

1 **STATEMENT OF FACTS**

2 G. was born on XXXX XXXX, 2005. On June 10, 2005, as a result of mother's seven year
3 history of substance abuse and testing positive for cocaine at the time of G.'s birth, and the biological
4 father's inability to provide ongoing care, supervision and the basic necessities of life for G., the County
5 Social Services Agency ("Agency") detained G. and placed him with foster mother L. XXXX. (WIC
6 §300 Petition filed 6/10/2005). G.'s biological siblings, XXXX, XXXX, and XXXX, were already
7 dependents of the juvenile court and were in the final stages of the adoption process. (detention report
8 dated 6/10/05, page 4.) The day of the detention hearing, G.'s appointed attorney requested an order
9 that the Agency evaluate any appropriate relative and consider the biological siblings'
10 caretaker/prospective adoptive mother for placement. The court ordered the Agency to consider placing
11 G. with his biological siblings (see 6/10/05 minute order). On July 12, 2005, the agency reported to the
12 court in the pretrial resolution conference (PRC) report, that Ms. XXXX, prospective adoptive parent of
13 the biological siblings, stated that "she believes siblings should be together and would adopt, however,
14 does not want to renew her foster care license." (PRC report dated 7/12/05, page 17.) The court again
15 ordered the Agency to provide a supplemental report for the next hearing to further address placement of
16 G. in Ms. XXXX's home.

17 By the contest date of August 2, 2005, the Agency reported to the court that Ms. XXXX "advised
18 that she could not take G. because her husband is seriously ill and requires a great deal of care. She
19 regrets that she must decline being considered as a caregiver for G." (See Information to Court Officer
20 dated 8/2/06 written by XXXX XXXX, CSW III.)

21 On January 10, 2006, at the WIC §366.21(e) review hearing, the court terminated family
22 reunification services to G.'s father. The Agency reported to the court in its report for this hearing that
23 Ms. XXXX had "expressed mixed interest in adopting G. Ms. XXXX, the current caregiver has
24 expressed a strong interest in adopting G." (report dated 1/10/06, page 12.) Up until this point, G. had
25 never met his biological siblings. CSW XXXX stated she arranged visits between G. and his siblings to
26 begin on January 14, 2006. (*Id.*) During the January 10, 2006 hearing, the court ordered that G. was not
27 to be removed from his current caretaker, Mrs. L. XXXX, without a noticed hearing, barring an
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1 emergency. That same day, jurisdiction over siblings XXXX, XXXX and XXX was terminated. The
2 court set a permanency hearing for G. for May 8, 2006. (Minute order dated 1/10/2006).

3 On May 8, 2006, the Agency requested a three month continuance in order “to receive G.’s birth
4 certificate, and so that CSW XXXX and adoptions worker can assess the commitment of the XXXXs’ to
5 adopting G..” (report dated 5/8/06, page 10.) On this day, the court ordered the Agency to initiate a
6 home study on the current caretakers. (Minute order dated 5/8/06.)

7 On April 20, 2006, G.’s biological siblings filed a WIC §388 petition requesting that the court
8 vacate the do not remove order so that G. can be united with them. The court set the matter on calendar
9 for June 13, 2006. On June 13, 2006 the matter was continued to June 27, 2006 because G.’s attorney
10 was ill. (Minute order dated 6/13/06.)

11 ARGUMENT

12 **I. G.’S BIOLOGICAL SIBLINGS HAVE NOT PROVEN THAT VACATING THE DO** 13 **NOT REMOVE ORDER IS IN G.’S BEST INTEREST**

14 G.’s siblings’ WIC §388 motion alleges a change of circumstance, in that their adoptive mother
15 has now decided she wants to adopt G.; however, the petition does not make even a prima facie showing
16 that G.’s best interest may be promoted by the proposed change of order. (WIC §388(b); Cal. Rules of
17 Court, rule 5.570(c), (f).). The burden of proof is on the person requesting the modification under WIC
18 §388. (Rule 5.570(f).) “If the request is for removal to a more restrictive level of placement, the
19 petitioner must show by clear and convincing evidence that the change is necessary to protect the
20 physical or emotional well-being of the child. All other requests require a preponderance of the
21 evidence to show that the child’s welfare requires such a modification.” (*Ibid.*)

22 Attached to G.’s siblings’ WIC §388 motion was evidence that the siblings want G. to be with
23 them and love him; however, the siblings presented no evidence removal of G. from the only home he
24 has ever known is in G.’s best interest. On the contrary, vacating the do not remove order could be very
25 detrimental to G., because if the agency decides to replace G., the stability and permanence he has now
26 would be shattered. Reports show that G. is thriving under the care of his current caretaker; Regional
27 Center terminated in-home occupational therapy services because services were no longer needed.
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1 (report dated 5/8/2006, page 4.)

2 In the case of *In Re Aaron R.* (2005) 130 Cal.App.4th 697, the child and two siblings were
3 removed from the mother's custody. The child's grandmother filed a WIC §388 petition alleging a
4 change of circumstances, in that the middle sibling, E.R., was transferred to the grandmother's custody
5 at the end of April 2004. The grandmother's petition also alleged that the younger siblings had formed a
6 "bond" that would be severed by Aaron's placement in a separate adoptive home. Nevertheless, the
7 court found no abuse of discretion in the trial court's determination that the grandmother had not made a
8 prima facie showing that placement with her would be in the child's best interest. (*Id.* at 707.) The
9 child had spent almost his entire life in the home of his foster parent and was thriving under her care.
10 The court reasoned, "In short, we think that the trial court could reasonably infer that, however liberally
11 construed, the petition fell short of establishing any realistic likelihood that the transfer of the custody of
12 a healthy child to an unfamiliar home could be justified by the preservation of a bond with a sibling 10
13 years his senior" (*Id.* at 707.) G.'s case is very similar in that the siblings' adoptive parent's home
14 is unfamiliar to G.. Furthermore, in G.'s case, sibling contact has been very limited, averaging at most
15 one time per month since January 2006, therefore the sibling relationship is not well established. (report
16 dated 6/13/06 at p 5.)

