THE MINNESOTA
COUNTY ATTORNEYS
ASSOCIATION

March 5, 2024

Senator Mary K. Kunesh
Assistant Majority Leader
3209 Minnesota Senate Bldg.
St. Paul, MN 55155

Re: SF 4480, Minnesota Indian Family Preservation Act

Dear Senator Kunesh:

The Minnesota County Attorneys Association ("MCAA") both supports and proposes some modifications to the proposed amendments to the Minnesota Indian Family Preservation Act ("MIFPA"). The 11 Sovereign Tribal Nations of Minnesota, led by Rebecca McConkey-Greene in "MIFPA Phase II", invited MCAA to continue discussions about changing MIFPA. MCAA worked with Tribes and other stakeholders to discuss and provide recommendations on proposed amendments. MCAA has appreciated the productive discussions about best practices, listened to individual experiences that were shared, and considered Tribal ideas as we considered areas for improvement in the statutes.

Child protection is a complicated and personal area of law, with a legacy of injustice to Native families. It is within this context that MCAA has participated in the discussion about proposed changes in order to better serve Native families in Minnesota. MCAA is mindful of how this proposal will affect child safety, permanency, and resources. Throughout MCAA's involvement with MIFPA Phase II, the MCAA continuously reviewed and shared the following concerns with the Tribes and other stakeholders involved in MIFPA Phase II.

SAFETY

MCAA is concerned that the proposed changes to determining jurisdiction for an Indian child could force the district court to dismiss a case and return an Indian child to a dangerous situation. Pg. 16, Lines 16.30-16.34.

- The proposed bill provides for jurisdiction to be determine solely by the Tribe. This conflicts with Federal Indian law, state law, state agreements with Tribes, and caselaw. ICWA provides that a judge must determine whether a child resides on a reservation, while the proposed MIFPA amendment would require the Tribe make that determination. If a Tribe decides an Indian child does not reside on the reservation, the case would proceed to State Court. However, if the State Court judge determines the child resides on a reservation, the State Court would not have jurisdiction and would have to dismiss the case. This significant loophole is

appropriately avoided through the existing law, which requires the State Court judge to make one determination if the child resides on the reservation or not. Tribes could still transfer cases to Tribal Court if they wish. Additionally, as is frequently encountered by MCAA members around the State, waiting for Tribes to respond (especially an out of state Tribe) to determine jurisdiction is anticipated to dramatically slow down courts from being able to act quickly to protect children.

PERMANENCY

The proposed changes to extend permanency timelines for up to fifteen (15) additional months (up to 21 months total) for all children in Minnesota, without adequate input from all stakeholders, could significantly impact permanency for children and affect child protection practice across the state. Pg. 41-43, Lines 41.19-43.2:

- The proposed extension of permanency timelines for all children up to 21 months could harm children by leaving them without loving, safe caregivers even if a parent is not close to being able to provide safe care. Minnesota's permanency timeline is 12 months. Minnesota law currently requires counties to return children home or file a petition seeking a different permanency plan at approximately twelve (12) months from out of home placement. The maximum permanency timeline allowed by federal law is 15 months. Tribes are relying upon the federal law as support for this proposal. Although this proposed change originally started as an extension for Indian children, it is now being proposed for all children. While extension of the timeline is sometimes warranted by a parent's progress towards child safety, it is important to have criteria for extensions that ensure children are not languishing in foster care without real hope of reunifying with their parent. The MCAA believes additional consultation with all stakeholders is necessary. The MCAA believes the creation of a task force, inviting all stakeholders is the best way to address this issue.

The MCAA is concerned that new proposed definition for "extended family member" would eradicate Tribes' discretion to define "extended family member" and contradict the Sibling Bill of Rights. Pg. 3, Lines 3.22-3.29; Pg. 31, Lines 31.15-31.21; Sibling Bill of Rights (260C.008); 260C.212, subd 2(d):

- The Definition of Extended Family Member would limit Tribes' ability to define who are extended family members of a child. Under the current definition, an extended family member is as defined by the law or custom of the Indian child's Tribe. The proposed language would eradicate Tribes' discretion to define "extended family member." For example, a step-parent or custodian of a sibling could not be considered a relative for the purpose of foster care placement. The proposed language could shift children's siblings out of the ICWA/MIFPA placement preferences and cause placement of children away from their siblings. This also creates a direct conflict with the Sibling Bill of Rights, which requires siblings to be placed together for foster care and adoption at the earliest time possible.

