor-Y.], and the minors [minor-X.] (age 13) and [minor-Y.] (age 12).

4. All above-named parties are properly joined herein as parties directly affected by the present proceeding now pending in respondent Superior Court. All proceedings about which this petition is concerned have occurred within the territorial jurisdiction of respondent Superior Court and the Court of Appeal of the State of California, Fifth Appellate District.

5. On September 10, 2004, the Department filed a petition under Welfare and Institutions Code section 300, subdivisions (a) and (b), alleging that Real Party in Interest [father] inflicted serious physical harm on [minor-X.] and his step-sibling

[minor-C.] and failed to protect the children due to his alcohol abuse and because he engaged in domestic violence against the children's step-mother, [name].

6. On October 4, 2004, an uncontested jurisdiction hearing was held on the petitions, at which time [father] submitted on the allegations and the children were found to be children described by Welfare and Institutions Code section 300, subdivisions (a) and (b).

7. On October 19 and 20, 2004, a contested disposition hearing was held, at which time [father] contested the Department's recommendation that the children [minor-X.] and [minor-Y.] be placed with petitioner, [client name], and that family maintenance services be provided to petitioner and the children. After testimony of the parties and despite the children's desire to reside with petitioner, the juvenile court refused to follow the Department's recommendation. Instead, the juvenile court ordered the children be placed in foster care and that reunification services be provided to both petitioner and [father].

8. Relief from this disposition order is sought from this court in the first instance as authorized by Code of Civil Procedure sections 1085, *et. seq.* and 1102, *et seq.,* and any other applicable authority.

9. Petitioner, the mother of these children, has a clear, present and fundamental right to the care and custody of [minor-X.] and [minor-Y.] As such, petitioner has a beneficial interest in these proceedings. In addition, the children have the right to preservation of, and placement with, their family. Because their interests

in the parent-child relationship are intertwined, petitioner and her children have a beneficial interest in these proceedings.

10. Unless restrained and prohibited by order of this court, petitioner may be further deprived of the custody of her children in violation of her rights to due process of law under the Fifth and Fourteenth Amendments of the United States Constitution, Article 1, section 7 of the California Constitution, and Welfare and Institutions Code section 361.2.[1] Moreover, the children are being deprived of their rights to preservation of, and placement with, their family, as required by sections 202, 300.2 and 361.2.

11. The actions of respondent Superior Court were in excess of jurisdiction, an abuse of discretion, a violation of California's statutory scheme, a violation of California's Constitution, and a violation of the United States Constitution. Respondent Superior Court was required to follow the requirements of section 361.2 when dealing with placement of children with a non-custodial non-offending parent such as petitioner. Because respondent Superior Court did not do so, the order denying petitioner placement of her children with family maintenance services was in excess of respondent Superior Court's jurisdiction and an abuse of its discretion, as more fully detailed in the attached Memorandum of Points and Authorities.

WHEREFORE, petitioner respectfully prays:

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[1] All statutory references throughout this Petition and Memorandum of Points and Authorities are to the Welfare and Institutions Code unless otherwise specified.

1. That a peremptory writ in the nature of mandate issue under seal of this court pursuant to Code of Civil Procedure section 1085, commanding respondent Superior Court to vacate its disposition order made on October 20, 2004, and issue instead an order placing the children [minor-X.] and [minor-Y.] in the custody of their mother, petitioner [Client name].

2. That an alternate writ in the nature of a mandate issue directing and compelling respondent Superior Court to show cause before this court, at a specified time and place, why the relief prayed for should not be granted.

3. For issuance of a peremptory writ in the nature of prohibition retraining respondent Superior Court from continuing to deprive petitioner of the custody and control of her children [minor-X.] and [minor-Y.]

4. For issuance of an alternate writ in the nature of prohibition directing and compelling respondent Superior Court to show cause before this court, at a specified time and place, why the relief prayed for should not be granted.

