

XXXX XXXX, Esq. State Bar No. XXXX
XXXX, XXXX, Esq. State Bar No. XXXX
XXXXXX XXX XXXXX XX XXX XXXX, XXXX
XXX XXXX XXX X, #XXXX
XXXXXXXXXX, XX XXXXX
Telephone: (XXXX) XXXX-XXXX
Facsimile: (XXXX) XXXX-XXXX
Attorneys for XXXX XXXX, Child

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF XXXXX**

| | | |
|------------------|---|--|
| In the Matter of |) | Case Number: XXXX |
| XXXX XXXX, |) | |
| |) | |
| a Child. |) | MEMORANDUM OF POINTS AND |
| |) | AUTHORITIES IN SUPPORT OF |
| |) | APPLICATION OF WIC §366.26(c)(1)(A), (D), |
| |) | (E) EXCEPTIONS |
| |) | |
| |) | Date: August 26, 2005 |
| |) | Time: 8:30 a.m. |
| |) | Dept.: XXXX |
| |) | |

INTRODUCTION

Counsel for the child, XXXX XXXX, submits this memorandum of points and authorities in support of her argument that the County Child Welfare Agency ("Agency") has failed to prove that XXXX is likely to be adopted and, in any event, the exceptions to adoption contained in Welfare and Institutions Code ("WIC") §366.26, subdivisions (c)(1)(A), (c)(1)(D), and (c)(1)(E) apply. Therefore, the court should order legal guardianship with XXXX's current caretaker.

///

STATEMENT OF FACTS

XXXX was born on May 17, 2003. On July 9, 2003, as a result of substance abuse and neglect by the mother, the Agency detained XXXX and placed her with maternal aunt XXXX

1 XXXX. (WIC §300 Petition filed 7/14/03.) XXXX is the mother's twin sister. (Detention Rpt.
2 dated 7/14/03, p.3.) Mother was ordered to complete drug treatment with random testing and
3 parenting and was given monitored visits. (Disposition Case Plan dated 8/11/03.) Mother gave
4 birth to half-siblings XXXX and XXXX in February 2004 and February 2005, respectively. Both
5 children were born exposed to methamphetamine and were detained. (§300 Petition re: XXXX
6 filed 2/23/04; WIC §300 Petition re: Anthony filed 2/7/05.) The court eventually released siblings
7 XXXX and XXXX to their father, A, where they remain.

8 By the 18-month review hearing for XXXX, mother had completed parenting but had only
9 partially complied with substance abuse treatment. (WIC §366.22 Rpt. dated 2/3/05, pp. 4-5.) In
10 addition, sibling XXXX was born drug-positive around this same time. The Agency reported that
11 maternal aunt XXXX "has provided a thriving environment" for XXXX and that placement with
12 her remained appropriate. (*Id.* at p. 6.) On February 16, 2005, the court terminated mother's
13 reunification services as to XXXX and set a WIC §366.26 hearing. (2/16/05 Min. Order.)

14 In the WIC §366.26 report for XXXX, the social worker said that maternal aunt XXXX had
15 always provided excellent care for XXXX but wanted legal guardianship because "she was hesitant
16 to adopt her twin sister's child." (WIC §366.26 Rpt. dated 6/15/05, p. 8.) XXXX was also
17 experiencing some stress due to a recent job promotion and the care of her own two children.
18 However, another maternal aunt, XXXX, was willing to adopt. Therefore, the social worker
19 recommended that an ICPC be ordered on XXXX, who lived in North Carolina. According to the
20 report, XXXX was 23, single, attending school to obtain her Bachelor of Arts degree and working.
21 (*Id.* at pp. 6-7.) The Agency would recommend termination of parental rights once the home study
22 on XXXX was completed. (*Id.* at p. 9.) The court ordered the ICPC on June 15, 2005.
23 (6/15/05Min. Order.)

24 A supplemental report regarding XXXX stated that the mother had successfully completed
25 an inpatient drug rehabilitation program on July 21, 2005. (Addendum Rpt. dated 8/4/05, p. 2.)
26 The Agency recommended that the WIC §366.26 hearing be continued to November 4, 2005 for
27 receipt of the ICPC evaluation. (*Ibid.*) In a report submitted the same day regarding XXXX, the
28 social worker said that she was assisting the mother to enter a sober living home. Moreover, the

1 social worker had visited the mother several times in her drug treatment program and “CSW
2 believes that mother is motivated to become a self-sufficient individual and remain drug free.”
3 (WIC §364 Addendum Rpt. re: XXXX dated 8/4/05, pp. 1-2.)

