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

REPLY BRIEF OF PETITIONER J.J. ON THE MERITS

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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:

Pursuant to rule 8.520, subdivision (a)(3) of the California Rules of Court, Petitioner J.J. respectfully submits this Reply to the Answer filed on December 24, 2012 ("Ans.") by the Los Angeles County Department of Children and Family Services ("DCFS") regarding the published decision in *In re I.J. et al.* (2012) 207 Cal.App.4th 1351 ("Opinion").

ARGUMENT

DEPENDENCY JURISDICTION OVER A MALE CHILD IS NOT JUSTIFIED WHERE HE HAS NEVER SUFFERED ANY TYPE OF HARM WHATSOEVER, AND SPECULATION CONCERNING RISK OF FUTURE HARM IS PREMISED SOLELY ON THE FATHER'S CLANDESTINE SEXUAL ABUSE OF HIS DAUGHTER

Where there is no evidence that a father's sons had been harmed in any way whatsoever, no competent evidence that he is likely to harm them, no evidence that a father has sexual interest in men or boys, and no evidence that the boys were aware of any abuse in the household, a father's sexual abuse of his daughter does not permit an inference that he will also sexually abuse his sons. In such a case, the juvenile court is without authority to declare jurisdiction over the son under Welfare and Institutions Code section 300, subdivisions (d), (b) or (j).

A. A Father presents no substantial risk of sexual abuse to his sons, as described by section 300, subdivision (d), based solely on his sexual abuse of his daughter.

1. *Male children are not at risk of molestation as a result of the sexual abuse of their female sibling.*

As I.J.'s brothers were never sexually abused themselves, DCFS argues that sexual abuse includes child molestation, which does not require a touching, and implies that Father sexually molested his sons. (Ans. 14-17.) DCFS argues that the sons were victims of such "non-touching offenses" as potentially witnessing I.J.'s abuse, and possibly becoming sexual predators like their father. (Ans. 13-15,

17, 26.) The potentialities argued by DCFS are quite speculative and are not the type of harm contemplated by either section 300, subdivision (d), or Penal Code section 647.6.

Father does not dispute that sexual abuse may be accomplished without contact. In *In re D.G.* (2012) 208 Cal.App.4th 1562, 1571, the court made that clear when it held that a father's solicitation of oral sex from his daughter's 16-year-old half-sister constituted sexual abuse, in violation of section 300, subdivision (d), since the act amounted to the offense of annoying or molesting the half-sister, in violation of Penal Code section 647.6.

However, a father's sexual abuse of his daughter does not equate to sexual molestation of his sons (or risk thereof). Ordinarily, the annoyance or molestation which is forbidden by Penal Code section 647.6, is not concerned with the state of mind of the child, but the objectionable acts of the defendant. (*People v. Carskaddon* (1957) 49 Cal.2d 423, 426.) The defendant's conduct must be motivated by an abnormal sexual interest. (Pen. Code § 646.7.) In a case where a father sexually abuses his daughter, he is motivated by an abnormal sexual interest in female minors. That does not mean that the father is also motivated by an abnormal sexual interest in male minors.

In all of the molestation cases cited by DCFS, the criminal defendant's actions were motivated by an abnormal sexual interest in the child; the defendant

involves the child for the purpose of fulfilling his own sexual gratification. (See Ans. 14-17 and cases cited therein.) Here, however, DCFS acknowledges that Father "may not have intended for his sons to observe the abuse of I.J." (Ans. 17.) Father's intent makes all the difference. Here, Father's abnormal sexual interest and actions focused solely on his daughter. She alone was the victim of his molestation. Though DCFS argues that the boys were at risk for walking in on the abuse, it acknowledges that Father concocted elaborate schemes to get I.J. alone with him and made excuses to get Mother and the sons out of the house. (Ans. 32.) These behaviors indicated that Father's sole sexual focus concerned his daughter. Father had no abnormal sexual interest or actions focused on his sons. They were not sexually molested by Father.

