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Written Testimony of Law Professor Annette Appell Regarding A.B. 28
Before the Nevada Assembly Judiciary Committee

February 17, 2003

I am a law professor at the William S. Boyd School of Law, University of Nevada, Las Vegas. My primary area of teaching and scholarship is child welfare. I have written extensively in the area of adoption. In addition, I represented hundreds of children in child welfare and termination of parental rights proceedings in Chicago, Illinois, and a few dozen here in Nevada as founder and co-director of the law school's Child Welfare Clinic of the Thomas and Mack Legal Clinic. I have also represented parents and guardians in these proceedings here and in Illinois. The Child Welfare Clinic is a teaching law office within the law school where specially licensed law students represent children, parents or guardians under faculty supervision.

I am testifying in support of Assembly Bill 28. Enactment of the bill would provide an important tool for families and children in Nevada, a tool that will likely aid in effecting permanent and stable adoptive placements for foster children. A.B. 28 protects the permanency of adoption while providing procedures for birth parents and adoptive parents to voluntarily enter into enforceable *agreements* for post-adoption contact. In other words, it is up to the persons who will live with the child and the birth and adoptive parents, and in some instances the children to decide whether, how much, and what type of, post-adoption contact is desirable. Under A.B. 28, the failure of the parties to perform under these agreements can never be grounds to set aside an adoption.

Approximately eighteen other states have similar statutes,¹ also known as adoption with contact. All of these statutes essentially do the same thing: they allow adoptive parents and birth relatives or others at, or before, the time of adoption to enter into enforceable agreements for post-adoption contact, such as visitation or correspondence. The statutes do not permit approval or enforcement of post-adoption contact plans unless the adoptive parents and the party who will have contact agree to such a plan at or before the time of adoption. The statutes do not permit the failure of post-adoption contact to be grounds for overturning a relinquishment or adoption. Impressed with the utility of adoption with contact, the U.S. Department of Health and Human Services, Children's Bureau, recommended that states enact these statutes in its 1999 GUIDELINES FOR PUBLIC POLICY AND STATE LEGISLATION GOVERNING PERMANENCE FOR CHILDREN.

What A.B. 28 Does

Specifically, the bill allows birth and adoptive parents and/or the adoptive child to enter into agreements regarding post-adoption contact. In order to be enforceable, these agreements

¹Arizona, California, Connecticut, Florida, Indiana, Louisiana, Massachusetts, Minnesota, Montana, Nebraska, New Mexico, New York, Oregon, Rhode Island, South Dakota, Vermont, Washington, and West Virginia. I say approximately eighteen because at least one statute, South Dakota's, is ambiguous; and another, New York's, is very weak.

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must (a) be included in the adoption decree; and (b) contain provisions that: the parties agree to the ongoing jurisdiction of the court; any party may seek enforcement of the terms of the agreement; the court may award costs and attorney=s fees to the prevailing party in an enforcement action; and the agreement terminates when the adoptee reaches turns 18. A birth parent may enter into such an agreement while preserving his or her anonymity, as long as an agent is designated to receive process on behalf of the parent.

A.B. 28 also provides a procedure, forum and standards should disputes about the agreement arise after adoption. First, the bill allows the adoption court to maintain jurisdiction should the parties need to enforce or modify the agreement. Thus the parties need not file a new lawsuit if disagreements arise regarding the agreement. Second, the bill provides strict grounds for modifying the agreement: the parties must agree or there must be a change of circumstances and the child=s best interests must require modification. Third, the bill shifts costs and attorney=s fees to the losing party in an enforcement action. This provision should encourage both compliance with the agreement and private resolution of disputes. The modification and fee-shifting provisions should also discourage frivolous litigation regarding the agreements.

More generally, A.B. 28 reflects the widespread recognition that agreeable levels of openness in adoption benefit children. Openness also benefits adoptive parents, who frequently want more information about their child and his or her origin or answers to questions that may arise as the child reaches developmental milestones. Openness benefits birth parents who believe it is best for their children to be adopted, but want ongoing or periodic update on their children=s well-being. Adoption with contact provides security regarding the status of post-adoption contact agreements.

