

Open Adoption

By Micah Smith & Sarah Kang

Adoption often marks a new beginning for all the parties involved—the children, the adoptive parents, as well as the biological parents. Most states treat adoption like the end of an old life and a beginning of a new one. These states do not want the biological parents to interfere with the adopted children's relationship with the adopted parents. This is the most common approach to adoption in the United States and the one that is used in Tennessee. In most of these states, there is no law regarding communication between the children and the birth parents. Thus, if the birth parents wanted to maintain contact with the child, there is nothing in the law that would help them to ensure that contact. The biological parents may have a written agreement with the adoptive parents regarding visitations or other forms of communications with the children. However, in these states, there is no means of enforceability. The adoptive parents are under no obligations, outside of their own good will, to recognize any agreement they may have with the birth parents.

However, in the past decade, more states have codified enforceability of agreements of post-adoption contact between the birth families and adopted children. Open adoptions, also called cooperative adoptions or adoptions with contact; refer to arrangements between the adoptive and the birth families that provide for contact between the two families. Before or after the adoption is finalized, the parties can come to an agreement that can range from informal understandings to formal written contracts. These agreements can govern a

wide range of communication between the birth families and adopted children, ranging from exchange of cards, letters, and photos to actual visits between the children and birth families.

The states that have open adoption laws in their codes recognize the benefits of such laws to the parties involved. Because many more adoptions in the United States today are non-infant adoptions, the children tend to be older. These children are adopted as stepchildren or from foster care and tend to have attachments to at least one member of their birth families. Permitting them to maintain contact with the family members could very well be in their best interest. Additionally, contact between the birth and adoptive families can be a beneficial resource to the adoptive parents. The birth families have more knowledge and information concerning the children's medical, social, and cultural history. Often, adoptive parents acknowledge this benefit of continuing contact with the birth families and will permit such contact without any formal agreement.

Many adoption professionals believe that having a written contractual agreement is better than an informal agreement. Having something in writing can make absolutely clear the limits, types, and frequency of the visitation rights. There will be no question about what is permitted and what is not permitted if there is an agreement in writing. If the state has no provision regarding the enforceability of such contracts, the benefits that come out of having an agreement in writing disappear. The security that the parties can potentially feel in knowing the specific nature of the future relationship between the birth family

and the adopted child will be greatly diminished if the agreement is not enforceable.

On the other hand, adoptive parents may worry that perhaps such an agreement will encourage the birth parent or family member to take undue advantage of the opportunity for continued involvement. Judges may also have concerns that such agreements will simply invite ongoing litigation between birth parents and adoptive parents.

In 1995, the Children's Bureau of the U.S. Department of Health and Human Services convened a group of experts to address the issue of adoption. That meeting of experts resulted in *Guidelines for Public Policy and State Legislation Governing Permanence for Children*. The group recommended that states adopt legislation allowing adoption with contact agreements including the following key provisions:

- Adoption is irrevocable and the birth parent's voluntary relinquishment may not be set aside.
- The court may approve the agreement only if all parties, including the child over the age of 12, agree on the provisions and if the court finds the agreement is in the best interest of the child.
- The court may approve post-adoption contact in whatever level of detail the parties agree to and the court deems appropriate.
- Any party to the agreement may petition the court to modify the agreement, order compliance, or to void the agreement.

- The **court may order compliance**, modify, or void the agreement only if the parties agree or circumstances have changed, and the action is in the best interest of the child.

Approximately 20 states currently have legislation permitting written and enforceable *adoption with contact* agreements.⁶¹ Many of these states have incorporated the language recommended by the *Guidelines*.⁶² The open adoption statutes in these states share some common elements. All of the states require the adoptive parents to agree to the *adoption with contact*. Each state's statute specifies who must approve of the agreement for it to be enforceable. All states except West Virginia require the agreement to be in writing, either as a written contract or court order. The parties that want to be included in the agreement must agree in writing to the terms of the contract. All of the states with *adoption with contact* legislation provide for enforcement of the agreements unless grounds exist not to enforce the agreement or to modify the agreement. Finally, none of the statutes allow the adoption to be vacated as a sanction for breach of the agreement or for modification of the agreement.