As stated in *In re Maria R.* (2010) 185 Cal.App.4th 48, 67–68, 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." Child molestation is plainly encompassed by section 300, subdivision (d). However, male children may not be presumed to have been sexually molested as a result of the sexual abuse of their sister. The kind of "collateral damage" discussed by *In re Maria R.* includes the notion espoused by DCFS that the sons may grow up to be sexual predators, or

the speculation that they boys could have potentially witnessed or encountered the abuse of their sister. Those are not the types of harm addressed by subdivision (d).

2. *This Court should not rewrite section 300, subdivision (d) to assume jurisdiction over the boys based on presumptions associated with an inapplicable statute.*

DCFS acknowledges that section 355.1 is not directly applicable to this case as that presumption was not triggered in this matter. (Ans. 19.) It is not. Here, the juvenile court never found that Father had been "found in a *prior* dependency hearing . . . to have committed an act of sexual abuse," and thus, there was no prima facie evidence that the boys were described by section 300. (§ 355.1, subd. (d)(3) [emphasis supplied].)

Yet, DCFS argues that *had* Father previously, "years earlier," been convicted of sexual abuse, the section 355.1 presumption would have been triggered and Father's children (regardless of gender) would have been declared dependents unless Father rebutted that prima facie evidence and persuaded the juvenile court that he no longer posed a threat. That's a lot of "ifs." Father agrees that had the circumstances been different, section 355.1 would apply. But Father also notes that had the boys been girls, section 300, subdivision (d) would have applied to them based on the sexual abuse of their sister. The facts are what they are, and section 355.1 does not apply in any way.

DCFS argues that because the juvenile court could declare jurisdiction over the boys in a future dependency proceeding based on the adjudicated allegations of past sexual abuse, it "logically follows" that the juvenile court had authorization to assert jurisdiction over the boys here and now. (Ans. 19-20.) The argument of DCFS is a *non sequitur* as it ignores the issues of timing as well as the different standards of proof associated with the two statutes at issue here. Sections 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.

Section 355.1 is not persuasive authority in this case because the Legislature did not intend for it to substitute for findings pursuant to section 300, subdivision (d) where sexual abuse is being alleged in court for the *first time*. If it so intended, it could have made that abundantly clear, in either subdivision (d) itself or the body of section 355.1. In *In re J.W.* (2002) 29 Cal.4th 200, the court stated that one principle of statutory construction assumes that every part of a statute serves a purpose and that nothing is superfluous. Another principle, commonly known under the Latin name of *expressio unius est exclusio alterius*, is that the expression of one thing in a statute ordinarily implies the exclusion of other things. (*Id.*, at p. 209.) Here, the inclusion of the words "prior dependency

hearing" operate to exclude from the ambit of section 355.1, the *current* dependency hearing. The Legislature utilized the word "prior" on purpose, and it should be ascribed its natural meaning. (*Katie V. v. Superior Court* (2005) 130 Cal.App.4th 586, 595 [When construing a statute, the reviewing court must first look to the words of the statute and give those words their normal, ordinary meaning.].)

The legislative history of section 300 indicates "an unmistakable intention to narrow the grounds on which children may be subjected to juvenile court jurisdiction." (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 823.) This court should not permit the expansion of juvenile court jurisdiction to include factual scenarios which are plainly unintended by the statutory language.

3. *The recent opinion in In re David R. explained that scientific authority supports the conclusion that a person who sexually abuses a female child is not likely to sexually abuse a male child.*

Shortly after DCFS filed its Answer, the Second District Court of Appeal, Division One, issued its opinion in *In re David R.* (December 31, 2012, B239629) ___ Cal.Rptr.3d ____ [2012 WL 6737811], holding that the fact that a father sexually abused his six-year-old stepdaughter (S.G.) was insufficient, by itself, to support a finding that father's two-year-old son (David) was at substantial risk of sexual abuse. In that case, in an apartment away from the family home with no one else present, father forced S.G. to masturbate him to ejaculation and fondled

her breasts. The juvenile court found jurisdiction over David pursuant to section 300, subdivisions (d) and (j) based solely on its view that "It's been long established that both sexes are at risk when this type of abuse occurs." The reviewing court held that this was a "misunderstanding of the law." (*Id.* at *1.)

