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Judy Pierson
Committee Assistant – Child Welfare and Foster Care
149-S
1-785-296-7644
Child.Welfare@house.ks.gov

Re: House Bill No. 2772 – Testimony regarding concerns

Dear Ms. Pierson:

Yesterday, February 16, 2024, I was made aware of efforts to pass a state ICWA bill in Kansas – the “Kansas Indian Child Welfare Act.” I have hurriedly studied the proposed bill and its context. I wish to express concerns regarding the bill and its timing.

By way of introduction, I have practiced law for thirty years and am a partner at Kansas’ largest law firm, Foulston Siefkin LLP. I am also an adoptive parent, a native southeast Kansan, and a card-carrying member of the Cherokee tribe (Dawes Roll). Among my adopted children is a Native American daughter. I’ve also represented adoption agencies.

I am a supporter of the federal Indian Child Welfare Act of 1978 and its purposes. I am pleased that the federal ICWA law survived its recent challenge before the United States Supreme Court. Having been scrutinized, litigated, and the subject of extensive federal regulations, the federal ICWA law is maturing into a tested law that our state and federal courts are learning to apply in a fair and balanced way.

We take a risk in adding to this existing federal regimen. The recent challenge of the federal Act galvanized tribes and members of the Native American community. But with the federal law’s survival, I question the need to add a hodgepodge of state ICWA laws to the mix. Moreover, I am especially concerned about the proposed Kansas ICWA law, House Bill No. 2772.

It is very important for the Committee to understand that there are already efforts underway to craft a uniform state ICWA law. The Committee is no doubt familiar with the work of the Uniform Law Commission. Over the years, Kansas lawyers have played key roles in the development of such uniform laws, and Kansas has a long history of enacting uniform acts, including some of the acts that I regularly litigate in Kansas state and federal courts (e.g., the Uniform Commercial Code and the Uniform Trade Secrets Act). I can tell you from personal experience that our state’s lawyers and judges will feel much more comfortable litigating and adjudicating a set of uniform state laws developed by the Uniform Law Commission. Certainty in the law is important to Kansans and their courts.

In speaking with experienced adoption attorneys knowledgeable on ICWA, I have learned that the Uniform Law Commission is already busy looking at the possible need for state ICWA

statutes and attempting to craft a uniform state ICWA law. Kansas should not go out on a limb and get out ahead of these efforts. Let the legal experts first do their work and come up with a well-considered and thoroughly vetted piece of uniform legislation for our legislators to adopt, before adding a Kansas state law to the federal ICWA statute and regulations that already occupy this field. We need to avoid conflict with the existing federal ICWA statute, regulations, and case law and not create uncertainty in the law.

Also, time is needed for House Bill No. 2772 to be studied by our state's (and our nation's) leading adoption attorneys. Over the years, I've had the opportunity to attend conferences of the American Academy of Adoption Attorneys (now called the Academy of Adoption & Assisted Reproduction Attorneys) and work with many of its members around the country. There are many fine Kansas adoption lawyers who are members of this organization, and the organization has an ICWA Committee. I believe our legislature would benefit from giving this committee and organization, especially its Kansas members, an opportunity to review and comment on this legislation.

Kansas is also the home to some very fine adoption agencies. The experiences of these agencies are invaluable and need to be brought to bear on this legislation, rather than having it hurried through the legislature.

As to House Bill No. 2772 in particular, I have concerns about its scope. The Bill appears to be directed largely at state-involved proceedings (i.e., cases in which the Kansas Department for Children and Families or another state agency has become involved in the welfare of an Indian child). However, the Bill does not specifically limit itself to such proceedings. If it is intended to be so limited, then the Bill needs to say so. As written, the Bill has sections covering "involuntary proceedings" and "voluntary consents," both of which may be the subject matter of a DCF-involved matter. But the "voluntary" section appears to apply to any and all situations "[w]hen[ever] any parent or Indian custodian voluntarily consents to an out-of-home placement or relinquishment or termination of parental rights," and the Bill's definition of "parent" is problematic. We need clarity that the Bill is strictly limited to state-involved matters.

Given more time, I am certain that I would have additional observations to offer.

Thank you for the opportunity to weigh in.

Sincerely,

FOULSTON SIEFKIN LLP



Scott C. Nehrbass