

---

**ACNJ SPECIAL**

---

**REPORT**

---

*An Information/Policy Brief on  
New Jersey's Children*

---

# *Open Adoption*

## *The Exception - Not The Rule*

By Mary E. Coogan, Esq.  
ACNJ Staff Attorney

Open adoption is a term used to describe a spectrum of contact that may occur between a birth family and an adoptive family before and/or after an adoption has been finalized. It can be limited to permitting the birth family to assist in the selection of the adoptive home. It can also include post-adoption contact, from the sharing of information between the families to actual visitation. In the majority of open adoption cases, contact between the families is limited to a meeting prior to placement and letters or cards afterwards. Most open adoptions do not result in regular, ongoing visitation, which is one of the many factors that distinguishes open adoptions from custody and/or visitation disputes in the divorce context.

A growing number of adoption professionals support the practice of some form of open adoption, feeling that it eliminates the secrecy inherent in adoption which they see as a detriment to the child's successful adjustment in the adoptive family. When the birth parents and adoptive parents meet, they can see each other as human beings and can handle discussions with the child about his or her background in a realistic, natural way. Some birth parents are more comfortable about surrendering the child once they meet the adoptive parents.

### **OPEN ADOPTION IN THE CHILD WELFARE CONTEXT**

The concept of open adoption has been discussed increasingly as a way to resolve termination of parental rights cases filed by the Division of Youth and Families Services (hereinafter referred to as "DYFS" or the "Division"). Those who advocate for open adoption see it as a way to lessen the painful loss experienced by the birth parent(s), enable children to know their heritage and to recognize prior relationships, and decrease the litigious nature of these cases. Those opposed to open adoption argue that some families may not come forward to adopt children who need homes, fearing the potential ongoing involvement of an abusive birth parent or one with a history of drug and/or alcohol problems, or that ongoing contact will interfere with the autonomy of the adoptive family. Further, once an adoption is finalized the Division is no longer involved to facilitate visits, which presents some logistical concerns.

---

**Association for Children of New Jersey**

35 Halsey Street Newark, New Jersey 07102

(973)643-3876 (973)643-9153 fax

<http://www.acnj.org>

Other disadvantages have been identified in the literature. In some cases, open adoption prevents the birth parent from achieving closure on the decision to place the child for adoption. For adoptive parents, having the birth parent continue to be involved with the child can be intimidating and has the potential to undermine their role as parents. It can also be confusing to the child, especially at key developmental stages, such as preschool and adolescence.

In addition to the impact of open adoption on the parties involved, some courts in other states have held that the promise of post-adoption contact invalidates a voluntary surrender. Enforcement of an open adoption agreement has been a difficult issue for many courts to resolve. One of the greatest barriers to open adoption is the potential for the court to be involved in the child's life to adulthood. Given the difficulty in assessing the long-term impact of post-adoption contact between the child and the birth family, ACNJ has strong reservations about mandating the enforcement of such agreements through an open adoption statute.

Both sides acknowledge the fact that disputes arising subsequent to the agreement, as the circumstances of both families and the needs of the child change, may create more post-adoption litigation. The already overburdened Family Court currently has no mechanism to address ongoing issues, however legitimate, in a nonlitigation setting. There is also concern that enforceable open adoption agreements may discourage adoptive families who would have considered open adoption on an informal basis from considering such an arrangement or from becoming adoptive parents altogether.

### NEED FOR LONG-TERM RESEARCH

Unfortunately these concerns have not been addressed by any longitudinal studies regarding the impact of such arrangements on the children involved. While there have been studies involving post-adoption contact in the private adoption arena there are no conclusive studies of the long term impact of open adoption on the children. Professor Marianne Berry, who has done extensive research on open adoption, concludes that:

Given the present state of knowledge, deci-

sion making around open adoption remains a risky business, with substantial need for caution, assessment, and planning. The primary need is for further research, particularly longitudinal research, to help determine whether and how openness contributes to stronger adoptive families and healthier adopted individuals. Berry at 134.

