Open Adoption: Optimum or Oxymoron?

Mirah Riben
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by Mirah Riben

Editor's Note: The following article challenges us to consider even more closely the ramifications of our own practice of adoption.

In order to keep up-to-date with the current trend of openness and make adoption a more appealing choice for birthmothers, many agencies are offering open adoption in which birthmothers take a more active role in the selection of the adoptive parents for their child and are promised letters, photos and/or visits. It is believed that this will help the birthmother maintain some sense of control and relieve, or at least reduce, a great deal of anxiety for the birthmother, who in the past was not allowed to even know if her child she lovingly sacrificed was dead or alive. Additionally, such open arrangements would spare adoptees the inevitable pain of unanswerable curiosity and rejection, just as an amicable divorce with joint custody is preferable to a hostile situation which pits children's loyalties between parents. And finally, by meeting the birthmother face to face, the adoptive parents would be prepared to face the inevitable questions.

So far so good...except that such open adoption arrangements are unenforceable according to a May, 1994 New Jersey Supreme Court Ruling which ended an almost four-year-old boy's weekly visits with his biological mother; the mother of his older brother and younger sister.

Open adoption, while a great idea in theory, is, and always has been, a legal oxymoron. Open adoption is still adoption, and, because adoption totally and irrevocably obliterates/terminates any and all rights of the biological parents, a court cannot enforce "rights" to visitation or even to photographs when one has no rights. Open adoption is thus the equivalent of annulling a marriage and then seeking spousal support.

Open adoption is still adoption and therefore starts with the relinquishment, not before. Check the laws in your state regarding at what time after the birth of the baby a decision to relinquish can be made. State law should provide minimum guidelines. But even if allowable, agencies should think very carefully about practices which enmesh adoptive parents with "their birthmother" while she is an expectant mother and not yet a birthmother, including allowing adoptive parents into labor and delivery. Such practices can cause undue pressure and/or coercion of the birthmother, reducing her to a handmaiden or "surrogate" who is carrying someone else's child. Do not allow "openness" to impede the birthmother from being able to make a clear, unpressured decision after her child is born without feeling guilty for disappointing people she has come to know and care about. Her feelings of coercion, even if unintended, could cause the adoption to be overturned, hurting everyone involved.

Any person or agency desiring to facilitate open adoptions had best:

(1) Check the laws in the state where the adoption is to take place to see if open adoptions are recognized within that state; do not make or allow your clients to accept "promises" that are unen-
forceable.

(2) Be sure of what the birthmother wants. Open adoption, even at its best, is not similar to joint custody in a divorce. She will not have any say as to how her child is raised. Does she have realistic expectations?

(3) Be sure what the adoptive parents understand of open adoption and what they truly want. Some adoptive parents will promise anything if they believe it is the only way to achieve their goal of parenthood but find they are not willing or able to keep those promises once the adoption has been finalized.

(4) Ask what the prospective adoptive parents and birthmother mean by "open". This can mean that the birthmother (a) has a choice in selecting adoptive parents, and/or; (b) will meet the adoptive parents and/or; (c) will receive updates via mail on a monthly or yearly basis, and/or; (d) will receive photos on a yearly basis until the child reaches a certain age; (e) will be allowed to visit yearly until a certain age.

(5) Match those with similar goals.

(6) All parties need to know what are "promises" and what is enforceable and how and by whom.

(7) Be prepared to offer ongoing post adoption support for all of the parties and enforce all pre-adoption arrangements.

The decision in New Jersey was inevitable, the problems that brought the case to court, all too common false expectations. Many open adoption arrangements have been made and broken over the past decade. Sometimes the adoptive parents find themselves unable to keep promises that were made with the best intent. Other times it appears that they intended to deceive the birthmother, who finds the phone she called them on while she was expecting suddenly disconnected once the adoption is finalized. Sometimes, it is the adoptive parents who are let down by a birthmother who finds it too painful to maintain contact, watching someone else reap the joy she is unable to.

The New Jersey case involves a 20-year-old pregnant single mother of a two-year-old, identified as Jeanne H. In 1989 Jeanne placed her newborn son with a couple she knew through a mutual acquaintance. The couple (identified as Donna and Steve H.) was married for two years and Donna had two teens from a former marriage. They met Jeanne, discussed adoption plans, Donna took Jeanne to a prenatal clinic, and it was agreed that Jeanne would receive pictures and would be able to visit him. Jeanne testified that she expected to get pictures of her child and to visit him twice a month. She believed she would be "a big part of the baby’s life" as a nanny or as "Aunt Jeanne".

