IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN RE I.J. ET AL. (MINORS), Persons Coming Under the Juvenile Law. LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Respondent, v. J.J. (FATHER), Petitioner.	**Case No. S204622** Court of Appeal No. B237271 Superior Court No. CK59248

ON APPEAL FROM THE JUDGMENT OF
THE SUPERIOR COURT OF LOS ANGELES COUNTY
The Honorable Timothy R. Saito, Judge

BRIEF OF PETITIONER J.J. ON THE MERITS

CRISTINA GABRIELIDIS
California Bar No. 214557
6977 Navajo Road, Suite 303
San Diego, California 92119
Telephone: (619) 733-1328
cgabrielidis@gmail.com

Attorney for Appellant J.J.
Under Appointment by the
Supreme Court of California
CAPLA Independent Case System

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CALIFORNIA CASES

CALIFORNIA STATUTES

OTHER SOURCES

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

IN RE I.J. ET AL. (MINORS), Persons Coming Under the Juvenile Law.	**Case No. S204622** Court of Appeal No. B237271 Superior Court No. CK59248
LOS ANGELES COUNTY DEPARTMENT OF CHILDREN AND FAMILY SERVICES, Respondent, v. J.J. (FATHER), Petitioner.	

APPEAL FROM THE JUDGMENT OF
THE SUPERIOR COURT OF LOS ANGELES COUNTY
The Honorable Timothy R. Saito, Judge

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

Petitioner J.J. hereby submits his opening brief on the merits after this Court granted review of a published decision of the Court of Appeal, Second Appellate District, Division Eight, filed on June 29, 2012. The Court of Appeal affirmed the findings and orders of the juvenile court declaring jurisdiction over all of J.J.'s children.

ISSUE PRESENTED

Where the sole evidence of such risk is the juvenile court's finding that father has sexually abused his female child, may the juvenile court presume that a male child is at substantial risk of future sexual or other abuse by his father, under Welfare and Institutions Code section 300, subdivisions (b), (d) or (j)?

STANDARD OF REVIEW

The issue presented here is purely a matter of law and statutory construction, and is based on undisputed facts. As such, the issue is subject to *de novo* review by this Court with no particular deference being given to the decisions of the trial and lower appellate courts. (*Dawson v. East Side Union High School District* (1994) 28 Cal.App.4th 998, 1041; *People v. Taylor* (1992) 6 Cal.App.4th 1084, 1091).

PROCEDURAL HISTORY

On August 8, 2011, the Los Angeles County Department of Children and Family Services ("DCFS") petitioned on behalf of 14-year-old I.J. (a female), 12-year-old male twins Saul and Luis, 9-year-old Isabel (a female), and 7-year-old Daniel (a male), alleging violations of Welfare and Institutions Code section 300, subdivisions (b), (d) and (j).[1] The petition alleged that for the past three years, Father had sexually abused I.J. by fondling and digitally penetrating her vagina, raping her and orally copulating her. It also alleged that Father made I.J. watch pornographic videos and that I.J. was afraid of Father. The petition alleged that in light of the sexual abuse, I.J.'s siblings were at risk of physical harm, damage, danger, sexual abuse and failure to protect. (CT 1-9.)[2]

At the August 8, 2011 detention hearing, the juvenile court found Father to be the presumed father for all of the children. It found there was a *prima facie* case that the children were described by section 300, subdivisions (b), (d) and (j), and ordered them detained from Father and released to Mother. The court granted Mother family maintenance services and authorized monitored visitation between

---

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

[2]The petition also alleged that Father abused alcohol, which rendered him incapable of providing the children with regular care and supervision, in violation of section 300, subdivision (b). (CT 7.) This allegation was dismissed for lack of evidence by the juvenile court at the adjudication hearing, and is not at issue here. (RT 209-210.)

Father and all of the children except I.J. (RT 5-8, 11; CT 90-91.)

In September 2011, the juvenile court issued a "stay away" order for Father, prohibiting him from any contact with Mother and the children. The temporary restraining order against Father was permitted to lapse. (RT 103-105.)

At the October 2011 contested adjudication and disposition hearing, the juvenile court found the allegations in the petition to be true (amending the counts to delete references to Mother's failure to protect), and declared I.J. a dependent under section 300, subdivisions (b) and (d). It declared I.J.'s siblings dependents under section 300, subdivisions (b), (d) and (j). (RT 208-210; CT 184-187.)

As for disposition, the court removed custody of the children from Father. The court found Mother to be a non-offending parent and ordered family maintenance services for her, to include a sex abuse awareness class. The court granted Father monitored visitation and family counseling with Mother and the children, and ordered him into sex abuse counseling. The court ordered individual counseling for I.J., to address issues associated with sex abuse. The court ordered the next report from DCFS to address the termination of jurisdiction. (RT 211-213; CT 184-187.)

STATEMENT OF FACTS

On August 3, 2011, Mother took I.J. to the Los Angeles Police Department to report that Father had been sexually abusing her. (CT 53.) There were no criminal charges filed against Father, but on August 4, 2011, Mother secured a month-long temporary restraining order against him, protecting herself and the children. (CT 32-35.)

Mother became suspicious of Father as his behavior had changed in the weeks leading up to August 2011. He began to drink alcohol abusively, wanted Mother to take Luis with her to run errands and to leave I.J. at home. Father would dictate which of the children Mother could take with her when she left the house. On August 2, 2011, Father asked her to go to the market to get some ice cream. Mother felt something was wrong, turned the web camera on the family computer and hid an MP3 player set to audio record. When she returned home the web camera was off. When she listened to the MP3 recording, she heard Father asking I.J. if she would move in with him if he left the house, and heard Father tell I.J. that she could have male friends, but could not have sex with them. Mother also discovered that Father had visited "incest websites" in his browsing history. (CT 23-24, 47.)

On August 3, 2011, Mother confronted I.J. about the MP3 recording. I.J. disclosed to Mother that Father had been having sex with her in the family home

for the past four months. I.J. said that every Tuesday, Father would make her come home early from school and would take her to the upstairs room and engage in sexual intercourse with her while her siblings were downstairs. The other children told Mother that Father would take I.J. upstairs when she came home from school. (CT 19, 23.)[3]

Mother took I.J. and her siblings to the local police station to report the abuse. (CT 19-20, 163-165.) That same day, I.J. was given a medical evaluation. I.J. had no visible injuries and her genital examination was normal except for a small abrasion. (CT 56-63.) Father denied the abuse allegations. (CT 29.)

A social worker interviewed the children. I.J. stated that Father had been sexually abusing her for three years. Father was normally strict, but told her that if she had sex with him he would allow her to have male friends, she could wear whatever clothes she wanted and could have a Quinceñera (a birthday celebration for a girl turning 15-years-old). Father wanted I.J. to watch pornographic videos

---

[3]This was not the first time that I.J. had made such allegations. In 2009, I.J. accused Father of sexually abusing her. DCFS substantiated the allegations and detained the children from Father. Three days later, I.J. recanted and the case was dismissed. Mother always remained suspicious and wondered if the allegations were really true. (CT 22-24, 26.)

In 2005, Father was accused of sexually molesting his niece. The niece was 14-years-old at the time and was residing with the family. Mother did not believe the allegations because the niece had run away from home to be with her boyfriend, and when the family reported her as a runaway, that's when she made the allegations. The niece later apologized. (CT 26, 108.)

with him on the family computer that portrayed a father having sex with his daughter, but I.J. did not like it and left the room. Father last had sex with her on August 2, 2011. I.J. denied having sex with anyone but Father. (CT 22-23, 28.)