The bill also promotes adoption by encouraging birth parents and children who already are bonded to one another to accept adoption while permitting the parent and child to maintain contact either directly or through the adoptive parents. This agreement for contact also helps assure adoptees that the adoptive and birth parents support the adoption and the child=s pre-adoptive connections. Studies have shown that this knowledge can lead to more successful and stable adoptions.

What A.B. 28 Does Not Do

A.B. 28 does not permit the parties to set aside an adoption or a valid relinquishment for, or consent to, adoption even if the adoptive parents or child do not abide by the terms of the agreement.

A.B. 28 does not require birth or adoptive parents to have post-adoption contact if they have not agreed to it.

A.B. 28 does not require any specific type or frequency of post-adoption contact. Parties are free to establish as little or as much contact as they desire, to permit in-person contact or merely e-mail, written, video or telephone contact.

A.B. 28 does not preserve parental rights. Instead, it provides a limited, quasi-contractual right to the post-adoption contact to which the parties agreed.

A.B. 28 does not lock adoptive and birth parents into a level or type of post-adoption contact if circumstances change over time or if the parties agree to a change.

Why A.B. 28 is Needed in Nevada

Birth and adoptive parents, social workers, attorneys and the courts need clear rules regarding post-adoption contact. The Nevada Supreme Court recently refused to enforce a post-adoption contact agreement because it was not incorporated into the adoption decree. *Birth Mother v. Adoptive Parents*, __ Nev. __, 59 P.3d 1233, 1236 (2002). Thus, it appears that under Nevada law, agreements for post-adoption contact are enforceable if they are incorporated into an adoption decree B just as A.B. 28 contemplates. But the Supreme Court=s decision did not (because the issues were not before it) provide guidelines for enforcement or modification of agreements, the effect on the finality of the adoption decree of failure to perform post-adoption contact or require informed consent to such agreements. A.B. 28 provides these guidelines.

Moreover, the legislature can provide needed clarity about enforceability of post-adoption contact agreements. The Nevada Supreme Court has addressed the issue of post-adoption contact agreements three times with varying results. In *Morse v. Daly*, 101 Nev. 320, 704 P.2d 1087 (1985), the court held that a district court could include a post-adoption visitation order in its adoption decree. In *Bopp v. Lino*, 110 Nev. 1246, 885 P.2d 559 (1994), the court held that the only enforceable post-adoption contact is that which was ordered pursuant to the limited circumstances outlined in NRS 127.171(providing for court-ordered visitation if such visitation had been previously awarded under NRS 125C.050). *Bopp*, distinguishing *Morse* because *Morse* was decided before enactment of NRS 127.171, suggested that the statute circumscribed the district court=s authority to order post-adoption contact, even when agreeable to the parties. *Birth Mother*, discussed above, suggests that the district court may order such contact in addition to any orders under NRS 127.171.

It is my understanding, that agreements for post-adoption contact are common in Nevada. Indeed, NAC 127.210(4)(c) authorizes ongoing contact after adoption. The Division of Child and Family Services (DCFS) utilizes such agreements up north when placing foster children for adoption. Practice down in the southern part of the state has been more limited due to the uncertainty of the agency=s role and the enforceability of the agreements. A.B. 28 would provide certainty and structure for a practice that is already occurring in Nevada. Legal clarity and consistency throughout the state would help everyone involved in the placement and adoption of children here. This need to provide structure and clarity for the already prevalent practice of open adoption was cited as a rationale for adoption with contact statutes in many of the states that have statutes like A.B. 28.

For foster children, A.B. 28 is particularly timely. The Adoption and Safe Families Act of 1997 (AASFA@) and Nevada=s incorporation of its mandates requires the state to seek to terminate parental rights for children who have been in foster care for fourteen out of twenty

months, unless the children are with relatives or there is compelling reason why termination of parental rights is not in the best interests of the child. Yet experts have long noted that the legal limitations of traditional adoption make it an unviable option for many foster children because it requires children to choose between their families of origin and new families and does not permit children to maintain their connections to birth families. Indeed, preliminary data show that one of the most common reasons for a child to be exempted from ASFA=s mandatory termination of parental rights requirement is that the child is older and does not want to be adopted. These considerations motivated the U.S. Children=s Bureau to recommend that state adoption statutes embrace adoption with contact provisions.

