

S204622

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

In the Matter of I.J., et al.,

Persons Coming Under Juvenile Court Law.

LOS ANGELES COUNTY DEPARTMENT
OF CHILDREN AND FAMILY SERVICES,

Plaintiff and Appellant,

v.

J.J.,

Defendant and Appellant.

Case No. S204622

**Court of Appeal, 2d
District Case No. B237271**

**Los Angeles County
Superior Court Case No.
CK59248**

**SUPREME COURT
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ANSWER BRIEF ON THE MERITS

From a Decision of the Court of Appeal
Second Appellate District, Division Eight

Frank A. McGuire Clerk
Deputy

On Appeal from the Judgment of the Superior Court for the
County of Los Angeles, Juvenile Division
The Honorable Timothy R. Saito, Judge Presiding

OFFICE OF THE COUNTY COUNSEL
JOHN F. KRATTLI
County Counsel
JAMES M. OWENS
Assistant County Counsel
EMERY EL HABIBY
Deputy County Counsel
State Bar No. 219781
201 Centre Plaza Drive, Suite 1
Monterey Park, California 91754-2142
Telephone: (323) 526-6228
Facsimile: (323) 881-6594
Attorneys for Plaintiff and Appellant,
Los Angeles County Department of Children
and Family Services

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201 Centre Plaza Drive, Suite 1
Monterey Park, California 91754-2142
Telephone: (323) 526-6228
Facsimile: (323) 881-6594
Attorneys for Plaintiff and Appellant,
Los Angeles County Department of Children
and Family Services

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION	1
COMBINED STATEMENT OF THE CASE AND FACTS	3
I. PROCEEDINGS IN THE JUVENILE COURT	3
II. PROCEEDINGS IN THE COURT OF APPEAL	7
A. Majority Opinion	7
B. Dissenting Opinion	9
III. ACTIONS IN THE SUPREME COURT	10
ARGUMENT	11
I. THE FATHER'S REPEATED RAPE OF HIS BIOLOGICAL DAUGHTER, DURING TIMES WHEN THE SIBLINGS WERE ALSO IN THE HOME, WAS SUFFICIENT EVIDENCE TO ASSERT DEPENDENCY JURISDICTION OVER THE SIBLINGS	12
A. The Juvenile Court Correctly Assumed Jurisdiction over I.J.'s Male Siblings under Section 300, Subdivision (d).	13
1. The statute's plain language	14
2. Both dependency and criminal statutes protect boys from sexual predators who have abused girls	18
3. Case law supports a finding of jurisdiction under section 300, subdivision (d).	21
B. The Evidence Supports a Finding of Dependency Jurisdiction over the Male Siblings Under Section 300, Subdivision (b).	27
C. The Juvenile Court Correctly Utilized Section 300, Subdivision (j), to Assume Jurisdiction over I.J.'s Male Siblings	29

CONCLUSION.....32
CERTIFICATE OF WORD COUNT PURSUANT TO RULE 8.360.....34

TABLE OF AUTHORITIES

Page

CASES

In re Alexis S. (2012) 205 Cal.App.4th 48.....8, 26

In re Ana C. (2012) 204 Cal.App.4th 131724

In re Andy G. (2010) 183 Cal.App.4th 14058, 24

In re Ashley B. (2012) 202 Cal.App.4th 96830

In re Dorothy I. (1984) 162 Cal.App.3d 1154.....30

In re Edward C. (1981) 126 Cal.App.3d 19330

In re Gladys R. (1970) 1 Cal.3d 855.....14

In re Heather A. (1996) 52 Cal.App.4th 183.....29

In re I.J., et. al. (2012) 207 Cal.App.4th 13511

In re James C. (2002) 104 Cal.App.4th 470.....10

In re Jason L. (1990) 222 Cal.App.3d 1206.....28, 29

In re Jeannie O. (1973) 32 Cal.App.3d 28830

In re Jonathan B. (1992) 5 Cal.App.4th 87313

In re Jordan R. (2012) 205 Cal.App.4th 111.....26

In re Joshua J. (1995) 39 Cal.App.4th 98421

In re Karen R. (2001) 95 Cal.App.4th 8422, 24

In re Kristin H. (1996) 46 Cal.App.4th 163530

In re La Shonda B. (1979) 95 Cal.App.3d 59313

In re Luke M. (2003) 107 Cal.App.4th 141210

In re Maria R. (2010) 185 Cal.App.4th 48.....passim

In re Michael S. (1981) 127 Cal.App.3d 34829, 30

In re P.A. (2006) 144 Cal.App.4th 13398, 19, 22

In re R.C. (2012) 210 Cal.App.4th 93027

In re R.V. (2012) 208 Cal.App.4th 83729

<i>In re Rubisela E.</i> (2000) 85 Cal.App.4th 177	8, 25
<i>In re Tania S.</i> (1992) 5 Cal.App.4th 728	10
<i>In re Taylor</i> (2012) 209 Cal.App.4th 210	21
<i>People v. Brandao</i> (2012) 203 Cal.App.4th 436	14, 16, 21, 26
<i>People v. Kongs</i> (1994) 30 Cal.App.4th 1741	15
<i>People v. Lambert</i> (1985) 165 Cal.App.3d 716	28
<i>People v. Phillips</i> (2010) 188 Cal.App.4th 1383	17
<i>People v. Thompson</i> (1998) 206 Cal.App.3d 459	16

STATUTES

Penal Code, section 11165.1	12, 14, 18, 23
Penal Code, section 290	18, 20
Penal Code, section 3003.5	21
Penal Code, section 647.6	passim

OTHER AUTHORITIES

Assem. Com. on Judiciary, Analysis of Sen. Bill No. 208 (1999- 2000 Reg. Sess.) as amended May 13, 1999	19
Leg. Com. com., West's Ann. Welf. & Inst. Code (2008 ed.) foll. § 355.1	18
Stats. 1996, ch. 908, § 1, subd. (b), p. 5105	21
Stats. 1999, ch. 417 § 2, eff. Sept. 16, 1999	18

WELFARE AND INSTITUTIONS CODE

Section 300	passim
Section 300.2	11
Section 355.1	18, 19, 23
Section 361	28
Section 361.5	20

INTRODUCTION

The Los Angeles County Department of Children and Family Services ("DCFS") respectfully requests this Supreme Court affirm the decision of the Second District Court of Appeal entitled *In re I.J., et. al.* (2012) 207 Cal.App.4th 1351 ("Opinion").¹ The Second Appellate District affirmed, in whole, the assumption of juvenile court jurisdiction over the victim child, I.J., her sister, and her three brothers, after finding their father repeatedly raped I.J. for years. Given the abuse constituted an extreme level of depravity, was ongoing, and occurred while the siblings were in the home, the evidence amply supported the assumption of dependency jurisdiction over I.J. and her siblings, even the male siblings, under Welfare and Institutions Code² section 300, subdivisions (b), (d), and (j).