All of I.J.'s siblings denied any abuse or neglect by Mother or Father. All of the children felt safe at home, liked residing with their parents, and denied that Father or anyone else had ever touched them inappropriately or in a sexual manner. None of the children witnessed I.J. being abused in any way. I.J. never told any of her siblings that she was being touched inappropriately by anyone. (CT 20-21.)

The children later confirmed their earlier statements to a dependency investigator, social worker Harvey. Saul said that he never received spankings and his parents usually talked to him when he got in trouble. Saul said he was not afraid of either of his parents and that he had never been touched inappropriately. (CT 104.) Saul said the allegations were not true and that he had never seen I.J. with Father alone in a room. Saul said Father was "a nice dad who does not hit them," and does not yell. (CT 105.) Saul was physically and psychologically functioning at age level and liked to play soccer and watch television. Saul had no behavioral concerns. (CT 111.) Luis echoed Saul's statements and said the allegations were not true. Luis said Father is "nice" and he had never seen Father mistreat I.J. (CT 105.) Luis was psychologically and physically functioning at age level and liked sports. (CT 111.)

Isabel said that the allegations were not true. Isabel said that Father was very strict (he makes the children clean the house), and that she had once heard Father and I.J. arguing before. Isabel said she had never seen Father and I.J. alone in a room together, aside from one time when I.J. was doing homework and both I.J. and Father were fully clothed. Isabel said Father is "a good dad and that he is very nice." (CT 106.) Isabel was psychologically and physically functioning at age level, liked school and enjoyed spending time with her family. She was outspoken and expressed how she missed her Father. (CT 111.)

Daniel said that Mother would spank him on his bottom and take his toys when he got into trouble, but that Father never spanked him. Daniel was not afraid of his parents. Daniel said the allegations were not true. He had never seen Father and I.J. alone in a room together and had never seen Father mistreat I.J. He said his parents were "nice" to him and his siblings. (CT 107.) Daniel was functioning at age level. Although shy, he stated he would like to visit his Father. (CT 111.)

After interviewing and reviewing the reports pertaining to the additional children, Ms. Harvey concluded they were not completely aware of the details of the case as to I.J. and Father. (CT 113.) The children wanted to see Father badly and had only been able to have one visit with him. (RT 213.)

When Ms. Harvey interviewed I.J. about the allegations she had made three days earlier, she recanted. I.J. said that her Father did not have sex with her. I.J.

said she had lied about the sexual abuse allegations because she was angry with Father and his strictness. I.J. said that she was spending time with the "EMO crew" and was told that she needed to start cutting herself and getting into fights to fit in; Father found out about this and she got in trouble. I.J. said "I did it when I was 11 years old and got away with it. So, I just did it again." I.J. denied that Mother had ever recorded her with an MP3 player, and denied telling Mother she had been sexually abused by Father. I.J. said she had a boyfriend and that they'd had sex on a Tuesday in the boy's bathroom. I.J. could not describe the appearance of the bathroom and said she didn't have her boyfriend's contact information because something was wrong with his phone.[4] (CT 103-104.)

Mother was confused as a result of I.J.'s recantation and said she did not know what to believe about the allegations. Mother did not agree that the sexual abuse had been happening for three years because I.J. told her it had been four months. Mother had noticed that I.J. had been cutting herself, and I.J. said she was doing it to fit in with friends at school. Father had been very upset with I.J. for things she had been doing wrong, and was critical of her because she had problems at school. Father did not allow Mother to take I.J. out of the house because he said I.J. was being "punished." (CT 107-108.) Mother herself had been sexually

---

[4]Mother reported in her application for a temporary restraining order that Father broke I.J.'s cell phone when he found out that she had a boyfriend. (CT 157.)

abused as a child. (CT 114.)

Ms. Harvey "suspect[ed]" that I.J. had been sexually abused by Father due to Father's patterns of sexual abuse. Father was 21-years-old when he began dating Mother, who was 14-years-old. Mother gave birth to I.J. when she was 16-years-old. Additionally, Father's niece accused him of sexual abuse when she was 14-years-old. Also, I.J.'s statements to DCFS, law enforcement and medical professionals were consistent and offered details as to how the sexual abuse occurred. The physical findings of I.J.'s forensic examination were "consistent" with I.J.'s history. (CT 113.)

ARGUMENT

THE JUVENILE COURT MAY NOT PRESUME THAT A MALE CHILD IS AT SUBSTANTIAL RISK OF FUTURE SEXUAL OR OTHER ABUSE BY HIS FATHER, UNDER WELFARE AND INSTITUTIONS CODE SECTION 300, SUBDIVISIONS (B), (D) OR (J), WHERE THE SOLE EVIDENCE OF SUCH RISK IS THE FATHER'S SEXUAL ABUSE OF HIS FEMALE CHILD

There is no question that incest between an adult and a child is a form of child sexual abuse. Such abuse naturally evokes intense feelings of repugnance and anger. But anger is blind. Where a father has sexually abused his daughter, the court will naturally be angered. However, the court has a duty not to turn a blind eye to the evidence and to statutory requirements for dependency jurisdiction. Where a father has sexually abused his daughter, it does not necessarily follow that he will also sexually abuse his sons, or that dependency jurisdiction is necessary to protect his sons. The court must have some evidence beyond the daughter's abuse (e.g., scientific evidence, or factual evidence of father's proclivity to molest boys) to support such a conclusion.

Here, no evidence supported the finding that I.J.'s brothers were at risk of sexual abuse. They did not know about the sexual abuse and had a good relationship with their Father. There was no evidence that Father had an interest in engaging in sexual conduct with a male child. Thus, any *speculation* that Father might sexually abuse a male child was insufficient to support jurisdiction.

I. Evidence that Father sexually abused his daughter is insufficient, in and of itself, to establish that his sons were at a substantial risk of harm under section 300, subdivisions (b), (d) or (j).

In this case DCFS failed to prove, and the juvenile court and court of appeal erred when they held that Father's three sons were at a substantial risk of harm and were described by section 300, subdivisions (b), (d) and (j), solely because Father had sexually abused his 14-year-old daughter. " ' "A dependency proceeding under section 300 is essentially a bifurcated proceeding." [Citation.] First, the court must determine whether the minor is within any of the descriptions set out in section 300 and therefore subject to its jurisdiction.' [Citation.] ' "The petitioner in a dependency proceeding must prove by a preponderance of the evidence that the child who is the subject of a petition comes under the juvenile court's jurisdiction." ' [Citation.] 'The basic question under section 300 is whether circumstances at the time of the hearing subject the minor to the defined risk of harm.' " (*In re A.S.* (2011) 202 Cal.App.4th 237, 243–244.) Where, as here, a county welfare agency alleges only that a Father's sons are at a substantial risk of harm because of the sexual abuse of their sister, there is not sufficient evidence to declare jurisdiction over them under section 300, subdivisions (b), (d) or (j).

A. I.J.'s brothers were not described by section 300, subdivision (b) because there was no evidence whatsoever that they were at substantial risk of serious physical harm.

