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8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **FOR THE COUNTY OF XXXXXX**
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11 In the Matter of:

12
13 M XXXX et al.,

14 Children.

) Case Number: XXXX
)
)

) **CHILD'S OPPOSITION TO FATHER'S**
) **MOTION TO DISMISS WELFARE AND**
) **INSTITUTIONS CODE SECTION 300**
) **PETITION FOR LACK OF SUBJECT**
) **MATTER JURISDICTION**
)
)

) Date: January XX, 2006
) Time: 8:30 a.m.
) Dept.: XXX
)

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18 **INTRODUCTION**
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20 The child, L XXXX, hereby opposes father Brian XXXX's motion to dismiss the Welfare and
21 Institutions Code section 300 petition -- and thus juvenile court jurisdiction -- in this matter for lack of
22 subject matter jurisdiction. Until State B authorities file a petition in the State B juvenile court and
23 ensure that L. will be protected if returned to State B, this Court continues to properly exercise
24 temporary emergency jurisdiction over L. under the Uniform Child Custody Jurisdiction and
25 Enforcement Act (UCCJEA), Family Code section 3400 et seq. In addition, dismissal of jurisdiction
26 would violate the stay order issued by the Second District Court of Appeal in this case, which prohibits
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1 the children from being transferred to State B under any circumstances as long as the stay remains in
2 effect.

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4 **ARGUMENT**

5 **I. CALIFORNIA CONTINUES TO HAVE EMERGENCY JURISDICTION UNDER**
6 **THE UCCJEA UNTIL A PETITION IS FILED IN THE STATE B**
7 **JUVENILE COURT**

8 The State B court previously agreed that California could maintain emergency jurisdiction over
9 M and L. until a child abuse and neglect petition was filed in the State B juvenile court. To date, there is
10 no evidence that such a petition has ever been filed. Therefore, California’s exercise of emergency
11 jurisdiction continues to be appropriate.

12 When a California court takes temporary emergency jurisdiction over a child who is the subject
13 of a prior custody order made by a sister state, it must immediately communicate with the court in the
14 other state “to resolve the emergency, protect the safety of the parties and the child, and *determine a*
15 *period for the duration of the temporary order.*” (Fam. Code, § 3424, subd. (d), italics added.) This
16 Court has tried to do exactly that, to no avail. On September 21, 2005, Judge DXXXX had a telephonic
17 conference with State B Sixteenth Circuit Court Judge GXXXX that was transcribed by the court
18 reporter. During that conference, several times Judge DXXXX said, and each time Judge GXXXX
19 agreed, that California would terminate its emergency jurisdiction over the children *once State B’s child*
20 *protective services filed a petition in the State B juvenile court:*

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23 Judge DXXXX: But with regard to emergency jurisdiction, that cannot go on
24 forever either. That’s why if you have any idea – well, the way I’m
25 thinking is once a petition if filed by the Children’s Services in State B,
26 then I can terminate the emergency jurisdiction here.

27 Judge GXXXX: Okay.
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1 (Reporter's Transcript of September XX, 2005 conference, attached as Exhibit 1, p. 5. L. requests that
2 the Court take judicial notice of the transcript, and all other documents attached as exhibits herein and
3 which have been received into evidence in the juvenile court, pursuant to Evidence Code section 452,
4 subdivision (d).)

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6 Later in the conference, a similar exchange occurred:

7 Judge DXXXX: Right. So if I know when they are going to – see, I figured the
8 emergency jurisdiction can terminate once there is a filing by DCFS in
State B. That way the children would be protected.

9 Judge GXXXX: Okay. If you can find out from Mr. CXXXX who he's been
10 talking to, I'll reach out and –

11 Judge DXXXX: That's right. That will be good.

12 Judge GXXXX: I will have to make some inquiries, but I have to at least have an
13 idea of who he's talking to. If it is here in the State's Attorney's Office, it
is only two floors away. I can walk up there.