The *In re David R.* court agreed with the reasoning of *In re Maria R.* (2010) 185 Cal.App.4th 48, 68, that a father's sexual abuse of his female daughters was, standing alone, insufficient to establish a substantial risk of sexual abuse of their male sibling. In particular, the court agreed with the *In re Maria R.* court's observation that no contrary decisions had ever "cited 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." (*In re David R.*, *supra*, 2012 WL 6737811 at *2, citing *In re Maria R.*, *supra*, 185 Cal.App.4th at p. 68.)

The court in *In re David R.* itself cited to scientific authority which supported the conclusion that a person who sexually abuses a female child is *not* likely to sexually abuse a male child. The court explained:

> The studies that have been done on siblings' risk of sexual abuse by their fathers show that in cases of a father's incest with a daughter, in the absence of other indicators of risk, "the male child is not likely to be victimized." (Wilson, The Cradle of Abuse: Evaluating The Danger Posed By A Sexually Predatory Parent To The Victim's Siblings (2002) 51 Emory L.J. 241, 263–264.) Thus, where a female child is the initial victim of abuse, "the abuser likely will prey upon other female children in the household, while leaving the male children alone." (*Id.* at p. 287.) A study published in the Journal of Child Sexual Abuse found that in 157 cases of sexual abuse

> within a family, 135 of the male perpetrators abused only female children (86%), 13 abused only male children (8.3%) and nine victimized both male and female victims (5.7%). (Proeve, A Preliminary Examination of Specific Risk Assessment for Sexual Offenders Against Children (2009) vol. 18, issue 6, Journal of Child Sexual Abuse 583, 585 (hereafter Proeve).)

(*In re David R.*, *supra*, 2012 WL 6737811 at *2-*3.)

The court in *In re David R.* noted that no expert testimony was offered to the juvenile court in support of the "substantial risk." Moreover, though there are risk factors for abuse, identified in research on the subject, DCFS offered no evidence regarding these and the juvenile court never considered any risk factors:

> "Other indicators of risk" may include the sexual proclivity of the molester. Is he an indiscriminately promiscuous adult; a pedophile; a pure incest offender? (Cavallin, Incestuous Fathers: A Clinical Report (1966) vol. 122, No. 10, American Journal of Psychiatry 122, 1132–1138.) Has he molested unrelated boys? (Wilson, Recognizing The Threat Posed by an Incestuous Parent to the Victim's Siblings: Part I: Appraising the Risk (June 2004) vol. 13, No. 2, Journal of Child and Family Studies 143, 153). One study found that the father's age when he abuses the minor female and his own sexual abuse as a minor affected the probability that the father would cross the gender boundary. (Proeve, supra, at p. 586.) Finally, the comparative sexual development of the molested female and a male sibling may be a factor affecting the male's risk of molestation. (See § 300, subd. (j), quoted at pp. 2–3, fn. 3, ante.)

(*In re David R.*, *supra*, 2012 WL 6737811 at *3.)

In his dissent, Judge Mallano agreed with the reasoning of *In re P.A.* (2006) 144 Cal.App.4th 1339, which presumed risk of sexual abuse to a son where a daughter has been sexually abused, and stated that a father's sexual abuse of his

child was prima facie evidence constituting a presumption and in this case "Father offered no evidence that he was not a risk to his son." (*In re David R.*, *supra*, 2012 WL 6737811 at *3 (dis. opn. of Mallano, P.J.).) The type of burden shifting espoused by Judge Mallano is alarming. It is axiomatic that 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. (*In re Brison C.* (2000) 81 Cal.App.4th 1373, 1379; *In re Amy M.* (1991) 232 Cal.App.3d 849.)

Where the county agency fails to introduce any evidence, including expert testimony, to support the juvenile court's conclusion that a male child is at risk of sexual abuse as a result of the sexual abuse of his sister, it fails to establish that the child is described by section 300, subdivision (d).

