

1 Institutions Code¹ section 366.26 hearing stage, T. is still in reunification with the legal guardian.
2 T.'s case is currently set for a section 366.21, subdivision (e) hearing on XXXX. Moreover, before
3 a child may be moved from a relative and placed in a foster home, the Agency must file a
4 supplemental petition under section 387 and present evidence "sufficient to show that the
5 placement is not appropriate in view of the criteria in Section 361.3." (§ 387, subd. (a); see also *In*
6 *re Miguel E.* (2004) 120 Cal.App.4th 521, 541.) Significantly, an otherwise appropriate relative
7 *may not be denied placement solely because the relative is unwilling to provide legal permanence*
8 *for the child if reunification fails.* (§ 361.3, subd. (a)(7)(H).)

9 Second, to remove T. from the home where the child has lived for XXXX months, when it
10 is possible the child could be returned to the legal guardian shortly, and when the current
11 caregivers are willing to provide the child with permanence through legal guardianship should
12 reunification fail, would violate the child's right to placement stability. "The Legislature has
13 declared that a dependent child has an interest in continuity and stability in placement. [Citation.]"
14 (*In re Stephanie M.* (2004) 7 Cal.4th 295, 326.) Indeed, the California Supreme Court has said that
15 a primary consideration in any custody determination should be the child's need for stability and
16 continuity. (*Id.* at 317.) Section 352 requires the juvenile court to "give substantial weight to ...
17 the need to provide children with stable environments, and the damage to a minor of prolonged
18 temporary placements." (§ 352, subd. (a).) Children also have a due process right to be free from
19 unnecessary shifts in custody and to a permanent and stable home. (*In re Arturo A.* (1992) 8
20 Cal.App.4th 229, 241, fn. 6; *In re Marilyn H.* (1993) 5 Cal.4th 295, 306.)

21 Third, should a section 366.26 hearing eventually be set in T.'s case, the child has a right to
22 assert the exceptional circumstances (§ 366.26, subd. (c)(1)(D)) and sibling relationship (§ 366.26,
23 subd. (c)(1)(E)) exceptions to adoption. Removal from the current placement prior to the section
24 366.26 hearing would substantially interfere with the child's ability to raise these exceptions
25 successfully.

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¹ All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

1 The exceptional circumstances exception applies when a child is living with a relative or
2 foster parent who is unable or unwilling to adopt due to exceptional circumstances, other than an
3 unwillingness to accept legal or financial responsibility, but who is able to provide a permanent
4 home for the child, and removal would be detrimental to the child's emotional well-being. The
5 exception cannot be applied in certain circumstances not present here. (§ 366.26, subd. (c)(1)(D).)
6 There is virtually no case law interpreting the (c)(1)(D) exception. However:

7 The legislative report that provided background for the original enacting legislation
8 suggested that if the child was placed with a relative who was willing to provide
9 long-term care, the child's need for stability and attachment were satisfied and
10 adoption was neither necessary nor wise unless the relative wanted to adopt [Sen.
11 Sel. Comm. On Children & Youth/SB 1195 Task Force Rep. On *Child Abuse
Reporting Laws, Juvenile Court Dependency Statutes, and Child Welfare Services*
(Jan. 1988) p. 12].

12 (Seiser & Kumli, California Juvenile Courts: Practice and Procedure (2005 ed.) Limited
13 Exceptional Circumstances Exception, § 2.171[5][a][iv]. p. 2-318.) The relatives in this case have
14 indicated that they are unwilling to adopt not because they do not want to accept legal or financial
15 responsibility for the children, but rather because they are morally opposed to adopting their
16 relatives' children. (See Declaration of XXXX attached to Z.'s motion, p. 2, ¶ 7.) Thus, if T. can
17 show that it would be emotionally detrimental to the child to be removed from the current home,
18 the court would be required not to terminate parental rights. However, if T. has already been
19 removed from the relatives before any section 366.26 hearing, it is a forgone conclusion the
20 exception will not apply.

21 Furthermore, removal from the placement prior to a section 366.26 hearing will negatively
22 impact T.'s ability to successfully invoke the sibling relationship exception, which requires proof
23 of a sibling bond such that loss of contact with the sibling would be detrimental to the child. (§
24 366.26, subd. (c)(1)(E); see *In re L.Y.L.* (2002) 101 Cal.App.4th 942, 952.) It is not necessary for a
25 child to have lived with his or her siblings in order for the exception to apply. (See *In re Naomi P.*
26 (2005) 132 Cal.App.4th 808.) Currently, adult sister XXXX (a former dependent) visits T. several
27 times a week and helps to feed, bathe, and babysit T. (See Declaration of XXXX attached to Z.'s
28 motion, p. 1, ¶ 4.) T.'s sister XXXX calls or visits at least once a week. T.'s adult brother, XXXX,
visits approximately once a month. (See Declaration of XXXX attached to Z.'s motion, p. 2, ¶ 8.)

1 If T. is moved from the home of a relative to that of an unrelated foster parent, common sense
2 dictates that the quantity and quality of the contact with the siblings will be greatly diminished, as
3 will T.'s ability to show the type of sibling bond needed to apply the sibling relationship exception.
4 For instance, sister XXXX is not likely to feel at liberty to bathe and clothe T. during a scheduled
5 visit in the home of a stranger. Removal will also affect the Agency's adoption assessment, which
6 must assess the amount and nature of any contact between a child and his or her siblings. (§
7 366.21, subd. (i)(2); *In re Megan S.* (2002) 104 Cal.App.4th 247, 252.)

8 It is clear that prior to termination of parental rights, this court has the authority to order a
9 specific out-of-home placement if in the child's best interest. (*In re Robert A.* (1992) 4
10 Cal.App.4th 174, 189 [recently cited with approval on this point by *Fresno County Department of*
11 *Children and Family Services v. Superior Court (Lily G.)* (2004) 122 Cal.App.4th 626, 648].) For
12 the reasons stated, it is in T.'s best interests to remain in the current relative placement until a
13 decision has been made regarding reunification with the guardian and until T. has had an
14 opportunity to show the court that it would be detrimental to remove the child from relatives and/or
15 to terminate sibling relationships. Therefore, counsel for T. joins Z. in requesting that the court
16 make a "do not remove" order preventing the Agency from removing T. from the home of the
17 relatives, XXXX, prior to return of the child to the legal guardian or completion of a section 366.26
18 hearing.

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22 Dated: XXXX, 2006

Respectfully submitted,

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