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18 **II. G.'S RIGHT TO STABILITY AND PERMANENCE OUTWEIGHS PLACEMENT**
19 **WITH HIS SIBLINGS IN THIS CASE**

20 WIC §16002 (a) provides in pertinent part: "It is the intent of the Legislature to maintain the
21 continuity of the family unit, and ensure the preservation and strengthening of the child's family ties
22 ensuring that when siblings have been removed from their home, either as a group on one occurrence or
23 individually on separate occurrences, the siblings will be placed in foster care together, unless it has
24 been determined that placement together is not in the best interests of one or more siblings." (See also
25 WIC §§306.5, 358.1, 360, and 366.29.) In G.'s case, it is not in his best interest at this point to place
26 him with his sibling group. The siblings' adoptive mother had several opportunities to be the caretaker
27 for G., early on at the inception of G.'s case; however for various reasons she was unable or chose not to
28 care for G.. First, Mrs. XXXX told the Agency she could not take care of G. because she did not want
to renew her foster license; then she declined because her husband was very ill and she could not take

1 care of a baby. What is even more concerning, is that even though she has had mixed feelings about
2 whether to adopt G. or not, Ms. XXXX's most recent assertion that she wants to adopt G. seems
3 questionable, given that according to CSW XXXX, "the Agency has serious concerns about Ms.
4 XXXX's genuine interest in adopting G. and her commitment to the permanent plan, as she has not
5 demonstrated the desire and efforts that one would make if they were interested in adoption.
6 Furthermore, Ms. XXXX has not made herself available to meet with CSW." (report dated 6/13/06, page
7 4.)

8 Furthermore, to remove G. from the home where he has lived in for over one year would violate
9 his right to placement stability. This is especially so since G.'s current caregiver has been consistent in
10 her strong desire and commitment to adopt G.. "The Legislature has declared that a dependent child has
11 an interest in continuity and stability in placement." (*In re Stephanie M.* (2004) 7 Cal.4th 295, 326.)
12 The California Supreme Court has said that a primary consideration in any custody determination should
13 be the child's need for stability and continuity. (*Id.* at p. 317.) WIC §352 requires the juvenile court to
14 "give substantial weight to . . . the need to provide children with stable environments, and the damage to
15 a minor of prolonged temporary placements." (WIC §352(a).) Children also have a due process right to
16 be free from unnecessary shifts in custody and to a permanent and stable home. (*In re Arturo A.* (1992)
17 8 Cal.App.4th 229, 241, fn. 6; *In re Marilyn H.* (1993) 5 Cal.4th 295, 306.)

20 Additionally, now that a WIC §366.26 hearing is set, pursuant to newly-enacted subdivision (n)
21 of WIC §366.26, G. will have the right to request that his current caregiver be designated as his
22 prospective adoptive parent. If the caregiver satisfies the specified criteria, the court will be required to
23 hold a noticed hearing and find that removal from his current caregiver is in G.'s best interest. (WIC
24 §366.26(n)(3)(A), (B).) G. has lived with his caregiver his entire life--since two days after he was born.
25 The caregiver has expressed her commitment to adopting G. and has been granted de facto status. Thus,
26 G.'s current caregiver clearly meets the criteria for designation as a prospective adoptive parent. (WIC
27 §366.26 (n)(1), (n)(2)(A), (B).) Removing G. from his caregiver prior to any WIC §366.26 hearing
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1 would conflict with the Legislature's purpose for enacting subdivision (n), which was to protect children
2 from psychological harm as a result of agency decisions to remove them from long-term prospective
3 adoptive caregivers without any judicial review to determine whether it is in the children's best interest.
4 (See legislative history of S.B. 218, Stats. 2005, c. 626, § 1, at
5 <http://www.leginfo.ca.gov/pub/bill/sen/sb_02010250/sb_218_cfa_20050906_135301_sen_floor.html>,
6 p. 5.)

9 **III. THE COURT HAS THE AUTHORITY TO UPHOLD THE DO NOT REMOVE** 10 **ORDER AS IT IS IN G.'S BEST INTEREST**

11 Prior to termination of parental rights, the juvenile court has the authority to order a child welfare
12 agency to make a specific out-of-home placement if it is in the child's best interest. (*In re Robert A.*
13 (1992) 4 Cal.App.4th 174, 189; see also *Fresno County Department of Children and Family Services v.*
14 *Superior Court (Lily G.)* (2004) 122 Cal.App.4th 626, 648-651 [upheld do not remove order regarding
15 freed children].) Furthermore, the juvenile court has a duty to ensure that the Department considers a
16 child's best interests when it makes a placement determination. (*In Re Shirley K* (2006) 140 Cal.App.4th
17 65.)

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19 It is in G.'s best interest not to be removed from the home of his current caregiver. G. has
20 known no other home. All the evidence indicates that he is bonded to Mrs. XXXX and Mr. XXXX.
21 Therefore, the court should continue the do not remove order in full force and effect until DCFS can
22 show that removal would be in G.'s best interest.
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24 **CONCLUSION**

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26 For the reasons stated, counsel for G. respectfully requests that the court deny G.'s siblings' WIC
27 §388 petition for failing to show that the requested modification would be in G.'s best interest.
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Dated: June 23, 2006

Respectfully submitted,

XXXXXXXX XXX XXXXXXXX, XXXX

By: XXXX XXXX

Attorney for Child