Subdivision (d) of section 300 defines sexual abuse for the purposes of declaring a child a dependent of the juvenile court. The definition is broad and encompasses not only acts of incestuous rape, but also acts of molestation, which do not require a touching. The statute seeks to protect the abused child and also children at risk of abuse. Given the cavalier nature of the father's ongoing abuse of I.J., where the siblings could have

¹ All citations to the Opinion are to the LexisNexis version, a copy of which is attached hereto.

² Unless otherwise indicated, all further statutory references are to the Welfare and Institutions Code.

walked-in on the abuse at any time, Father placed the siblings at risk of sexual abuse because the risk of exposure to the incestuous rape of their sister constituted sexual abuse as defined by the statute. Moreover, as the Opinion aptly observes, when the abuse is so aberrant in nature, all children in the home are at risk even if they were not targeted at the time of juvenile court intervention.

Similarly, section 300, subdivision (b), protects children who are at risk of physical harm because of their parent's abrogation of parental responsibilities. Again, given the aberrant conduct at issue here, the evidence supported an assumption of jurisdiction over the siblings under subdivision (b), because a juvenile court could reasonably infer the siblings were at risk of suffering physical harm at the hands of a father who repeatedly, forcibly raped his biological daughter.

Likewise, subdivision (j), jurisdiction was warranted to protect the siblings. Subdivision (j) permits a court to assume jurisdiction over the siblings of an abused child. That was precisely the scenario presented to the juvenile court.

Thus, the Opinion is sound, harmonious with the purpose of dependency law – to protect children – and consistent with other dependency statutes and the Penal Code as they relate to sexual abuse and sexual predators. Therefore, the decision of the Second District Court of Appeal should be affirmed.

COMBINED STATEMENT OF THE CASE AND FACTS

The subjects of the underlying juvenile dependency matter, which commenced in August 2011, are I.J. (then age 14), her three brothers (12-year-old twins, and a third brother, age eight), and her sister (age nine). (Opinion, p. 6; Clerk's Transcripts ["CT"] 1-6.) Petitioner herein is the children's father, J.J. ("father"). The children's mother ("mother") was not a party to the appellate proceedings below, nor is she a party to the instant action.

I. PROCEEDINGS IN THE JUVENILE COURT.

The Los Angeles County Department of Children and Family Services ("DCFS") initiated dependency proceedings on behalf of I.J. and all her siblings in August 2011, after their mother took the children to a police station suspecting I.J. had been sexually abused by her father. DCFS filed a petition under section 300, subdivisions (b) (failure to protect), (d) (sexual abuse), and (j) (abuse of a sibling.) (Opinion, p. 6; CT 1-6.)

The juvenile court ultimately found, under the pled subdivisions, that for the past three years, the father sexually abused I.J. by fondling and digitally penetrating her vagina, forcefully raping her by inserting his penis inside her vagina, and once forcing the girl to expose her vagina to the father at which point he orally copulated the child's vagina. The juvenile court also found that on a prior occasion, the father forced I.J. to watch pornographic videos with him, that the child was afraid of her father

because of the abuse he perpetrated against her, and that the abuse not only endangered I.J.'s physical health and safety, but also placed her siblings "at risk of physical harm, damage, danger, sexual abuse and failure to protect." (Opinion, p. 6; CT 1-6, 184-185.)

Indeed, the record overwhelmingly supported the juvenile court's findings of abuse, and included evidence of an audio recording of the father asking I.J. whether she would move in with him if he left the home and telling her that she could have boyfriends, but could not have sex with them. The children's mother also discovered that the father had been viewing many incest websites. (Opinion, p. 7; CT 19-20.)

According to I.J., her father forced her to have sex with him every Tuesday when her mother went to retrieve the siblings from school; Tuesdays were the days I.J. arrived home earlier than her siblings. The most recent incident of rape occurred after the father asked the mother to go to the market and to take one of the twin brothers with her as the child had a habit of wanting to know what others in the home were doing. After the mother and child left for the market, the father told I.J. to come to his upstairs bedroom. He then went downstairs to check on the other siblings who remained in the home, and returned to I.J. He instructed I.J. to pull down her pants and underwear, and commanded her to bend over. Then, standing against her backside, he inserted his penis inside her vagina. (Opinion, p. 7; CT 19, 22.)

I.J. further reported her father once orally copulated her and had asked her to watch computer videos of fathers having sexual intercourse with their daughters. I.J. denied her father ever threatened her not to disclose the abuse, but he told her if she complied, he would permit her to have boyfriends, wear the clothes she wanted to wear, and attend her Quinciñera. (Opinion, p. 7; CT 19, 22.)

I.J.'s statements to law enforcement and medical professionals were consistent with the disclosures made to her mother and the DCFS social worker. (Opinion, p. 9; CT 113.) The medical findings also were consistent with the reported history of abuse. (CT 113.) I.J. denied having sex with anyone besides her father. (CT 22.)

There had been a prior investigation in 2009 for sexual abuse, but I.J. recanted the allegations out of fear that her father would go to jail. She was willing to come forward now out of fear for her sister, who would soon be 11 years old, the age when their father began abusing I.J. (Opinion, p. 8; CT 22-23.)

All the siblings reported positively about their treatment in the home, denied being abused in any manner, and denied any of the siblings disclosed abuse. Though the mother reported the siblings had observed I.J. and the father spend time alone together in the parents' bedroom, the boys denied making such statements to mother and claimed to be unaware of I.J. and the father ever being alone in the parents' bedroom. But I.J.'s sister

once heard the father and I.J. arguing in the parents' bedroom. When the sister went into the room, she saw I.J. behind the door and her father at the computer. Both were clothed. (Opinion, pp. 8-9; CT 19-20.)

