December 22, 2021

TO: Governor Kathy Hochul
Governor's Office
State Capitol
Albany, New York 12224

Re: Assembly Bill 6700/Senate Bill 6357: Establishes procedures regarding orders of post-termination visitation and/or contact between a child and such child's parent.

Dear Governor Hochul:

We, the undersigned, are a group of adoption attorneys and other adoption and child-welfare professionals from across New York State, who work with adoptive families, children, child welfare agencies and the court system to protect and advocate for the rights of adoptive children and their families.

We submit this letter in opposition to the passage of Assembly Bill 6700/Senate Bill 6357 as drafted, for the reasons set forth below. It appears that Assembly Bill 6700/Senate Bill 6357 is a recycling of a bill previously introduced as the "Preserving Family Bonds Act" which was **vetoed** in 2019. While the current version of the bill is a slight improvement from the version introduced in 2019, there remain a number of issues with the current bill that must be addressed. It is our understanding that the bill has already passed through both the Senate and Assembly and will be delivered to you for consideration this week. For the reasons set forth below, we strongly urge you not to sign this bill into law in the form in which it passed the Senate and Assembly.

Currently, in order for a child in foster care to be "freed" for adoption, the parental rights of the child's birth parent(s) must either be terminated by the Family Court or surrendered by the

birth parent(s) by executing a Judicial Surrender. If the foster care agency and/or adoptive parents agree to allow post-adoption visitation or contact between the child and the birth parent(s), the parties may agree to "conditions" in the Judicial Surrender which allow for enforceable post-adoption contact. If the Surrender does not contain such conditions, or if the parental rights of the birth parent(s) are terminated, they do not have the right to any post-adoption contact with the child and do not have standing to seek visitation post-adoption. The adoptive parents are still free to permit contact, at their discretion, if they feel it is appropriate for the child.

The proposed bill would authorize birth parents who are parties to termination of parental rights proceedings to petition for post-termination visitation and/or contact with the child, even over the objection of the adoptive parents and/or the foster care placement agency. The bill would also authorize the Family Court to enforce or modify such visitation orders after they are issued, up until the time the child turns 18.

The proposed legislation would substantially alter the status quo in foster care adoptions, to the peril of prospective adoptive children, as it would disincentivize prospective adoptive parents from adopting, would lead to increased cost and litigation in foster care adoptions, and would require children to remain in foster care for longer periods of time. Perhaps most concerningly, the bill is arguably violative of the Fifth and Fourteenth Amendments of the United States Constitution, as dictated by the United States Supreme Court in *Troxel v. Granville*.

Disincentive to Surrender

Because a child in foster care cannot be adopted into a permanent home until he or she has been "freed" for adoption, a child must remain in foster care until the birth parent(s) either surrender their parental rights or have their parental rights terminated by the court. Termination of parental rights ("TPR") proceedings can take up to a year or more to litigate and cost the county a great deal of time and resources, all while the subject child remains in the foster care system. The more favorable alternative, therefore, in cases of severe abuse, neglect or abandonment, is a surrender of parental rights by the birth parent(s). Many birth parents are incentivized to surrender their parental rights (rather than going through a termination proceeding) by the possibility of post-adoption contact with the child. Post-adoption contact is currently only available if the birth parent(s) sign a "conditional" Judicial Surrender. Allowing birth parents to petition for visitation and/or contact in conjunction with a TPR proceeding disincentivizes the use of conditional Judicial

Surrenders, since a birth parent would still have the ability to seek post-adoption contact with the child *even if his or her parental rights were terminated for neglect, abuse or abandonment*. This will undoubtedly lead to an increase in TPR litigation for the county, which is not only costly and time-consuming (and onerous to the already over-burdened Family Court system) but requires children to remain in foster care for longer periods of time before they can be "freed" for adoption.

No Restriction on Modification

While the bill provides that the initial hearing on post-termination visitation/contact must occur concurrently with the dispositional hearing on the TPR petition, it also provides that, if the Family Court *does* approve some type of post-adoption visitation or contact, the birth parent(s) can subsequently seek to have that order modified based on a showing of a substantial change in circumstances. That means that a birth parent who was awarded some type of post-adoption contact at the time of the TPR could potentially file modification petitions, continuously, up until the time the child reaches the age of 18 seeking different or additional contact with the child. That could potentially mean that the adoptive parents (and the child) may be subject to ongoing litigation with the birth parent(s) – whose parental rights have already been terminated – for a period of up to 18 years. Even if these modification petitions are denied or dismissed by the Family Court, there is no limit on the number of petitions that may be filed (or the frequency), thus requiring the adoptive parents to appear in court time and time again, potentially years after the adoption has finalized. This creates uncertainty for the family and leaves the possibility of litigation hanging over their heads until the child reaches the age of majority.

