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April 24, 2008

Hon. Dave Jones, Chair
Assembly Judiciary Committee
State Capitol, Room 3146
Sacramento, California 95814

Subject: AB 2736 (Cook), as proposed to be amended
Hearing: Assembly Judiciary Committee – April 29, 2008

Dear Assembly Member Jones:

The Judicial Council has not taken an official position on AB 2736 (Cook), which would authorize the use of customary adoptions for Indian children subject to the jurisdiction of the juvenile dependency court, but we have identified a serious concern with the bill as proposed to be amended by the author and sponsor. Customary adoption, as defined in AB 2736, would be an adoption pursuant to tribal custom which would not require or result in the termination of parental rights. Historically the Judicial Council has supported the addition of new permanent placement options for all dependents as furthering the mission of the court to find safe, stable, and permanent homes for dependent children. Thus, at the outset, the addition of a new permanent plan for Indian children appears to be a very positive development which is consistent with the objectives of the juvenile court, and our concerns are not directed at the core objective of AB 2736.

Our concern relates to the role of the juvenile court in the customary adoption process as set forth in the proposed amendments. Under current law, Indian tribal courts and state courts have

concurrent jurisdiction, and an Indian tribe may petition for transfer of a dependency matter to its tribal court, and such transfer is required unless the juvenile court finds good cause not to transfer the case. AB 2736 does not address such transfers of jurisdiction, but rather concerns cases in which the juvenile court retains jurisdiction over the Indian child's dependency proceeding. However, AB 2736 appears to render the juvenile court's jurisdiction pro forma in a case in which customary adoption is being pursued. As set forth in AB 2736, the customary adoption process would work as follows: (1) the court would make a finding that customary adoption was a compelling reason not to terminate the parental rights of the dependent child, (2) the tribe or its designee would perform a home study and background check of the proposed adoptive home, (3) the tribe would have 120 days to file a customary adoption order that would set forth the legal, financial, and other rights of the birth and adoptive parents pursuant to tribal custom, and (4) the court would set an adoption hearing at which time it would be required to enter the customary adoption order. Our concern is with the final step in this process.

The Indian Child Welfare Act (ICWA) and the state statutes that mirror ICWA require the juvenile court to give full faith and credit to the public acts and judicial proceedings of an Indian tribe to the same extent that it would to any other entity. AB 2736 expressly applies this provision to the customary adoption order filed by the court, but then goes further, and provides that the court *shall* enter the order. This additional mandatory language is of concern because it appears to prevent the court from exercising any discretion with regard to the entry of the adoption order, thereby making the court's function essentially clerical, and the hearing unnecessary. Full faith and credit as required under ICWA does not mandate the court to apply the law of the tribe in violation of the legitimate public policy of the state. In the case of juvenile dependency proceedings, the primary policy objective of the state is to ensure that all orders made by the court are in the best interest of the child who is the subject of the proceeding. If a conflict were to occur between the best interest of the child and the customary adoption order filed by the tribe, AB 2736, with its explicit requirement that the court enter the customary adoption order, appears to go beyond the principles of full faith and credit, and would require the court to enter an order even if the court determined that entry of the order was detrimental to the child.

Because dependent children are parties to dependency proceedings, and are represented by counsel, it would be problematic if the child or his or her counsel objected to the entry of the adoption order, and the juvenile court had no ability to take notice of that objection. As defined in AB 2736, a customary adoption order is unlike a traditional adoption order because it would outline rights and responsibilities for more than two parents. This complexity suggests a range of hypothetical orders that might be problematic. For example, the customary adoption order might authorize contact with a birth parent which the juvenile court had already found to be a danger to the child. In such a circumstance, the court, while affording due deference to the acts of the tribe, must have some authority to protect the policy interest of the state in preserving the welfare of the child. Amending AB 2736 to remove the requirement that the court enter the order would still leave customary adoption as a viable placement for Indian children, and would not undermine the sovereignty of the tribes in any way. Because the juvenile court maintains jurisdiction over the child throughout the process, there is no diminution of the authority of the

tribe if the statute ensures that the court's jurisdiction is meaningful rather than ministerial. In these cases, the tribes are standing in the shoes of the child welfare agency in trying to evaluate and arrange an appropriate adoptive placement for a child. In no other case is the court required to enter an adoption order with no authority to review it to determine whether it is in the best interest of the child, and it is neither necessary nor appropriate to eliminate the discretion of the court in this circumstance. By contrast, a requirement that the court act as an executive branch agency does diminish the appropriate role of the court within our system of separation of powers.

It may be appropriate, given the special policy considerations that underlie ICWA, to constrain the circumstances in which the court may exercise its discretion. For example, the bill might be amended to require the court to enter the customary adoption order "unless the court finds, by clear and convincing evidence, that entry would be detrimental to child." Such a limitation would balance the need to give great deference to the acts of the tribe, and the interest of the state in protecting the welfare of children under its jurisdiction. Alternatively, the Committee may wish to consider restructuring the customary adoption process so that the court would not select customary adoption as a permanent plan until it had had an opportunity to review the proposed customary adoption order. Either of these approaches would restore the appropriate discretion of the juvenile court, and address our concern regarding AB 2736.

Sincerely,

Tracy Kenny
Attorney

TK/yt

cc: Members, Assembly Judiciary Committee
Hon. Paul Cook, Member of the Assembly
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