While the siblings' statements remained consistent, I.J. later recanted the allegations, denied there had been an audio recording, denied she had disclosed the abuse to her mother, and denied ever being left alone with her father. During the recantation, she mentioned her boyfriend was pressuring her to have sex and claimed they indeed had sex in a bathroom stall, but then could not describe the stall and stated the boyfriend's telephone did not work when the DCFS social worker asked for his number. (Opinion, p. 8; CT 103-104.)

Further investigation revealed that in 2005, the father's niece accused him of sexually abusing her when she was 14 years old and lived in the family's home. The allegations were substantiated by DCFS, but the niece recanted, and criminal charges were dropped. (Opinion, p. 9; CT 108-109.)

At the trial on October 17, 2011, the juvenile court received the DCFS reports in evidence, without objection. No party proffered any other evidence, documentary or testimonial. The court found I.J.'s disclosures of abuse credible because they were consistently made to DCFS, law enforcement, and to the forensic examiner, and because the disclosures were so detailed in describing the timing and manner of the abuse. In accord, the juvenile court declared all the children dependents under section

300, subdivisions (b), (d), and (j), retained them in the custody of their mother, and removed them from the father's custody. (Opinion, p. 9; CT 184-185; Reporter's Transcript ["RT"] 208-209, 211.)

The father timely noticed an appeal. (CT 188.)

II. PROCEEDINGS IN THE COURT OF APPEAL.

The father appealed to the Second District Court of Appeal, challenging, in relevant part, the findings of jurisdiction under section 300, subdivisions (b), (d), and (j), relating to I.J.'s brothers.³ (Opinion, p. 10.) In the Opinion, filed on June 29, 2012, and later certified for publication, Division Eight of the Second Appellate District affirmed the juvenile court's findings, in whole, including those relating to I.J.'s brothers. (Opinion, p. 10.)

A. Majority Opinion.

Preliminarily, the Majority, written by Justice Grimes, with Presiding Justice Bigelow concurring, found the evidence amply supported the true findings made by the juvenile court, that I.J. indeed was sexually abused repeatedly by her father. (Opinion, p. 5, 10.) The Majority next rejected the notion that the positive treatment of the younger siblings meant they were not at substantial risk of sexual abuse or physical harm.

³ On appeal, the father challenged all the jurisdictional findings, including those relating to I.J. and her sister. However, the arguments made before this Court pertain only to the findings made with regard to I.J.'s brothers.

(Opinion, p. 10.) With regard to I.J.'s sister, the Majority concluded, "there can be no legitimate dispute that the evidence places her at substantial risk of sexual abuse as she approaches [I.J.]'s age." (Opinion, p. 10.)

Turning to the brothers, and noting appellate decisions concluding otherwise, the Majority held a juvenile court has the authority to take jurisdiction over boys whose father forcibly raped their sister. (Opinion, pp. 10-12, citing *In re P.A.* (2006) 144 Cal.App.4th 1339, *In re Andy G.* (2010) 183 Cal.App.4th 1405; disagreeing on this point with *In re Rubisela E.* (2000) 85 Cal.App.4th 177, 197-199, *In re Alexis S.* (2012) 205 Cal.App.4th 48, 49-50, 52, 55, *In re Maria R.* (2010) 185 Cal.App.4th 48, 67.)

As repeated by the Majority: "[A]berrant sexual behavior by a parent places the victim's siblings who remain in the home at risk of aberrant sexual behavior." (Opinion, p. 13, citing *In re P.A.*, *supra*, 144 Cal.App.4th at p. 1347.) Concluding that the father's behavior was "aberrant in the extreme[.]" the Majority appreciated the boys were unaware of the abuse at the time, but stated it was impossible for that unawareness to continue and determined the boys were at risk of learning to become sexual predators and believing it was acceptable to manipulate someone more vulnerable. (Opinion, p. 13.)

The Majority recognized it was impossible to know what a specific sexual predator may do in the future, but "that very uncertainty makes it

virtually incumbent upon the juvenile court to take jurisdiction over the siblings" (Opinion, p. 13.) Evidence of aberrant sexual behavior of this magnitude – a father's rape of his minor, biological daughter – is sufficient to support a finding that the male siblings living in the home are at risk. (Opinion, p. 13.)

B. Dissenting Opinion.

Justice Flier filed a concurring and dissenting opinion. Justice Flier agreed with the Majority as to the findings relating to I.J. and her sister, but did not agree with the holding pertaining to the brothers. (Opinion, p. 14.) Justice Flier opined the evidence relating to the brothers showed they were well cared for and safe. (Opinion, pp. 14-15.) The Dissent stated that to find a child at risk of sexual abuse, a court must find the child in danger of a specific sex act "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." (Opinion, p. 15, citing *In re Maria R.*, *supra*, 185 Cal.App.4th at pp. 67-68, omitting italics.)

The Dissent recognized the split in authority on this point and concluded the evidence was insufficient without a showing that the perpetrator of sexual abuse against a female child is likely to similarly abuse a male child. (Opinion, p. 15.)

///

III. ACTIONS IN THE SUPREME COURT.

The father filed a Petition for Review in the California Supreme Court, which was granted on September 19, 2012.

QUESTION PRESENTED

Whether a father's forcible, repeated, incestuous rape of his biological daughter, which had been ongoing for three years and began when the child was 11 years old, is sufficient to support a finding that male siblings living in the home are at substantial risk of sexual abuse or other harm.

STANDARD OF REVIEW

The father claims this Court should review the Opinion de novo, but in the body of his brief makes insufficiency of the evidence arguments. (See Brief of Petitioner J.J. on the Merits ["PB"] 2, 12.) As fashioned by this Court, the issue at bar is whether the presented facts were sufficient to support dependency jurisdiction over the male siblings. Indeed, a juvenile court's jurisdictional findings routinely are reviewed for substantial supporting evidence. (*In re James C.* (2002) 104 Cal.App.4th 470, 482.) Under this standard, the reviewing courts examine the whole record in a light most favorable to the findings and conclusions of the lower court and indulge all legitimate inferences in favor of them. (*In re Tania S.* (1992) 5 Cal.App.4th 728, 733-734; *In re Luke M.* (2003) 107 Cal.App.4th 1412, 1427.)

However, regardless of whether the standard of review is the substantial evidence test or de novo review, the Opinion should be affirmed. The evidence presented in the case at bar fell well within the statutory provisions describing when a juvenile court can take jurisdiction over a child. A juvenile court is permitted to act to protect not only abused children, but also children at risk of abuse. Looking at the relevant statutes, the risk to I.J.'s male siblings, even assuming they were not at risk of being raped, permitted the juvenile court to take action to protect them.