Undue Burden on Foster/Adoptive Parents

This all places an extreme and undue burden on foster parents who are considering becoming adoptive parents, creating a major disincentive for families to adopt children out of foster care. It removes any real ability for adoptive parents to negotiate and agree upon post-adoption contact with the birth parent(s), as it leaves the question of whether and what type of visitation will be allowed up to the sole discretion of the Family Court Judge. This increases uncertainty and generates additional litigation. Increased litigation comes at a cost to adoptive parents who are not entitled to assigned counsel before the child is "freed" for adoption and are only entitled to a subsidy of up to $2,000 to cover the cost of representation in the adoption proceeding. This means that any legal fees incurred by the adoptive parents in litigating visitation

hearings at the TPR stage, or litigating any future modification proceedings, would have to be paid for by the foster/adoptive parents out-of-pocket. If this bill is to be passed in some form, it is strongly encouraged that language be added that includes foster/adoptive parents in the list of individuals entitled to assigned counsel in these pre- and post-termination proceedings, assuming they are financially eligible.

Constitutional Implications

The bill also has constitutional implications and is potentially violative of adoptive parents' rights under the United States Supreme Court's holding in *Troxel v. Granville* (530 US 57 [2000]). In *Troxel,* the Supreme Court re-affirmed the age-old promise of the Due Process Clause that a parent's interest in the care, custody and control of their children ("perhaps the oldest of the fundamental liberty interests recognized by this Court") will not be interfered with by the Government. In that case, the Court dealt with a Washington State statute that authorized third parties to seek visitation with a child "at any time" so long as such visitation would serve the best interests of the child. The Supreme Court struck down this statute as being unconstitutional, as it subjected a parent's decision concerning visitation with their child(ren) to state-court review and contained no presumption of validity in the parent's decision regarding the care and custody of their child.

Assembly Bill 6700/Senate Bill 6357 contains many of these same fundamental defects, and its constitutionality is questionable at best. The bill allows for birth parents whose parental rights have already been terminated (legal strangers to the child) to seek visitation and/or contact with the child *even over the objection of the adoptive parents*. Pursuant to Domestic Relations Law § 110, an adoption creates a parent-child relationship between the adoptive child and the adoptive parents, and the adoptive parents "acquire the rights and incur the responsibilities of [a] parent" with respect to such child. As such, the adoptive parents acquire this "fundamental liberty interest" in making decisions concerning the care, custody and control of their children immediately upon adoption. This bill allows the Family Court to infringe upon this fundamental right, exposing adoptive parents to litigation regarding what is in the best interest of their children, and giving sole discretion in that regard to the Family Court Judge – something which was expressly forbidden by the Supreme Court in *Troxel*.

Conclusion

In closing, it is important to remember that the overarching principle of New York's adoption statutes, as interpreted by the New York Court of Appeals, is to further the best interests of adoptive children (*see Matter of Jacob*, 86 NY2d 651, 657-58 [1995]). Our State is concerned with providing stability and permanency to children in foster care and pre-adoptive homes, recognizing that adoption of children into safe, stable, loving and permanent adoptive homes satisfies the overriding policy of providing for the best interests of children.

This bill will certainly be a harbinger for additional litigation and increased costs associated with freeing children for adoption, and it will also disincentivize adoptive families from considering adopting children out of the foster care system, resulting in the undesirable effect of more children remaining in foster care for longer periods of time. While this bill may be well-intentioned (and we have no doubt it is), it is clear to those of us who are intimately involved with the adoption and foster care community that the impacts and consequences of the proposed amendments will undoubtedly be drastic, far-reaching, and severe.

Please contact the President of our organization, Kathleen ("Casey") Copps DiPaola, at **518-436-4170,** or by email at kdipaola@theCDSLawFirm.com to discuss how NYAAFF can be involved in making Assembly Bill 6700/Senate Bill 6357 a piece of legislation that would benefit children and families, rather than one which has the potential to harm children in the foster care system and potentially discourage families from considering adoption. At this time, we urge you to **VETO** the bill in its current form.

Thank you for your time and attention.

Kathleen ("Casey") Copps DiPaola

New York Attorneys for Adoption & Family Formation
By: Kathleen ("Casey") Copps DiPaola, Esq.
President
1 Marcus Blvd., Suite 200
Albany, New York 12205
Phone: (518) 436-4170
Fax: (518) 436-1456
kdipaola@theCDSLawFirm.com