4 Mother’s Visits

5 In June 2004, the Agency reported that the mother visited regularly with XXXX and
6 XXXX. “Interaction during visitation is reportedly loving and playful.” Both the maternal
7 grandmother and maternal aunt XXXX said that the mother was bonding with the girls. (Interim
8 Rev. Rpt. dated 6/1/04, p. 6.) In the twelve and eighteen-month review reports submitted in
9 September 2004 and February 2005, the social worker wrote that visits between the mother and
10 XXXX occurred “often” because the mother lived with the maternal grandmother, who was
11 XXXX’s daytime care provider. (WIC §366.21(f) Rpt. dated 9/1/04, p. 10; WIC §366.22 Rpt.
12 dated 2/3/05, p. 7.) A March 2005 report stated that the mother was currently living with a friend
13 of the maternal grandmother but was visiting the children several times a week. (Addendum Rpt.
14 dated 3/8/05, p. 2.) However, the WIC §366.26 report, under “History of Contacts Between Child
15 and Family,” said nothing about the amount or nature of visitation between XXXX and the mother.
16 (WIC §366.26 Rpt. dated 6/15/05, p. 6.)

17 Sibling Visits

18 The WIC §366.26 report stated that XXXX saw siblings XXXX and XXXX once to twice a
19 week. The Agency provided no information on the quality of the relationship between XXXX and
20 her siblings. (WIC §366.26 Rpt. dated 6/15/05, p. 6.)

21 On August 4, 2005, a contested WIC §366.26 hearing was set and the court ordered points
22 and authorities on the appropriate permanent plan for XXXX. (8/4/05 Min. Order.) On August 17,
23 2005, the court ordered a supplemental report addressing sibling visits and unmonitored visitation
24 for the mother with XXXX. (8/17/05 Min. Order.)

25 Subsequently, counsel for XXXX obtained declarations from maternal aunt XXXX XXXX,
26 maternal grandmother XXXX XXXX, and maternal aunt XXXX XXXX in support of a WIC §388
27 petition to grant the mother additional reunification services. (See WIC §388 Petition that is being
28 filed by the child concurrently with this memorandum of points and authorities.) In her

1 declaration, maternal aunt XXXX says that XXXX had lived with her since she was less than two
2 months old. In XXXX's opinion, XXXX has a close relationship with her mother, who she calls
3 "Mommy." XXXX has observed the mother to be loving and caring toward XXXX during visits.
4 Moreover, since completing drug rehabilitation, the mother has not appeared to be under the
5 influence of drugs or alcohol during visits. XXXX was told by a social worker that she had to
6 adopt XXXX or else she would be adopted by some other family. She felt pressured to agree to
7 adopt. However, she is reluctant to do so because she believes that the mother will be in a position
8 to care for XXXX in the near future. For now, XXXX believes it is in XXXX's best interest to
9 remain with her maternal family in California. She is more than willing to become XXXX's legal
10 guardian. (Declaration of XXXX XXXX, attached to child's WIC §388 Petition filed 8/26/05.)

11 Maternal grandmother XXXX XXXX declared that she has spent time with XXXX nearly
12 every single day since XXXX was born. She has provided day care for XXXX from 6:00 a.m. to at
13 least 3:00 p.m. virtually every weekday. In addition, she has cared for XXXX some evenings and
14 weekends. XXXX's mother has visited the home nearly every day. According to the grandmother,
15 "XXXX knows her mother very well and loves her. She calls XXXX 'Mommy.' When XXXX
16 visits, she interacts with XXXX in a very loving manner and provides everything XXXX needs.
17 XXXX prepares her meals, she bathes her, she combs her hair, she watches television with her, and
18 she watches XXXX and her little sister, XXXX, when they are playing . . . XXXX is always
19 loving and caring towards the children." The grandmother has seen no signs of relapse since the
20 mother completed drug rehabilitation in July 2005. She believes that if the mother continues in her
21 sobriety, she is capable of being a good mother.