ARGUMENT

Dependency laws seek to protect not only the child victims from abuse, but also those children at risk of abuse. "[T]he purpose of [dependency laws] is to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm. . . ." (§ 300.2.)

To help accomplish this goal, section 300 describes the categories of children who may be adjudged dependents of the juvenile court. The relevant subdivisions here are (b) (failure to protect), (d) (risk of sexual abuse), and (j) (sibling abuse). As is explained below, the father's ongoing, incestuous rape of I.J., done at times when the siblings were at the home,

provided substantial evidence to support the assumption of jurisdiction over all the children under section 300, subdivisions (b), (d), and (j).

I. THE FATHER'S REPEATED RAPE OF HIS BIOLOGICAL DAUGHTER, DURING TIMES WHEN THE SIBLINGS WERE ALSO IN THE HOME, WAS SUFFICIENT EVIDENCE TO ASSERT DEPENDENCY JURISDICTION OVER THE SIBLINGS.

Section 300, subdivision (d), permits a court to assume jurisdiction over a child who has been sexually abused or is at substantial risk of sexual abuse, as defined in Section 11165.1 of the Penal Code, by his or her parent, guardian, or a member of the household, or where the parent or guardian failed to protect the child from sexual abuse when he/she knew or should have known of the abuse. (§ 300, subd. (d).)

Similar to the "failure to protect" clause in subdivision (d), subdivision (b), permits a court to assume jurisdiction over a child who is suffering or at risk of suffering serious physical harm or illness resulting from the failure or inability of his/her parent to supervise or protect the child. (§ 300, subd. (b).) Neither subdivision requires a court to find that the subject child has been actually harmed, only that the child is at substantial risk of harm. (See § 300, generally.)

Subdivision (j) jurisdiction is warranted where a child was abused or neglected and there is a substantial risk the child's siblings will be abused or neglected as well. Subdivision (j), permits juvenile courts to protect the siblings who may not yet have been abused or neglected.

Here, the male siblings fall squarely into all three subdivisions as the children were at risk of sexual abuse and other harm at the hands of their father.⁴

A. The Juvenile Court Correctly Assumed Jurisdiction over I.J.'s Male Siblings under Section 300, Subdivision (d).

The Court of Appeal properly sustained jurisdiction over I.J.'s male siblings under section 300, subdivision (d). The appellate court reasoned that I.J.'s brothers, though unaware of the sexual abuse, were not likely to remain ignorant of that fact indefinitely. (Opinion, p. 13.) The appellate court also reasoned that I.J.'s brothers, once aware of their sister's sexual abuse by their father, could, *inter alia*, become sexual predators like their father. (Opinion, p. 13.) The Majority aptly noted that the unpredictable nature of sexual predators makes it incumbent upon juvenile courts to assert jurisdiction over any child living in the home. (Opinion, p. 13.) This commonsense approach is supported by the statute's plain language, consistent with other dependency and criminal statutes, and the case law interpreting them.

⁴ Reviewing courts need only determine whether the overall jurisdictional ruling over the children, not the particular subsets, was appropriate in order to affirm. (*In re La Shonda B.* (1979) 95 Cal.App.3d 593, 599-600.) "The reviewing court may affirm a juvenile court judgment if the evidence supports the decision on any one of several grounds" (*In re Jonathan B.* (1992) 5 Cal.App.4th 873, 875, 877.) Regardless, in the case at bar, substantial evidence supported the findings of jurisdiction under all three subdivisions, (b), (d), and (j), of section 300.

1. The statute's plain language.

Section 300, subdivision (d), permits a juvenile court to assert jurisdiction where:

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, by his or her parent or guardian or a member of his or her household, 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.

Thus, jurisdiction is warranted when a child has been sexually abused, is at risk of sexual abuse as defined by Penal Code section 11165.1, or the parent fails to protect the child from sexual abuse. (§ 300, subd. (d).) Penal Code section 11165.1, refers to specific acts of sexual abuse and includes sexual assault, incest, and child molestation. (Pen. Code § 11165.1, subd. (a).) The definition of "child molestation" is set forth in Penal Code section 647.6. (Pen. Code § 11165.1, subd. (a).)

The California Supreme Court explained the primary purpose of Penal Code section 647.6, is the "protection of children from interference by sexual offenders, and the apprehension, segregation and punishment of the latter." (*People v. Brandao* (2012) 203 Cal.App.4th 436, 441 [citing *In re Gladys R.* (1970) 1 Cal.3d 855, 868, internal quotation marks omitted].) Penal Code section 647.6 and the case law interpreting it broadly define

"child molestation" as not requiring a touching, but instead necessitating only (1) conduct a normal person would unhesitatingly be irritated by and (2) conduct motivated by an unnatural or abnormal sexual interest. (*Ibid.*)

Thus, the statutory scheme envisions that sexual abuse does not require a touching and can constitute otherwise innocuous acts that are objectively irritating or harassing to a child and subjectively motivated by an unnatural or abnormal sexual interest by the perpetrator. In determining whether the defendant's conduct would unhesitatingly irritate or disturb a normal person, courts employ an objective test, not dependent on whether the child was in fact irritated or disturbed. (*Ibid.*) Thus, the fact that the siblings were at the home during times of the abuse and could have walked in on it, meant their father "failed to adequately protect [them] from sexual abuse" (§ 300, subd. (d).)

In *People v. Kongs* (1994) 30 Cal.App.4th 1741, 1751, the Court held that photographing a child may constitute sexual abuse. In that case, the defendant attended family photo shoots and posed and photographed girls, none of whom were nude, with their legs spread and their underwear or genitalia showing with his camera focused on that area. The defendant told police that he received a roller-coaster like thrill from his activities, and described it as a "fetish." (*Id.* at p. 1747.) The Court held the evidence sufficient to sustain the charge of annoying or molesting a minor under Penal Code section 647.6. (*Id.* at p. 1751.)

