

CHILD PROTECTION BEST PRACTICES BULLETIN

Innovative Strategies to Achieve Safety, Permanence, and Well-Being

OPEN ADOPTION AND MEDIATED POST-ADOPTION CONTACT AGREEMENTS (PACA)?

What are *Post-Adoption Contact Agreements* ?

Adoption is the permanent, legal transfer of all parental rights to another individual or couple. The adoptive parent(s) legally, emotionally and unconditionally accepts the child and has the same rights and responsibilities as parents whose children are born to them.

Open adoption occurs when there is some form of communication or contact between the adoptive family, the adopted child, and the birth family after the adoption has finalized. Contact and communication can range from an infrequent exchange of letters and pictures, perhaps through a neutral third party, to supervised or unsupervised visits between the child and birth family. The level of openness in an adoption is decided on a case-by-case basis by those involved and may include birth parents, siblings and/or relatives. Best practice calls for Post Adoption Contact Agreements (PACA), mediated between adoptive and birth families, that are court ordered and enforceable. These agreements are driven by the adoptive and birth families, not by attorneys or others.

Consideration of open adoption should be a part of the decision-making process for every child whose plan is changed to adoption, or where a concurrent plan of adoption has been established. Open adoption should be pursued unless it is not in the best interest of the child. The participants must understand that open adoption is primarily for the child's benefit. Openness permits the adoptive parents to keep the birth parents informed about the child's well-being and allows the child access to important medical information which may become relevant as the child grows. Adoptees need access to information about their family history—medical, genetic, psychological, as well as information about their ancestry. Mediation between the birth family and adoptive parents is the best way to achieve an agreement that will benefit everyone involved. The child's wishes should also be taken into consideration.

What is *current practice*?

New Mexico law supports open adoption in Section 32A-5-35 of the New Mexico Adoption Act. This statute provides for an open adoption and contact agreement in the best interests of the child. The statute requires that the contact agreement be included in the final decree of adoption. The Court can subsequently modify the agreement if there has been a change in circumstances and the agreement is no longer in the adoptee's best interests. The Post Adoption Contact Agreement must contain a clause stating that the parties agree to the continuing jurisdiction of the Court and to the agreement. It must also state that the parties understand that any disagreement or litigation regarding the terms of the agreement shall not affect the validity of the relinquishment of parental rights, the adoption, or the custody of the adoptee.

In some judicial districts, the Post Adoption Contract Agreement is being mediated through the Administrative Office of the Courts' Children's Court Mediation Program. This is the preferred practice. However, in judicial districts without mediation services, Children, Youth and Families Department (CYFD) staff will meet with the birth and adoptive families to discuss options and help work out an agreement between the birth family and the adoptive family. When agreement is reached, typically it is the adoptive family's attorney who details the arrangement in the adoption petition and final adoption decree.

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Child Protection Best Practices Bulletin

What is *best practice*?

Once there is plan of adoption, an identified adoptive family who is amenable to an open adoption, and a birth family who has agreed to enter into an open adoption mediation (not a Post Adoption Contact Agreement), the case is referred. Informal discussion about open adoption may begin at the point a concurrent plan of adoption is established or prior to a CYFD Change of Plan Staffing where adoption may be considered. CYFD caseworkers should talk to birth families and prospective adoptive families to educate them about the process, and assess their feelings and wishes. It is absolutely critical that the birth parents thoroughly understand that open adoption is about their child(ren) and their best interests. Because open adoption and a contact agreement often follow a relinquishment of parental rights, birth parents sometimes think that the relinquishment is akin to a “plea bargain” based on what they get in return for relinquishing. Birth parents need to receive information and counseling about the provisions of the law that clearly state that relinquishment cannot be tied to the terms and conditions of the contact agreement. Birth parents must understand that the open adoption and contact agreement are instead a way to demonstrate their love and concern for their child(ren).

Once there is a plan of adoption, an adoptive family who is amenable to an open adoption, and a birth family who has agreed to enter into a Post Adoption Contact Agreement, the case is referred to the Children’s Court Mediation Program, or internally to CYFD if there is no Mediation Program in the judicial district. The first meeting with the mediator involves the parties and their attorneys and is essentially educational. The mediator explains the process and guidelines, collects information from the parties, identifies who will participate in the mediation, and clarifies which party will circulate the contact terms and draft the final Post Adoption Contact Agreement. (This is typically the Adoptive Parent’s Attorney. If not available, the GAL, Youth Attorney, or Respondent Attorney can draft the agreement.) The Children’s Court Attorney cannot draft a contact agreement given the potential for conflict of interest.

The mediator then holds a second meeting to develop the terms and conditions of the Post Adoption Contact Agreement. Ideally, participants are limited to the proposed adoptive parents, the identified birth family members (parents, siblings, grandparents, etc.) and youth 14 years of age and older. Other participants are included only when the mediating parties need substantive assistance.

Once the terms and conditions have been identified, the mediator distributes the draft contact terms to all parties for review. The adoptive parent’s attorney, or other designated attorney, drafts the informal agreement and circulates it to all parties and attorneys. Follow-up mediation sessions may be scheduled to resolve any outstanding issues. Feedback is reviewed and incorporated as appropriate and the agreement is signed by birth and adoptive parents and filed with the Court.