States with *adoption with contact* statutes vary in some areas. Some of the states (notably New York and South Dakota) do not have provisions specifying the contents and enforcement of the agreements. Most of the states permit adoption with contact as long as the terms and conditions of the contact are in the child's best interests. The terms in the agreement are subject to court control in most states. Thirteen of the twenty statutes apply to most adoptees, and thus are not restricted to foster children or relative adoptions, while four

restrict *adoption with contact* to dependent children (Connecticut, Louisiana, Nebraska, New York), one to step-parent adoptions (Vermont), and two to children with significant attachments to their birth parents (Indiana, Rhode Island). Most of the statutes permit post-adoption contact for birth parents and some states even allow other birth relatives, such as grandparents, siblings, aunts, or uncles, who have significant emotional ties to the child to be included in the agreement. Many of the states permit the parties to come before the court if there are disputes regarding compliance and modification of the terms of the agreement. However, some states, including Arizona, Connecticut, Louisiana, Minnesota, and Oregon require parties to participate in mediation before going before the court.

Some of the states that do not have enforceable *adoption with contact* laws have addressed the issue without providing for enforceable agreements. Alaska's statute states that contact agreements are not prohibited. North Carolina permits agreements between the birth and adoptive parents but specifies that they are not enforceable and failure to comply is not grounds to invalidate consent to the adoption. Ohio and South Carolina specifically state that mutual agreements for contact are non-binding and non-enforceable. Missouri and Tennessee leave decisions regarding contact and visitation with birth families to the sole discretion of the adoptive parents.

An important issue to address is how the states with open adoption legislation reached that goal. In almost every state with the legislation, the primary motivating factor was the child's interest in open adoption. Another

important factor was the fact that there was a trend in more openness of adoption. Codifying adoption with contract will provide structure and clarity to the people interested in pursuing an open adoption.

In the states that have passed the legislature, origination and initial support of the statutes include: 1) the recommendation by a committee or coalition established to overhaul the state adoption act or examine children's issues (e.g., Connecticut, Florida, Montana, Vermont); 2) a coalition of state agencies and private child welfare, and adoption, agencies and other stakeholders (California, Indiana, Oregon, Rhode Island); or 3) private interest groups, such as adoption agencies or child advocates (Arizona, Massachusetts, Minnesota, Nebraska). The majority of the statutes were initially proposed by the public sector, usually a child welfare agency.

The following is a chart that offers a comparison of open adoption statutes according to the types of criteria discussed above.

ADOPTION WITH CONTACT STATUTES

STATE	WHICH ADOPTees	WHO CAN HAVE CONTACT	WHOSE APPROVAL NEEDED	STANDARD FOR COURT APPROVAL	STANDARD TO MODIFY OR ENFORCE
AZ	All children	Birth parents	Court, birth & adoptive parents, placing agency (when child in custody); court will consider wishes of child 12 & over.	Best Interests of the child (BIC)	May modify if in BIC & exceptional change in circumstances or agreement.
CA	Children adopted with adoption or child welfare agency involvement.	Relatives of adoptee, incl. birth parents. (Note that contact with the adoptee is permitted only when there is an existing relationship between adoptee & relative.)	Court, birth relative & adoptive parent, child 12 & over	BIC	May enforce if in BIC of the child & party seeking enforcement attempted alternative dispute resolution (ADR); may modify or terminate if agreement (& agreement filed with court) or in BIC, substantial change in circumstances & party seeking modification attempted ADR.
CT	Foster children	Birth parents who agree to voluntarily relinquish parental rights	Court, birth & adoptive parents, child 12 & over (GAL* or child's counsel may be heard)	BIC	Modify or terminate if in BIC

STATE	WHICH ADOPTEES	WHO CAN HAVE CONTACT	WHOSE APPROVAL NEEDED	STANDARD FOR COURT APPROVAL	STANDARD TO MODIFY OR ENFORCE
FL	Foster children	Birth relatives who are not parties to adoption petition	Court, birth relatives, adoptive parents (will consider recommendations of GAL,* child welfare agency, foster parents, et al.)	BIC	Adoptive parents may petition for termination or modification if in BIC. Court may order mediation
IN	Children over two with significant emotional attachments to birth parents	Birth parents who have voluntarily relinquished parental rights	Court, birth & adoptive parents, placing agency, GAL* or CASA,** child 12 & over	BIC	May modify if in BIC