22 With regard to XXXX's relationship with her siblings, the grandmother states that XXXX
23 spends time with XXXX and XXXX four to five times per week. XXXX refers to them as her
24 little sister and brother. It is clear to the grandmother from the way that XXXX interacts with and
25 talks about her siblings, that she feels very attached to them. A social worker told the grandmother
26 that if a family member did not adopt XXXX, she would be placed with strangers for adoption.
27 (Declaration of XXXX XXXX, attached to child's WIC §388 Petition filed 8/26/05.)

1 In her declaration, maternal aunt XXXX XXXX states that she attends college in North
2 Carolina and that once she finishes school she plans to return to California, sometime in early
3 2006. She told social worker D that she was willing to adopt XXXX after being told that otherwise
4 XXXX would be adopted by someone outside of the family. To date, no one has contacted her
5 about initiating a home study. She believes that the mother should be given another chance to
6 reunify with XXXX before XXXX is adopted by anyone. (Declaration of XXXX XXXX, attached
7 to child's WIC §388 Petition filed 8/26/05.)

8 9 **ARGUMENT**

10 11 **I. THE EVIDENCE IS NOT CLEAR AND CONVINCING THAT XXXX WILL BE 12 ADOPTED WITHIN A REASONABLE TIME**

13 DCFS has not met its burden of proving that XXXX is likely to be adopted by clear and
14 convincing evidence. (WIC §366.26 (c)(1).) "Clear and convincing evidence requires a finding of
15 high probability. The evidence must be so clear as to leave no substantial doubt. It must be
16 sufficiently strong to command the unhesitating assent of every reasonable mind." (*In re Jerome*
17 *D.* (2000) 84 Cal.App.4th 1200, 1205.) While the focus of an adoptability determination is on the
18 child's characteristics, and a child need not already be placed in a pre-adoptive home, there
19 nevertheless must be convincing evidence of the likelihood that adoption will occur *within a*
20 *reasonable time.* (*In re Brian P.* (2002) 99 Cal.App.4th 616, 624; *In re Asia L.* (2003) 107
21 Cal.App.4th 498, 510.)

22 In *Tamneisha S.*, the Second District Court of Appeal found insufficient evidence of
23 adoptability regarding a three-year-old whom DCFS had failed to place in an adoptive home after a
24 ten-month search. (*In re Tamneisha S.* (1997) 58 Cal.App.4th 798.) The child's foster parents
25 only wanted guardianship. Tamneisha, who had been born drug-exposed, was mildly
26 developmentally delayed and had experienced earlier medical problems; however, there was no
27 evidence that she had any serious special needs by the time of the permanency hearing. (*Id.* at pp.
28 801-803.) Noting that WIC §366.26 (c)(3) only allowed for a single continuance, not to exceed 90

1 (now 180) days, to locate an adoptive home, the appellate court held it was within the juvenile
2 court's discretion to order legal guardianship. (*Id.* at pp. 803, 807.)

3 Here, the WIC §366.26 report contains scant information about XXXX's developmental,
4 mental, and emotional status. XXXX was prenatally exposed to drugs. There is no indication that
5 she has ever had a developmental assessment. She is not yet in school, where evidence of a
6 developmental delay would likely be detected. More importantly, the *only* person identified in the
7 WIC §366.26 report as having expressed an interest in adopting XXXX is her 23-year-old aunt,
8 who is still in college and is currently living in North Carolina. Adoption by XXXX cannot occur
9 unless and until North Carolina approves an adoption home study. (Fam. Code §§7907.5, 7910.)
10 The court ordered an ICPC evaluation of the aunt on June 15, 2005. However, according to
11 XXXX, she has yet to even be contacted by anyone about the home study. The Agency has not
12 identified any other prospective adoptive families for XXXX.

