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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF XXX XXXXXXXX**
10

11 In the Matter of) Case Number: XXXX
12)
13 (MINOR) XXXX) **ABUSE OF DISCRETION BRIEF**
14 a Minors.)
15)
16) Date: September XXX, 2005
17) Time: 08:30 am
18) Dept.: XXXX

19 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

20 **STATEMENT OF FACTS**

21 Prior to their detention, (Minor) and her two sisters had a substantial, ongoing relationship
22 with Ms. XXXX for a substantial period of time. (Minor) and her siblings, along with their
23 mother, even lived with Ms. XXXX, off and on, when the need would arise. When they were
24 detained, Ms. XXXX immediately expressed interest in having them placed with her
25 (Jurisdictional/Disposition Report, p. 19). She also disclosed her criminal history and filled out an
26 Exemption Request form.

27 Moreover, during the children's placement in foster care, all three minors have had regular
28 visits with Ms. XXXX. The FFA caseworker reported that Ms. XXXX has been loving, engaged,

1 and appropriate with the children during visits, has brought educational toys, clothing, and other
2 gifts for the children, and that the children enjoy these visits (FFA Quarterly report, 6/14/05 –
3 9/14/05, pp. 9, 25, 36.) (Minor) (FFA Quarterly report, p. 25), and her siblings have expressed a
4 desire to live with Ms. XXXX again, and (Minor) has stated that she believes Ms. XXXX would
5 take good care of her and her sisters.

6 Although the record in this case does not contain any written statement of the County
7 Social Services Agency (“Agency”) reasons for denying the Exemption Request, in oral testimony
8 DCFS brought up four concerns: (1) the seriousness of Ms. XXXX’s criminal history; (2) her
9 relationship with her son, XXXX; (3) the fact that one incident of sexual abuse of (Minor) may
10 have occurred in Ms. XXXX’s home; and (4) the fact that Ms. XXXX has had prior involvement
11 with Agency.

12 None of these concerns, when examined in light of the facts of this case, provides any
13 support for the Agency’s denial of the waiver.

14 The Agency’s concern about the seriousness of Ms. XXXX’s criminal record fails to take
15 into account the facts that all the offenses occurred 14 or more years ago, and none of the offenses
16 involved child endangerment of any kind. Ms. XXXX explained in her exemption request that the
17 offenses resulted from a drug problem that she overcame many years ago. She has been clean and
18 sober since 1992, has been employed since 1993, currently holds a management position, and owns
19 a large home (WIC 361.4 Exemption Request dated 9/15/04) Ms. XXXX has indicated her
20 willingness to submit to drug testing, but the Agency has ignored this offer. (ARA’s testimony,
21 9/19/05.)

22 The Agency’s concern about Ms. XXXX’s relationship with her son XXXX is also
23 unsupported by the facts. First, Mr. XXXX has recently begun a 12-year prison sentence, so it will
24 be many years before there is any possibility that Mr. XXXX would be released and would seek
25 contact with the minors. Second, Ms. XXXX, throughout the history of this case, has acted to
26 protect the minors from Mr. XXXX and prioritized the minors’ interests over any feelings she may
27 have for her son.

1 Ms. XXXX responded promptly and appropriately as soon as she found out that her son had
2 molested (Minor), and continued to cooperate and work toward a resolution of the criminal case
3 that would be in (Minor)'s best interests. She assisted the police in locating him (Interim Review
4 Report, 12/15/2004); urged him to tell the truth about his abuse of (Minor), then reported his
5 statements to DCFS. (Detention Report p. 5, Jurisdictional/Disposition Report, p. 11.) Ms. XXXX
6 persuaded her son to plead guilty, so that (Minor) would not have to testify at trial and could begin
7 the healing process. (Detention report, 8/01/05, p.5.) Moreover, even prior to the disclosure of her
8 son's sexual abuse of (Minor), Ms. XXXX had allowed the minors and their mother to live with
9 her after she had kicked Mr. XXXX out of her home. (Jurisdiction/Disposition Report, 11/01/04,
10 p. 10.)

11 There is no factual support for the Agency's claim that Ms. XXXX should have known
12 about the single incident of sexual abuse that may have occurred in her home. This incident
13 occurred while Ms. XXXX was at the store, and (Minor) "cleaned herself up" before Ms. XXXX
14 returned. (Minor) never disclosed the incident to her. (Jurisdiction/Disposition Report, 11/01/04,
15 p. 8.) There is no feasible way that Ms. XXXX could have known about the incident – and her
16 conduct once she learned about the sexual abuse clearly shows that she took appropriate action as
17 soon as she knew about it.

18 Finally, the Agency's stated concern that Ms. XXXX has had prior involvement with the
19 dependency system is unsubstantiated. Ms. XXXX has never been the subject of any reports in the
20 Child Abuse Central Index (8/9/04 Child Protection Program search results) Although she may
21 have received services voluntarily from DCFS in the past, there is no evidence that she ever abused
22 or neglected her own children or that any dependency petition was ever filed concerning them.