5. For such other and further relief as this court may deem just and proper.

DATED:_____ Respectfully submitted,

_____
[Attorney name], State Bar No. _____
Attorney for Petitioner [CLIENT NAME]

VERIFICATION

I, [ATTORNEY NAME], declare as follows:

1. I am an attorney licensed to practice law in the State of California.

2. My office is located in [town], California, in the County of [name].

3. I am the attorney for petitioner [Client name], having been appointed to represent [Client name] by this court on November 19, 2004. I am appointed under the Central California Appellate Program [Assisted/Independent] Case System.

4. Petitioner resides in [town], California, in the County of [name].

5. Because petitioner resides outside the county where I have my law office and because the allegations of this petition are based on my reading of the appellate record on file with this court in Case Number F_____, I assert the truth of such representations made in the within petition on my information and belief that such representations are true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 29th day of December, 2004 in [town], California.

_____

[Attorney name]
Declarant

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT IN THE NATURE OF MANDATE OR PROHIBITION

COMBINED STATEMENT OF THE FACTS AND CASE[2]

1. Detention and Jurisdiction

Petitioner is the mother of [minor-X.] (13 years old) and [minor-Y.] (12 years old). Petitioner has five other children ranging in age from 15 to 21 years. (C.T. pp. 28, 157.)[3] None of petitioner's other children are the subject of this dependency proceeding.

[minor-X.] and [minor-W.] were removed from their presumed father, Real Party in Interest [father's name],[4] because [minor-X.] and his step-sibling [minor-C.] suffered physical abuse at the hands of [father] and there was domestic violence between [father] and [minor-X.]'s and [minor-Y.]'s step-mother. (C.T. pp. 2-34.)[5]

No allegations were filed against petitioner in this proceeding. (R.T. pp. 6, 19.)

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[2] A combined Statement of the Case and Facts is recommended in dependency appellate proceedings. (*In re Kimberly F.* (1997) 56 Cal.App.4th 519, 522, fn. 2.)

[3] During his testimony at the disposition hearing, Real Party in Interest makes reference to a child "[Minor D.]". (R.T. pp. 39-40.) [Minor-D.], who died by hanging while in the California Youth Authority (and may have committed suicide), is not petitioner's child. (C.T. pp. 28, 69, 158.)

[4] See R.T. 7-10 (re presumed father status).

[5] Although no sexual abuse allegation was filed against [father], at the time of the disposition hearing a criminal proceeding was pending against him based on allegations that he and [minor-Y.] were having sexual relations. (R.T. pp. 113-114.)

Petitioner was previously married to [father]. (C.T. p. 157.) [Father] physically abused petitioner during their marriage. (C.T. pp. 27-28.)[6] [Father] concealed and kept the children from petitioner after their divorce. Despite petitioner's attempts to exercise the custody and visitation rights granted to her by the family court, there were long periods of time in which petitioner had not contact with her children. (C.T. pp. 157, 176-203; R.T. pp. 27-36, 50-56, 64-67.)

In its report for the detention hearing, the Kern County Department of Human Services (the Department) stated petitioner admitted a history of substance abuse. Petitioner had been sober since April 6, 2002. The Department further stated that petitioner "is in a lesbian relationship with [partner]. They reside together." (C.T. p. 28.)

Petitioner requested placement of [minor-Y.] and [minor-X.] at the detention hearing on September 13, 2004. (R.T. pp. 10-11.) At that time, the Department recommended, and petitioner was only granted, supervised visits. (C.T. pp. 32-33; R.T. pp. 13-15.)

In its Social Study prepared for the October 4, 2004 jurisdiction hearing, the Department reported that petitioner's only criminal record was for driving without a license. (C.T. pp. 80.) Although [father]'s household was the subject of many Child Protective Services referrals, petitioner's only Child Protective Services record was

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[6] There are two Clerk's Transcripts on Appeal filed with this court, one for [minor-X.] and one for [minor-Y.] These transcripts are substantially similar, although not identical. For purposes of this writ, reference will be made solely to the Clerk's Transcript filed for [minor-Y.]

an unfounded allegation of physical abuse by petitioner against [minor-X.]. (C.T. p. 82.)