The MCAA is concerned that the proposed MIFPA amendments would bar current foster parents, potential foster parents, and past foster parents from intervening in CHIPS cases to

have their voices heard and to advocate for the child. Pg. 20-21, Lines 20.32-21.3; Rule 34.02; Rule 32.01, subd. 4; Rule 34.01; 260C.221, subd. 2(a)(5):

The proposed changes prohibiting party status conflict with current Minnesota statute and rules. Additionally, it would bar current foster parents, potential foster parents, and past foster parents from intervening in CHIPS cases to have their voice heard and advocate for the child. The proposed changes include potentially barring relatives of the child an Indian custodian, which is contrary to the spirit of ICWA and MIFPA. Currently, the law allows an interested person to intervene in the case, if the judge finds that that person's intervention is in the child's best interests. This allows for the judge to have the flexibility to address different situations and consider whether a foster parent should have a voice in a hearing. Additionally, Tribes are parties to these matters, so Tribes would have the opportunity to agree or disagree with the proposed intervention. Prohibiting foster parents from intervening in CHIPS or permanency cases, as proposed, would detrimentally prevent judges from hearing from the people who are seeing the child every day. The proposed language conflicts with grandparents' right to intervene and relatives' rights to be heard by the court. MCAA believes that the interests of justice require that a judge consider the voice of every person that shows up to support a child. MCAA believes that retaining existing language further provides for due process while also providing an opportunity to contest a person's intervention if it is not appropriate.

RESOURCES

The MCAA is concerned that the proposed language would limit judges' ability to order parents to appear in-person for hearings or trials. Pg. 8, Lines 8.13-8.15; Pg. 10, Lines 20.14-20.19

- Virtual Court Appearances, as proposed would limit judges' ability to order parents to appear in-person for hearings or trials. Remote appearances for Tribal Representatives are allowed under current law, which is logical and crucial to allowing Tribal Representation from geographically distant locations. The MCAA proposes that the current amendment also include Guardians ad Litem, who also often travel long distances and add an expert voice. However, the decision on whether an Indian Child's parents or the Indian Custodian can appear remotely should be left to the discretion of the judge. If a judge is concerned about a parent's credibility, their willingness or ability to travel to the State to care for the children or believes that settlement negotiations would be more productive in-person, a judge should have the ability to require an in-person appearance. As proposed, a judge could only require an in-person appearance if it was not "unduly burdensome," which is likely to vary greatly in interpretation and lead to inconsistency and additional litigation through appeals.

By appointing parents' counsel through the Office of Appellate Counsel and Training, a panel not yet formed and consisting of only four (4) total attorneys to cover a variety of cases, the MCAA is concerned that there would not be enough attorneys to handle Indian child custody cases thoroughly and MCAA is concerned that these attorneys would have insufficient

ICWA/MIFPA training. Pg. 20, Lines 20.14-20.19:

> The Appointment of parents' attorneys from Office of Appellate Counsel and Training would require that the Office would represent low-income parents of Indian children in child custody proceedings outside of child protection, such as minor guardianship cases. MCAA is concerned that this newly-created office would not have enough attorneys to handle these cases thoroughly and that the Office's attorneys would not have any ICWA or MIFPA training. This proposal would be difficult to implement and could leave Indian Children's Parents without skilled representation.

Thank you for your help with our work to keep Minnesota children safe and connected to their families and cultures. We welcome the opportunity to talk further about these recommendations as the bill moves through the process.

Sincerely,

Robert M. Small
Executive Director

Erin Johnson, Assistant Washington County Attorney
Co-Chair, MCAA Indian Child Welfare Act Subcommittee

Heather Capistrant, Assistant Ramsey County Attorney
Co-Chair, MCAA Indian Child Welfare Act Subcommittee