What are the advantages of *Open Adoption & Mediated Contact Agreements*?

There is considerable value to the child, adoptive parents, and birth family to have some degree of ongoing contact after an adoption has finalized. Open adoption provides children adopted as infants information about their birth family. Open adoption may allow older children adopted from foster care to continue relationships with birth families. This can minimize a child’s sense of loss, ease feelings of abandonment, and have a positive impact on a child’s sense of self-worth. An open adoption can actually help a child to bond with an adoptive family. Open adoption also allows birth parents to diminish their sense of loss, particularly when they become an ongoing resource for a child’s medical, social, religious, and cultural history. Adoptive parents and children have a greater sense of permanence and peace in their relationship when the adoption is open. The adoptive parents’ acceptance of birth parents reinforces a sense of worth in the child.

Pending termination of parental rights may be resolved by voluntary relinquishment on the principle of best interests of the child.

Children in open adoptions are not confused about who their parents are; they understand the different roles of adoptive and birth parents in their lives. An open adoption does not interfere with the adoptive parents’ sense of entitlement or sense that they have the right to parent an adopted child. Adoptive parents have a clearer sense of their parenting roles and responsibilities.

Open Adoption and Mediated Contact Agreements

What is my ROLE...

As a *JUDGE*, you would inquire about open adoption mediation at the permanency hearing or subsequent review where adoption is the permanency goal. You would ensure that the birth parents clearly understand that the open adoption and contact agreement cannot be conditioned on their relinquishing their parental rights.

As a *PERMANENCY OR PLACEMENT WORKER*, you would discuss open adoption with birth parents and prospective adoptive parents. You would make the referral for mediation, conduct Best Interest Placement staffings and full disclosure presentations, and complete all necessary paperwork. You would make reasonable efforts to recruit for a concurrent or adoptive family who is willing to consider an open contact agreement in the best interests of the child.

As a *CHILDREN'S COURT ATTORNEY*, you would provide advice to the Permanency and/or Placement Worker on issues raised by the parties in interest. You would participate in the information meeting prior to the mediation and prepare the order for mediation. You would also ensure that the Post Adoption Contact Agreement is provided to all counsel of record when the drafting attorney cannot do so.

As a *RESPONDENT ATTORNEY*, you would participate in the information meeting prior to the mediation. You would counsel your client that whatever their motivation for entering into the open adoption and contact agreement, they need to be clear that it does not include any bargaining in return for their relinquishment. You would also review the Post Adoption Contact Agreement prior to finalization.

As a *YOUTH ATTORNEY or GAL*, you would participate in the information meeting prior to the mediation. You would provide appropriate counsel to your client regarding the process of mediation and the provisions governing open adoption. You would review the Post Adoption Contract Agreement prior to finalization.

As an *ADOPTIVE ATTORNEY*, you would participate in the information meeting prior to the mediation. You would counsel your client that whatever their motivation for entering into the open adoption and contact agreement, they need to be clear that it does not include any bargaining in return for relinquishment. You would draft the agreement incorporating the draft contact terms developed in the mediation and circulate it to all parties and attorneys. You would review the Post Adoption Contact Agreement with your client prior to finalization. You would file the Post Adoption Contact Agreement with the court as part of the final decree of adoption.

As a *CASA VOLUNTEER*, you would inquire whether the young person has been provided age-appropriate information about how the open adoption will work in his/her case. For youth age 14 and older, you would ensure the youth's appropriate participation in the mediation itself.

As a *CRB MEMBER*, you would inquire about open adoption and mediated Post Adoption Contact Agreements for children under review with a primary plan of adoption. You would document your observations and recommendations in the CRB report.

As a *PARENT*, you would ask your attorney questions about open adoption and possible relinquishment. You would ask why an open adoption is not the same as a plea bargain. You would actively participate in the mediation in accordance with the best interests of the child.

As a *FOSTER PARENT*, you would openly support the open adoption and mediated process. You would engage in conversations with a Placement Worker regarding the possibility of becoming an adoptive parent.

As an *ADOPTIVE PARENT*, you would engage in conversations with your CYFD Worker regarding the possibility of open adoption. You would actively participate in the mediation in accordance with the best interests of the child.

As a *CHILD or YOUTH*, you would learn about open adoption and participate in the mediation as appropriate. If you are 14 years or older you would inform your attorney whether you agree to the terms of the contact agreement. You would ask questions of the Judge, GAL, Youth Attorney, CYFD Worker, or CASA about open adoption and the mediation process. You would ask about contact with siblings or relatives if this contact would be important to you.

As a *MEDIATOR*, you would contact all interested parties to discuss the mediation process and schedule an initial meeting to review the guiding principles of open adoption, establish a framework for how to proceed and clarify issues, including who is responsible for writing the final Post Adoption Contact Agreement. You would meet with birth and adoptive parents (and children 14 years and older, as appropriate) to draft contact terms for an agreement. You would circulate the draft contact terms to all parties and their attorneys for review and ensure that they are satisfied with the terms of the agreement before the adoptive attorney or other designated attorney drafts the agreement for a final review. You would schedule a follow-up mediation with birth and adoptive parents to resolve any outstanding issues.