I.J.'s three brothers were not described by section 300, subdivision (b), based on the sole evidence that Father sexually abused I.J. A child comes within the jurisdiction of the juvenile court under section 300, subdivision (b) when:

> The 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 or guardian to adequately supervise or protect the child, or the willful or negligent failure of the child's parent or guardian 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 or guardian to provide the child with adequate food, clothing, shelter, or medical treatment, or by the inability of the parent or guardian to provide regular care for the child due to the parent's or guardian's mental illness, developmental disability, or substance abuse.

(§ 300, subd. (b).)

Section 300, subdivision (b) means what it says. "Before courts and agencies can exert jurisdiction under section 300, subdivision (b), there must be evidence indicating that the child is exposed to a *substantial* risk of *serious physical* harm or illness." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 823.) This "substantial risk" must be a result of the parent's failure or inability to adequately supervise or protect the child. (*In re A.S.*, *supra*, 202 Cal.App.4th at p. 244; § 300, subd. (b).) The county welfare agency must show by a preponderance of the evidence that the child is a person described by section 300. (§ 355, subd. (a).)

In *In re I.J. et al.* (2012) 207 Cal.App.4th 1351, 1365 (*I.J.*), the court upheld the juvenile court's assumption of jurisdiction over I.J.'s male siblings pursuant to section 300, subdivision (b). In so holding, the *I.J.* court deferred to *In re P.A.* (2006) 144 Cal.App.4th 1339, 1343, 1345 (*P.A.*), where the court found that two male siblings were at risk of harm under section 300, subdivision (b), by reason of the father's sexual abuse of their sister, even though both brothers indicated they had not observed any inappropriate touching of their sister by the father, and there was no evidence father had ever engaged in homosexual conduct. The court in *P.A.* engaged in little analysis on the issue, but appeared to center its entire decision on its belief that "aberrant sexual behavior by a parent places the victim's siblings who remain in the home at risk of aberrant sexual behavior." (*P.A.*, *supra*, 144 Cal.App.4th at p. 1347.)

Judge Madeleine Flier dissented from the majority opinion in *I.J.* and stated that I.J.'s brothers were not subject to jurisdiction under section 300, subdivision (b) because:

> there was no evidence they were at risk of serious physical harm as a result of father's failure to supervise or protect them. The only evidence was that the brothers felt safe with father and wished to continue living with him. The brothers denied any abuse, and no evidence suggested their denials were inaccurate or made to protect father. No other evidence suggested the brothers were at risk of abuse. Additionally, DCFS did not allege that father failed to provide them with adequate food, clothing, shelter, or medical treatment. The juvenile court therefore erred in taking jurisdiction under section 300, subdivision (b).

(*I.J.*, *supra*, 207 Cal.App.4th at pp. 1365-1366 (conc. & dis. opn. of Flier, J.).)

Judge Flier's opinion includes an actual analysis of what is required by section 300, subdivision (b), as well as an application of the relevant facts of this case – and it makes sense. I.J.'s brothers were not shown to be at a substantial risk of harm in the manner described by section 300, subdivision (b).

In *In re Andy G.* (2010) 183 Cal.App.4th 1405, 1415, fn. 6 (*Andy G.*), a case on which the majority opinion in *I.J.* relies, Division Eight of the Second District stated that father was "arguably correct" when he contended that his conduct in sexually abusing his 2-year-old son Andy's two half-sisters (ages 12 and 14), did not put Andy at risk under section 300, subdivision (b).

In support of this conclusion, the *Andy G.* court cited to *In re Rubisela E.* (2000) 85 Cal.App.4th 177, 196 (*Rubisela E.*), where Division Two of the Second District reversed jurisdictional findings under section 300, subdivisions (b), (c), (d), and (j), that the four younger brothers of a 13-year-old female victim of sexual abuse were at risk of similar abuse. In *Rubisela E.*, there was no evidence of any suspicious behavior toward the boys and no evidence of any homosexual actions or tendencies on the part of the father. County counsel conceded that section 300, subdivision (b) did not apply to father's conduct. (*Rubisela E.*, *supra*, 85 Cal.App.4th at p. 194.)

Section 300, subdivision (b) should never have been applied to I.J.'s brothers. To support jurisdiction under this section, there must be evidence that " 'at the time of the jurisdictional hearing the child is at substantial risk of serious physical harm....' " (*In re B.T.* (2011) 193 Cal.App.4th 685, 692.) The only evidence here showed that I.J.'s brothers were well taken care of, loved their Father, were not in fear of him, had never suffered any physical abuse by Father and were never even spanked by him. As I.J.'s brothers were not at substantial risk of serious physical harm at the time of the jurisdictional hearing, there was no basis for the juvenile court to take jurisdiction of them under section 300, subdivision (b).

B. I.J.'s brothers were not described by section 300, subdivision (d) because there was no evidence, just speculation, that they were at substantial risk of sexual abuse.

I.J.'s brothers were not described by section 300, subdivision (d) because there was no evidence that they were at substantial risk of sexual abuse. A child comes within the jurisdiction of the juvenile court under section 300, subdivision (d) when:

> The child has been sexually abused, or there is a substantial risk that the child will be sexually abused, as defined in section 11165.1 of the Penal Code,[5] by his or her parent or guardian or a member of his or her household,

---

[5]Penal Code section 11165.1 defines sexual abuse as sexual assault. Further, the statute defines sexual assault, in relevant part, as: "the

> or the parent or guardian has failed to adequately protect the child from sexual abuse when the parent or guardian knew or reasonably should have known that the child was in danger of sexual abuse.

(§ 300, subd. (d).)

Here, the court in *I.J.* held that I.J.'s brothers were at risk of sexual abuse under section 300, subdivision (d), solely based on the sexual abuse of I.J. The court stated "[w]e first reject the notion that, merely because younger siblings of a sexually abused girl are treated well by the abusing parent, they are therefore not at substantial risk that they will be sexually abused (§ 300, subd. (d)) . . . I.J. too may well have been happy and well-treated by her father until she reached the age of 12, when her father began the sexual abuse." (*I.J., supra*, 207 Cal.App.4th at p. 1360.) The *I.J.* court agreed with *P.A.* that "aberrant sexual behavior by a parent places the victim's siblings who remain in the home at risk of aberrant sexual behavior." (*Id.* at p. 1364, citing *P.A., supra*, 144 Cal.App.4th at p. 1347.) The *I.J.* court found Father's behavior "aberrant in the extreme" in that he raped I.J. by placing his penis in her vagina. Though the court recognized that I.J.'s brothers were completely unaware of Father's behavior at the time, it is not possible for that

---

intentional touching of the genitals or intimate parts (including the breasts, genital area, groin, inner thighs and buttocks) or the clothing covering them, of a child, or of the perpetrator by a child, for purposes of sexual arousal or gratification, except that, it does not include acts which may reasonably be construed to be normal caretaker responsibilities; interactions with, or demonstrations of affection for, the child; or acts performed for a valid medical purpose." (*Id.*, subd. (b).)

unawareness to continue. "The three boys are at risk of learning to become a sexual predator like father and of learning from father that it is appropriate to manipulate others who are more vulnerable." (*I.J.*, *supra*, 207 Cal.App.4th at p. 1364.)

Insofar as the *I.J.* court seeks to justify subdivision (d) jurisdiction over I.J.'s brothers based on its concern that the brothers will learn about the sexual abuse and will also learn to become sexual predators, its rationale is not soundly based in statute. Penal Code section 11165.1 "refers to specific sex acts committed by the perpetrator on a victim, including child molestation . . . and *does not include* in its enumerated offenses the collateral damage on a child that might result from the family's or child's reaction to a sexual assault on the child's sibling." (*In re Maria R.* (2010) 185 Cal.App.4th 48, 67–68 (*Maria R.*) Such "collateral damage" includes the concern that a child will grow up to be like his father. That is not the kind of harm addressed by subdivision (d).

