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

In the Matter of	) CASE NUMBER: XXXX
	)
(Minor) XXXX	) <b>NOTICE OF MOTION AND MEMORANDUM</b>
	) <b>OF POINTS AND AUTHORITIES FOR</b>
a Minor.	) <b>LEGAL GUARDIANSHIP PURSUANT TO</b>
	) <b>§360 OF THE WELFARE AND</b>
	) <b>INSTITUTIONS CODE</b>
	)
	) Date: NOVEMBER 14, 2005
	) Time: 8:30 a.m.
	) Dept.: XXXX

TO: ALL PARTIES HEREIN AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE THAT, on November 14, 2005 at 8:30 A. M., or as soon thereafter as this motion may be heard in Department XXXX of the XXXXXX Superior Court, Juvenile Division, the mother, by and through her attorney of record, J. XXXX will, and by this does move the court for an order granting a legal guardianship pursuant to Welfare and Institutions Code ("WIC") §360.

This motion is based on Points and Authorities filed herewith, all of the pleadings, records, and papers on file herein, and on all the evidence, both oral and documentary, which shall be presented at the hearing of the motion.

DATED: November \_\_, 2005

XXXXXX XXX XXXXXX

Respectfully Submitted,

By\_\_\_\_\_

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Attorney for the Mother

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2

3 **STATEMENT OF FACTS**

4 (Mother) XXXX is the mother of ten dependent children, one non-dependent child, XXXX  
5 XXXX, and the child who is before the court today, (Minor) XXXX. All of her children were born  
6 drug exposed or at risk of drug exposure, due to mother's disease of addiction. (Minor) XXXX was  
7 born drug exposed in June 2005.

8 In January 2004, when (Mother) was pregnant with (Minor)'s older sibling, XXXX XXXX, she  
9 contacted the child's maternal aunt C. (Mother) realized that she was unfit to care for this child and  
10 decided to consult with her relatives to set up a plan for her child's care. C and (Mother) made a plan  
11 for XXXX to be in legal guardianship with C through probate court. C successfully petitioned for a  
12 probate legal guardianship over XXXX in March 2004. She has continued to care for XXXX in legal  
13 guardianship to this day, almost two years later.

14 In 2005, (Mother) became aware that she was pregnant with (Minor), and she was still  
15 dependent on drugs. She contacted C again and requested that she also care for the new baby. An  
16 emergency response, before the family could carry out their plan, however the County Social Services  
17 Agency filed a dependency petition regarding (Minor).

18 Once the Agency filed the petition regarding (Minor), they took the position that they had to  
19 comply with California statutes implementing the federal Adoption and Safe Families Act ("ASFA")  
20 before (Minor) could be placed with C. They inspected C's home, and required her to correct various  
21 problems to meet licensing standards. C did so, and on July 25, 2005 C's home passed ASFA  
22 inspection, according to the agency's court report dated July 29, 2005.

23 However, the Agency still refused to allow (Minor) to be placed with C, because C had a  
24 criminal record. She had a XXXX misdemeanor conviction for theft of personal property, an infraction  
25 for theft, a misdemeanor conviction for receiving stolen property, and a felony conviction for receiving  
26 stolen property. C received probation for each of these offenses, and she has never been incarcerated.  
27 The Agency refused to seek a waiver of these convictions, even though they were for relatively minor  
28

1 offenses many years ago. C has had no arrests or convictions since XXXX, and C has been caring for  
2 (Minor)'s sibling for almost two years.

### 3 4 ARGUMENT

#### 5 6 **I. WIC §360 allows this Court to appoint a legal guardian without declaring (Minor) a** 7 **dependent, and without requiring the guardian to fulfill ASFA requirements.**

8 Welfare and Institutions code § 360 provides, in pertinent part, as follows:

9 (a) *Notwithstanding any other provision of law*, if the court finds that the child is a person  
10 described by § 300 and the parent has advised the court that the parent not interested in  
11 family maintenance or family reunification services, it may in addition to or *in lieu of*  
12 *adjudicating the child a dependent child* of the court, order a legal guardianship, appoint a  
13 legal guardian and issue letters of guardianship, if the court determines that the guardianship  
14 is *in the best interest of the child*, provided the parent and the child agree to the guardianship,

15 ....