More importantly, there are few, if any, studies involving cases in the child welfare system, i.e. cases involving child abuse and neglect. The protection and safety concerns that caused the child to enter foster care in the first place, such as parental drug addiction and physical abuse or neglect, or sexual abuse of the child, make open adoption in the child welfare context a far more difficult option. In light of the foregoing, open adoption may not be appropriate for a large number of children in foster care. The New Jersey Courts have indicated that voluntary agreements entered into by biological relatives and adoptive parents after counseling and advice and which are in the best interests of the particular child may be recognized. However, the Courts have been clear that such agreements are not judicially enforceable. The New Jersey Supreme Court recently affirmed the non-enforceability of such agreements in its K.H.O. decision, and correctly so.

### SOME ISSUES TO CONSIDER

Recognizing the movement towards creating open adoption arrangements, ACNJ urges caution. The parameters of such arrangements should be very narrow. ACNJ suggests the following guidelines, which are geared to protecting the interests of the children who may be involved in an open adoption arrangement. *Open adoption should be the exception not the rule.*

*1) Both the birth parents and the prospective adoptive parents must fully understand and accept their future roles in the child's life prior to entering into an open adoption arrangement.* In the private adoption context, the parent has already decided to place his/her child for adoption. In the child welfare arena, the parent may view the decision as the last available option. Neither side entering into an open adoption arrangement should feel that such an agreement is being imposed upon them. To assure this is

the case, there must be a counseling component to any agreement. *An open adoption agreement should never be imposed upon unwilling families.* The New Jersey Courts have correctly acknowledged that permitting voluntary agreements for visitation where biological parents voluntarily surrender their rights is not the same as authorizing courts to mandate post-adoption visitation in involuntary termination cases.@ B.G.S., at 598.

**2) Any continuing contact between the birth family and the child must be subject to the best interests of the child.** Given the fact that the adopting parent(s) has been approved by the Division as being able to raise the child and see to his/her physical and emotional well-being, *the adoptive parent(s) should have the final say as to whether post-adoption contact should continue if there are ongoing problems implementing an agreement.* To allow otherwise will guarantee future litigation in situations where the families cannot get along, thus creating additional unnecessary emotional stress and unaffordable legal fees.

Most of the birth families as well as the adoptive families involved in DYFS cases are not in a position of being able to afford ongoing legal fees. The state's Law Guardian Program, which currently provides representation to children in abuse and neglect cases typically ends representation when the court process ends. The program is already overburdened and not in a position to provide representation to children involved in post-adoption conflicts. Moreover there is no free counseling or mediation program available through the Family Court to resolve such disputes. Unless sufficient funding is provided for counseling services, mediation services and legal assistance to both birth and adoptive families, tough decisions must be made to limit conflicts arising around the enforcement of open adoption agreements. Studies in the divorce arena have documented the negative impact that ongoing conflict has on the emotional well-being of children.

**3) Consideration should be given to limiting open adoption to specific types of cases or placing parameters on the type of contact.** The real question is what type of contact is in the child's best interests? Clearly ongoing face-to-face visits pose more poten-

tial logistical, safety and emotional problems than an initial meeting and perhaps ongoing exchange of information through letters and pictures.

Open adoption may be a benefit to children who have been placed in foster care after having a relationship with a parent. In some cases where the child has been placed due to neglect rather than abuse, the child may have maintained strong ties to the parent. Some continued contact might help the child in dealing with adoption. Some foster parents who ultimately adopt do meet the birth parents during the course of the child's placement, especially if there is ongoing visitation. They may not have an objection to post-adoption contact. The preferences of older children in such cases should be factored into the decision regarding post-adoption contact, although not the controlling factor.