13 The fact that the social worker, in both the June 15th WIC §366.26 report and August 4th
14 supplemental report, *recommended that the court not terminate parental rights until the ICPC*
15 *evaluation is received* is strong evidence that she does not believe XXXX is generally adoptable.
16 Counsel for the child commends the social worker for her responsible recommendation, which
17 protects XXXX from the very real possibility of becoming a permanent legal orphan. (See *In re*
18 *Jerred H.* (2004) 121 Cal.App.4th 793.) According to an October 2003 report by the California
19 Department of Social Services, as of July 30, 2002, there were 5,846 legally-freed children in the
20 state who were not yet placed in an adoptive home. For 913 of these freed children, their case plan
21 goal was no longer adoption. (Cal. Dept. of Social Services, *Adoptions in California: Agency,*
22 *Independent, and Intercountry Adoption Programs Annual Statistical Report for July 1, 2001 –*
23 *June 30, 2002* (Oct. 2003) p. 16.) Furthermore, a recent law journal article addresses the shortfalls
24 of concurrent planning as mandated by the federal Adoption and Safe Families Act, including poor
25 permanency planning for foster children that has resulted in the creation of more legal orphans.
26 (William Wesley Patton and Amy M. Pellman, *The Reality of Concurrent Planning: Juggling*
27 *Multiple Family Plans Expeditiously Without Sufficient Resources*, Winter 2005, 9 UC Davis J.
28 Juv. L. & Pol'y 171.)

1 Given the sketchiness of both the adoption assessment and the adoptive plan in this case,
2 the court presently lacks convincing evidence that XXXX is likely to be adopted within a
3 reasonable time if it terminates parental rights. Therefore, the court should select the next most
4 permanent plan, legal guardianship.

5
6 **II. THE ONLY EVIDENCE PRESENTED ON THE ISSUE OF XXXX’S**
7 **RELATIONSHIP WITH HER MOTHER SHOWS XXXX IS BONDED TO HER**
8 **AND WOULD BE HARMED BY LOSS OF THE RELATIONSHIP**

9 In order to apply the beneficial relationship exception to adoption, the court must find that
10 the mother has maintained regular visitation and contact, and that the child would benefit from
11 continuing the relationship. (WIC §366.26, subd. (c)(1)(A)). If so, the court then balances the
12 benefit to the child of preserving the relationship against the security that an adoptive home would
13 confer. If severing the relationship would greatly harm the child, the preference for adoption is
14 overcome. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 575.) The type of relationship that would
15 cause the balance to tip against termination of parental rights is, “a relationship characteristically
16 arising from day-to-day interaction, companionship and shared experiences.” (*In re Casey D.*
17 (1999) 70 Cal.App.4th 38, 51.)

18 The mother in this case has had day-to-day contact with XXXX. According to the
19 Agency’s own reports, for most of the time since XXXX was detained, the mother has lived with
20 the maternal grandmother, who has been XXXX’s day care provider. (WIC §366.21(f) Rpt. dated
21 9/1/04, p. 10; WIC §366.22 Rpt. dated 2/3/05, p. 7; Addendum Rpt. dated 3/8/05, p. 2; Status
22 Review (RPP) Rpt. dated 8/17/05, p. 5.) The maternal grandmother also attests that the mother has
23 spent significant time with XXXX almost every day. (Declaration of XXXX, attached to WIC
24 §388 Petition.) Thus, the first prong of the beneficial relationship exception, regular visitation and
25 contact, has been met.

26 As for the second prong, whether XXXX would benefit from continuing her relationship
27 with her mother, the only evidence that has been presented to the court – the declarations of the
28 maternal relatives – supports that she would. Both the maternal grandmother and maternal aunt

XXXX, state that XXXX has a close relationship with her mother and calls her “Mommy.” Per the grandmother, during her daily visits, the mother prepares XXXX’s meals, bathes her, combs her hair, watches television with her, and supervises her and her siblings. (Declarations of XXXX and XXXX, attached to WIC §388 Petition.) In short, the mother occupies a “parental role” in XXXX’s life. (*In re Derek W.* (1999) 73 Cal.App.4th 823, 827.)