As for the risk of actual sexual harm to I.J.'s brothers, there is a split of authority as to whether a male child is at risk of sexual abuse under section 300, subdivision (d), when his female siblings have been sexually abused.

In *Rubisela E.*, *supra*, Division Two of the Second District reversed a jurisdictional finding that the four younger brothers of a 13–year old female victim of sexual abuse were at risk of similar abuse. The father had asked the victim to

perform a sexual act and had touched her on multiple occasions, but there was no evidence of any suspicious behavior toward the boys and no evidence of any homosexual actions or tendencies on the part of the father. Based on this record, the court concluded DCFS had failed to meet its burden of proof under section 300, as there had been "no demonstration by [DCFS] that 'there is a substantial risk [to the brothers] that [they] will be abused or neglected, as defined in ... [the applicable] subdivisions.' " (85 Cal.App.4th at pp. 198–199, quoting *In re Edward C.* (1981) 126 Cal.App.3d 193, 198–199.)

In concluding that a male child was at risk when his female siblings had been sexually abused, *In re Karen R.* (2001) 95 Cal.App.4th 94, 90-91 (*Karen R.*), *P.A.* and *Andy G.*, rejected *Rubisela E.* In these cases, there was some actual exposure (or at least close proximity and possibility of actual exposure) of the sexual abuse to the male children. *P.A.* involved the assertion of jurisdiction over the two younger brothers of a 9-year-old girl whose biological father had molested her. Father molested P.A. while she was sleeping; P.A. shared a bunkbed with her two brothers (she slept on the top bunk and her brothers shared the bottom bunk), while father and mother shared a bed adjacent to the bunk bed. (*P.A.*, *supra*, 144 Cal.App.4th at pp. 1341-1343.) In *Karen R.*, Karen told her male sibling she had been raped (very brutally) by father immediately after it happened, the male sibling then watched and cried while father repeatedly struck Karen with his fist, and then

heard Karen report her rape to their mother, who refused to help. (*Karen R.*, *supra*, 95 Cal.App.4th at pp. 87-88.) In *Andy G.*, the father molested his adolescent stepdaughters and exposed himself to them while his son was in the same room, thus, directly victimizing the boy. (*Andy G.*, *supra*, 183 Cal.App.4th at pp. 1414-1415.)

In *Maria R.*, Division One of the Fourth District disagreed with prior cases "to the extent that they [] held or implied that the risk that [a male child] faces may–in the absence of evidence demonstrating that the perpetrator of the abuse may have an interest in sexually abusing male children–be deemed to be one of 'sexual abuse' within the meaning of subdivision (d)." (*Maria R.*, *supra*, 185 Cal.App.4th at p. 67.) The *Maria R.* court noted that the courts deciding *P.A.*, *Andy G.*, and *Karen R.*, had been unable to cite "any scientific authority or empirical evidence to support the conclusion that a person who sexually abuses a female child is likely to sexually abuse a male child." (*Id.* at p. 68.) In the absence of scientific evidence "demonstrating that a perpetrator of sexual abuse of a female child was in fact likely to sexually abuse a male child," the court was "not persuaded that the rule of general applicability enunciated in *P.A.*, and repeated by the *Andy G.* court, is grounded in fact" and "decline[d] to adopt the reasoning of *P.A.* and *Andy G.*" (*Id.* at p. 68.)

Acknowledging that the risk of harm to a younger male child can also be supported by evidence concerning the specific actions of the abuser, the *Maria R.* court found no evidence in the record before it that the father "ha[d] an interest in engaging in sexual activity with a male child." (*Maria R.*, *supra*, 185 Cal.App.4th at p. 68.) Accordingly the *Maria R.* court rejected the juvenile court's conclusion that the father's sexual abuse of his daughters placed his son at substantial risk of sexual abuse under subdivision (d). (*Ibid.*)

Father encourages this Court to adopt the sound reasoning of *Maria R.* Though sexual abuse of a child is unquestionably wrong and aberrant, it defies the language of subdivision (d) and Penal Code section 11165.1, to *presume* that a male child is at risk of sexual abuse by his father where the *only* evidence of potential sexual harm is the sexual abuse of a female sibling. There must be some other *evidence* to support the conclusion that a person who sexually abuses a female child is likely to also sexually abuse a male child. (See Argument § III., *infra* [discussing research which describes the nature and proclivities of perpetrators of sexual abuse against children].)

Cases following *Maria R.* have remained split regarding the issue of whether male children are presumed to be at risk of sexual abuse where their female siblings have been so abused. In *In re Alexis S. et al.* (2012) 205 Cal.App.4th 48 ("*Alexis S.*"), the Division Four of the Second District adopted the

> wanted to live with father. No evidence suggested that Jose and Eric were protecting father or being untruthful in their statements and no evidence was presented that father had or would harm them in any manner. Speculation that a father may sexually abuse a male child is insufficient to support jurisdiction. Instead, there must be evidence such that the court reasonably could find the child to be a dependent of the court.

(*Ana C., supra*, 204 Cal.App.4th at pp. 1336-1337 (conc. & dis. opn. of Flier, J.).)

In this case, there was no evidence that I.J.'s brothers were at risk of sexual abuse because, as stated in *Maria R., Alexis S.* and the dissent in *Ana C.*, there was no evidence to support the conclusion that just because Father sexually abused his daughter, he was also likely to sexually abuse his sons. Citing to *Maria R.*, Judge Flier stated in her dissent:

> Here, no evidence supported the finding that the brothers were at risk of sexual abuse. There was no evidence that father had an interest in engaging in sexual conduct with a male child. Speculation that a father may sexually abuse a male child is insufficient to support jurisdiction. Instead, there must be evidence such that the court reasonably could find the child to be a dependent of the court. [Citation.] The court erred in taking jurisdiction over the brothers under section 300, subdivision (d).

(*I.J., supra*, 207 Cal.App.4th at p. 1367 (conc. & dis. opn. of Flier, J.).)

As Judge Flier stated, here, the evidence showed that I.J.'s brothers were completely unaware of the sexual abuse, which always happened apart from them. There was no evidence whatsoever that Father had ever engaged in any sexual activity with a male child, or that he had any interest in doing so. The only evidence in the record showed that Father was strictly interested in females. The

dependency investigator found that Father had a "pattern" of sexually abusing 14-year-old girls (including Mother, the niece, and finally I.J.). Father was also interested in viewing pornographic videos showing fathers having intercourse with their daughters. There was no evidence of a similar proclivity regarding male minors.

Speculation that a father may sexually abuse a male child is insufficient to support jurisdiction under section 300, subdivision (d). Instead, there must be some evidence such that the court reasonably could find the child to be a dependent of the court. (*In re Sheila B.* (1993) 19 Cal.App.4th 187, 198-199; *Maria R.*, *supra*, 185 Cal.App.4th at p. 68.)

C. I.J.'s brothers were not described by section 300, subdivision (j) because DCFS only alleged sexual abuse under subdivision (d) as a potential harm and there was a lack of evidentiary support for that subdivision; also, the record contains no evidence showing the brothers suffered any other type of harm contemplated by subdivision (j).