16 No person shall be appointed guardian under this section *until an assessment as specified in*  
17 *subdivision (g) of Section 361.5 is read and considered by the court and reflected in the*  
18 *minutes of the court. The assessment shall include the following:*

19 \* \* \*

20 4. A preliminary assessment of the eligibility and commitment of any identified prospective  
21 guardian, particularly the caretaker, to include a social history including a screening for  
22 criminal records and prior referrals for child abuse or neglect, the capability to meet the  
23 child's needs, and the understanding of the legal and financial rights and responsibilities of  
24 guardianship.

25 5. The relationship of the child to any identified prospective guardian, the duration and  
26 nature of the relationship, the motivation for seeking guardianship, and a statement from the  
27 child...

28 (WIC §360(a) (emphasis added).) Thus, under WIC §360, this Court has the authority to grant a legal  
guardianship for a child without declaring the child a dependent, if the parents and the court agree that  
legal guardianship is in the child's best interest, and an assessment is conducted by the Agency  
pursuant to WIC §360(a)/WIC §361.5(g) and "read and considered" by the court.

WIC §360(a) does not, by its terms, require that the home of the guardian meet licensing  
standards, and it would not make sense to read any such requirement into WIC §360, given the  
legislative intent behind this statute. The guardianship provisions of WIC §360 were added in 1994.

1 Their purpose was to “additionally authorize the [juvenile] court to order a legal guardianship and  
2 appoint the legal guardian, if the court determines that a guardianship is in the best interest of the  
3 minor, provided the parent and the minor agree.” (1994 Cal ALS 900; 1994 Cal SB 1407; Stats 1994 ch  
4 900.) The only limitation imposed by the legislation on the juvenile court’s power to appoint a  
5 guardian was that “the court shall not appoint a person as a legal guardian until a specified assessment  
6 is read and considered by the court.” (*Id.*)

7 Although the court must consider the Agency’s assessment and recommendation--including any  
8 possible impact that C’s criminal history might have on (Minor)’s best interests--the court’s power to  
9 order a guardianship under WIC §360 without declaring the child a dependent is not restricted by the  
10 criminal record disqualification/waiver provisions of WIC §361.4. Indeed, Legislature clearly signaled  
11 its intent to grant the juvenile court unrestricted authority to appoint a guardian, by beginning WIC  
12 §360 with the language “notwithstanding any other provision of law . . . .”

13 The criminal records disqualification and waiver provisions of WIC §361.4 were intended to  
14 implement the requirements of ASFA. The central purpose of ASFA was to, “make safety a paramount  
15 concern in placement and provision of services to *dependent children*”. (42 U.S.C. § 671(a)(15)  
16 (emphasis added).) Neither ASFA itself, nor California’s implementing legislation were intended to  
17 restrict the juvenile court’s authority under WIC §360 to carry out a family’s own plan to ensure safety  
18 and stability for a child through legal guardianship as an alternative to having the child declared a  
19 dependent.

20 Instead, under WIC §360(a)(4), the prospective guardian’s “screening for criminal records” is  
21 merely one of among a long list of factors that the assessment must include and the court must consider.  
22 The purpose of the assessment required by WIC §360(a) is not to restrict the court’s authority to grant a  
23 guardianship, but to give the court the information needed to determine whether the guardianship is in  
24 the child’s best interests. In *In re Dakota S.*, (2000) 85 Cal.App.4<sup>th</sup> 494, the Court of Appeals found  
25 that the juvenile court’s failure to obtain and consider the agency’s assessment before ordering a  
26 guardianship was harmless error, because the court had access to the same information from other  
27 sources. The Court relied on the language of WIC §360(a) in concluding that the Agency assessment  
28

1 was merely a source of information for the court, not a necessary prerequisite to the appointment of a  
2 guardian:

3 [T]he obvious and important purpose of this statutorily required preliminary assessment is to  
4 provide the juvenile court with the information necessary to determine whether guardianship  
5 is in the child's best interests, and whether the prospective guardian is an appropriate person  
6 to assume the duties of guardianship. (see *Welf. & Inst. Code*, § 360, subd. (a)).

7 *Id.*, 85 Cal.App.4<sup>th</sup> at 501.

8 Thus, WIC §360(a) allows this court to do *exactly what the probate court could have done*, if  
9 the Agency had not interfered with the family's preexisting plan for (Minor)'s care--appoint C as her  
10 legal guardian, upon a finding that the guardianship would be in her best interests.

