I. THE JUVENILE COURT'S DETRIMENT FINDING IS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Section 366.21, subdivision (f) is the statute that sets forth the procedures the juvenile court must follow at a 12-month review hearing. That statute provides in pertinent part:

> At the permanency hearing, the court shall determine the permanent plan for the child, which shall include a deter-mination of whether the child will be returned to the child's home and, if so, when, within the time limits of subdivision (a) of Section 361.5. 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.

Section 366.21, subdivision (c) requires the social worker to file a report with the court containing his or her recommendations for disposition of the matter at that hearing. The statute specifically requires the social worker who recommends that the child not be returned to parental custody to "specify why the return of the child would be detrimental to the child."

The juvenile court made a detriment finding in this case but there is nothing in the social worker's report to support the finding that return to parental custody would have been detrimental to the children. The sole statement in the social worker's report concerning detriment is as follows:

> A[.] . . . was given 12 months to reunify with her children and has no suitable residence to provide for their care. The children would continue to be at risk if returned to her custody, as she resides with her boyfriend and his family. Ms. A. has stated her boyfriend will not be a part of her child-ren's lives, yet she remains in his home and has decided against pursuing

her own residence although CSA has pro-vided a Pro Family worker to assist her to seek housing.

(CT 252.)

This statement of detriment contains no facts that demonstrate how or why the children would be at risk if the children were returned to her custody to live with her in the boyfriend's home. There is no evidence that the agency had checked out the boyfriend and found him or his home to be unsuitable for the children in any way. The only evidence in the record concerning the boyfriend is that he has two children of his own--a nine year old and a one year old. (CT 213.) There is no evidence that he has abused or neglected his own children and no evidence that his home is uninhabitable or is otherwise not a safe place for children. A parent's lack of separate housing, in and of itself, may not serve as the basis for a detriment finding.

In *David B. v. Superior Court* (2004) 123 Cal.App.4th 768, 773, the agency recommended against returning a child to her father's custody because he lived in shared housing with relatives and had no home of his own. There was no evidence that the father was ever told by the agency or by the juvenile court that separate housing was a condition of having his children returned to him. The juvenile court accepted the agency's recommendation and concluded it could not safely release the child to the father's custody because of his housing situation. The court of appeal re-versed that finding and the order denying him custody of the child. Noting that the agency had the burden of proving that re-siding in that household would constitute a significant danger to the child, the court held that the agency had presented no evidence that showed that the

child would be at risk. The court further held that the juvenile court erred in just accepting the agency's judgment on the issue because the agency "specifically had the burden of *proving* the contention, it was entitled to no such deference." (*Ibid*: emphasis in the original.)

In *In re Danielle M*. (1989) 215 Cal.App.3d 1267, the court reversed a finding that it would be detrimental to place the father's children with him based on the social worker's argument that there was risk to the children because he was unemployed and living with his mother. In doing so, the court said,

> Here there was no evidence of how [the father's] lack of employment and a separate residence would adversely affect his daughters, and to hold these factors detrimental *per se* is unthinkable. . . . "The issue presented by this appeal is very clearly drawn. Can a court lawfully deprive a parent who is able to provide good care, of the custody of his/her child simply because the parent is unemployed and shares a home with his/her parent? The negative answer urged by appellant is absolutely required unless this court decides to license social services to remove all children from the unemployed and from those who by choice or necessity share a home with a friend or relative. Such intrusiveness must not be tolerated by a free society."

(*Id.* at p. 1271.)

The fact that the parent does not have separate housing, in and of itself, does not establish that there is a substantial risk of detriment to the children if they are returned to the parents' custody in that housing situation. Much more is required. The agency has the burden of establishing that return to parental custody would pose a substantial risk of detrimental to the child and must set forth the evidence of that detriment in the social worker's report. The agency did not do so in this case.

A.'s case plan contained no requirement that she obtain her own housing as a

condition of having her children returned to her. (CT 63-64.) Her lack of separate housing was not a reason her children became dependents of the court--her poor judgment in the selection of babysitters and failure to act promptly to protect her children when she discovered that the babysitter was hurting them were the bases for the dependency. A. had completed two programs designed to address these issues and although she did not necessarily comprehend everything those programs tried to teach her, the agency neither asserted nor established that a similar situation was likely to arise again in the future or was likely to arise if she resided with her boyfriend.

There is similarly no evidence that A. was advised that if she did not obtain separate housing her children would not be returned to her. Consequently, her failure to have obtained separate housing, particularly in the absence of any evidence of detriment if the children were to live with her in that housing, may not be used to support a conclusion that the children cannot be safely returned to her custody.

> What [the agency] was required to establish was that releasing [the child] to [the father's] custody would "create a substantial risk of detriment to the safety, protection, or physical or emotional well-being of the child." (Welf. & Inst. Code, § 366.22, subd. (a).) *That standard*, while vaguely worded to be sure, *must be construed as a fairly high one.* It cannot mean merely that the parent in question is less than ideal, did not benefit from the reunification services as much as we might have hoped, or seems less capable than an available foster parent or other family member.
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> We do not get ideal parents in the dependency system. But the fact of the matter is that we do not get ideal parents anywhere. Even Ozzie and Harriet weren't really Ozzie and Harriet. Ideal parents are a rare--if not imaginary--breed. Some of us get luckier than others when it comes to parents, and most who work in this system are able to look back and realize how fortunate they were. But the State of California is not in the business of evaluating parents and redistributing their offspring based upon perceived merit.
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> The parents who come through the dependency system are more in

> need of help than most. If we are lucky, they are parents who can learn to overcome the problems which landed their children in the system, and who can demonstrate the dedication and ability to provide for their child-ren's needs in an appropriate manner. They will not turn into superstars, and they will not win the lottery and move into a beachfront condo two blocks from a perfect school.
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> This is a hard fact to accept. We are dealing, after all, with children, and the dedicated people who work so hard to help these families are understandably desirous of providing those children the best possible circumstances in which to grow up. But there are times when we have to take a step back and make sure that we are not losing sight of our mandate. We are looking for passing grades here, not straight A's.

(*David B. v. Superior Court, supra,* 123 Cal.App.4th at pp. 789-790; emphasis added.)

In light of the fact that the agency cited A.'s housing situation as the sole reason why the children would be at risk if they were returned to her custody and provided no evidence of any kind as to how return to A.'s custody in that home would be detrimental for these children, there is no evidentiary basis for the court's finding that the children could not be safely returned to A.'s custody. Therefore, the order maintaining the children in continued out-of-home placement must be reversed.