14 Judge DXXXX: I do understand that there – I made an order that the children
15 remain with the mother. She was the only one here. Okay? But I also
16 clearly understand that there has got to be a time limit to that order, and
17 the reason for that is because I'm not at liberty to interfere with anything
you folks are doing in State B. That's the way I look at it, and I think that
18 once a petition is filed, then I can just terminate my jurisdiction here.

19 Judge GXXXX: Okay. Well, let me – find out from Mr. CXXXX who he's talking
20 to. If I see anybody from the State's Attorney's office in authority, I will
make some inquiry to them, him or her.

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22 (Exhibit 1, p. 7.)

23 In his motion to dismiss the California dependency action, the father does not allege, nor has he
24 produced any evidence to support, that juvenile court proceedings have been initiated in State B. (See
25 Father's Motion to Dismiss, pp. 1-16, Exhibits 1-2.) Indeed, the last two reports filed by the California
26 Social Services Agency (Agency) social worker stated in no uncertain terms that the State B authorities
27 had said they would not decide whether or not to initiate juvenile court proceedings until the children
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1 were back in State B. (Supplemental Report dated October X, 2005, p. 4;) Thus, this Court has no basis
2 to do anything other than to continue its emergency jurisdiction until it receives evidence that a juvenile
3 court petition has been filed in State B and that the children will be protected if they are returned to that
4 state.

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6 In *In re C.T.*, a UCCJEA case, the court recognized that the juvenile court of a state with
7 exclusive continuing jurisdiction to make a child custody determination is the appropriate forum in
8 which to hear allegations of abuse or neglect, regardless of whether the initial custody order was made
9 by that state's family court. (*In re C.T.* (2002) 100 Cal.App.4th 101, 113-114.) In that case, an
10 Arkansas family court granted primary custody of the child to the father as part of a divorce proceeding.
11 (*Id.* at p. 104.) Later, during a visit with the mother in California, the child disclosed that she was being
12 sexually abused by the father and California initiated dependency proceedings. (*Id.* at pp. 104-105.)
13 The California dependency court communicated with the family court in Arkansas, which refused to
14 cede jurisdiction. (*Id.* at p. 105.) The Arkansas court did agree, however, to allow the child to remain in
15 the mother's custody in California pending a hearing in Arkansas on the abuse allegations. (*Ibid.*) The
16 California court then placed the child with the mother and terminated its jurisdiction. (*Ibid.*) The court
17 of appeal agreed that the emergency justifying California's jurisdiction ceased to exist once the
18 Arkansas court said that it was willing and able to address the allegations in its court and that it would
19 recognize the California court's order placing the child with her mother pending further court
20 proceedings in Arkansas. (*Id.* at p. 113.) In response to the mother's argument that the emergency was
21 ongoing because the court in Arkansas that would hear the matter was a family, not a juvenile, court, the
22 appellate court said:

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26 [T]he Arkansas juvenile court has exclusive jurisdiction of proceedings in which a
27 juvenile is alleged to be a dependent. (Ark. Code Ann. § 9-27-306(a)(1).) Moreover, the
28 juvenile court has jurisdiction to hear proceedings commenced in a court of comparable
jurisdiction of another state that are transferred to it pursuant to the [UCCJEA]. (Ark.

1 Code Ann. § 9-27-306(f.) If the Arkansas juvenile court does not resume jurisdiction,
2 [the mother] may file a petition to have [the child] declared a dependent. (Ark. Code
3 Ann. § 9-27-310(b)(3)(A).) ... We have no reason to believe that the state of Arkansas is
4 unwilling or unable to exercise its sound *parens patriae* duty to protect its resident
5 children.

6 (*Id.* at pp. 113-114; see also *In re Valerie Lynn Anast* (1974) 22 X.App.3d 750, 753-754 [decision of
7 State B appellate court recognizing that juvenile, not family, court is proper forum to address allegations
8 of abuse or neglect].)

9 Judge GXXXX has conceded that it would probably be best if the current allegations were
10 addressed in abuse and neglect proceedings in State B. (Exhibit 1, p. 3, line 28 – p. 4, line 7.) It is
11 especially important in this case that the allegations be heard in a juvenile court. During the September
12 XX conference call with Judge DXXXX, Judge GXXXX said that he had not looked at any of the
13 investigations done by State B’s Department of Children and Family Services (DCFS) “because I don’t
14 have access to those records. They were done by the police department and DCFS, so I don’t believe
15 they are part of our file because nothing has ever been filed in abuse or neglect” (Exhibit 1, p. 6,
16 lines 2-6.) Yet, in his March XX, 2005 order holding the mother in contempt for failing to appear and
17 granting the father immediate physical custody of the children, Judge GXXXX found that there was no
18 credible evidence to support that the children had ever been abused by the father and, in particular, no
19 evidence to support the sexual abuse allegations that were determined to be *indicated* by the State B
20 DCFS in report number SCR #XXXXXX. (Copy of March XX, 2005 order attached as Exhibit 2; copy
21 of SCR #XXXXXX report dated September XX, 2004 attached as Exhibit 3.) Presumably, the State B
22 juvenile court would have access to DCFS’s records and investigations, which are crucial to determining
23 whether or not the father poses a risk to the children.
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26 The primary duty of the juvenile court is to provide for the protection of children who come
27 within the court’s jurisdiction. (*In re Malinda S.* (1990) 51 Cal.3d 368, 384.) It would violate that duty
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1 to terminate jurisdiction over the children without knowing whether they will be protected if returned to
2 State B or simply handed back to their father. Even assuming that the children are not at risk of sexual
3 abuse by the father, Dr. KXXXX's recent Evidence Code section 730 evaluation of the children
4 constitutes substantial evidence that they would be at risk of emotional or physical harm if forced to
5 return to their father. (EC 730 Evaluation by Dr. KXXXX dated May XX, 2005, p. 10.) The children,
6 ages 14 and 11, are adamant that they are afraid of their father and will not return to him willingly.
7 Under these circumstances, this Court has no choice but to maintain emergency jurisdiction over the
8 children until it clear that the State B juvenile court will hold a hearing on the allegations and ensure the
9 children's safety outside of the home of the father pending the outcome of the juvenile court
10 proceedings.
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14 **II. DISMISSAL OF JURISDICTION WOULD VIOLATE THE APPELLATE COURT'S**
15 **STAY ORDER**

16 Contrary to the father's assertion, dismissal of jurisdiction by this Court would violate the court
17 of appeal's June XX, 2005 order, which states in pertinent part:

18 This court's April XX, 2005 order staying the trial court's April 22, 2005 order directing
19 the minors, M and L, to be transported to State B, remains in full force and effect pending
20 further order of this court. **UNDER NO CIRCUMSTANCES** are the minors, M and L, to
21 be transferred or transported to State B until the stay issued by this court is lifted.

22 (Copy of order attached as Exhibit 4, emphasis in original.)
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1 A stay by the appellate court not only suspends enforcement of the appealed judgment or order,
2 but matters embraced therein or affected thereby as well. (Code Civ. Proc., § 916, subd. (a).)¹

3 According to Rutter’s California practice guide on appeals and writs with regard to stays:

4 Whether a particular matter is ‘embraced in’ or ‘affected by’ an appealed judgment or
5 order so as to be subject to the stay depends on whether the *purpose* of the stay ... would
6 be *frustrated* by further trial court proceedings on the matter. [Citations.] ... Essentially,
7 if trial court proceedings on the particular matter would have any impact on the
8 ‘effectiveness’ of the appeal, the proceedings are stayed; otherwise, the proceedings are
permitted. [Citations.]

9 (Eisenberg, Horvitz & Wiener, CAL. PRAC. GUIDE: CIVIL APPEALS & WRITS (The
10 Rutter Group 2004) Stays and Supersedeas, §§ 7:8-7:9, emphasis in original.)