STATE	WHICH ADOPTEES	WHO CAN HAVE CONTACT	WHOSE APPROVAL NEEDED	STANDARD FOR COURT APPROVAL	STANDARD TO MODIFY OR ENFORCE
LA	Foster children	Parents whose consent or relinquishment is required for adoption, grandparents, sibling if with substantial relationship to child such that child would be harmed w/o contact & preservation of relationship is in BIC. ¹	Court, birth relatives, adoptive parents (CW agency & child's attorney must review agreement; if they approve, then presumed to be BIC; CASA** may review); court shall solicit the wishes of child 12 or older	BIC (informed by 3 listed factors); if CW agency & child's attorney approve, then agreement presumed to be BIC	Modify or terminate if change of circumstances & agreement no longer serves BIC; may be modified by agreement without court approval
MA	All children	Birth parents	Court, birth & adoptive parents, placing agency (when child in custody), child's attorney (when child in state custody), child 12 & over	BIC, fair and reasonable terms, agreement entered into freely & voluntarily	May modify if in BIC & material substantial change in circumstances; may not expand, enlarge or increase amount of contact or place new obligations on adoptive parents

STATE	WHICH ADOPTEES	WHO CAN HAVE CONTACT	WHOSE APPROVAL NEEDED	STANDARD FOR COURT APPROVAL	STANDARD TO MODIFY OR ENFORCE
MD	All children	Birth parent and other relatives of the child	Parent and adoptive parent	BIC	May modify if a court decides that an exceptional circumstance has arisen and the modification is in BIC
MN	All children	Birth and marital relatives, incl. step-parents, who have lived with the child death dddeathof except in related adoption	Court, adoptive parents, birth relative, agency if child in its custody	BIC	BIC & exceptional circumstances or agreement
MT	All children	Placing parent	Parent & adoptive parent	None (court approval not required)	Not detrimental to child, does not undermine adoptive parent's authority, and compliance unduly burdensome due to changed circumstances
NE	Foster children	Birth parents	Court, birth & adoptive parents (GAL*'s opinion considered)	BIC, with guidance	BIC & exceptional circumstances or agreement

STATE	WHICH ADOPTees	WHO CAN HAVE CONTACT	WHOSE APPROVAL NEEDED	STANDARD FOR COURT APPROVAL	STANDARD TO MODIFY OR ENFORCE
NM	All children	Relatives	Court, birth & adoptive parents (child's wishes considered)	Not in BIC (i.e., BIC presumed)	BIC & changed circumstances
NV	All children	Birth parents	Birth and adoptive parents and child	None	The court that enters the decree of adoption has JX to enforce, modify, or terminate the agreement until the child turns 18, the child becomes emancipated, or until the agreement is terminated
NY	Foster children	Birth parents	Court, birth & adoptive parents	None	BIC
OR	All children	Relatives	Court, birth, adoptive parents, GAL*	None	BIC & exceptional circumstances or agreement

STATE	WHICH ADOPTEES	WHO CAN HAVE CONTACT	WHOSE APPROVAL NEEDED	STANDARD FOR COURT APPROVAL	STANDARD TO MODIFY OR ENFORCE
RI	All children	Birth parents	Court, adoptive & birth parents, GAL* (if one) or placing agency & child 12 & over	BIC	BIC
SD	All children	Birth parents	Birth & adoptive parents	None	Not stated
VT	Children adopted by step-parents	Adoptee, birth and adoptive parents, other relatives/persons.	Minor 14 years or older, step/adoptive parent, custodial birth parent, person who will have contact; placing agency (if any)	BIC (informed by six listed factors)	BIC to enforce; modification if BIC & exceptional circumstances have arisen or agreement
WA	All children	Birth parents	Court, birth & adoptive parents, GAL,* placing agency	BIC	BIC & exceptional circumstances or agreement
WV	All children	Anyone	Anyone & adoptive parents	None	Enforce if in BIC; court may consider child's wishes

STATE	WHICH ADOPTees	WHO CAN HAVE CONTACT	WHOSE APPROVAL NEEDED	STANDARD FOR COURT APPROVAL	STANDARD TO MODIFY OR ENFORCE
U.S. HHS Guidelines	Foster children	Adoptee, birth parent, sibling, grandparent, or other relative or individual w/ significant emotional tie to child.	"Parties" & child over 12	BIC (& contact appropriate as supported by the record)	May enforce, modify, or void if in BIC & change in circumstances or agreement (not sloppy language here re. enforcement)

* Guardian ad Litem.

** Court Appointed Special Advocate

Notes

¹ If there is no parent who meets these criteria, contact may be between the child and any other blood or adoptive relatives or other persons who meet the criteria listed in the table.

⁶¹ These states are Arizona, California, Connecticut, Florida, Indiana, Louisiana, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Nevada, New Mexico, New York, Oregon, Rhode Island, South Dakota, Vermont, Washington, and West Virginia.

⁶² Much of the information contained in this section has been taken from a report developed by Dean Annette R. Appell of the University of Nevada, Las Vegas, in 2003 for the state of Nevada. We thank Dean Appell for generously sharing this information with us.