2. Disposition

A. Department's Recommendation

In its Social Study prepared for the October 19, 2004 disposition hearing, the Department acknowledged petitioner as the non-custodial, non-offending parent coming forward to request placement of [minor-Y.] and [minor-X.]. The Department recommended the children be placed with petitioner. The Department noted petitioner's agreement to participate in sexual abuse awareness counseling and family counseling with the children, as well as to enroll the children in individual counseling. (C.T. pp. 159, 161.)

The Department's disposition report did not specifically label petitioner as a lesbian. However, the report included information, including a criminal history and child abuse index check, on petitioner's partner, [partner]. (C.T. pp. 161-164.) The Department's failure to specifically re-state that petitioner was a lesbian caused respondent Superior Court (hereafter "the court") to express disappointment and concern regarding the report, and to state that the report was "very misleading to the Court." (R.T. pp. 78-79.)

B. [Father]'s Objections to Placement With Petitioner

[Father] objected to the Department's recommendation. (R.T. p. 25-26.) He testified petitioner never visited the children, although even his own counsel appeared confused as [father] described the significant contact petitioner had managed to have

with her children. (R.T. 28-35.) [Father] believed petitioner did not have a stable lifestyle, would not keep the children safe, and would not send the children to school. [Father] also did not like petitioner's partner, [partner], nor did he approve of petitioner's lesbian "lifestyle." (R.T. 35-43.)

[Father] testified he had recently considered allowing [minor-X.] to live with petitioner, despite his knowledge of petitioner's "living arrangement." (R.T. 43-46.) However, [father] stated he did not "agree with my children being in that type of thing" (a statement to which the court responded "Sure."). (R.T. p. 46.) [Father] testified he was "not open to the fact of my children going and living in a lifestyle like that." (R.T. pp. 46-48.)

C. Petitioner's Drug History

The Department's disposition recommendation included petitioner submitting to random drug tests. However, the Department's Social Worker, [name], testified at the disposition hearing she saw no signs of drug use by petitioner during her home visits, interviews, and observations of petitioner. As part of her investigation, [name] had not personally required petitioner to drug test. [Name] was unaware if petitioner had tested for the Department. (C.T. p. 166; R.T. pp. 83-84, 98-99.)

D. Child Protective Service Referrals Regarding [Partner's Name]

Regarding petitioner's partner, [name], the Department's disposition report noted she had no biological children but that she had legal guardianship of two children. There were Child Protective Services referrals related to [partner] and her wards, but there was no match on the Department of Justice Child Abuse Central

Index and no open case on the children. (C.T. p. 161; R.T. pp. 55-56, 76-78.) At the disposition hearing, social worker Hall testified she spoke with [partner]'s ward [minor-A.] regarding the allegations she made against [partner], and although one of the allegations was apparently substantiated, the social worker was satisfied that the allegations did not pose a risk to [minor-Y.] and [minor-X.]. (R.T. pp. 76-78.) The court remained dissatisfied that the Department did not specify the exact allegations made against [partner]. (R.T. pp. 114-115.)

E. Petitioner's Residence and Household Income

Regarding petitioner's home, the Department reported it was "adequate" and did not "possess any immediate safety hazards for the children based on their age." [minor-X.] would have his own room, and [minor-Y.] would share "a large bedroom with her siblings." (C.T. p. 162.)

If [minor-Y.] and [minor-X.] were placed in the home, 8 people would be residing in petitioner's and [partner]'s four bedroom home: [partner], her two wards, petitioner and three of her children ([minor-J.], [minor-X.], and [minor-Y.]) and [partner]'s father, [name], who was 70 years old and terminally ill, and for whom petitioner provided In-Home Supportive Services. (R.T. pp. 69-70, 72, 79, 107-109.)