I.J.'s brothers were not described by section 300, subdivision (j). A child comes within the jurisdiction of the juvenile court under section 300, subdivision (j) when:

> The child's sibling has been abused or neglected, as defined in subdivision (a), (b), (d), (e), or (i), **and** there is a **substantial risk** that the child will be abused or neglected, as defined in those subdivisions. The court shall consider the **circumstances surrounding the abuse** or neglect of the sibling, **the age and gender of each child**, the nature of the abuse or

> neglect of the sibling, the mental condition of the parent or guardian, and any other factors the court considers probative in determining whether there is a substantial risk to the child.

(§ 300, subd. (j) [emphasis added].)

In *I.J.*, the court upheld the juvenile court's findings that I.J.'s brothers were described by section 300, subdivision (j). The court stated it could not "agree with *Rubisela E.* that it would be 'problematic' to uphold jurisdiction under subdivision (j) as to the sons simply because there is currently no evidence of any 'suspicious' contact by the father with the sons." (*I.J.*, *supra*, 207 Cal.App.4th at p. 1364.) The *I.J.* court concluded I.J.'s siblings were at risk of sexual abuse under subdivision (d) – and implied that subdivision (j) was also applicable because I.J.'s brothers were at risk of sexual abuse. (*Id.* at p. 1365.)

In her dissent, Judge Flier stated:

> The allegations with respect to the brothers under section 300, subdivision (j) are the same as those under section 300, subdivision (d) and lack evidentiary support for the same reasons. Although subdivision (j) is broader that subdivision (d), DCFS alleged no other harm to the brothers as a result of the sexual abuse of I.J. The fact that in general a male child may be harmed by 'knowledge that a parent has so abused the trust of their sister,' or other consequences of sexual abuse of a sibling (*Rubisela E.*, *supra*, 85 Cal.App.4th at p. 198), does not show jurisdiction was proper in this case because DCFS did not allege the brothers suffered any specific harm as a result of I.J.'s abuse and the record contains no evidence showing the brothers suffered such harm.

(*I.J.*, *supra*, 207 Cal.App.4th at pp. 1367-1368 (conc. & dis. opn. of Flier, J.).)

Judge Flier's reasoning makes sense and it should be adopted by this Court. Judge Flier's reasoning draws from *Rubisela E.,* where the court reversed jurisdictional findings as to the victim's four brothers, who ranged in ages from 2 to 12, because there was no evidence they were at risk of sexual abuse under subdivision (j) or (d) based solely on the sexual abuse of their sister. (*Rubisela E., supra*, 85 Cal.App.4th at p. 199.)

In *Maria R.*, the court clarified that subdivision (j) permits the adjudication of a child whose sibling has been determined to have been sexually abused under subdivision (d), "if the court finds that there is a substantial risk that the child will be abused or neglected, as defined in subdivisions (a), (b), (d), (e), *or* (i) of section 300." The taking of jurisdiction of a child under subdivision (j) is not limited to a risk of sexual abuse, as that term is defined by subdivision (d) and Penal Code section 11165.1. Rather, the juvenile court may assume jurisdiction of the child "if, after considering the totality of the child's circumstances, the court finds that there is a substantial risk to the child in the family home, under *any* subdivision enumerated in subdivision (j), taking into consideration the totality of the child's and the sibling's circumstances." (*Id.* at pp. 62-65.)

The *Maria R.* court held that the father's sexual abuse of his daughters did not establish that his son was at substantial risk of sexual abuse within the meaning of subdivision (j), as defined in subdivision (d) and Penal Code section 11165.1.

(*Maria R., supra*, 185 Cal.App.4th at p. 68.) The court vacated the jurisdictional finding under subdivision (j) and remanded to the juvenile court with directions to detain the son in protective custody and order the county welfare agency to assess any harm that the son may have suffered, or any risk to him that may exist, under section 300. (*Id.* at p. 70.)

In *In re R.V., Jr.* (2012) 208 Cal.App.4th 837 (*R.V.*), the court affirmed the juvenile court's finding that a 3-year-old male minor was at risk under section 300, subdivision (j), in light of the father's sexual molestation of his 10-year-old stepdaughter. The *In re R.V.* court found that the facts of that case were materially different from those in *In Maria R.* and that the court was thus not constrained by the holding in that case with respect to the juvenile court's findings under section 300, subdivision (j) as to the minor, R.V. (a boy). In *In re R.V.*, the father sexually abused Y.R. (R.V.'s half-sister), at least once a week for eight months by touching and kissing her breasts, touching her genitals (including digital penetration), forcing her onto the bed in order to remove her skirt and making her watch a pornographic movie with him while he exposed his genitals to her. "R.V. not only witnessed the father sexually abusing Y.R., but he also participated in helping Y.R. resist the father's unwanted advances, showing he was keenly aware of the inappropriateness of the father's behavior. By repeatedly exposing R.V. to aberrant sexual behavior in this manner, and allowing him to engage in the struggle, the

father placed R.V. at risk of sexual abuse within the meaning of section 300, subdivision (d)." (*R.V.*, *supra*, 208 Cal.App.4th at p. 846.) Thus, *R.V.* was unlike *Maria R.*, where the record was devoid of any evidence the son had been exposed to his sisters' sexual abuse or was even aware of it. (*Maria R.*, *supra*, 185 Cal.App.4th at p. 69.)

R.V. was also distinguishable from *Maria R.* in that there was expert testimony regarding risk to the son as a result of the sexual abuse of his sisters. In *R.V.*, the forensic interview expert testified that R.V. was a potential victim of sexual abuse because he had witnessed his sister being molested. (*R.V.*, *supra*, at p. 847.)

Where there is no additional evidence or expert testimony regarding risk to a son as a result of the sexual abuse of his sisters, the son is not aware of his father's sexual abuse of his sister, and the son has suffered no form of abuse (as set forth in subdivisions (a), (b), (d), (e) or (i)), the juvenile court may not declare jurisdiction over the son pursuant to subdivision (j). (*Maria R.*, *supra*, 185 Cal.App.4th at pp. 63-70.) The juvenile court is instructed by subdivision (j) to consider "circumstances surrounding the abuse or neglect of the sibling, the age and gender of each child, the nature of the abuse or neglect of the sibling . . . and any other factors the court considers probative in determining whether there is a substantial risk to the child." (§ 300, subd. (j); see *In re Lucero L.* (2000) 22

Cal.4th 1227, 1237, fn. 4, and accompanying text.) The juvenile court neglects to consider such circumstances, as required by subdivision (j), when it simply presumes that a male child is somehow at substantial risk based only on the sexual abuse of his sister.

II. Under the facts of this case, the court is not authorized to presume Father would sexually abuse all of his children, and require him to rebut that presumption with evidence.

In *I.J.*, the court held that it was "impossible to say what any particular sexual predator" was likely to do in the future, and that made it "virtually incumbent upon the juvenile court to take jurisdiction over the siblings, at least until such time as the offending parent produces evidence that the siblings are *not* at substantial risk of sexual abuse or other harm." As persuasive authority for imposing a *presumption* that Father would sexually abuse all of his children, and requiring him to rebut that presumption with evidence, the *I.J.* court cited to section 355.1, subdivision (d). (*I.J.*, *supra*, 207 Cal.App.4th at p. 1364.)