Donna told the court, "We agreed that when the baby was a certain age...he would get to meet his brother and any other children she had had later on." They kept in touch until the adoption was finalized around the child's first birthday when they quarrelled about Jeanne coming to see him for the first time since he was born, and bringing a birthday present. Jeanne then filed to have the adoption overturned. During the three years of litigation, Jeanne maintained weekly visitation which was court ordered against the wishes of the adoptive parents.

In upholding the rights of the adoptive parents, Supreme Court Justice Alan B. Handler said such open agreements are not supported by state law. Handler said that in putting her son up for adoption Jeanne "intentionally abandoned" her child. And thus, the court ordered the almost four year
old child, identified as Steven H., to be abandoned by his birthmother, older brother and younger sister, in practice, not just theoretically. This, despite Justice Daniel O’Hern stating, “Nothing in this record indicates that Jeanne seriously impaired or will seriously impair her child’s health and development. Is she to be condemned because she sought, without full knowledge of the law, to provide a better place for her child to grow up?”

Justice Handler said, “Because intentional abandon-

ment involves the willful repudiation of parental obligations, a reversal of abandonment must, minimally, involve conduct that is tantamount to the purposeful resumption of parental obligation. At no time did she express the wish to undertake the normal parental responsibilities for the child. . .her interest was only in seeing the child and in being informed of his progress.”

Justice O’Hern disagreed and showed more compassion, saying, “all we have is a confused and hesitant young woman confronted by the eternal riddle posed by Solomon’s test: Which of the two, a birthmother or an adoptive parent, most loves this child? Recognizing her own weaknesses, Jeanne, the birthmother, was willing to yield custody of her child to Donna and Steve, the adoptive parents, but did not want to give up all contact with her child. Her rights to her child should be decided now on a level playing field.”

Jeanne was described by her attorney as being “totally devastated” by the decision, while Donna and Steve were described by their attorney as being “very ecstatic”. Donna and Steve’s attorney also said that the child was on the verge of harm because of the conflict between natural mother and adoptive parents. He stated, “They didn’t get along, at the least, and the child was caught in the middle.”

Cecillia Zalkind, assistant director of the Association for Children of New Jersey was “very pleased” with the decision. Nancy Goldhill, of Legal Services of New Jersey, which filed a friend of the court brief for the birthmother, is suggesting new legislation.

With all the laws in this country to protect consumers’ rights (i.e. 24 hours to cancel any contract you sign except a relinquishment!) do we not need legislation whereby any woman placing her child for adoption would have to go before a judge and be asked if she realized that she was forever abandoning her rights as that child’s parents and that any “rights” of contact or visitation afterward were merely favors granted by adoptive parents and were not guaranteed or enforceable in a court of law? The birthmother should then have at least 24 hours to decide if she still wanted to go through with the process. This would save a great deal of court costs and heartache on everyone’s part later on.

Or perhaps what is needed, as has been proposed by Annette Baran and other adoption experts, is the abolishment of adoption as it is currently practiced in this country (which issues fraudulently falsified “amended” birth certificates stating that the child was born to its adoptive parents). Perhaps there is no way to fix the current sealed, secret process of producing fraudulently falsified “amended” birth certificates stating that the child was born to its adoptive parents. Perhaps it cannot be fixed but needs to be destroyed and re-created.

Do we need to be concerned that open adoption agreements being unenforceable would make birthmothers less likely to place their chil-
Children? Not if we do not perceive it as a tragedy if women choose to keep their babies and hope that those who want to would get the support they needed to do so. Of more concern should be the fact that women will not know that these agreements are unenforceable, and never have been. Of more concern should be that expectant mothers are not deceived into believing that they can abdicate responsibility while maintaining some level of contact.

Because the goal of adoption in this country has switched from finding homes for homeless children to finding babies to fill desperate empty arms, sadly any gimmick to obtain the sought-after white, healthy newborn has become fair game. Simply tell expectant mothers whatever it is believed they want to hear. If it is thought that birthmothers want confidentiality, then promise them that. If, on the other hand, it is thought that birthmothers want ongoing contact or at least knowledge of their child, then tell them that’s what they’ll get. Tell them anything they want to hear. This is not only cruel and unethical for the birthmother, it also commodifies the child, ignoring his or her rights, needs, desires, and wishes for emotional and physical well-being.

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References


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