During the disposition hearing, petitioner's household income became a source of concern for the court. Petitioner testified she received AFDC benefits and some income from her in-home supportive services to [name].

F. [Partner]'s Social Security Benefits

[Partner] receives Social Security benefits, although neither petitioner or social worker [name] where certain during their testimony whether this was because she was diabetic or had some form of mental disability. However, during her meetings with [partner], social worker [name] saw no signs that [partner] had a severe mental illness that would cause any risk to [minor-Y.] or [minor-X.]. (R.T. pp. 57-58, 61, 63, 80-83, 99, 109.) At the conclusion of evidence at the disposition hearing, County Counsel stated that [partner] informed social worker [name] during the break that her benefits were for "her diabetes and her physical disability." (R.T. p. 105.)

G. Children's Desire to Live With Petitioner and Minors' Counsel's Position

Prior to his detention from [father]'s home, [minor-Y.] wanted to live with petitioner. (R.T. pp. 37, 44-47.) [Minor-X.] told the social worker from the time of his detention that he loves his mother and would rather live with her than his father. (C.T. p. 15.) During the disposition hearing, social worker [name] testified that [minor-X.] wanted to live with petitioner. (R.T. p. 100.)

In contrast, [minor-Y.] was very protective of [father] and wanted to remain with him. (C.T. pp. 63-64.) At the jurisdiction hearing, [minor-Y.]'s counsel reported [minor-Y.] "very much wants to go home with her father today." (R.T. p. 22.) At the disposition hearing, social worker [name] testified that during her initial conversations with [minor-Y.], the child stated she did not want to live with petitioner because petitioner was a lesbian. However, by the time of the disposition hearing

[minor-Y.] had changed her mind and stated she'd like to live with her mother. (R.T. pp. 85-91, 100-101.)

During closing argument at the disposition hearing, minors' counsel conceded both of his clients wished to be placed with petitioner. Minors' counsel nevertheless argued against placement. Referring to the parties' focus on petitioner's lesbian relationship, minor's counsel stated he believed that could be taken "out of the equation" and placement was still not warranted because: (1) there were too many people living in the home; (2) there was too little income to support those people; (3) there was too many unknowns about the adults living in the home regarding their personal problems and issues; and (4) there was insufficient explanation regarding the Child Protective Services referrals regarding petitioner's partner [partner's name] (R.T. pp. 119-120.)

H. The Court's Ruling Denying Placement With Petitioner

In its statement of decision, the court denied placement with petitioner because "placement of the children would be detrimental to their interests." (R.T. p. 120, 126.) Agreeing with minors' counsel, the court stated the "status" of petitioner's household was "questionable." The court was concerned about the referrals regarding [partner]'s ward. (R.T. pp. 120-121.) The court was also clearly concerned about petitioner's lesbian relationship. Conceding it had done the jurisdiction hearing and therefore had been specifically informed in that report regarding the relationship, the court went on to state:

COURT: I am concerned, though, that the dispositional report mentioned nothing of that particular relationship in the report. And even if somebody just read the dispositional report, you would believe that it was, perhaps, what may be considered to be a traditional family relationship, and that there were two other adults in the home, a [partner] and [name], but no reference was made to the fact that [name] was the father of [partner] and was being cared for because of a terminal illness. So I was concerned about that.

I'm also – as I have stated before, I am concerned about the department's failure to consider the impact on the children of placing them into this kind of a relationship.

And although the social worker indicated that that's not the consideration of theirs, that they feel that's discrimination, we're not here to determine whether or not we're discriminating against parents. We're here to determine what is the best interests of the children. And I feel we're putting the best interests of the children secondary to some rights that some people may feel they have as parents.

Parents do have rights. But I think the only reason that the Court is intervening in this case is because of the issue of whether or not the best interest of the children are at stake here. And the Court really believes that the best interests of the children are at stake. And there was not an adequate consideration made into this situation. Especially when you had a child who told the social worker that she did not want to enter or live in that household initially because she was opposed to the lifestyle of her mother.