Section 355.1 is entitled "Injuries or detrimental condition resulting from those who have care or custody as prima facie evidence; presumptions and burden of proof." It provides:

> Where the court finds that either a parent, a guardian, or any other person who resides with, or has the care or custody of, a minor who is currently the subject of the petition filed under Section 300 (1) has been previously convicted of sexual abuse as defined in Section 11165.1 of the Penal Code,

> (2) has been previously convicted of an act in another state that would constitute sexual abuse as defined in Section 11165.1 of the Penal Code if committed in this state, (3) **has been found in a *prior* dependency hearing or similar proceeding in the corresponding court of another state to have committed an act of sexual abuse**, or (4) is required, as the result of a felony conviction, to register as a sex offender pursuant to Section 290 of the Penal Code, that finding shall be prima facie evidence in any proceeding that the subject minor is a person described by subdivision (a), (b), (c), or (d) of Section 300 and is at substantial risk of abuse or neglect. The prima facie evidence constitutes a presumption affecting the burden of producing evidence.

(§ 355.1, subd. (d) [emphasis supplied].)

Section 355.1, subdivision (d)(3) is inapplicable here because: DCFS failed to plead the statute in its dependency petition, or argue it before the juvenile court; the terms of the statute have not been met because Father was not found to have been a sexual abuser in a *prior* dependency hearing; and the Legislature did not intend for section 355.1, subdivision (d)(3) to substitute for findings pursuant to section 300, subdivision (d) because of the different standards of proof and burdens of production associated with each statute.

A. Section 355.1, subdivision (d) never came into play in this case because DCFS failed to plead it in its dependency petition.

Section 355.1, subdivision (d) does not apply here because DCFS failed to give anyone notice of any reliance on the statutory presumption before the juvenile court. In *In re A.S.* (2011) 202 Cal.App.4th 237 (*A.S.*), the court considered a

similar argument in the context of section 355.1, subdivision (a).[6] In *A.S.*, the county welfare agency argued that the juvenile court properly sustained a dependency petition, brought under section 300, subdivision (b) (based on an unexplained subdural hematoma suffered by an eight-month-old girl), because it had made a prima facie case pursuant to section 355.1, subdivision (a), and the parents failed to meet their burden of producing evidence in rebuttal.

The *A.S.* court held that the county child welfare agency failed to plead section 355.1, subdivision (a) in its dependency petition, but only cited to section 300, subdivision (b). (*A.S.*, *supra*, 202 Cal.App.4th at p. 243.) Further, at the jurisdiction hearing, the county welfare agency did not mention section 366.1, or argue that any rebuttable presumption arose under which the parents had the burden of production. Additionally, the juvenile court did not address section 366.1, or make any threshold findings. (*A.S.*, *supra*, 202 Cal.App.4th at p. 243; see *In re Shiela B.* (1993) 19 Cal.App.4th 187, 200 ["Since the juvenile court never made the finding required by this section, this presumption never came into play."].)

---

[6]Section 355.1, subdivision (a) provides: "Where the court finds, based upon competent professional evidence, that an injury, injuries, or detrimental condition sustained by a minor is of a nature as would ordinarily not be sustained except as the result of the unreasonable or neglectful acts or omissions of either parent, the guardian, or other person who has the care or custody of the minor, that finding shall be prima facie evidence that the minor is a person described by subdivision (a), (b), or (d) of Section 300."

The *A.S.* court concluded that the county welfare agency "forfeited" the matter by not giving the parents and the court sufficient notice of its reliance on section 355.1, subdivision (a). It reasoned "[w]hen the Agency intends to rely on the statute to shift the burden of production to the parents to show that neither they *nor other caretakers* caused the child's injuries, it must do so in a clear cut manner. It should, of course, cite section 355.1, subdivision (a) in the petition along with the applicable subdivision of section 300." (*A.S.*, *supra*, 202 Cal.App.4th at p. 243.)

Here, DCFS failed to raise section 355.1 in the juvenile court. Its report filed immediately prior to Father's adjudication hearing made no mention of the statutory presumption. Further, during the extensive argument offered at the hearing, DCFS did not bring the provision to the trial court's attention. DCFS's failure to rely upon section 355.1 constitutes a forfeiture of its right to raise it for the first time on appeal. To permit DCFS to do so would be unfair to both the trial judge and to Father who have been denied an opportunity to address the presumption. (*In re Dakota S.* (2000) 85 Cal.App.4th 494, 501-502.) Section 355.1 simply does not apply in the resolution of this case.

B. Section 355.1, subdivision (d) does not apply here because the terms of the statute have not been met; Father was not found in a *prior dependency hearing* to have committed an act of sexual abuse.

Section 355.1, subdivision (d) does not apply here because the plain terms of the statute have not been met. Father (1) has not previously been convicted of sexual abuse, (2) has not previously been convicted of an act in another state that would constitute sexual abuse in California, (3) has not been found in a **prior** dependency hearing to have committed an act of sexual abuse, and (4) is not required to register as a sex offender.

Section 355.1, subdivision (d)(3) requires that a parent have been found to have committed sexual abuse in a "prior dependency hearing." Where statutory language is clear, there is no room for interpretation. (*Walker v. Superior Court* (1988) 47 Cal.3d 112, 121.) If the Legislature had intended section 355.1, subdivision (d)(3) to apply in an *instantaneous* dependency hearing alleging sexual abuse, it would have said so. (*Fitch v. Select Products Co.* (2005) 36 Cal.4th 812, 818 [the statutory language is generally the most reliable indicator of legislative intent].) It did not.

Here, DCFS failed to allege that Father had been found in a "prior dependency hearing" to have committed sexual abuse. He had not. Though two previous allegations of sexual abuse by Father were "substantiated" in an

investigation by a *social worker* (CT 22-24, 26, 108), there was no "dependency hearing" on these matters, as set forth in section 355.1, subdivision (d)(3). A dependency hearing involves a dependency petition with allegations setting forth a factual basis for the offense, parties are represented by counsel, rules of evidence apply, challenges to evidence may be made, and a juvenile court's decision is subject to appellate review. (§§ 300, *et seq.*) In contrast, the only requirement for "substantiating" sexual abuse allegations is that the social worker believe them. There is little due process associated with a social worker's assessment.

There is no question that a "prior" finding of sexual abuse is required for section 355.1, subdivision (d)(3) to apply. As the court in *Maria R.* pointed out:

> While a **previous finding** that a parent has sexually abused a sibling of the child constitutes prima facie evidence in any proceeding that the child is described by subdivisions (a), (b), (c), or (d) of section 300 and is at substantial risk of abuse or neglect, none of the cases that we have discussed involved a *prior* finding of sexual abuse. (§ 355.1, subd. (d).)

(*Maria R.*, *supra*, 185 Cal.App.4th at p.67, fn. 12 [emphasis supplied].)

However, none of these other cases cited by *Maria R.* (including *P.A.*, *Karen R.* and *Andy G.*) actually applied section 355.1 to outright substantiate allegations under section 300. Such a result would have been improper under the plain terms of the statute. Section 355.1 would only apply to create a presumption under section 300 where there has been a "prior" adjudication of sexual abuse.