11 **II. Even if WIC §361.4 applies, the Agency abused its discretion by refusing to seek a**  
12 **criminal records exemption.**

13  
14 The criminal records exemption provisions of WIC §361.4 must be applied in light of the  
15 general legislative policies favoring placement of dependent children with relatives, and favoring  
16 placements of siblings together. WIC §361.3 provides that "preferential consideration shall be given to  
17 a request by a relative of the child for placement of the child with the relative." The statute thus  
18 requires that relatives be placed "at the head of the line" in choosing a placement, and that relatives "be  
19 assessed and considered favorably, subject to the juvenile court's consideration of the suitability of the  
20 relative's home and the best interests of the child." (*Cesar V. v. Superior Court (2001)*, 91 Cal.App.4<sup>th</sup>  
21 1023, 1033.)

22  
23 Similarly, WIC §16002 provides, "It is the intent of the Legislature to maintain the continuity of  
24 the family unit, and ensure the preservation and strengthening of the child's family ties by ensuring that  
25 when siblings have been removed from their home, either as a group ... or individually on separate  
26 occurrences, the siblings will be placed in foster care together . . . ." (See also WIC §358(b) and WIC  
27 §358.1 (report for dispositional hearing must address placing siblings together).)  
28

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

8  
9 If the Agency refuses to grant an exemption, the juvenile court reviews this decision for abuse  
10 of discretion. (See *L.A. County Dept. of Ch. & Fam. Serv. v. Superior Court (Valerie A.)*, (2001), 87  
11 Cal.App.4<sup>th</sup> 1161, at 1166-1167 (applicable legal standard is whether Agency abused its discretion in  
12 failing to seek an exemption).) (See also *In re S.W.* (2005), 131 Cal.App.4<sup>th</sup> 838, 849; *In re Hanna S.*  
13 (2004) 118 Cal.App.4<sup>th</sup> 1087; *In re Jullian B.* (2000), 82 Cal.App.4<sup>th</sup> 1337, 1350.) Thus, the Agency  
14 does not have “carte blanche in its placement decisions” and the court must still assess “whether  
15 Agency acted arbitrarily and capriciously, considering the minor’s best interests.” (See *Dept. of Soc.*  
16 *Serv. v. Sup’r Ct. of Siskiyou Cty.* (1997) 58 Cal.App.4<sup>th</sup> 721,734; see also *Fresno Cty. Dept. of*  
17 *Children & Family Serv. v. Supr. Ct. of Fresno Cty.*, (2004) 122 Cal.App.4<sup>th</sup> 626, 649.)

18  
19 In this case, there is substantial evidence that the Agency abused its discretion in refusing to  
20 seek and grant a waiver for C. Her convictions are remote in time, involved relatively minor offenses  
21 and no jail time, and did not involve any crime of violence or child endangerment. C has never been  
22 the subject of a child abuse or neglect report, and has been caring for (Minor)’s older sibling for almost  
23 two years. In an attempt to justify its refusal to seek a waiver, the Agency improperly relies on records  
24 of arrests that did not lead to any conviction—including an arrest when C was only 18 years old. Their  
25 obvious bias against C, as evidenced by its reliance on non-probative arrest records from many years  
26 ago and failure to consider the potential benefit to (Minor) of being placed with a close relative who is  
27 her sister’s legal guardian, are arbitrary and capricious and clearly contrary to (Minor)’s best interests.  
28

1 This court should find that the Agency's refusal to seek, and grant, a criminal records exemption for C  
2 is an abuse of discretion.

3 **CONCLUSION**

4  
5 Pursuant to Welf. & Inst. Code § 360, this Court should appoint C as (Minor) XXXX's legal  
6 guardian, without adjudicating (Minor) to be a dependent child of the court. Although this court must  
7 "read and consider" the Agency's assessment and recommendations, the fact that C has a criminal  
8 record does not restrict this court's authority to appoint her as (Minor)'s guardian under § 360. Even if  
9 this Court determines that the criminal records provisions of § 361.4 apply to § 360 guardianships, this  
10 Court should find that the Agency's refusal to seek and grant a criminal records exemption is an abuse  
11 of discretion in the circumstances of this case.

12 It is clearly in (Minor)'s best interests to be provided with a safe and stable home with her aunt  
13 and sister, in accordance with her family's original plan for her care--a plan that would have been  
14 carried out without any need for this court's involvement but for the Agency's needless interference.  
15 This Court has the authority under § 360 to restore that original plan, grant legal guardianship, and  
16 avoid any need for (Minor) to become involved in the dependency system.

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19  
20 DATED: November \_\_, 2005

Respectfully submitted,

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24 By \_\_\_\_\_

XXXX XXXX

25 Attorney for the Minor  
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