And, frankly, I find nothing wrong with a child saying that. I think children should be given values in life. And I think it's appropriate for somebody to discuss those values with them.

I don't think it's appropriate for the social worker and the Department of Human Services to try to change the mind of that child to think differently. That's not their job. That is not their job. I think the parents have a right to instill the moral values.

Now, I don't know what the values were of the household that the children were in. And I understand the dilemmas that the social worker – in which the social worker was placed, where she certainly had allegations and there were criminal charges pending now of the daughter sleeping with the father.

But you look at this whole background and you see just a whole load of issues of sexual abuse, sex among the children, all these improprieties which are totally dysfunctional in a family. And we're going to take these poor children and put them into what is traditionally another questionable family environment.

I mean, I don't care what the new generation is saying about we have to accept this. And you know what, I don't know that people have to accept it, especially children, when it's going to have a detrimental effect on their life and they've expressed a desire not, initially, to go into that type of environment.

I don't think that the State or the Court or anybody else is forced to place them in there, because people have rights to live the way they want to; that is, in a nontraditional family sense.

That's the whole reason we take children out of the – take dependency issues in, is because of nontraditional families. It's a nontraditional issue. Whether or not they want to accept this – the state wants to accept this as a traditional family, that's another issue. I don't think that is the issue before the Court.

The issue before the Court is the best interest of the children.

I really concur with [minors' counsel] on this. I think we can cut out that issue of the relationship of the mother with her lesbian partner. But there are so many issues here that really trouble the Court placing these children in that type of environment. I certainly think it would be wrong for the Court to intervene in that way and do something like that.

* * *

The non-custodial parent's request for placement is denied, as the Court finds it is detrimental to the children's interest. (R.T. pp. 121-127.)

Petitioner filed a timely notice of appeal to this decision. (C.T. pp. 204-205.)

Thereafter, this court granted petitioner's motion to convert the appeal to a writ.

ARGUMENT

RESPONDENT SUPERIOR COURT'S DENIAL OF PLACEMENT WITH PETITIONER WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND MUST BE REVERSED

The court erred when it denied placement of [minor-Y.] and [minor-X.] with their mother, a non-custodial and non-offending parent. The findings and evidence in this case do not support the court's conclusion that placing [minor-Y.] and [minor-X.] with their mother would be detrimental to the children's safety, protection, or physical or emotional well-being.

When a court orders removal of a child pursuant to Section 361, the court must first determine if there is a parent with whom the child was not residing at the time that the events or conditions arose that brought the child within the provisions of Section 300, who desires to assume custody of the child. If that parent requests custody, the court shall place the child with the parent unless it finds that placement with that parent would be detrimental to the safety, protection, or physical or emotional well-being of the child. (Welf. & Inst. Code, sec. 361.2, subd. (a).)

Section 361.2 establishes the procedures a juvenile court must follow for placing a dependent child following removal of that child from the custodial parent pursuant to section 361. (*In re Marquis D.* (1995) 38 Cal.App.4th 1813, 1820.) The court is specifically required to make either written or oral findings setting forth the basis for its determinations under Section 361.2 subdivision (a). (Welf. & Inst. Code, sec. 361.2, subd. (c).) Failure to follow this statutory procedure can result in a derogation of the goal to preserve family ties and to limit the court's control of a child

to that necessary for protection of the child and the public. (*In re Marquis D.*, *supra*, 38 Cal.App.4th at p. 1823; Welf. & Inst. Code, sec. 202, subd. (a).)

Pursuant to section 361.2, subdivision (a), a non-custodial parent is presumptively entitled to custody. (*In re Catherine H.* (2002) 102 Cal.App.4th 1284, 1292.) This is true because "[a] parent's interest in the companionship, care, custody and management of his children is a compelling one, ranked among the most basic of civil rights. [Citation.]" (*In re Marilyn H.* (1993) 5 Cal. 4th 295, 306.) In addition, children have the right to preservation of, and placement with, their family. (Welf. & Inst. Code, secs. 202, 300.2.)