In more recent times, many of the children being placed today are going into foster care right from the hospital at birth. In such cases it may not be in anyone's best interest to attempt to create an ongoing relationship between the birth parents and the adoptive parents who have no prior relationship. The sharing of information or a face-to-face meeting prior to finalizing the adoption may suffice.

Evidence of past contact and/or relationship between the birth family and the child is a factor to be considered when defining the type of contact or to establish limits on the frequency of post-adoption contact. Establishing an ongoing visitation plan may create an expectation for the child that the birth parent cannot meet. Existing studies show that contact tends to lessen over time. The failure to follow through with the agreement may have a devastating impact upon the child, leaving the adoptive family to deal with the consequences.

**4) Siblings and extended family members.** In some cases, the child's post-adoption contact with the birth family might be with a sibling or limited to contact with a grandparent, aunt or uncle. Discussions with these relatives may have to be handled separately from the birth parent. The relative may also be the person to facilitate the exchange of information between the adopting family and the birth family.

## CONCLUSION

Open adoption offers an opportunity for a birth family and an adoptive family to make a positive connection for the child or children involved. There are different levels of "openness" which can be successfully achieved in some DYFS cases. It may be sufficient for the families to meet and exchange information, pictures, and/or add to the child's Life Book. Some families may be comfortable with continuing the contact through letters. Others may wish to arrange ongoing visits. We must remain focused on the child when considering such arrangements. We must also be realistic about logistical issues and recognize that people's living arrangements change over time. It is important that all involved fully understand their options, rights and responsibilities to the child, and only agree to arrangements they feel comfortable with.

ACNJ will continue to gather information about open adoption and to talk to those families who have been involved in open adoptions arrangements. We believe more dialogue is necessary on this issue. For further information or if you can add something based upon your own personal experience or research, please call Mary Coogan at (973) 643-3876 or send an email to [mary@acnj.org](mailto:mary@acnj.org).

## Sources:

Berry, Marianne, "Risks and Benefits of Open Adoption," The Future of Children, Volume 3, No. 1, pgs. 125-138 (Spring 1993)

Berry, Marianne, "The Practice of Open Adoption: Findings from a Study of 1396 Adoptive Families," Children and Youth Services Review, Volume 13, pgs. 379-395 (1991)

Berry, Marianne, "The Role of Open Adoption in the Adjustment of Adopted Children and Their Families," Children and Youth Services Review, Volume 20, Nos. 1/2, pgs. 1-21 (1998)

Berry, Marianne; Seader, Mary Beth, "Parent Access After Adoption," Debating Children's Lives, Mary Ann Mason and Eileen Gambull, Editors (1994)

Brodzinsky, David, "Long-term Outcomes in Adoption," The Future of Children, Volume 3, No. 1, pgs. 153-166 (Spring 1993)

Byrd, A. Dean, "The Case for Confidential Adoption," Public Welfare, pgs. 20-23 (Fall 1988)

Division of Youth & Family Services v. B.G.S., 291 N.J. Super. 582 (App. Div. 1996)

Hollinger, Joan Heifetz, "Adoption Law," The Future of Children, Vol. 3, No. 1, pgs. 43-61 (1993)

In the Matter of the Guardianship of K.H.O., a Minor, 161 N.J. 337 (1999)

In re Guardianship of R.O.M.C., 243 N.J. Super. 631 (App. Div. 1990)

Lamb, Michael, Kathleen J. Sternberg, and Ross A. Thompson, "The Effects of Divorce and Custody Arrangements on Children's Behavior, Development, and Adjustment," Family and Conciliation Courts Review, Vol. 35 No. 4, pgs. 393-404 (October 1997)

Nitti, Theresa A. "Stepping Back from the Psychological Parenting Theory: A Comment on *In re J.C.*," Rutgers Law Review, Vol. 46, pgs. 1003-1039 (1994)

Watson, Kenneth W., "The Case for Open Adoption," Public Welfare, pgs. 24-28 (Fall 1998)