

Post-Adoption Sibling Contact: Some Issues to Consider

Introduction

Do siblings placed in different adoptive homes have an independent right to a continuing relationship once the adoptions are finalized? What if the siblings never lived together? What if the adoptive parent objects to the contact? Should the integrity of the new family be paramount? Should it matter whether the objection appears to be reasonable? Should a court be able to overrule that objection?

How do we balance the importance of existing or anticipated sibling bonds with the sanctity of the adoptive family? Do siblings have a fundamental right of visitation? What if any impact will creating a right to post-adoption contact have upon the state's ability to recruit new families willing to adopt children living in foster care?

Supreme Court Recommends Legislative Review

Recently, the New Jersey Supreme Court had an opportunity to consider these questions. In New Jersey Division of Youth & Family Services v. S.S., a child named A.M.S., almost four years old, "lives happily with the only family she has ever known, a foster family that wishes to adopt her."¹ Her four older siblings have already been adopted by another family. The families have voluntarily maintained the sibling relationship. Since the sibling relationship was not in jeopardy, the Court chose not to address the constitutional questions. Rather the Court indicated that the public policy concerns would benefit from some legislative review. Writing for a unanimous Court, Justice Albin articulated issues for legislative consideration.

"In lights of the goals of the Child Placement Bill of Rights Act, the [grandparent and sibling] Visitation Statute, and the Adoption Act, the Legislature may wish to weigh the importance of maintaining sibling relationships in the post-adoption context against the need for protecting parental autonomy and the harmony of the new family unit, and ensuring the success of our adoption system."²

In its opinion, the Court identified state statutes that address post-adoption sibling visitation.³ While a few states have statutes authorizing post-adoption visitation, it is more common for statutes to permit the adoptive parents and birth family to enter into an agreement for post-adoption contact and/or to authorize courts to enforce such a consent agreement. Some states prohibit a sibling from seeking contact after an adoption is finalized.

No one questions that sibling ties are important. In the best of all worlds, all adopted children would know their siblings, half siblings, birth parents and relatives. All adoptions would be “cooperative” or “open”, permitting interaction and ongoing dialogue between the families. In fact, in the ideal world we would not have adoptive homes because all children would live with their birth parents, not needing placements with other families to protect them from abuse and neglect. But we do not live in an ideal world. Many children removed because of abuse and neglect cannot return home and need adoptive families to raise them. These questions raise complicated issues, not easily resolved when applied to real family situations.

Concern has been expressed about any law that **mandates** post-adoption sibling contact for several reasons. Such a law would:

- Interfere with the autonomy of the adoptive family,
- Further limit an already dwindling pool of prospective adoptive parents,⁴ and
- Require supports that do not exist.

While continued contact between siblings should be encouraged, additional legal obligations should not be imposed on adoptive families, especially when the supports needed to implement such mandates do not exist. A thoughtful approach is needed. A suggested first step is to obtain input from experts, as well as foster and adoptive families perhaps through a Task Force, similar to the New Jersey Assembly Task Force on Grandparenting which

held public hearings in 1999 to determine what supports were needed by grandparents and other relative caregivers.⁵ The Supreme Court noted an absence of “expert testimony comparing the importance of existing or anticipated sibling bonds to the sanctity of the adoptive family” in the record.⁶

Sibling Relationships are Important

Some argue that there is nothing more precious than a sibling relationship, one established through shared experiences of life. A sibling relationship may be the longest lasting relationship most people have; longer than other relationships with parents, spouses or children.⁷ The bond exists in children raised in well-adjusted families, and arguably the bond is stronger between brothers and sister from dysfunctional families. “They learn very early to depend on and cooperate with each other to cope with their common problems.”⁸

Siblings entering foster care should be placed together and remain together. Most child welfare experts agree that siblings can offer each other a distinctive and beneficial kind of emotional support, especially if they had previously lived together in households with parents who are abusive or neglectful. New Jersey’s *Child Placement Bill of Rights*⁹ requires that every effort be made to place siblings together. The policy of the Division of Youth & Family Services (DYFS) is to make every effort to place siblings together. Sadly it does not always happen.

According to DYFS statistics, groups of two or three siblings are placed in the same home 63.5 percent of the time. However sibling groups of four or more live in same home less than 30 percent of the time.¹⁰ It can be difficult to find homes for large sibling groups. Many children entering foster care have special needs, perhaps due to substance abuse by the mother or the trauma of movement through several foster homes, which require more attention. Siblings may have different fathers. It may be

challenging for a DYFS case manager to find and maintain a placement for a sibling group with difficult or defiant behaviors. Sometimes siblings are not together simply because the case manager did not check to see if a child had older brothers and sisters.