Appellate review of the factual basis for dispositional orders looks for substantial evidence in the record, whether or not contradicted, supporting those orders. In making its determination, the appellate court reviews the record in the light most favorable to the juvenile court's determinations and draws all reasonable inferences from the evidence which support the court's determination, to determine whether evidence of reasonable, credible and solid value exists such that a reasonable trier of fact could find as the trial court found. (*In re Heather A.* (1996) 52 Cal.App.4th 183; *In re Nada R.* (2001) 89 Cal.App.4th 1166.)

In this case, the evidence relied upon by the juvenile court to support its findings and orders was not of reasonable, credible or solid value, nor was the evidence sufficient to support separation of a parent and her children. Instead, the court allowed it's apparent bias against same-sex domestic partnerships to govern its decisions.

A trial court's inability to allow homosexual parents equal parenting rights is not without precedent. Family courts have dealt specifically with this issue in the context of custody and visitation rights in cases of marriage dissolution. In that analogous context, appellate courts have long held that a parent is not unfit, as a matter of law, merely because he or she is homosexual. (*Nadler v. Superior Court* (1967) 255 Cal.App.2d 523, 525.) Consequently, a trial court may not determine custody on the basis of sexual preference alone. (*Marriage of Birdsall* (1988) 197 Cal. App. 3d 1024, 1028.) However, the court may consider a parent's homosexuality as a factor *along with* the other evidence presented. (*Chaffin v. Frye* (1975) 45 Cal.App.3d 39, 46.) Moreover, to the extent the court considers a parent's homosexuality, it should be considered only in light of its impact, *if any*, on the children. (*In re Marriage of Wellman* (1980) 104 Cal.App.3d 992, 998.)

The court in *Wellman* was dealing with another societal "hot-button" – non-marital relationships – and the proper context in which a trial court may consider evidence that divorced parents were engaging in such conduct in front of the children. The observations of the *Wellman* court are particularly apt here:

> It is not the function of a trial court in cases of this sort to punish parents for what the court may regard as their shortcomings, nor to reward an 'unoffending' parent for any wrongs suffered by the 'sins' of the other; '[t]he prime question is, what is the effect upon the lives of the children.' . . . [P] . . . As our state Supreme Court has explicitly recognized, nonmarital relationships are pervasive in current society, and mores in regard to cohabitation have changed radically, so that courts 'cannot impose a standard based on alleged moral considerations that have apparently been so widely abandoned by so many.' [Citation.]" (*Id*., at p. 998.)

The assumption that raising children in a homosexual household is automatically detrimental to children has likewise been "widely abandoned" in California. Family Code section 9000 expressly recognizes adoptions by "domestic partners." A "domestic partner" is defined in Family Code section 297 as including two persons of the same sex who meet the criteria set forth therein. Moreover, at least one appellate court has expressly rejected any implication that the suitability of a child's foster placement would be subject to question because his foster parents were lesbians. (*In re Brian R.* (1991) 2 Cal.App.4th 904, 917.)

In this case, the court had no *evidence* that placement of [minor-X.] and [minor-Y.] into petitioner's home (and consequently into a home in which there was an existing and open lesbian relationship between petitioner and [partner]) would be detrimental to either child. Instead of evidence, the court relied on his own concerns about the placement of the children "into this kind of relationship" (R.T. p. 122) and his speculation that placing children who have experienced "a whole load of issues of sexual abuse, sex among the children, all these improprieties which are totally dysfunctional . . . and [placing] these poor . . . into what is traditionally another questionable family environment." (R.T. p. 123.) In contrast, the evidence in this case, particularly with regard to [minor-X.], was that the children wanted to be placed with petitioner. [Minor-X.] wanted to live with his mother even before the Department intervened and removed the children from [father]. The only hint of detriment came from [minor-Y.]'s statement, made early in the proceeding, that she did not want to live with her mother because her mother was a lesbian. But [minor-

Y.] had clearly changed her mind by the disposition hearing, and stated through counsel and the social worker that she *wanted* to live with petitioner.

It could be argued that the court did articulate other concerns regarding placement of [minor-X.] and [minor-Y.] with petitioner. By concurring with minors' counsel that the issue of the lesbian relationship could be "cut out" from the placement decision, it could be inferred that the court was also concerned that: (1) too many people lived in the home; (2) there was too little income to support those people; (3) there were too many unknowns regarding the personal problems and issues of the adults living in the home; and (4) there was insufficient explanation regarding the Child Protective Services referrals regarding petitioner's partner [partner] (See R.T. pp. 119-120, 124.) Neither minors' counsel nor the court gave any indication of concern regarding petitioner's self-reported drug history.

Where a trial court has failed to make express findings, the appellate court generally implies such findings only where the evidence is clear. (*In re Marquis D., supra,* 38 Cal.App.4th at p. 1825.) In this case, the evidence of detriment based on the concerns articulated by minors' counsel were by no means clear.

Conjecture and doubts expressed by a court or counsel are not substantial evidence of risk of detriment. (*In re Steve W*. (1990) 217 Cal. App. 3d 10, 22-23.) Moreover, the cases dealing with the facts giving rise to court's and counsel's concerns in this case do not support a finding of detriment sufficient to separate a parent and her children, whether that parent is *offending* (and therefore subject to a detriment finding under section 361) or *non-offending* (and therefore, like petitioner,

subject to a detriment finding under section 361.2). For example, a child is not deemed to be at substantial risk of detriment because the parent is poor or receives AFDC. (*In re Danielle M*. (1989) 215 Cal. App. 3d 1267 [father's unemployment and lack of his own home was insufficient to deny his custody of two daughters removed from mother's custody].) As to the nebulous concerns that [partner] had a mental health problem, at least one court of appeal found that an offending parent's active schizophrenia was an insufficient basis on which to remove a child under section 361. (*In re Jamie M*. (1982) 134 Cal. App. 3d 530, 537.) Nor has petitioner's counsel found case or statutory authority holding that a child is at substantial risk of detriment simply because a parent does not provide her with her own room.

Out-of-home placement is a last resort, to be considered only when the child would be in danger if allowed to reside with the parent. (*In re Henry V.* (2004) 119 Cal.App.4th 522.) One extreme example supporting removal is found in *In re Jason L.* (1990) 222 Cal. App. 3d 1206. In *Jason L.,* the evidence revealed that a divorced father had sexually molested his daughter, engaged previously in adult homosexual relationships, shared a bedroom with his son and even showered with him on occasion. These facts supported removal of the son from father's custody, particularly when father had initially denied joint showers and mother testified that son's feelings of responsibility for father might have resulted in son's lack of truthfulness about his relationship with father.

In contrast, the findings and evidence in this case are far removed from the findings in *Jason L.* and do not support the conclusion that placing [minor-X.] and

[minor-Y.] with their mother would be detrimental to the safety, protection, or physical or emotional well-being of the children. Rather, this is a case in which the court did "not appear to fully appreciate 'the balance between family preservation and child well-being struck by the Legislature' when it drafted section 361." (*In re Henry V., supra,* 119 Cal.App.4th at pp. 530-531.) And, as noted by the court in *Henry V.*, important societal interests are served by keeping this balance in mind:

> [O]ur dependency system is premised on the notion that keeping children with their parents while proceedings are pending, whenever safely possible, serves not only to protect parents' rights but also children's and society's best interests. "Our society does recognize an 'essential' and 'basic' presumptive right to retain the care, custody, management, and companionship of one's own child, free of intervention by the government. (See, e.g., *Stanley v. Illinois* (1972) 405 U.S. 645, 651 [31 L. Ed. 2d 551, 92 S. Ct. 1208]; *Lassiter v. Department of Social Services* (1981) 452 U.S. 18, 27 [68 L. Ed. 2d 640, 101 S. Ct. 2153]; Civ. Code, §§ 232 *et seq*., 4600, subd. (c), 7000 et seq.; Welf. & Inst. Code, § 361 *et seq*.) Maintenance of the familial bond between children and parents--even imperfect or separated parents--comports with our highest values and usually best serves the interests of parents, children, family, and community. Because we so abhor the involuntary separation of parent and child, the state may disturb an existing parent-child relationship only for strong reasons and subject to careful procedures. (*In re Henry v., supra,* 119 Cal.App.4th at pp. 530-531. See also *In re Jasmine G*. (2000) 82 Cal. App. 4th 282, 292, ("[i]t must be recognized that the dependency statutes are a series of structured procedures and substantive rules intended to balance the protection of children and family preservation, not to impose the values, let alone the aesthetics, of "1999 Orange County" on any particular family).)

As demonstrated herein, the findings and evidence in this case do not support the court's conclusion that placing [minor-Y.] and [minor-X.] with their mother would be detrimental to the children's safety, protection, or physical or emotional well-being.

Therefore, the court erred when it denied placement of [minor-Y.] and [minor-X.] with their mother, a non-custodial and non-offending parent.

CONCLUSION

In this case, the court allowed it's apparent bias against same-sex domestic partnerships to govern its decisions denying petitioner placement of her children. Although the court was not precluded from considering the environment into which it placed the children, petitioner's lesbian relationship, in-and-of itself, was insufficient to deny placement. Moreover, none of the other evidence upon which the court impliedly relied to support its findings and orders was of reasonable, credible or solid value, nor was the evidence sufficient to support deny petitioner or her children the placement they all requested.

Because custody of children is a fundamental right to which a parent is entitled, the court's erroneous denial of placement violated petitioner's constitutional and statutory rights. Moreover, because [minor-Y.] and [minor-X.] also have a right to placement with, and preservation of, their family, the court's denial of their request for placement with petitioner violated the rights of the children.

For the foregoing reasons, and based upon the facts and arguments set forth in this Petition, petitioner respectfully prays:

1. That a peremptory writ in the nature of mandate issue under seal of this court pursuant to Code of Civil Procedure section 1085, commanding respondent Superior Court to vacate its disposition order made on October 20, 2004, and issue

instead an order placing the children [minor-X.] and [minor-Y.] in the custody of their mother, petitioner [Client name]

2. That an alternate writ in the nature of a mandate issue directing and compelling respondent Superior Court to show cause before this court, at a specified time and place, why the relief prayed for should not be granted.

3. For issuance of a peremptory writ in the nature of prohibition retraining respondent Superior Court from continuing to deprive petitioner of the custody and control of her children [minor-X.] and [minor-Y.].

4. For issuance of an alternate writ in the nature of prohibition directing and compelling respondent Superior Court to show cause before this court, at a specified time and place, why the relief prayed for should not be granted.

5. For such other and further relief as this court may deem just and proper.

Dated: December 29, 2004 Respectfully submitted,

_____
[Attorney name]
Attorney for Petitioner [Client name]

CERTIFICATION OF WORD COUNT
(CAL. RULES OF COURT, RULES 8.204(c), and 8.360(b)(1))

I, [Attorney name], declare:

1. I am an attorney licensed to practice in the State of California. I have been appointed by this court under the Central California Appellate Program Assisted Case System to represent petitioner [Client name]

2. The petition in this matter was produced on a computer using a word processing program. That program calculated the number of words in the petition to be 6,965, including the caption, signature blocks, tables of contents and authority, and this Certification of Word Count.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on [date] in [town], California.

_____
[Attorney name], State Bar No. _____
Attorney for Petitioner, [Client name]