Such was the case in *In re John S.* (2001) 88 Cal.App.4th 1140, 1142, where the court affirmed a juvenile court's use of section 355.1, subdivision (d) to presume jurisdiction over a minor under section 300. In *In re John S.*, father was a registered sex offender, and section 355.1, subdivision (d) allowed that status, notwithstanding the fact that father was a noncustodial parent, to constitute *prima facie* evidence that the minor came within section 300, subdivisions (b) and (d). The court noted that the statutory presumption that a child is a dependent child of the court when "either a parent, a guardian, or any other person who resides with, or has the care or custody of" the subject child is required to "register as a sex offender" is not conclusive and affects only the burden of producing evidence. The father was free to present evidence that his status as a registered sex offender did not place the minor at substantial risk of abuse or neglect. Father did not do so, and the juvenile court did not err in adjudging the minor a dependent. (*In re John S.*, *supra*, 88 Cal.App.4th at p. 1145-1146.)

Here, as there has been no "prior dependency hearing" adjudicating Father as a sexual abuser, section 355.1 and its presumptions are inapposite.

C. The Legislature did not intend for section 355.1, subdivision (d)(3) to substitute for findings pursuant to section 300, subdivision (d) because of the different standards of proof and burdens of production associated with each statute.

In any way suggesting that section 355.1, subdivision (d)(3) may serve to presumptively establish a violation of section 300, where there has been *no prior finding of sexual abuse in a dependency hearing*, the courts in *P.A., Maria R.* and *I.J.* have gone rogue in their statutory construction and application. The Legislature did not intend for section 355.1, subdivision (d)(3) to substitute for findings required by section 300, subdivision (d). The two statutes have markedly different standards of proof and burdens of production. They are not interchangeable and address different concerns. The standards of proof and burdens of production required by section 300 may not be disregarded by constructively applying section 355.1 where that section is plainly inapplicable.

The court in *P.A.* held that where a child has been sexually abused, any younger sibling who is approaching the age at which the child was abused (regardless of gender), may be found to be at risk of sexual abuse. (*P.A.*, *supra*, 144 Cal.App.4th at p. 1347.) The *P.A.* court stated its conclusion was "consistent with" section 355.1, subdivision (d). Although the *P.A.* court acknowledged that section 355.1, subdivision (d) "was not triggered here because there was no prior dependency proceeding at the time of the jurisdictional hearing, it nonetheless

evinces a legislative determination that siblings of sexually abused children are at substantial risk of harm and are entitled to protection by the juvenile courts." (*Ibid.*)

Here, the *I.J.* court agreed with the reasoning in *P.A.*, and observed that, although there was no prior dependency proceeding, section 355.1, subdivision (d) "nonetheless evinces a legislative determination that siblings of sexually abused children are at substantial risk of harm and are entitled to protection by the juvenile courts." (*I.J.*, *supra*, 207 Cal.App.4th at pp. 1363.)

The *Maria R.* court held that there was more than ample evidence that a father committed acts of sexual abuse as defined in Penal Code section 11165.1 towards two of his daughters. Citing to section 355.1, subdivision (d)(3), the *Maria R.* court stated these findings constituted "prima facie" evidence that father's son was described by section 300, subdivision (a), (b), (c) or (d), and was at substantial risk of abuse or neglect. (*Maria R.*, *supra*, 185 Cal.App.4th at p. 69.)[7]

---

[7]The *Maria R.* court also stated:

> Where a child's sibling has been sexually abused, a trial court could determine that such a child has been harmed, or is at risk, under a subdivision of section 300 that is *not* enumerated in subdivision (j). (355.1, subd. (d); see, e.g., *In re Amy M.*, (1991) 232 Cal.App.3d 849, 855 [social services agency filed petition as to a child whose sibling was sexually abused under § 300, subds. (c) and (j)].)

These decisions failed to consider that the Legislature did not intend for section 355.1, subdivision (d)(3) to substitute for findings pursuant to section 300, subdivision (d) because of the different standards of proof and burdens of production required by each statute. Where jurisdiction is not proper under section 300, the juvenile court should not be permitted to "backdoor" dependency by applying section 355.1, where that statute is inapplicable by its plain terms.

The petitioner in a child dependency proceeding must prove by a preponderance of the evidence that the child who is the subject of a petition comes under the juvenile court's jurisdiction. (*A.S., supra,* 202 Cal.App.4th at p. 244.) A preponderance of evidence is "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." (See Black's Law Dict. (6th ed. 1990) p. 1182, col. 1.)

Section 355.1 does not deal with the preponderance of the evidence, nor does it maintain the burden of proof on the county welfare agency. It states that a prior finding that a parent has committed a crime of sexual abuse constitutes "prima facie" evidence that the minor is a person described by section 300, subdivision (a), (b), (c) or (d). Once a prima facie case has been made, the burden of proof is then shifted to the parent to rebut the allegation.

(*Maria R., supra,* 185 Cal.App.4th at p. 65, fn. 9.)

Evidence Code section 602 states that a "statute providing that a fact or group of facts is prima facie evidence of another fact establishes a rebuttable presumption." Prima facie evidence is not conclusive evidence; it simply denotes that the evidence may suffice as proof of a fact until or unless contradicted and overcome by other evidence. (*In re Woodson's Estate* (1939) 36 Cal.App.2d 77, 80; *Maganini v. Quinn* (1950) 99 Cal.App.2d 1, 6 [The words "prima facie" mean at first view, and a prima facie case is one which is received or continues until the contrary is shown].)

Thus, section 355.1, subdivision (d) allows for a rebuttable presumption that affects the burden of producing evidence. (*In re John S.* (2001) 88 Cal.App.4th 1140, 1145 [holding the same as to § 366.1, subd. (d)].) As the Legislative history to the statute makes clear: "The burden of producing evidence is a lower standard than the burden of proof. The burden to produce evidence means producing some evidence, even though the evidence may fall short of convincing the court to agree with the party bringing the evidence. The standard is the same as evidence sufficient to avoid summary judgment during a pretrial hearing. A party having the burden of proof, must provide sufficient evidence to convince the court, usually by a preponderance, to find in its favor." (Assem. Com. on Judiciary, Rep. on Sen. Bill No. 208 (1999-2000 Reg. Sess.) as amended May 13, 1999, p. 3.)

Section 355.1 allows a juvenile court to find that a minor is a person described by section 300, subdivision (a), (b), (c) or (d), based on prima facie evidence. That is a very low threshhold, lower than what would normally be required by section 300 (preponderance of the evidence).

In *David L. v. Superior Court* (2008) 166 Cal.App.4th 387, 392, the juvenile court set a section 366.26 hearing regarding the minor pursuant to section 366.3, subdivision (c), which provides: "If, following the establishment of a legal guardianship, the county welfare department becomes aware of changed circumstances that indicate adoption may be an appropriate plan for the child, the department shall so notify the court. The court may ... order that a hearing be held pursuant to [s]ection 366.26 to determine whether adoption or continued legal guardianship is the most appropriate plan for the child." The father argued that the juvenile court erred in utilizing a prima facie standard, instead of preponderance of the evidence, to determine whether to set the 366.26 hearing. (*Id.* at 394.) The court held that the language of section 366.3, subdivision (c), supports the prima facie standard, since the county welfare department need only "notify" the juvenile court of changed circumstances, "not prove them." The court continued that the "lower standard" was also consistent with the Legislature's preference for adoption because it more "readily" facilitates consideration of that option. (*Ibid.*) The court continued that it saw no reason to require "the more exacting preponderance

standard" to protect parental interests. (*Ibid.*)

Section 300 and 355.1 are not fungible. Section 355.1 requires a very low standard of proof (akin to a "notice") and shifts the burden of proof to the parent. Section 300 requires a more exacting preponderance of the evidence standard and does not allow for any shifting of the burden of proof. Moreover, section 355.1 should not be applied where the plain language of the statute prohibits its application – as here, where there has been no prior finding of sexual abuse in a dependency hearing. Quite simply, section 355.1 should not be applied where it is not *intended* to apply, as dictated by the plain language of the statute.