11 If this Court were to dismiss jurisdiction over M and L, there would be nothing to stop
12 the father from promptly seeking to enforce the State B custody order granting him immediate
13 physical possession of the children and returning to State B with them forthwith. This would
14 clearly frustrate the court of appeal’s order that “UNDER NO CIRCUMSTANCES are the
15 minors ... to be transferred or transported to State B” pending lifting of the stay, the purpose of
16 which was to ensure that the children would not be returned to the father in State B without
17 adequate safeguards for their protection in place. Thus, this Court cannot terminate jurisdiction
18 over M and L without violating the appellate court’s order.

19 Moreover, the father’s claim that under the UCCJEA, he could not obtain physical
20 custody of the children without filing a petition for enforcement and obtaining an order from a
21 California family law court is far from clear. (Father’s Motion to Dismiss, pp. 11-13.) The
22 father cites to Family Code sections 3445 – 3448 to support his argument. (*Id.* at p. 13.) Family
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28 ¹ Although orders affecting child custody are excepted from the general rule that the perfecting of an
appeal automatically stays trial court proceedings on any matter embraced therein (Code Civ. Proc., §
917.7; *In re Nicholas H.* (2003) 112 Cal.App.4th 251, 260), this case does not involve an automatic stay.

1 Code section 3448 does set forth a procedure for seeking enforcement of an out-of-state custody
2 order, which requires the filing of a petition and a noticed hearing. However, the available
3 defenses to enforcement are very limited and do not appear to be applicable in this case. (Fam.
4 Code, § 3448, subd. (d).) Additionally, unlike in dependency court, the children would not be
5 parties nor entitled to the appointment of counsel in the family court. (Compare Fam. Code, §
6 3150, subd. (a) with Welf. & Inst. Code, §§ 317, subd. (c), 317.5, subd. (b).)

8 Furthermore, Family Code section 3448 is part of Chapter 3 (“Enforcement”) of the
9 UCCJEA, the same chapter as section 3443, which provides in part: “A court of this state may
10 utilize any remedy available under other laws of this state to enforce a child custody
11 determination made by a court of another state. *The remedies provided in this chapter are*
12 *cumulative and do not affect the availability of other remedies to enforce a child custody*
13 *determination.”* (Fam. Code, § 3443, subd. (b), emphasis added.)

15 Also, Family Code section 3446 states that a California court “may grant any relief
16 normally available under the law of this state to enforce a *registered* child custody determination
17 made by a court of another state.” (Fam. Code, § 3446, subd. (a), emphasis added.) The father
18 has previously stated that the State B order has already been registered in California. (See
19 Father’s Motion for California to Decline Jurisdiction filed February 9, 2005, p. 12, lines 13-14.)
20 A copy of the registration was received into evidence by this Court. (Copy of registration
21 attached as Exhibit 5, p. 1.)

24 Thus, this Court cannot be assured that if it dismissed jurisdiction, a family court judge
25 would review the matter prior to any return of the children to State B. There is nothing to
26 guarantee that the father could not simply walk into a local law enforcement agency and ask for
27 assistance in taking immediate custody of the children pursuant to the registered State B custody
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1 order. Even if a petition for enforcement were filed in the family court, the grounds for opposing
2 enforcement of a registered out-of-state custody order are very limited and do not apply here.
3 Therefore, the Court simply cannot dismiss its jurisdiction without frustrating the purpose of the
4 appellate court's stay, which is to ensure that the children will be protected from any risk from
5 their father before returning them to State B.
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8 **CONCLUSION**

9 For the reasons stated, L respectfully requests that the father's motion to dismiss the
10 dependency petition be denied.
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15 Dated: January XX, 2006

Respectfully submitted,

XXXXXXXX XXX XXXXXXX, CLC X

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By: XXXX XXXX
Attorneys for L XXXX, Child
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