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24 **IN LIGHT OF THE ABOVE FACTS, IT WAS AN ABUSE OF DISCRETION FOR DCFS**
25 **TO REFUSE TO GRANT AN EXEMPTION ALLOWING PLACEMENT OF MINORS**
26 **WITH MS. XXXX**

27 The placement issues in this case must be considered in light of the general policy, clearly
28 expressed in the applicable statutes, favoring placement of dependent children with relatives,
whenever such placement is consistent with the best interests of the child. Welfare and Institutions

1 Code (“WIC”) §361.3 provides that “preferential consideration shall be given to a request by a
2 relative of the child for placement of the child with the relative.” The statute thus requires that
3 relatives be placed “at the head of the line” in determining which placement is in a child’s best
4 interests, and that relatives “be assessed and considered favorably, subject to the juvenile court’s
5 consideration of the suitability of the relative’s home and the best interests of the child.” (*Cesar V.*
6 *v. Superior Court*, (2001), 91 Cal.App.4th 1023-1033.) If the Agency decides not to place a child
7 with a relative, the court must exercise its independent judgment in reviewing the placement
8 decision, rather than merely reviewing the decision for abuse of discretion. (*Id.*)

9 Consistent with the overall policy favoring placement with relatives, WIC §361.4(d)(2)
10 creates an exception to the general rule that dependent children cannot be placed with caregivers
11 who have committed certain crimes. WIC §361.4(d)(2) allows placement with a relative caregiver
12 who has a criminal record, if the Agency grants a criminal records exemption. The standard that
13 the Agency must apply in deciding whether to grant an exemption is **whether there is**
14 **“substantial and convincing evidence to support a reasonable belief that the applicant . . . [is]**
15 **of such good character as to justify . . . granting an exemption.”** (Cal. Health & Safety Code
16 §1522(g)(1).)

17 If the Agency refuses to grant an exemption, the juvenile court reviews this decision for
18 abuse of discretion. (*L.A. County Dept. of Ch. & Fam. Serv. v. Superior Court (Valerie A.)* (2001),
19 87 Cal.App.4th 1161, at 1166-1167 (applicable legal standard is whether DCFS abused its
20 discretion in failing to seek an exemption,); *In re S.W.* (2005) 131 Cal.App.4th 838, 849 (same); *In*
21 *re Hanna S.* (2004) 118 Cal.App.4th 1087.)

22 In *In re Jullian B.* (2000), 82 Cal.App.4th 1337, the court of appeals found that the agency
23 abused its discretion in not granting an exemption, because the Sacramento County Agency had a
24 practice of refusing exemptions without considering the facts of each case: “[N]o one in authority
25 considered whether the statutory disability that [the relative] suffered by virtue of his conviction . .
26 . should be waived based on [§1522(g)(1)] . . . We hold that . . . the agency must request a waiver
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1 pursuant to section 361.4, subdivision (d)(3), or explain why, based on the merits of the individual
2 case and subject to review for abuse of discretion, it did not do so.” (*Id.*, 82 Cal.App.4th at 1350.)¹

3 As in *Jullian B.*, in this case there is no evidence that the Agency gave any weight to the
4 unique facts of this case before it refused the exemption request: the many years that have passed
5 since Ms. XXXX’s convictions, her willingness to submit to drug testing, her key role in
6 cooperating with the criminal prosecution of her son, and her long-standing relationship and strong
7 commitment to all three minors. The Agency made a “superficial” attempt, at best, when they
8 considered a waiver for Ms. XXXX. By giving no weight to the facts surrounding their concerns,
9 their actions closely resemble the “inaction” taken in *Jullian B.* The relative placement worker in
10 this case testified that there was *nothing Ms. XXXX could do* to convince DCFS to grant a waiver:

11 Q -" Is there anything that Ms. XXXX could possibly do to obtain a waiver in this
12 case?"

13 A -" I don't know if there is anything that Ms. XXXX can do. I merely denied the
14 waiver on the information that we have.

15 Moreover, even if DCFS did take into account the individual facts of this case before
16 making its decision, the decision is still an abuse of discretion. Even in situations where the
17 agency has “exclusive authority,” the agency does not have “carte blanche in its placement
18 decisions” and the court must still assess “whether DCFS acted arbitrarily and capriciously,
19 considering the minor’s best interests.” (*Dept. of Soc. Serv. v. Sup’r Ct. of Siskiyou Cty.* (1997) 58
20 Cal.App.4th 721,734; *see also Fresno Cty. Dept. of Children & Family Serv. V. Supr. Ct. of Fresno*
21 *Cty.*, (2004) 58 Cal.App.4th 721649.

22 The Agency’s stated reasons for denying the exemption are arbitrary and capricious, in that
23 they fail to take into account the remote time period of the convictions, Ms. XXXX’s consistent
24 history of putting the minors’ interests ahead of her son’s, and Ms. XXXX’s prompt and effective
25 response when she learned of the sexual abuse of (Minor). Most importantly, it is clearly contrary
26 to the minors’ best interests in this case to deny Ms. XXXX’s exemption request, in light of their

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28 ¹ *Jullian B.* was an ICWA case, and the court’s precise holding was that the agency had to either request a waiver, or explain why it declined to do so, to avoid the ICWA placement preference. The case is applicable here because the ICWA placement preference is analogous to the WIC §361.3 preference for relative placements.

1 close, loving, and long-term relationship with her, and the absence of any other appropriate
2 relatives with whom they could be placed.

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4 DATED:

Respectfully submitted,

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8 By: XXXX

9 Attorney for (Minor) XXXX
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