The Agency has simply offered *no* evidence on the quality or nature of the relationship between XXXX and mother, despite the fact that the law requires it to be addressed in the adoption assessment. (WIC §366.21(i)(2) [assessment must include a review of the amount and nature of the contact between the child and parent since the time of placement].) This case is similar to *Brandon C.*, in which the Second Appellate District upheld the juvenile court’s finding that the parental relationship exception applied. (*In re Brandon C.* (1999) 71 Cal.App.4th 1530.) In *Brandon C.*, four-year-old twins were placed with their grandmother who wanted to adopt them. The grandmother and mother both testified that the mother had visited weekly throughout the years, the children had a good relationship with her, and it would not be in the children’s best interests to cut off contact with the mother. (*Id.* at pp. 1533, 1536-1537.) DCFS did not present any evidence to the contrary. (*Id.* at p. 1537.) Indeed, the appellate court said that DCFS had failed to provide virtually any information about the quality of the mother’s visits during the years leading up to the WIC §366.26 hearing. (*Id.* at p. 1538.) Furthermore, the fact that the mother had never progressed beyond weekly monitored visits was not determinative. The court said that the benefit of continued contact with the mother must be considered within the context of the limited visitation she was allowed to have. (*Id.* at pp. 1537-1538.)

In *Jasmine D.*, the court rejected a mother’s WIC §366.26(c)(1)(A) defense, even though the mother had visited consistently and the visits were positive for the minor, because the mother had still not complied with her reunification plan nor overcome the problems that lead to the minor’s dependency. (*In re Jasmine D.* (2000) 78 Cal.App.4th 1339.) Under such circumstances, the benefit of adoption outweighed the benefit of continuing the relationship. (*Id.* at pp. 1352-1353.) The mother in this case, however, has finally completed her case plan and appears to be maintaining sobriety. (See WIC §388 Petition.) Even the social worker now “believes that mother

1 is motivated to become a self-sufficient individual and remain drug free.” (WIC §364 Addendum
2 Rpt. re: XXXX dated 8/4/05, pp. 1-2.) That the mother is not currently ready to regain custody is
3 not a bar to applying the WIC §366.26(c)(1)(A) exception. (*In re Amber M.* (2002) 103
4 Cal.App.4th 681, 690.)

5 It is also significant that this court recently ordered the Agency to address unmonitored
6 visits for the mother with XXXX. In *Jerome D.*, the court said that a finding that the WIC §
7 366.26(c)(1)(A) exception did not apply was inconsistent with a virtually simultaneous order
8 allowing unmonitored visits with the mother. (*Jerome D.*, *supra*, 84 Cal.App.4th 1200, 1208.)

9 In conclusion, the mother has maintained regular contact with XXXX and the only evidence
10 before the court indicates that XXXX would benefit from continuing the relationship to such an
11 extent as to outweigh the benefit of adoption by her maternal aunt.

12
13 **III. THE EXCEPTIONAL CIRCUMSTANCES EXCEPTION APPLIES AS IT**
14 **WOULD BE DETRIMENTAL TO REMOVE XXXX FROM HER**
15 **CARETAKER, WHO IS UNCOMFORTABLE WITH ADOPTION BUT**
16 **AVAILABLE FOR GUARDIANSHIP**

17 The exceptional circumstances exception applies when a child is living with a relative or
18 foster parent who is unable or unwilling to adopt due to exceptional circumstances, other than an
19 unwillingness to accept legal or financial responsibility, but who is able to provide a permanent
20 home for the child, and removal would be detrimental to the child’s emotional well-being. The
21 exception cannot be applied in certain circumstances, which are not relevant here. (§
22 366.26(c)(1)(D).)

23 Unfortunately, there is very little case law involving the WIC §366.26(c)(1)(D) exception,
24 and what little exists is not very enlightening. In *Rachel M.*, after parental rights were terminated,
25 the grandmother said the social worker had coerced her into agreeing to adopt by threatening to
26 remove the child if she did not acquiesce. (*In re Rachel M.* (2003) 113 Cal.App.4th 1289, 1296.)
27 The grandmother preferred guardianship. The appellate court found the mother and child had
28 waived the right to raise the WIC §366.26(c)(1)(D) exception because they had failed to assert it in
the juvenile court. (*Id.* at p. 1295.) Nevertheless, the court said that without trying to determine

1 what factors would satisfy the WIC §366.26(c)(1)(D) exception, it was convinced that mere family
2 preference for legal guardianship over adoption was not enough. (*Id.* at p. 1298.)