B. 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.

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., supra,* 1 Cal.App.4th at p. 823.) Boys are not at a substantial risk of seriously physical harm as the result of the sexual abuse of their sister.

DCFS argues that section 300, subdivision (b) applies to the instant scenario because sexual abuse constitutes bodily harm. (Ans. 27-29.) Father agrees that sexual abuse is offensive to a child's body and their physical well-being. However, it remains that a father's sexual abuse of his daughter does not equate to sexual abuse of, or substantial risk of the same, to his son.

DCFS cautioned that a court need not wait until a child is injured to protect him. (Ans. 29.) DCFS glosses over the fact that here, the boys here had a good relationship with their Father and wanted it to continue. Evidence of past conduct may be probative of current conditions, and a child must be at risk of harm during the jurisdictional hearing for the court to sustain the petition. (*In re Jasmine G.* (2000) 82 Cal.App.4th 282, 289-290; *In re Alexander K.* (1993) 14 Cal.App.4th 549, 558-559.) In this scenario, past conduct indicated that Father did not harm the boys, but treated them well. That fact was probative of current conditions and current risk of harm.

DCFS argues that the boys here were at risk of harm because Father's actions were so "aberrant" and "depraved," and it was impossible to say what Father was going to do in the future. (Ans. 29.) Any act of sexual abuse against a child could be described using the many inflammatory adjectives utilized by DCFS. *All* acts of sexual abuse could be considered "aberrant" so that all children may be considered to be at risk as the result of an act of sexual abuse. This renders

the term "aberrant" to be fairly meaningless. The term "aberrant" should be reserved, in the context of the issue presented here, for the 5.7% of male sexual abuse perpetrators who abused both male and female victims. (*In re David R.*, *supra*, 2012 WL 6737811 at *3, citing Proeve.) Absent any evidence in support, a juvenile court should not be permitted to presume that a father falls within that 5.7% of male sexual abuse perpetrators.

Where the only evidence of abuse if the father's sexual abuse of his daughter, that is not sufficient to support a finding that male children are at substantial risk of serious physical harm under section 300, subdivision (b).

C. I.J.'s brothers were not described by section 300, subdivision (j).

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.)

DCFS argues that the boys were at risk of learning to become sexual predators like their Father, and thus were described by section 300, subdivision (j). (Ans. 32.) However, possibly learning to become a sexual predator is not a type of

harm identified under any of the subdivisions of section 300. DCFS never alleged that the brothers actually suffered any specific harm as a result of I.J.'s abuse. (*In re Rubisela E.* (2000) 85 Cal.App.4th 177, 198.) There is no authority for the notion that possibly learning to become a sexual predator is a type of harm addressed by any provision under section 300.

The knowledge that a parent has abused the trust of their sister, or other collateral consequences of sexual abuse of a sibling, does not show jurisdiction is proper under section 300 where a male child is concerned. Here, the record contains no evidence showing the brothers suffered actual harm, and the record was devoid of evidence that they were at substantial risk of suffering any type of specific future harm. As such, they were not described by section 300, subdivision (j). (*In re Maria R.*, *supra*, 185 Cal.App.4th at p. 68.)

CONCLUSION

In deciding the issue raised in this case, the split among the courts of appeal reflects the division between passionate outrage and reasoned interpretation of statute and standards of evidence. Where a father has sexually abused his daughter, it almost never means that he will also sexually abuse his sons. A juvenile court must have some evidence beyond the daughter's abuse (e.g., scientific evidence, or factual evidence of the father's proclivity to molest boys), to support any conclusion to the contrary.

This Court should reverse the Opinion.

Respectfully submitted,

Date: January 22, 2013

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CERTIFICATE OF COMPLIANCE

I certify that:

Pursuant to California Rules of Court, rule 8.520(c)(1), and according to the Word Perfect document word count function, the attached reply brief contains

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Dated: January 22, 2013

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**

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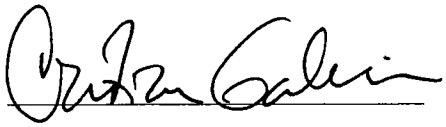

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