Not all sibling relationships are through blood. Consider the example of three siblings entering placement who are placed together. Another child (call him John), born three years later to the same mother but different father, is placed into another foster home. John never experiences those shared events that create and solidify the “sibling bond” with his three older siblings. Instead John develops a relationship with the children in his foster home. Although not related by blood, these children become John’s brothers and sisters. Through their shared experiences of life, they develop the “sibling bond” that the literature identifies as being special and in need of protection. John is eventually adopted into that home in part because of that psychological bond, and they become his legal family. Is it appropriate to disrupt that sibling bond at a later date to protect a blood sibling relationship that never existed?

It is not the children’s job to sacrifice their new families to fix bad social work practice...If the family is loving and safe, leave the child where he is planted and blooming. Child-to-mother attachment occurs before sibling-to-sibling attachment. Do not ask a child to give up her primary bond to her parent to establish, not preserve a relationship with a stranger who happens to have shared the same womb at a different time.¹¹

Sibling Visitation Can Be Complicated

If not feasible to place siblings together DYFS is expected to facilitate ongoing contact between siblings while they are in care. But let us imagine that the DYFS case manager was not aware of John’s older siblings when he was

placed and does not arrange visits. No other participants in the litigation ask the judge to order visits. Not knowing of their existence, John cannot miss his siblings. Let’s further imagine that the three older siblings were placed with a paternal relative, not related to John. Should the three older blood related siblings have the right to demand visits with John even over the objection of John’s parents?

There are logistics issues to consider. Families may live at different ends of the state or even in another state. What if the siblings seeking visitation have returned to the birth family and the adoptive family does not think it is their child’s best interest to have contact with the birth family? If the reasons the child entered foster care in the first place and the parental rights terminated involved parental drug addiction and/or physical abuse or neglect, the adoptive parents’ objection may be justified. Continued contact becomes difficult to implement. DYFS is no longer involved to facilitate the visits.

Parents set rules and standards for their children to live by. Parenting styles differ from home to home. What if the families have very different lifestyles; one being a lifestyle that the other family does not want their child exposed to or to emulate? What if the visits result in a child acting out at home?

Establishing an ongoing visitation plan creates an expectation for the child that more visits will occur. This can be a very positive thing. But what if a sibling initiates contact, obtains a court order for ongoing contact, but then does not continue to visit? The failure to follow through with the agreement may have a devastating impact upon their child, leaving the adoptive family to deal with the consequences. Is the state willing to fund support services to help families facilitate these visits and address ongoing problems?

New Jersey Adoption Law

Once the adoption is finalized in New Jersey, the adoptive parents have exclusive responsibility for and authority over their child. “The entry of a judgment of adoption shall establish the same relationships, rights and responsibilities between the child and the adopting parent *as if the child were born to the adopting parent* in lawful wedlock.”¹² [*emphasis added*] In New Jersey there is no difference between a biological parent and an adoptive parent. “The intent of the Legislature is to promote the creation of a new family unit without fear of interference from the natural parents.”¹³ Both retain the same rights, both incur the same obligations. As parents then, should not the adoptive parents be able to determine the extent of the child’s contact with individuals outside the immediate family?

The US Supreme Court has long recognized the fundamental right of parents to make decisions regarding the upbringing of their children.¹⁴ The right of parents to enjoy a relationship with their children is of constitutional dimension.¹⁵ Both federal and State constitutions protect the integrity of the family unit.¹⁶

Moreover an adoptive family needs the opportunity to grow and develop as an autonomous family. Experts say that adoptive parents need to feel that they have become the child’s rightful parents, legally and emotionally. “A fear that the biological family may come back to claim the child, or the biological family’s actual, ongoing involvement in the child’s life may hinder this bonding process.” Yet limiting contact with biological siblings may worsen a child’s feeling of abandonment and alienation.¹⁷ So the right of siblings for post-adoption contact needs to be balanced against the need for parental autonomy. We need to recognize that the adoptive parents have the right to decide what is in the best interest of their child.

New Jersey Grandparent and Sibling Visitation Statute

New Jersey’s first grandparent visitation statute was enacted in 1972.¹⁸ The statute was amended in 1987 to allow siblings to apply for visitation. Prior to 1993 only families disrupted by death, divorce or separation were subject to an application of a grandparent or sibling seeking visitation.¹⁹ The statutory amendments in 1993 expanded the scope of grandparents’ and siblings’ visitation rights and removed the requirement that the birth parents be deceased or divorced.