In *People v. Thompson* (1998) 206 Cal.App.3d 459, 468, the Court found that repeatedly driving past a child while staring and gesturing at her may constitute sexual abuse. The *Thompson* Court held that the Penal Code does not require the specific act be lewd or obscene; rather the statute requires proof of acts that a normal person would be unhesitatingly irritated by, and that the acts be motivated by an abnormal or unnatural interest toward the child victim. (*Ibid.*)

In *People v. Brandao, supra*, 203 Cal.App.4th at p. 441, the Court held that sending an inappropriate text message to a child may constitute sexual abuse. There, the Court held that although no specific intent is required under Penal Code section 647.6, subdivision (a)(1), the statute does require that the act be motivated by an unnatural or abnormal sexual interest or intent with respect to children. (*Ibid.*) In *People v. Brandao*, a 15-year-old girl received numerous sexually suggestive text messages from her high school soccer coach who was 37 years old. (*Id.* at p. 440.) Other girls had also received suggestive messages. (*Ibid.*) The Court rejected the defendant's argument that he was joking and did not mean to hurt or take advantage of the girls. (*Id.* at p. 441.) The appellate court reasoned that Penal Code section 647.6, subdivision (a)(1), requires no specific intent, only that the acts be "motivated by an unnatural or abnormal sexual interest or intent with respect to children." (*Ibid.*)

The Court of Appeal in *People v. Phillips* (2010) 188 Cal.App.4th 1383, 1395, found the evidence sufficient to support a conviction under Penal Code section 647.6, even though there was no specific child targeted. The *People v. Phillips* Court concluded that the man's actions – masturbating in his car parked outside a school – showed an intent to be observed by a child. (*Ibid.*) While the father here may not have intended for his sons to observe the abuse of I.J., his actions certainly placed them at risk of such. Children at risk are expressly protected by section 300, subdivision (d).

A father who rapes his biological daughter while his sons are in close proximity can be said to have committed an act "motivated by an unnatural or abnormal sexual interest or intent with respect to children." (*Ibid.*) And, while the father's sexual interest or intent may not have been directed at his male children, his rape of their sister, while the sons were at the home, placed the boys at risk. And, even though the father may not have intended for his sons to see the abuse of their sister, he certainly did not protect them from that possibility, thus triggering section 300, subdivision (d).

Thus, the statutory scheme's broad definition of sexual abuse does not discount non-touching offenses, or the risk of them, as merely "collateral damage," as claimed by the Dissent (Opinion, p. 15), but

properly categorizes them as varying types of sexual abuse for which dependency jurisdiction under section 300, subdivision (d), is proper.

2. Both dependency and criminal statutes protect boys from sexual predators who have abused girls.

A look at other dependency and criminal statutes confirms the conclusion that a male child, who lives in the same household as a parent who has committed ongoing acts of incestuous rape, is at risk of harm or abuse as defined by section 300, subdivision (d). For example, section 355.1, in relevant part, creates a presumption that any child, whose parent previously was found to have committed acts of sexual abuse as defined by Penal Code section 11165.1 or is required to register as a sex offender under Penal Code section 290, is subject to the juvenile court's jurisdiction. (§ 355.1, subd. (d).) The presumption does not distinguish between male and female abuse victims.

The Legislature enacted section 355.1, subdivision (d), in 1999, as emergency legislation. (Stats. 1999, ch. 417 § 2, eff. Sept. 16, 1999.) The Legislature acknowledged that children were placed at risk "when permitted contact with a parent or caretaker who has committed a sex crime." (Leg. Com. com., West's Ann. Welf. & Inst. Code (2008 ed.) foll. § 355.1, at p. 499.) Section 355.1, subdivision (d), was designed to provide children with "greater protection from sexual abuse by requiring a person with a history of sexual abuse to bring forth evidence sufficient to show

that the minor in that person's care or household is not at risk of harm." (Assem. Com. on Judiciary, Analysis of Sen. Bill No. 208 (1999-2000 Reg. Sess.) as amended May 13, 1999.) Section 355.1, subdivision (d), makes no distinction based on the gender of the prior victim and the gender of the child subject to the dependency court proceedings. While not directly applicable to the case at bar, section 355.1, subdivision (d), demonstrates the commonsense notion that siblings of molested children are at risk of sexual abuse and are entitled to the protection of the juvenile court. (*In re P.A.*, *supra*, 144 Cal.App.4th at p. 1347.)

The father makes much ado about the inapplicability of section 355.1. (PB 30-43.) Respondent acknowledges the presumption was not triggered in the instant matter. Indeed, at trial, DCFS was the only party to proffer evidence; clearly, the juvenile court did not shift the burden to the father. (RT 201-204.) Section 355.1 is relevant, however, to illustrate a legislative concern about any child living in a home with a sexual predator. Had the father here, years earlier, been convicted of sexual abuse, the section 355.1 presumption would have been triggered, and the male siblings living in the home would have been adjudged dependents unless the father produced evidence that he no longer posed a threat. It logically follows that when a juvenile court finds a father has perpetrated incestuous rape against his daughter while male siblings were in the home, the court is authorized

to find the boys at similar risk and assert dependency jurisdiction over them.

Similarly, section 361.5, subdivision (b)(6), though not directly applicable to the case at bar, also acknowledges that siblings of molested children, regardless of gender, are at risk of sexual abuse when in the same home as the sexual predator, and are entitled to the protection of the juvenile court. Section 361.5, subdivision (b), lists circumstances where a juvenile court, after removing a child from parental custody, can deny a parent reunification services and immediately place the child in a permanent, out-of-home plan. Subdivision (b)(6), permits a court to forego reunification services where "the child has been adjudicated a dependent pursuant to any subdivision of Section 300 as a result of severe sexual abuse . . . to the child, a sibling, or a half sibling by a parent or guardian." (§ 361.5, subd. (b)(6).) Included in the definition of "severe sexual abuse" is intercourse. (*Ibid.*) The statute makes no distinction between the gender of the child and the abused sibling, thus further evincing a legislative determination that siblings of severely sexually abused children, regardless of gender, are at substantial risk of harm.

Correspondingly, under section 290 of the Penal Code, all persons convicted of a sex crime are subject to mandatory lifetime registration as a sex offender. This includes defendants convicted of molesting children under Penal Code section 647.6. The purposes of Penal Code section 290

are twofold: (1) to ensure sexual predators are readily available for police surveillance because they are likely to commit similar offenses in the future and (2) to allow the public to take protective measures by identifying the presence of sex offenders. (See Stats. 1996, ch. 908, § 1, subd. (b), p. 5105; see also *People v. Brandao*, *supra*, 203 Cal.App.4th at p. 441.) California law also provides for residency restrictions for sex offenders, barring them from living within 2,000 feet of schools and parks where children congregate. (Pen. Code § 3003.5, deemed unconstitutional as applied in *In re Taylor* (2012) 209 Cal.App.4th 210.) These provisions make no distinctions based on the gender of the victims and the children intended to be protected in the future, evincing a legislative understanding that child sexual predators pose a risk to all children.