3 In this case, the maternal aunt, XXXX, is uncomfortable with adopting her twin sister's
4 child. In her declaration, XXXX states she is reluctant to adopt despite pressure from the Agency
5 because she believes that the mother will be in a position to care for XXXX in the near future.
6 However, she is more than willing to become XXXX's legal guardian. (Declaration of XXXX
7 XXXX, attached to WIC §388 Petition.)

8 XXXX has lived with XXXX since she was under two months old. It is the only home
9 XXXX has ever known. Except for saying that XXXX has provided XXXX with excellent care,
10 the Agency has not addressed the bond between XXXX and her aunt nor the likely effect on
11 XXXX if she were removed from her home. However, given that XXXX has lived with her aunt
12 all her life, it is reasonable to infer that removal would be detrimental.

13 The detriment would be compounded by the Agency's plan for XXXX if the court
14 terminates parental rights. The Agency proposes to send XXXX to North Carolina to be adopted
15 by her aunt XXXX. XXXX is only 23, is still in college, works in addition to attending school, and
16 has never raised a child. Furthermore, she plans to return to California in 2006 when she finishes
17 college, which would result in uprooting XXXX yet again. Additionally, if XXXX were to move
18 to North Carolina, she would not only be separated from XXXX, but also from her maternal
19 grandmother and mother, whom she is accustomed to seeing virtually every day, and her two
20 siblings. Instead of being cared for during the day by her grandmother and mother as she is now,
21 XXXX would likely end up in day care with strangers while XXXX goes to school and works.
22 This hardly seems like a sensible plan when XXXX, already a mother of two, has been providing
23 exemplary care for XXXX for two years and is willing to become her legal guardian. Moreover, if
24 the court orders legal guardianship, the Agency may always ask the court to reconsider a plan of
25 adoption once XXXX has returned to California. (WIC §366.3 (c).)

26 Maternal aunt XXXX has cared for XXXX her whole life and the evidence supports an
27 inference that XXXX would be emotionally harmed if removed from XXXX and her other
28

1 maternal relatives in California and sent to North Carolina. Therefore, the court should apply the
2 WIC §366.26(c)(1)(D) exception and order legal guardianship with XXXX.

3
4 **IV. IT WOULD BE DETRIMENTAL TO XXXX TO TERMINATE HER**
5 **RELATIONSHIP WITH HER SIBLINGS**

6 The sibling relationship exception applies when termination of parental rights would cause
7 substantial interference with a sibling relationship, “taking into consideration the nature and extent
8 of the relationship, including, *but not limited to*, whether the child was raised with a sibling in the
9 same home, whether the child shared significant common experiences or has existing close and
10 strong bonds with a sibling, and whether ongoing contact is in the child’s best interest, including
11 the child’s long-term emotional interest, as compared to the benefit of legal permanence through
12 adoption.” (WIC §366.26 (c)(1)(E), italics added.)

13 While the burden is on the party raising the sibling relationship exception to show
14 detriment, the social worker is nonetheless obligated to assess the amount and nature of any contact
15 between a child and his or her siblings as part of the adoption assessment. (WIC §366.21(i)(2); *In*
16 *re Megan S.* (2002) 104 Cal.App.4th 247, 252.) The WIC §366.26 report contains no information
17 about the quality of XXXX’s relationship with XXXX and XXXX. However, the maternal
18 grandmother reports that XXXX spends time with her siblings four to five times per week and is
19 very attached to them. (Declaration of XXXX, attached to WIC §388 Petition.) In the absence of
20 any contrary evidence, the court is entitled to credit the grandmother’s statements that XXXX
21 shares a close relationship with her siblings. (See *Brandon C.*, *supra*, 71 Cal.App.4th 1537.)
22 Moreover, termination of parental rights in this case will cause substantial interference with
23 XXXX’s sibling relationships, since XXXX will be forced to move to North Carolina. Therefore,
24 the court may apply the WIC §366.26(c)(1)(E) exception in this case.
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CONCLUSION

For the reasons stated, counsel for XXXX respectfully requests that the court find that XXXX is not likely to be adopted or that an exception to adoption applies and order legal guardianship with XXXX's current caregiver.

Dated: August 26, 2005

Respectfully submitted,

XXXXXX XXX XXXXX, XXXX

By: XXXX XXXX

Attorney for XXXX, Child