That same year major revisions were made to New Jersey’s adoption laws. The New Jersey Supreme Court had an opportunity to review the legislative history of both sections of law when deciding In the Matter of the Adoption of a Child by W.P. and M.P. in 2000. The Court determined that the Legislature did not intend the Grandparent Visitation Statute to apply to situations where the child is adopted by nonrelative adoptive parents.²⁰

A judicial review of the legislative history revealed that the overarching purpose of revising the adoption statutes was to facilitate and encourage adoptions.²¹ Moreover the Legislature had specifically rejected a provision permitting post-adoption contact between a child and biological family with the consent of the adopting parent. “The Grandparent Visitation Statute must not be interpreted to qualify or condition an adoption.”²² The Court also stressed the needs of the adoptive family.

An adoptive family must be given the right to grow and develop as an autonomous family, and must not be tied to the very relationship that put the child in the position of being adopted. Any other ruling would relegate the adoptive parents to ‘second class’ status.²³

Are Adoptive Parents Second Class Citizens?

Through the selection, training, and licensing of the resource parent, DYFS is saying that this individual is able to parent. Through the adoption process we are saying that this adoptive parent loves this child and will act in the child's best interest as if the person gave birth to the child. Since the State is not and should not be a parent, we need to allow the adoptive parent to exercise parental authority. Compelling visitation over the objection of the adoptive parent could result in the undermining of their authority and ability to make parental decisions in other areas of the child's life. And it may cause potential adoptive parents to think twice about getting involved with the child welfare system.

Anecdotal evidence suggests that many adoptive parents are willing to maintain sibling contacts. However they want to be able to choose to schedule visits with their child's birth family and to end or limit the contact if it becomes detrimental to their child without having to go to court. In mandating sibling visitation post adoption over the objection of the adoptive parent, would not the Legislature be telling adoptive parents that they are less than real parents, giving them second class citizen status? Wouldn't we be saying that they are not trusted to do what is best for their child, that they have more responsibility than birth parents, but less rights?

Why should the State continue to tell an adoptive family how to raise their child? To some the constant intrusion is insulting. If the issue is that we do not trust the adoptive parent to act in the child's best interest, then we need to reassess the selection process, training and the licensing process. The solution is not to impose more obligations on already stressed adoptive homes and create anxiety in the adoptive parent and child by the threat of further litigation.

A statute providing the right to seek visitation permits any application to be filed. What if a request for visitation is denied, thus finding the adoptive parent's denial of contact justified? Will the State pay that parent's legal fees? Will the State step in to fix that disruption?

The Needs of Separated Siblings

Children taken out of their biological parents' homes and placed into foster care or adoptive homes have likely endured a considerable amount of hardship. Separation from their biological siblings may compound feelings of loss and abandonment. Continued contact may ease those feelings. Depriving the child of the relationship may have lasting effects on the child's development.

Experts arrive at different conclusions regarding whether continued contact with birth family – including parents, siblings and other relatives – is beneficial or detrimental. Some psychologists maintain that the legal status of an adoption does not erase these relationships from the child's memories; nor does it resolve any conflicts they generate or perpetuate. Therefore the best way for the child to come to terms with her past is if the natural parent remains a live presence, not a fantasy.²⁴ Other experts favor a clean break with the past, letting the adoptive relationship to take hold psychologically. They argue that severing the ties with abusive or neglectful parents is a better way to ensure that the child's adjustment to the adoptive family is not jeopardized by the conflicting loyalties produced by continued contact.²⁵

More important, "there is not much empirical research on the short or long term consequences of open adoption for children whose biological parents agreed to resolve a contested adoption in exchange for a promise of continued contact, or whose biological parents had their parental rights terminated for child abuse or neglect."²⁶

In the case of a very young child, some argue that children placed with adoptive parents shortly after birth are not likely to have formed stable bonds with biological parents or other family members never lived with. “[I]nfants are much more likely to adjust to their new surroundings and to perceive themselves as ‘belonging’ to their adoptive parents.”²⁷ If the adopted child is an infant separated from his sibling before any bond was formed, it is more difficult to justify infringement on adoptive parents’ autonomy. That is not to say, however, that establishing and maintaining a relationship would be a negative experience.

Cooperative or Open Adoptions

Any contact between a birth family and an adoptive family before and/or after an adoption has been finalized falls within the definition of an open or cooperative adoption. The range of arrangements regarding contact can be informal through an occasional exchange of letters, phone calls or photos, or a formal written contract involving scheduled visitation.

Supporters of post-adoption contact see the deprivation of the sibling relationship having a negative impact on the child’s development.²⁸

Those opposed to post-adoption contact 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 DYFS is no longer involved to facilitate visits, which presents some logistical concerns.