3. Case law supports a finding of jurisdiction under section 300, subdivision (d).

Applying case law that analyzes section 300, subdivision (d), to the instant facts, demonstrates the juvenile court rightly assumed jurisdiction over I.J.'s brothers under section 300, subdivision (d).

In *In re Joshua J.* (1995) 39 Cal.App.4th 984, the Fourth District Court of Appeal held that a father who sexually abused a six-month-old boy reasonably could be found to pose a risk of sexual abuse to the father's newborn son. (*Id.* at p. 987.) The finding was inferentially supported not only by the nature of the abuse, but also by evidence showing that the

father suffered from serious mental-health problems as well. (*Id.* at pp. 987-988, fn. 3.)

In *In re Karen R.* (2001) 95 Cal.App.4th 84, the Second District Court of Appeal held that a father who had committed two incidents of forcible incestuous rape of his own daughter when she was 13 years old reasonably could be found "to be so sexually aberrant" that the siblings of the victim, both male, age eight, and female, age six, were at substantial risk of sexual abuse as well. (*Id.* at pp. 90-91.) "Although the danger of sexual abuse of a female sibling in such a situation may be greater than the danger of sexual abuse of a male sibling, the danger of sexual abuse to the male sibling is nonetheless substantial. Given the facts of this case, the juvenile court reasonably could conclude every minor in the home, regardless of gender, was in substantial danger of sexual abuse by father." (*Id.* at p. 91.)

In re P.A., *supra*, 144 Cal.App.4th 1339, is another case from the Second District Court of Appeal, which found younger brothers were at risk of sexual abuse even though the abuse perpetrated against their sister was far less severe than the abuse suffered in *In re Karen R.* (*Id.* at p. 1346-1347.) The Court reasoned there was evidence to support the finding because the boys were approaching the age at which the father began to abuse their sister, and he had access to the boys. (*Id.* at p. 1342.) The *In re P.A.* Court reached this result even though there was no evidence the father

had ever engaged in homosexual behavior, the father had been participating in sexual abuse counseling and parenting classes, the boys had not been sexually abused, and the boys indicated they were unaware of the abuse of their sister. (*Id.* at pp. 1345-1347.) The Court stated, "The juvenile court properly could conclude that father's presence in the home placed his sons at risk of sexual abuse." (*Id.* at p. 1347.)

In support of its holding, the *In re P.A.* Court cited the presumption of section 355.1, explained above. (*Id.* at p. 1147.) To recall, section 355.1 creates a presumption that any child whose parent previously was found by a court to have committed acts of sexual abuse as defined by Penal Code section 11165.1 or is required to register as a sex offender, is subject to the juvenile court's jurisdiction. (§ 355.1, subd. (d).) While the presumption was not triggered in *In re P.A.*, the Court nonetheless concluded that section 355.1 evinced a legislative determination that "siblings of sexually abused children are at substantial risk of harm and are entitled to protection by the juvenile courts." (*Id.* at p. 1147.) Similarly, here, though section 355.1 was not triggered, the presumption, which does not distinguish between male and female abuse, evinces an understanding that sexual predators pose a risk to all children in the home, not just the female children.

What the cases cited above illustrate is that the sexual abuse of a female child does not preclude a finding that another child, including a

male child, is at substantial risk of sexual abuse while in the abuser's custody. This particularly is true where, as here, the abuser's conduct exhibits a high degree of sexual deviance and was done while other children were in the home.

The Second Appellate District echoed these conclusions in *In re Andy G.* (2010) 183 Cal.App.4th 1405, in holding that regardless of whether the male child witnessed the father molest his sister, the father's act of sexually abusing his daughter while the son was living in the same home or sharing the same room "evinces, at best, a total lack of concern for whether [the son] might observe [the father's] aberrant sexual behavior." (*Id.* at p. 1414.) The appellate court affirmed findings that a two-year-old boy was at risk of sexual abuse where the father sexually abused the boy's 12-year-old and 14-year-old half-sisters. (*Id.* at pp. 1409-1410, 1415.) In affirming the risk-of-abuse finding as to the boy, the Court noted that the father had exposed himself to his stepdaughter in his son's presence, and that the father had used his son to gain access to his stepdaughters, all of which inferentially supported a finding that the father had no concern for causing his son to witness aberrant sexual behavior. (*Id.* at p. 1414. See also *In re Ana C.* (2012) 204 Cal.App.4th 1317, 1332.)

However, the Second District, a year prior to its decision in *In re Karen R.*, *supra*, held that a father who sexually abused his 13-year-old daughter multiple times, including forcing her to orally copulate him,

inferentially supported a finding that the nine-year-old daughter was at risk, but declined to find the brothers at risk. (*In re Rubisela E.*, *supra*, 85 Cal.App.4th at pp. 193, 197, 199.) The Court found it reasonable to conclude that in the 13-year-old's absence, the father would likely focus on the nine-year-old daughter, but could not make a similar finding relating to the boys. (*Ibid.*)

That said, the Court went on to acknowledge the "real possibility that brothers of molested sisters can be molested [citation] or in other ways harmed by the fact of the molestation within the family. Brothers can be harmed by the knowledge that a parent has so abused the trust of their sister. They can even be harmed by the denial of the perpetrator, the spouse's acquiescence in the denial, or their parents' efforts to embrace them in a web of denial." (*Id.* at p. 198.) Thus, though coming to a different ultimate conclusion, the *In re Rubisela E.* Court recognized that under different facts, the sexual abuse of a girl may justify jurisdiction over her brothers. (See *Ibid.*)

In *In re Maria R.*, *supra*, 185 Cal.App.4th 48, relied upon by the father and the Dissent (Opinion, p. 15; PB 18-22), the Fourth District Court of Appeal ruled that in the absence of evidence showing the sexual predator had demonstrated an interest in male children, such as a scientific study showing that a person who sexually abuses a female child is likely to sexually abuse a male child, the evidence was insufficient to support a

finding that a boy was at risk of sexual abuse based on the abuse of his sister. (*Id.* at pp. 67-68; see also *In re Alexis S.* (2012) 205 Cal.App.4th 48, 55; *In re Jordan R.* (2012) 205 Cal.App.4th 111, 138-139.)

The *In re Maria R.* Court stated that dependency jurisdiction under section 300, subdivision (d), must "refer[] 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., supra*, 185 Cal.App.4th at pp. 67-68.) But as explained above, "child molestation" does not require a touching, but instead requires (1) conduct a normal person would unhesitatingly be irritated by, and (2) conduct motivated by an unnatural or abnormal sexual interest. (*People v. Brandao, supra*, 203 Cal.App.4th at p. 441.) The ongoing abuse of female children in the home while the male children are present places the boys at risk of encountering the abuse and thus places them at risk of child molestation.

This is particularly true where, as here, the abuse included the ongoing incestuous rape, beginning when the victim was only 11 years old. The nature of the abuse, duration of it, the victim's prepubescent age (for a duration of the abuse), and the fact that the father so brazenly abused I.J. in the home while the siblings were there, revealed a depth of depravity, lack of control, and callousness. The father revealed a character so depraved, so

aberrant, and so immoral that it fully supported the trial court's finding that any children living in his household, both boys and girls, were at risk of his sexual predations. Moreover, the cavalier and brazen nature of the father's acts, by perpetrating the abuse while other children were in the home, indicates the male siblings were, at a minimum, placed at risk of being exposed to the abuse. That risk of exposure was enough to warrant jurisdiction under section 300, subdivision (d). Thus, regardless of whether this Court reviews the instant matter de novo or for substantial supporting evidence, the Opinion should be affirmed.

B. The Evidence Supports a Finding of Dependency Jurisdiction over the Male Siblings Under Section 300, Subdivision (b).

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

(§ 300, subd. (b).)

Section 300, subdivision (b), has been held to cover a wide variety of physical harms or illnesses to children, ranging from exposure to domestic violence to sexual abuse. (See, e.g., *In re R.C.* (2012) 210 Cal.App.4th 930 [exposure to domestic violence may serve as the basis for jurisdiction under § 300, subd. (b)]; *In re Jason L.* (1990) 222 Cal.App.3d

1206 [physical force required to molest children while a perpetrator is aroused constitutes "bodily harm"].)

In *In re Jason L.*, the Fourth District Court of Appeal held that sexual abuse constitutes a substantial danger to a child's "physical health." (*In re Jason L.*, *supra*, 222 Cal.App.3d 1206, 1216.) In that case, the father challenged the juvenile court's decision to remove his son from the father's custody based on evidence that the father had sexually molested his daughter when she visited the home. (*Ibid.*) In finding the evidence sufficient to support removal, the appellate court recognized that section 361, subdivision (b)(1), requires a finding of "a substantial danger to the physical health of the minor[.]" before removing the child from the home of the custodial parent. The Court concluded the operative phrase "physical health" was synonymous with "bodily." (*Ibid.*, citing *People v. Lambert* (1985) 165 Cal.App.3d 716.) The *In re Jason L.* Court reasoned that even if a sexual predator did not use violence to force his victim to engage in a sexual act, the physical force required to perform the act on a child while the perpetrator was aroused met the standard for bodily harm. (*Id.* at p. 1217.)

In the case at bar, the father and Dissent highlight the evidence that the brothers "felt safe with father" and "wished to continue living with him[.]" (PB 14-15; Opinion, pp. 14-15.) But these facts do not rule out a finding under section 300, subdivision (b). "The court need not wait until a

child is seriously abused or injured to assume jurisdiction and take the steps necessary to protect the child." (*In re R.V.* (2012) 208 Cal.App.4th 837, 843, citing *In re Heather A.* (1996) 52 Cal.App.4th 183, 194-196, citing *In re Michael S.* (1981) 127 Cal.App.3d 348, 357-358.) Because sexual abuse constitutes "bodily harm," and because the father's actions here were so depraved and aberrant, the assumption of dependency jurisdiction over all of I.J.'s siblings—male and female—was proper under section 300, subdivision (b). "It is of course impossible to say what any particular sexual predator . . . is likely to do in the future in any particular instance. . . [b]ut . . . that very uncertainty makes 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." (Opinion, p. 13.)

C. The Juvenile Court Correctly Utilized Section 300, Subdivision (j), to Assume Jurisdiction over I.J.'s Male Siblings.

Subdivision (j) jurisdiction is warranted where the child's sibling was abused or neglected and there is a substantial risk the child will be abused or neglected as well. In reviewing the legislative history of section 300, subdivision (j), the court in *In re Jason L.*, *supra*, 222 Cal.App.3d at p. 1215, noted: "Prior to 1989, Welfare and Institutions Code section 300 did not specify sibling abuse as a ground for declaring a child a dependent of the juvenile court. Nonetheless, case law upheld petitions seeking to

declare children dependents on this basis." (See also *In re Dorothy I.* (1984) 162 Cal.App.3d 1154, 1157-1158; *In re Michael S.* (1981) 127 Cal.App.3d 348 [overruled on other grounds in *In re Kristin H.* (1996) 46 Cal.App.4th 1635, 1667]; *In re Edward C.* (1981) 126 Cal.App.3d 193, 203; *In re Jeannie O.* (1973) 32 Cal.App.3d 288, 304.)

Subdivision (j) was intended to expand the grounds for the exercise of jurisdiction as to children whose sibling had been abused or neglected as defined in subdivisions (a), (b), (d), (e), or (i). (*In re Ashley B.* (2012) 202 Cal.App.4th 968, 982-983.) Subdivision (j) does not state that its application is limited to the risk that the child will be abused or neglected in the same manner as the sibling. Rather, subdivision (j) directs the trial court to consider whether there is a substantial risk that the child will be harmed under subdivisions (a), (b), (d), (e), or (i) of section 300, notwithstanding which of those subdivisions describes the child's sibling.

Further, subdivision (j) contains a specific legislative directive to consider multiple factors, including "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).) The "nature of the abuse or neglect of the sibling" is only one of many factors that the court is to consider in assessing whether the child is at risk of abuse

or neglect in the family home. (*Ibid.*) Subdivision (j) thus allows the court to take into consideration factors that might not be determinative if the court were adjudicating a petition filed directly under one of the other subdivisions. (See *In re Maria R.*, *supra*, 185 Cal.App.4th at p. 64.)