III. Psychological research does not support the blind assumption that a father's sexual abuse of his daughter places all of his children, regardless of gender, at risk of sexual abuse.[8]

In *In re B.T.* (2011) 193 Cal.App.4th 685, 694, the court stated that the county welfare agency "assumes an adult woman who has had a consensual sexual relationship with an unrelated 15–year–old boy will probably sexually abuse her infant daughter. This is, of course, a complete non sequitur, so it is not surprising that the record contains no evidence to support this assumption." The non sequitur applicable in this case is finding that a father's sexual abuse of his daughter, absent other evidence, means that he will probably sexually abuse his male son. There is little support for such a conclusion in research which has examined incestuous relationships in families.

---

[8]This Court should consider scientific evidence when crafting a rule interpreting section 300 in this case. Seminal dependency cases have utilized psychological research in reaching their conclusions. For example, in *In re Autumn H.* (1994) 27 Cal.App.4th 567, 575 (*Autumn H.*), the court examined the beneficial parent-child relationship exception to adoption, and interpreted the " 'benefit from continuing the relationship' " to mean "the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." According to the 1973 work of psychoanalytic theory central to *Autumn H.*, a child could not develop such a significant attachment to a parent without the parent's attention to the child's needs for physical care, nourishment, comfort, affection and stimulation. (See Goldstein et al., Beyond the Best Interests of the Child (1973) pp. 6, 17.)

Data from the 2000 National Incident-Based Reporting System (NIBRS) (in which law enforcement agencies from 19 U.S. states reported data), showed that gender of the perpetrator interacts with the age and gender of the victim targeted for sexual abuse. Males constitute the largest group of sex offenders nationwide and females and children constitute the overwhelming majority of their victims. Adult male sex offenders tend to select about 90% female victims; the typical male sex offender targets both child and adult female victims. (McCloskey & Raphael, Adult Perpetrator Gender Asymmetries in Child Sexual Assault Victim Selection: Results from the 2000 National Incident-Based Reporting System (2005) 14:4 Journal of Child Sexual Abuse 1-24.)

The age at which a male is at greatest risk of sexual assault is 4, while for females the age of greatest risk is 14. Nevertheless, being female throughout the lifespan increased the risk of sexual assault; even at age 4, a female's risk of victimization was twice that of males. For all instances of sexual abuse, females constituted 83.3% of all victims, males 14.1% of all victims, and 2.6% did not have either gender or age recorded. (*Ibid.*)

For non-forcible sex offenses (non-forcible incest and statutory rape), a female adolescent victim was almost 120 times more likely to have an adult male perpetrator than an adult female perpetrator, while male adolescent victims were about 11 times more likely to have an adult female perpetrator. (*Ibid.*)

For forcible and non-forcible sex offenses combined, male offenders overwhelmingly chose opposite-sex victims (about 90% female victims vs. 10% male victims). For non-forcible sex offenses (including incest), male offenders chose opposite-sex (female) victims almost 98% of the time. The study concluded that overall, gender of the victim was a major selection factor for male offenders. (*Ibid.*)

The NIBRS study did not address the likelihood of a male perpetrating sex abuse against both male and female victims, only that males overwhelmingly chose to abuse females.

In another study of 102 "incest families," researchers found that victims of father-child sexual abuse experience greater relationship problems with their father/perpetrators than do nonabused siblings. Only approximately one-third of siblings report clinically significant relationship problems with father/perpetrators. (Lipovsky et al. (1993) Parent-Child Relationships of Victims and Siblings in Incest Families, 1:4 Journal of Child Sexual abuse 35-50.) This data suggests that the overwhelming majority of nonabused siblings do not have a problematic relationship with their fathers, even though the fathers have sexually abused a sibling.

The data shared above suggests that fathers will overwhelmingly pick female victims for sexual abuse within their households. It is much less likely that

a father will abuse his son than his daughter. Moreover, because the majority of nonabused siblings, largely sons, do not have problematic relationships with their fathers, those relationships should be preserved in the absence of other evidence that the relationship is harmful.

CONCLUSION

Sexual abuse is a highly inflammatory subject, prone to prejudices and assumptions of the worst kind. It is imperative that any unsupported assumptions about perpetrators of sexual abuse not be the basis of declaring jurisdiction over a child, where that child has not experienced any sexual abuse in any fashion. This Court should rule that a juvenile court may not presume that a male child is at substantial risk of future sexual or other abuse by his father, under section 300, subdivisions (b), (d) or (j), where the sole evidence of such risk is the father's sexual abuse of his female child.

Respectfully submitted,

Date: November 26, 2012

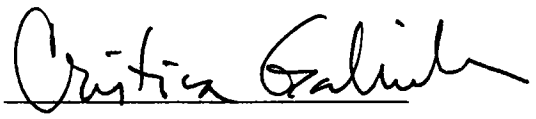
CRISTINA GABRIELIDIS
California Bar No. 214557
6977 Navajo Road, Suite 303
San Diego, California 92119
Telephone: (619) 733-1328
cgabrielidis@gmail.com

CERTIFICATE OF COMPLIANCE

I certify that:

Pursuant to California Rules of Court, rule 8.204(c), and according to the Word Perfect document word count function, the attached opening brief contains 11,702 words (a brief must not exceed 25,500 words).

Dated: November 26, 2012



CRISTINA GABRIELIDIS

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN RE I.J. ET AL. (MINORS), Persons Coming Under the Juvenile Law.	**Case No. S204622** **PROOF OF SERVICE**

I, the undersigned, say: I am over eighteen years of age, a resident of the County of San Diego, State of California, not a party to the within action, and my business address is 6977 Navajo Road, Suite 303, San Diego, California 92119; and I served one copy of the within as follows:

Clerk, Court of Appeal
Second Appellate District, Division Eight
300 So. Spring St. 2nd Floor, North Tower
Los Angeles, CA 90013

California Appellate Project
Los Angeles Office
520 S. Grand Avenue, Fourth Floor
Los Angeles, CA 90071

Office of County Counsel
Edelman's Children Court
201 Centre Plaza Dr., Ste. 1
Monterey Park, CA 91754

(Attorney for Mother)
Karen Rose, LADL #3
1000 Corporate Center Drive, Suite 400
Monterey Park, CA 91754

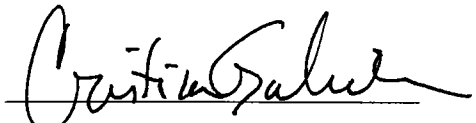
(Attorney for Children)
Juan Valles, CLC #1
Children's Law Center, Sixth Floor
201 Center Plaza Drive
Monterey Park, CA 91754-2177

(Attorney for Father)
Renelde Espinoza, LADL #4
1000 Corporate Center Dr., Ste. 420
Monterey Park, CA 91754

Office of the Clerk
Superior Court, County of Los Angeles
201 Centre Plaza Drive
Monterey Park, CA 91754

J.J.
[confidential address]

I certify under penalty of perjury that the foregoing is true and correct.
Executed November 26, 2012 at San Diego, CA.



CRISTINA GABRIELIDIS