

Written Testimony in opposition to H.B. 2772

To the House Committee on Child Welfare and Foster Care

By: Martin W. Bauer, Martin Pringle Oliver Wallace & Bauer LLP

I am writing the Committee in opposition to H.B. 2772 which appears to be an even longer version of what are called mini-ICWAs. I have spent my career focused on permanency for children in adoptions, guardianships and Child in Need of Care (CINC) proceedings. I am the past President of the American Academy of Adoption Attorneys and during my service to that organization, served on the national panel to work on an update of the Indian Child Welfare Act. This included meeting with national representatives of the Five Civilized Indian Nations representing all other Tribes. I have handled numerous actions under the federal Indian Child Welfare Act and sought to work through issues with children in states where mini-ICWAs either existed. I just learned of the hearing on H.B. 2772 so will continue to study the bill's language, but I present some early observations.

I first oppose Kansas enacting a mini-ICWA because the current Kansas CINC and Adoption and Relinquishment Act already requires compliance with the federal ICWA requirements. My experience is that adding another set of rules delays achieving permanency for the child involved. It does not increase the likelihood that the child will be placed with an Indian family. The first placement preference of the federal ICWA is a family member of the child and this has been interpreted and applied as placement with the non-Indian family member if that is in the best interests of the child. H.B. 2772 would at the least delay this determination by the added requirements and at worst, seek to override this best interests outcome of keeping the child with an appropriate family member by creating so many conditions that the Indian family has to be given preference. The child's interests and the state's interest in protecting the child's interest should convince the Committee not to pass this Bill for a further vote.

Second, the mini-ICWA proposed in other states has been an effort by Tribes to overcome and in fact, override the result in Baby Girl Veronica. In general, this U.S. Supreme Court case held that a birth father who had not supported the birth mother during the pregnancy and had not been involved with the child after the child's birth thus was not to be considered to have had "custody" of the child, was not entitled to the protections of the federal ICWA. If this mini-ICWA tries to protect a father who has not provided support to the mother during pregnancy or to the child after delivery so that the Tribe can force a different placement, the child is left in limbo while those efforts are made which rarely are a benefit to the child and the child's need for permanency and security.

Third, on a fiscal note, the Bill appears to expand "active efforts" required to rehabilitate or reintegrate the child with a parent if the child is eligible to enroll with a Tribe. Those added active efforts will both increase the costs of the Department of Family and Children and its contractors, but it will likely increase the cost of foster care as children will be in foster care longer as the conditions and efforts added by H.B. 2772 are considered and satisfied. These same concerns exist as H.B. 2772 appears to apply to adoptions as well. All of this will also add to the costs and delay of litigation and judicial involvement. The current requirements in the CINC Code and the adoption act have been sufficient to achieve a balance between Tribal considerations and those of the child.

Fourth, I wish all Tribes were responsive to notices of CINC proceedings and adoptions. While Tribes appearing to support H.B. 2772 may promptly and consistently respond to inquiries about Tribal eligibility, services and placements, the majority of Tribes I have had to contact have either not

responded, responded and then not acted or, worst of all, not responded until very late in the placement process wanting to start over as if the “child time” in limbo did not matter.

Finally, the legality of ICWA statutes have increasingly come under challenge. To approve a Bill that is likely to be challenged with little or no study of its real benefits or the costs of its being passed should convince the Committee to table the Act or refer it to the Judicial Council for further consideration.