Experiences in Other States

I have studied adoption with contact statutes for the past fifteen years. My interest was sparked by the foster children I represented in Illinois who refused to be adopted unless they could have ongoing contact with their parents or siblings; and by the parents of these children who would not relinquish their children for adoption, even while recognizing adoption was best, unless these parents could have some guarantee that they could have news about, or contact with, their children after adoption.

When I began my study, there were less than a handful of statutes. Each year new adoption with contact statutes are enacted. In 2001, I was fortunate to receive a small grant from Nevada DCFS to study the implementation of the statutes in seventeen states. It was a small, impressionistic study, but it revealed a number of things. First, adoption with contact statutes are seen as (a) promoting the flow of information to, for or about, adoptees after adoption; (b) providing structure and sanction for the ongoing practice of open adoption; and (c) helping to free children for adoption. Second, in the child welfare context, adoption with contact compliments concurrent planning and naturally arises during permanency planning. Third, there is no known litigation arising out of statutory post-adoption agreements. My legal research has turned up reported litigation relating only to post-adoption agreements arising out of, and because of, New York=s very poorly drafted statute. My DCFS study asked persons familiar with the courts and adoption about litigation arising out of the statutes and no one was aware of any litigation in his or her state. Fourth, state child welfare agencies were instrumental to the passage and implementation of the statutes in many states. Finally, nearly every person interviewed regarded adoption with contact as a useful and positive permanency tool, despite concerns that the statute might sometimes be used coercively or to meet the adults= and professionals= needs, rather than the child=s best interests, and despite concerns regarding whether the enforcement provisions would or could be utilized, due to the absence financial remedies, access to attorneys, fears of alienating the adoptive parents, and judicial attitudes toward enforcement.

Policy Considerations

Numerous policies favor adoption with contact. First, post-adoption contact may be best for the child. The child may need to maintain contact with significant persons or simply to leave a door open for that contact should the child need it or information in the future. Second, permitting enforceable post-adoption contact may free more children for adoption. For example,

parents B particularly noncustodial parents B may be unwilling to relinquish parental rights if it means that they will be forever cut off from their child or from information about the child. A related, third reason is to encourage settlements of adoption disputes. For example, when two adoption petitioners are seeking the same child, one may be willing to yield if they can reach a reliable agreement for post-adoption contact. Finally, family autonomy favors adoption with contact, rather than court-imposed post-adoption contact. Permitting those who have and will have a significant relationship with the child to make decisions about that child is both empowering and consistent with American legal and philosophical principles holding that families are the most appropriate decisionmakers on behalf of children.

Concerns militating against adoption with contact include fears that it may lead to subsequent litigation. Such litigation could be costly financially and emotionally. Such post adoption contact agreements may be coercive for birth parents and preadoptive parents. That is, they may, respectively, feel pressured to agree to post-adoption contact to avoid involuntary termination of parental rights or as a condition to adopting a desired child. The circumstances of the parties may also change over time. For example, the adoptive family may move too far away from visiting relatives, or parties to the agreement could become ill or involved in activities that make contact undesirable. Finally, lines of parental authority could become so blurred that the adults are involved in a contest for control of the child=s activities and values.

Well-crafted agreements and procedure can mediate many of these concerns. Trained counselors, mediators or lawyers may be available to assist the parties in protecting their interests and designing the agreements, as they do in other states. Parties can draft flexible agreements that either set a bare minimum of contact, to be increased if the birth parents, adoptive parents and adoptee agree, or that name a respected third party to mediate disputes or make final decisions when the parties differ about the level of contact. Parties can agree to birth and adoptive parent contact and determine later when and if the child will have direct contact. The parties can also include provisions in agreements for contingencies, such as arrangements for visitation if one of the parties moves away from the area. Parties can designate relatively objective indicators that contact should increase or decrease, such as illness, additional, unavoidable demands on the adults=, or adoptee=s, time, or the age of the adoptee.

A.B. 28 would allow birth and adoptive families to structure their own relationships. Social workers, child welfare and adoption agencies, lawyers, mediators and the courts can then provide information and assistance to the families for whom adoption with contact may be appropriate.

Thank you for the opportunity to testify. Please feel free to contact me if I can be of assistance: 702-895-3671; appell@unlv.edu