One of the greatest barriers to open adoption is the potential for continued court involvement. Even those supporting open adoptions recognize 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.

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. ACNJ has previously expressed reservations about mandating contact through an open adoption statute.

Other States Statutes Addressing Post-Adoption Contact

In the mid-90s, states began to enact statutes that recognize the possibility that an open adoption arrangement may be compatible with a full and final legal adoption.²⁹ While most statutes address contact for birth parents, some address contact for other birth relatives including grandparents and siblings.³⁰ Some states statutes are permissive, meaning that post-adoption contact agreements are permitted, but do not mandate enforcement. Others simply protect the visitation that was established by court order prior to the adoption. As of 2003, five states required the parties to attend mediation before petitions are brought to the judge.³¹

What to do in New Jersey?

Post-adoption sibling contact is a type of open or cooperative adoption. 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, telephone conversation and emails. Others may wish to arrange ongoing visits. While we should 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.

Anecdotal evidence suggests that foster parents who adopt oppose mandatory contact. They

recognize the child’s need to maintain existing relationships, but it should be on a voluntary basis. Once an adoption is finalized these parents do not want to have to seek the court’s permission to limit the contact if it becomes detrimental to their child.

Some articles and other advocates make the argument for children to have a fundamental interest in sibling contact, thus creating a constitutional right of contact.³² Some opine that it is unlikely that the US Supreme Court will declare that siblings have a fundamental right of association any time soon.³³

Surely the interests of children must be balanced in the equation, but we need to remember that adopted children do not exist in a vacuum. Visitation affects adoptive parents and newly formed adoptive families whose interests are also significant. We want a system that encourages prospective adoptive parents to adopt or at least one that does not discourage families from adopting because of fear or additional obligations.

Recognizing the movement towards creating cooperative/open adoption arrangements, ACNJ urges caution and recommends that the Legislature first create a Task Force to solicit input from young adults who have aged out of the foster care system, adoptive families, foster families, those who recruit adoptive homes, and psychological experts regarding the pros and cons of post-adoption contact between siblings coming out of foster care and other members of the child’s birth family. Let’s take the needed time to consider Justice Albin’s suggestion and “weigh the importance of maintaining sibling relationships in the post-adoption context against the need for protecting parental autonomy and the harmony of the new family unit, and ensuring the success of our adoption system.” We can all learn something from such a process and hopefully create a system that is supportive of maintaining sibling contacts

without trampling on the rights and needs of adoptive families.

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¹ New Jersey Division of Youth & Family Services v. S.S., In the Matter of the Guardianship of A.M.S., Minor Child (A-48-September Term 2005) __ N.J. __ 2006

² Id., slip opinion at p.12

³ Id. at fn 1; fn2, fn3 and fn 4).

⁴ Some argue that the reason more and more people are adopting children born outside the US is because of a perception that this will ensure that they do not have to deal with the birth family. www.adoptioninstitute.org reports that international adoptions more than doubled between 1991 and 2001. Eighty-nine percent of the children adopted during those 11 years were under the age of five. NJ Foster and Adoptive Family Services supports the education and training of families regarding post-adoption sibling visitation to encourage them to consider it, but opposes mandating post-adoption contact, see www.fafsonline.org for position statement.

⁵ The New Jersey Assembly Task Force on Grandparenting held public hearings to hear from grandparents and other relatives parenting children about what their needs were; issuing a report in January 2000. Those hearings and report helped support the introduction of the kinship legal guardianship statute, New Jersey’s Kinship Navigator Program and financial subsidies for both DYFS and non-DYFS kinship placements: first state recognition of grandparents and other relative caregivers needing financial support.

⁶ New Jersey Division of Youth & Family Services v. S.S., In the Matter of the Guardianship of A.M.S., Minor Child (A-48-September Term 2005) __ N.J. __ 2006 slip opinion at p. 11.

⁷ Seifert, Meghann M., *Note: Sibling Visitation After Adoption: The Implications of the Massachusetts Sibling Visitation Statute*, 84 B.U.L. Review 1467, 1987-1490. (December 2004); Patton, William Wesley, *The Status of Siblings’ Rights: A View into the New Millennium*, 51 De Paul L. Rev. 1 (Fall 2001); Marrus, Ellen, “Where Have You Been Fran?” *The Rights of Siblings to Seek Court Access to Override Parental Denial of Visitation*; 66 Tenn. L.Rev. 977 (Summer 1999); *The Sibling Bond: Its Importance in Foster Care and Adoptive Placement* at pgs 1-2, Gloria Hochman, Ellen Feathers-Acuna, and Anna Huston, National Adoption Information Clearinghouse; Administration for Children and Families, US Department of Human Services (1992); http://naic.acf.hhs.gov/pubs/f_sibling.cfm;

⁸ *The Sibling Bond*, *supra* at pgs 1-2.

⁹ *NJSA* 9:6B-1 et seq.

¹⁰ See *ACNJ Child Protection Data Report, Appendix B* reporting 2005 DYFS statistics.

¹¹ Kupecky, Regina, *Womb Mates: When Sibling Rights & Child-Parent Attachment Clash* *Adoptalk* (North American Council on Adoptable Children (2002).

¹² *NJSA* 9:3-50(b).

¹³ *In the Matter of the Adoption of a Child by W.P. and M.P.* 163 N.J. 158, 169-170 (1998).

¹⁴ See e.g., *Wisconsin v. Yoder*, 406 U.S. 205, 231-34 (1972) (recognizing parents' rights to make decisions regarding the religious upbringing of their children); *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944) (citing *Pierce v. Soc'y of Sisters*, 268 U.S. 510 534 (1925) ("It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.") *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (recognizing parents' rights under the Fourteenth Amendment to determine what subjects their children will study).

¹⁵ *In re Guardianship of K.H.O.*, 161 N.J. 337, 346 (1999) (citing *Stanley v. Illinois*, 405 U.S. 645, 92 S. Ct. 1208, 31 L. Ed.2d 551 (1972)); *In re Adoption of Children by G.P.B. Jr.*, 161 N.J. 396, 404 (1999); *Adoption of Children by L.A.S.*, 134 N.J. 127 (1993); *A.W.*, *supra*, 103 N.J. 591. Parents have a fundamental liberty interest in raising their biological children. *Santosky v. Kramer*, 455 U.S. 745, 753, 102 S. Ct. 1388, 1394, 71 L. Ed.2d 599, 606 (1982).

¹⁶ *Stanley*, *supra*, 405 U.S. at 651, 92 S. Ct. at 1212-13, 31 L. Ed. 2d at 558-59; *A.W.*, *supra*, 103 N.J. at 599.

¹⁷ 84 *B.U.L. Rev.* 1467, 1486-87.

¹⁸ *N.J.S.A.* 9:2-7.1 (L. 1971, c.420, §1, effective Feb. 1, 1972).

¹⁹ *W.P.*, *supra*, 163 N.J. at 165.

²⁰ *Id.* at 168 and 171.

²¹ *Id.* at 173.

²² *Id.* at 174.

²³ *Id.* at 175-76 citing *Mimkon v. Ford*, 66 N.J. 426, 441 (Clifford, J., dissenting).

²⁴ *Post-Adoption Contact With Biological Parents*, 2-13 *Adoption Law and Practice* §13.02 at page 7 (Matthew Bender & Company, Inc. 2004).

²⁵ *Id.* at pgs 1 and 10; 84 *B.L.U. Rev.* 1467, 1489

²⁶ *Adoption with Continuing Contact: 'Open Adoption' – An Overview of Contemporary Law and Policy*, 2-13B *Adoption Law and Practice* §13-B.01 at page 4 (Matthew Bender & Company, Inc. 2004).

²⁷ *Post-Adoption Contact With Biological Parents*, 2-13 *Adoption Law and Practice* §13.02 at page 3 (Matthew Bender & Company, Inc. 2004).

²⁸ 84 *B.L.U. Rev.* 1467, 1489.

²⁹ *Adoption with Continuing Contact: "Open Adoption" – An Overview of Contemporary Law and Policy*, 2-13B *Adoption Law and Practice* §13-B.01 (Matthew Bender & Company, Inc. 2004).

³⁰ *Cooperative Adoptions: Contact Between Adoptive and Birth Families After Finalization*, State Statutes Services 2003; National Adoption Information Clearinghouse, Administration for Children and Families, US Department of Human Services; <http://naic.acf.hhs.gov/general/legal/statutes/cooperative>

³¹ *Id.* The five states identified are Arizona, Connecticut, Louisiana, Minnesota and Oregon.

³² Ferraris, Angela; *Comment: Sibling Visitation as a Fundamental Right in Herbst v. Swan*; 39 *New Eng. L. Rev.* 715 (Spring 2005); Markel, Christine D., *Notes and Comments: A Quest for Sibling Visitation: Daniel Weber's Story*, 18 *Whittier L. Rev.* 863 (1997); *Post-Adoption Contact With Biological Parents*, 2-13 *Adoption Law and Practice* §13.02 at pg. 11 (Matthew Bender & Company, Inc. 2004).

³³ *The Status of Siblings' Rights*, *supra* at pgs. 24-25, fn 123.

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