The broad language of subdivision (j) clearly indicates that the trial court is to consider the totality of the circumstances of the child and his or her sibling in determining whether the child is at substantial risk of harm within the meaning of any of the subdivisions enumerated in subdivision (j). The provision thus accords the trial court greater latitude to exercise jurisdiction as to a child whose sibling has been abused than the court would have in the absence of that circumstance. Further, limiting the application of subdivision (j) to the same ground found to apply to the child's sibling would render subdivision (j) superfluous because the count could simply be filed under the applicable subdivision. (See *In re Maria R.*, *supra*, 185 Cal.App.4th at p.64.)

The father's sexual abuse of I.J. provided a sufficient basis for the court to find that the other children – both males and females – were minors described by section 300, subdivision (j). Because the court found that the father had abused I.J. as defined in subdivisions (b) and (d), jurisdiction over the remaining children was proper under section 300, subdivision (j). The father's ongoing sexual abuse of I.J. reflects a profound lack of judgment by an unreformed and unrepentant sexual predator. His aberrant

conduct and lack of judgment constituted sufficient evidence for the juvenile court to adjudge his remaining children dependent children under section 300, subdivision (j).

Moreover, the father's sexual abuse of I.J. reflected a willingness to concoct elaborate schemes to get I.J. alone with him. He made excuses to get the mother out of the home. He forced I.J. to watch "father-daughter" incest pornography. Such conduct indicates a conniving, calculating sexual predator who abused his role as a father to receive sexual gratification from his own biological child. His behavior and total lack of remorse, indicates he would not hesitate to abuse his parental authority in the future with regard to his other children. These facts further place the boys at risk of "learning to become sexual predators like father and of learning from father that it is appropriate to manipulate others who are more vulnerable."

(Opinion, p. 13.) This is a reasonable inference. A sexually abusive and manipulative father living in the home creates an extremely dysfunctional home environment and poses a risk to the well-being of any child in the home. (*In re Maria R.*, *supra*, 185 Cal.App.4th at p. 69.)

CONCLUSION

The facts presented in the case at bar constituted substantial evidence to support dependency jurisdiction over all the children – I.J., her sister, and her brothers. The juvenile court did not need data showing that sexual predators of female children may prey on boys, nor was DCFS

required to make a showing that the father had sexual proclivities toward boys, in order to assert jurisdiction over I.J.'s brothers. The father's behavior was so obscene, so deviant, so aberrant, that he posed a risk to all children living in the home. Thus, the evidence amply supported jurisdiction over I.J.'s brothers under section 300, subdivisions (b), (d), and (j). The decision of the juvenile court and the Opinion supporting it, should be affirmed by this Supreme Court.

DATED: December 24, 2012

Respectfully submitted,

JOHN F. KRATTLI
County Counsel

By



EMERY EL HABIBY
Deputy County Counsel


Attorneys for Respondent

CERTIFICATE OF WORD COUNT PURSUANT TO RULE 8.360

The text of this brief consists of 7,983 words as counted by the Microsoft Office Word 2003 program used to generate this brief.

DATED: December 24, 2012 Respectfully submitted,

JOHN F. KRATTLI
County Counsel

By 
EMERY EL HABIBY
Deputy County Counsel

Attorneys for Respondent

DECLARATION OF SERVICE

STATE OF CALIFORNIA, County of Los Angeles:

LINDA KAPPELER states: I am and at all times herein mentioned have been a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen years and not a party to nor interested in the within action; that my business address is 201 Centre Plaza Drive, Suite 1, City of Monterey Park, County of Los Angeles, State of California; that I am readily familiar with the business practice of the Los Angeles County Counsel for collection and processing of correspondence for mailing with the United States Postal Service; and that the correspondence would be deposited within the United States Postal Service that same day in the ordinary course of business.

That on December 24, 2012, I served the attached **ANSWER BRIEF ON THE MERITS IN THE MATTER OF I.J. et al., CASE NO. S204622**, upon Interested Parties by depositing copies thereof, enclosed in a sealed envelope and placed for collection and mailing on that date following ordinary business practices in the United States Postal Service, addressed as follows:

Jack A. Love, Esq.
3053 Rancho Vista Blvd., Suite H200
Palmdale, California 93551
(Counsel for Appellant Father)

Karen Rose, Esq.
LADL 3
Law Office of Alex Iglesias
1000 Corporate Center Drive,
Suite 400
Monterey Park, California 91754
(Trial Counsel for Mother)

Stephanie Miller, Esq.
California Appellate Project
520 So. Grand Avenue, 4th Floor
Los Angeles, California 90071

Clerk of the Court
Supreme Court of California
350 McAllister Street
San Francisco, California 94102-7303

I declare under penalty of perjury that the foregoing is true and correct. Executed this December 24, 2012, at Monterey Park, California.



LINDA KAPPELER

DECLARATION OF PERSONAL SERVICE

STATE OF CALIFORNIA, County of Los Angeles:

LINDA KAPPELER states: I am employed in the County of Los Angeles, State of California, over the age of eighteen years and not a party to the within action. My business address is 201 Centre Plaza Drive, Suite 1, Monterey Park, California 91754-2142.

On December 24, 2012, I personally served the attached **ANSWER BRIEF ON THE MERITS IN THE MATTER OF I.J. et al., CASE NO. S204622** to the persons and/or representative of the court as addressed below:

For a party represented by an attorney, delivery was made to the attorney or at the attorney's office by leaving the documents, in an envelope or package clearly labeled to identify the attorney being served, with a secretary or an individual in charge of the office, between the hours of 9:00 a.m. and 5:00 p.m.

For the court, delivery was made to the Clerk of the Superior Court by leaving the documents in an envelope or package, clearly labeled to identify the hearing officer being served, with the counter clerk in that office, between the hours of 8:30 a.m. and 4:30 p.m.

Honorable Timothy R. Saito
Dept. 405
c/o Clerk of the Superior Court
Edmund D. Edelman Children's Court
201 Centre Plaza Drive, Suite 3
Monterey Park, California 91754-2158

Juan Valles, Esq.
Children's Law Center 1
201 Centre Plaza Drive, Suite 7
Monterey Park, California 91754
(Trial Counsel for Minors)

Clerk of the Court
Court of Appeal
Second Appellate District
Division Eight
300 South Spring Street
2nd Floor, North Tower
Los Angeles, California 90013-1213

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 24, 2012, at Monterey Park, California.



LINDA KAPPELER