GUIDELINES FOR COMPLETING A MEDIATED OPEN ADOPTION

1. Informal discussion of an open adoption begins before a Change of Plan (COP) staffing; however, various options for open adoption should be discussed more formally at the COP staffing. Prior to the COP staffing, the Permanency Planning Worker (PPW) should talk with the birth family about their feelings and desires regarding open adoption and relinquishment. The Placement Social Worker should talk with the prospective adoptive family regarding their feelings and wishes around open adoption and should educate the family about the benefits of open adoption and the process as necessary. The Placement Social Worker should notify the prospective adoptive parents about potential legal representation that may be available to assist them with the mediation and adoption finalization. Knowing the wishes of each family should be helpful in case planning at the COP staffing.
2. If an adoptive family has not been identified prior to the COP staffing, then those participating in the COP staffing should discuss and develop a plan to identify an adoptive family that may be willing to consider a mediated open adoption. Again, the PPW can use the Preserving Connection/Open Adoption Plan as a tool. Once an adoptive family has been identified, PPW will follow through with the case as outlined below.
3. Once an adoptive family who is amenable to an open adoption has been identified, and the birth parents/family have agreed to enter into an open adoption mediation, then the PPW should proceed to the Best Interest Placement staffing, Full Disclosure presentation, and the signing of the adoptive placement agreement, as per policy.
4. The mediator will contact the PPW within 3 business days of the initial date of referral to gather necessary information. PPW will respond to the mediator with the necessary information within 5 business days of being contacted by the mediator.
5. If the parties agree to proceed with the mediation process, the mediator will contact all identified parties to review the Guiding Principles of open adoption and ground rules, ask them to review and sign an *Agreement to Mediate*, and determine who will be responsible for writing the final open adoption mediation agreement. The mediator will then meet with the birth and adoptive families **only** to discuss contact and to draft the post adoption contact terms. The person responsible for writing the final agreement (as agreed upon during the first contact with the mediator) will distribute a draft to all parties and their attorneys for review. The agreement is then finalized and incorporated into the final adoption decree. The mediation should be initiated and concluded within 60-90 days of the referral. If there is no agreement reached, the mediator will distribute a *No Agreement Letter*, and the PPW will proceed with the case as a non-open adoption case.
6. The PPW will place a copy of the open adoption mediation agreement in the case file. The PPW should provide a copy of this agreement to the Placement Worker, so the Placement Worker can place a copy in the adoptive family's file.
7. If the biological parent/s wish to relinquish parental rights, the PPW will refer them to formal relinquishment counseling.
8. The PPW should refer the pre-TPR case to the local mediation program coordinator by submitting the designated AOC Children's Court Mediation Program Referral Intake form within 10 business days of the signing of the Adoptive Placement Agreement. If there is no mediation program in a specific area, the statewide coordinator should be contacted about how to proceed with the mediation process. Ideally, participants in open adoption mediation are limited to the proposed adoptive parents, the identified birth family members (parents, siblings, grandparents, etc.) and youth 14 years of age and older. Other participants, including CYFD staff, are included only when the mediating parties need substantive assistance. The PPW may seek the advice of the Children's Court Attorney (CCA) on issues raised by the parties in interest, but the CCA is not to be included in the mediation directly and cannot provide legal advice to any party other than the PPW. The CCA cannot participate in any manner in the development of the mediation agreement. The only role for the CCA aside from providing legal advice to the PPW is to ensure that once finalized, the mediation agreement is provided to all counsel of record.
9. Within 5 business days of making the referral to the local mediation program, the PPW or Supervisor should ask the CCA to prepare a stipulated order for mediation.
10. The CCA should file the stipulated order for mediation within 10 business days of receiving the request from the PPW.
11. If the birth parent wants to have a conditional relinquishment contingent on a specific adoptive family adopting their child, then the PPW ensures that the prospective adoptive family is approved, that the adoption placement agreement is signed and that the open adoption mediation agreement is completed. Conditional relinquishments can only be taken with the condition of a specific adoptive family filing a petition for adoption. A conditional relinquishment cannot be accepted with the condition being a post adoption contact.
12. The attorney representing the prospective adoptive family files the open adoption mediation agreement with the court as part of the final decree of adoption, making the agreement enforceable by the court. Alternatively, the mediated agreement can be filed as an Exhibit after mediation occurs and prior to filing the final decree of adoption; however, it is not enforceable until after the adoption finalization. NM Children's Code Section 32A-5-35 (D) states "parties agree to the continuing jurisdiction of the court and to the agreement and understand and intend that any disagreement or litigation regarding the terms of the agreement shall not affect the validity of the relinquishment of the parental rights, the adoption, or the custody of the adoptee."

*** Note: After finalization of the adoption, the court can modify the open adoption agreement based on a change of circumstances. The court cannot alter the underlying adoption based on failure of the adoptive parents to allow contact. The court cannot enforce an informal open adoption agreement between the birth and adoptive families.*

This bulletin is jointly published by:

