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Attorney for the (Child) XXXX, Child

**SUPERIOR COURT OF CALIFORNIA**  
**COUNTY OF XXXXXX**

In the Matter of	) Case No.: XXXX
	)
(Child) XXXX,	)
	) <b>Minor's Motion to Prevent Removal from</b>
a Child.	) <b>Existing Placement; Supporting Points</b>
	) <b>and Authorities.</b>
	)
	)
	) Date: December 13, 2005
	) Time: 8:30 a.m.
	) Dept: XXXX

TO ALL PARTIES HEREIN AND THEIR COUNSEL OF RECORD:

The minor (Child) XXXX submits the following MOTION TO PREVENT REMOVAL FROM EXISTING PLACEMENT herein:

**STATEMENT OF FACTS**

The minor, (Child) XXXX, currently resides in the home of his half-brother's parents, D. and J. XXXX, with his half-brother, XXXX XXXX. He was initially placed in that home as a result of a Family Team Decision Making Meeting on August 24, 2005, in which (Child)'s

1 family, with the approval of County Social Services Agency (“Agency”), decided that (Child)  
2 should be allowed to live in the XXXX home while his father worked on stabilizing his  
3 housing situation. On October 19, 2005, the Agency brought a Welfare and Institutions Code  
4 (“WIC”) §342 petition to detain (Child), because his father had not taken steps to stabilize his  
5 living situation. In accord with their previous approval of the family’s plan for (Child) to live  
6 with the XXXX, the Agency placed (Child) with the XXXX.

7 On November 10, however, the Agency terminated (Child)’s placement with the  
8 XXXX, and sent him to the home of his maternal grandmother, XXXX XXXX, on an extended  
9 visit. ((Child) had previously been placed with Ms. XXXX pursuant to a permanent plan of  
10 legal guardianship, but this plan failed due to Ms. XXXX’s poor health and inability to care for  
11 (Child).) The termination of (Child)’s placement was based solely on the fact that Mr. XXXX  
12 has a 7-year-old misdemeanor conviction under Penal Code §273d, relating to an alleged  
13 incident involving XXXX XXXX. Since the date of the conviction, Mr. XXXX successfully  
14 reunified with XXXX in 2000, and has had no criminal convictions, arrests, or abuse/neglect  
15 reports since that date.

16 At the hearing before this Court on November 15, 2005, minor’s counsel objected to  
17 (Child)’s removal from his appropriate and stable placement with the XXXX, and his being  
18 returned to his grandmother, after placement with her had failed in the past. This Court  
19 pointed out that the placement order currently in effect was for (Child) to be placed in the  
20 XXXX home, and that no one had requested any change in that order. Following the  
21 November 15, 2005 hearing, (Child) returned to the XXXX home.

22  
23 **I. WIC §361.4 DOES NOT REQUIRE (CHILD)’S REMOVAL FROM THE XXXX**  
24 **HOME**

25 The Court of Appeal has held, in a case with facts very similar to this case, that the  
criminal record disqualification provisions of WIC §361.4 apply only to initial placement of a  
child, not to removal of a child from an existing placement. (XXX XXXXX county DCFS v.

1 *Superior Court (Cheryl M.)* (2003) 112 Cal.App.4<sup>th</sup> 509.) In *Cheryl M.*, as in this case, the  
2 children's caregiver was convicted of felony infliction of corporal injury upon her child in  
3 violation of Penal Code §273d(a). After she successfully reunified with her own children, the  
4 Dependency Court ordered that her nieces, who were Court dependents, also be returned to her  
5 care. DCFS opposed this order on other grounds, but did not argue that such a placement  
6 would violate WIC §361.4. Three years later, the caregiver was convicted of another offense,  
7 and this time DCFS argued that the Court had no discretion to allow the nieces to remain with  
8 her, because of WIC §361.4. The Court found that it would be detrimental to the nieces to be  
9 removed from their aunt's care, and denied DCFS's request to remove them. The Court of  
10 Appeals affirmed, holding that the Penal Code §273(d) conviction "does not prohibit the  
11 Dependency Court from exercising its discretion to allow the children to remain in their  
12 placement in Cheryl's home." (*Cheryl M.*, 112 Cal.App.4<sup>th</sup> at 519.) After a careful analysis of  
13 the language of WIC § 361.4 and related statutes, the Court of Appeals concluded that the  
14 statute applies only to initial placements, so that "a nonexempted disqualifying offense  
15 precludes the county from placing a child with the relative, but does not require removal from  
16 an existing relative placement." (*Id.*, at p. 520.) Therefore, the Dependency Court had  
17 discretion to deny DCFS's request to remove the children from their caregiver, and did not  
18 abuse its discretion. (*Id.*)

19 Likewise, in this case, (Child) has been placed with the XXXX since August 2005--  
20 three months before the Agency sought to remove him under WIC §361.4. The XXXX have  
21 not requested foster care funding, so ASFA approval is not necessary to make the placement  
22 feasible. The Agency's own report shows that the placement was appropriate and beneficial to  
23 (Child), and that removing him from the XXXX home would be highly detrimental to his well  
24 being. Prior to being placed with the XXXX, (Child) has had 14 placements. (Report,  
25 11/15/2005, at p. 12.) (Child) has made many requests to live with his half-brother XXXX and  
XXXX's parents. (*Id.* at p. 13.) Mr. XXXX has expressed his commitment to caring for  
(Child), has worked extensively with the local school district to get (Child) enrolled in an

1 appropriate educational program and has ensured that (Child) is current and compliant with his  
2 medications and psychological evaluations. (*Id.* at p. 10-11.)

3 As in *Cheryl M.*, the Agency initially placed (Child) in the XXXX home, at first  
4 pursuant to the Family Team Decision Making meeting, and then pursuant to the October 19,  
5 2005 detention--but now seeks to remove (Child) because of WIC §361.4. As in *Cheryl M.*,  
6 WIC §361.4 does not require removal of (Child) from his existing placement with the XXXX.  
7 It is within this Court's discretion to allow (Child) to stay in his placement, as the unique facts  
8 of this case clearly demonstrate that removing (Child) from his half-brother and caregivers--  
9 who have made a strong commitment to meet his needs--and placing him either in a temporary  
10 and unstable "visit" with his grandmother or in another long succession of foster and group  
11 homes, would be severely detrimental to (Child)'s well-being.

## 12 **II. APPLYING §361.4 TO THIS CASE WOULD VIOLATE (CHILD)'S** 13 **CONSTITUTIONAL RIGHT TO DUE PROCESS**

14 The Court of Appeals recognized in *Cheryl M.* that, if WIC §361.4 were interpreted to  
15 deprive the Juvenile Court of all discretion to place a child with a caregiver who has a non-  
16 waiveable conviction, this would raise a constitutional issue. (See *Cheryl M.*, 112 Cal.App.4<sup>th</sup>  
17 at 521 n. 2.) ("We base our decision concerning removal of the children on statutory  
18 construction. Thus, we do not decide whether the . . . due process rights of the children also  
19 vest the Dependency Court with discretion.")

20 The California Supreme Court has held that children have a fundamental constitutional  
21 right to belong to a family unit (*In re Marilyn H.* (1993) 5 Cal.4th 295, 306) and to have a  
22 placement that is stable and permanent (*In re Jasmon O.* (1994) 8 Cal.4th 398, 419).  
23 Legislation that interferes with a fundamental right must serve a compelling purpose and be  
24 necessary and effective to the accomplishment of that purpose. Otherwise, it must be set aside  
25 or limited. (*Sherbert v. Verner* (1963) 374 U.S. 398; *In re Santos Y.* (2001) 92 Cal.App.4th  
1274, 1315.) In at least two prior cases, the Court of Appeals has held that a statute is

1 unconstitutional as applied, when it substantially interfered with a child’s constitutional interest  
2 in a stable placement. (See, e.g., *In re Bridget R.* (1996) 41 Cal.App.4th 1483, 1507-1508  
3 (application of ICWA provisions violated children’s “fundamental and constitutionally  
4 protected interest in their relationship with the only family they have ever known”) **Review**  
5 **in 2014 found Bridget R Superseded by Statute;** *In re Santos Y.*, 92 Cal.App.4th at 1312  
6 (application of ICWA provisions violated child’s fundamental right to a stable home).)

7 As argued above, this Court should avoid any potential violation of (Child)’s due  
8 process rights--as did the Court of Appeal in *Cheryl M.*--by construing WIC §361.4 to apply  
9 only to initial placements--not to removal of a child from a preexisting placement. If this Court  
10 were to rule that WIC §361.4 requires (Child) to be removed from the XXXX home, in spite of  
11 any harm that such removal would cause him, then this Court should rule that WIC §361.4 is  
12 unconstitutional as applied.

13  
14 Dated: \_\_\_\_\_

Respectfully submitted,

XXXXXXX XXX XXXXXXX, XXXX

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18 XXXX XXXX

19 Attorney for the Minor  
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