THE END OF ADOPTION SECRECY IS NIGH

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California law does not presently allow unrestricted access by adoptees to their birth or adoption records. The agreement of the birth parents is required to open these sealed records. California's original sealed records statutes were enacted in 1927 under former California Civil Code section 227,[1] and in 1935 under California Health and Safety Code section 10439.[2]

However, even this statutory scheme, most recently modified in 1994, does not directly address the issue of adoptions which pre-date 1994. The Civil Code provisions were recently relocated to the California Family Code.[3]

The prophylactic effect of these statutes in preventing adoptees from freely tracing their birth parents has, to some extent, been circumvented by so-called "open adoption." In open adoption, the identity and location of the birth families is available to the adoptive parents and can be disclosed by them to the adoptee.

The stated legislative intent at the time when the original statutes were enacted was to protect the integrity of the adoptive family and eliminate the stigma of illegitimacy as to the adopted child. Prior to 1927, the birth certificates of adoptees born of unmarried parents were prominently stamped with the word "Illegitimate." Incalculable harm was suffered by adoptees labeled with this mark of Cain. A right of privacy for birth parents was a by-product of the closed adoption process.

The specifically stated intent was to avoid intrusion by persons outside the adoption process. It was suggested by some that continued confidentiality would help the adoptive family establish itself as a social unit, free from outside interference. In addition, confidentiality was thought

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1. CAL. CIV. CODE, § 227 (repealed 1990).
2. CAL. HEALTH & SAFETY CODE, § 10439 (repealed 1995).
3. *See* FAM. CODE, § 9200 (West 1994 & Supp. 1997).

to provide an environment in which the child would be encouraged to identify closely with its adoptive parents.

It is fundamental that where legislation impacts human emotions, as in the family law arena, the regulation of the flow of information by the courts must be exercised in a way which will serve the parties appropriately. This should be considered under present circumstances where, as a practical matter, the information superhighway virtually guarantees that even birth parents who want to remain anonymous will be found sooner or later. That inquiry could either come directly to them or through the very relatives from whom they wish to maintain their adoption secret.

The landmark adoption treatise, *The Adoption Triangle*,[4] authored by Sorosky, Baran and Pannor, concluded that the vast majority of birth parents do not want the confidentiality that is asserted on their behalf. The authors' study shows that it is a myth that birth parents want permanent anonymity and privacy relative to their adopted children. Subsequent research has confirmed these conclusions.

When the theories supporting the legislative intent began to be undermined by research, the notion that privacy was desired by the majority of birth parents assumed, by default, greater significance. The idea that the fact of the adoption of a child could be completely hidden from that child long enough for the child to identify with its adoptive parents is illogical. It seems more likely that when the adoptee inevitably discovered the fact of his or her adoption and wondered why the adoptive parents had withheld that information that the bond with the adoptive parents could be seriously strained and perhaps damaged. Consequently, the legislative intent has failed to serve the adoptive families well.

The question is therefore presented as to whether adoptees should be given free and unfettered access to their birth records in California. For obvious legitimate privacy reasons, this assumes that adoption records would not be available to the general public for review but only to parties to the adoption itself.

Are adoptees entitled to learn as much as they can about their heritage and history or is it more appropriate for the legal system governing adoptions to support a fiction that children were hatched from a file cabinet? The profound guiding truth here is that adoptees are blameless in their births.

Although California is often considered to be a relatively liberal jurisdiction in many areas of the law, in the area of sealed adoption records it lags behind other relatively conservative states such as Alaska, Kansas,

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4. ARTHUR D. SOROSKY, M.D. ET AL., THE ADOPTION TRIANGLE (1978).

Texas, and Tennessee. Alaska and Kansas have had open adoption records for decades. Tennessee unsealed its adoption records to adoptees in 1995.[5] Legislation is currently pending in Texas to do the same.[6]

Imagine, for a surreal moment, that all birth records were sealed. No individual could ever lay their hands on any documentary proof that the adults who raised them were truly their biological parents. DNA testing or other mechanisms for correlating genetic material would be required to positively identify familiar links. Individuals who considered themselves to be part of a particular family would have to submit to testing in order to prove their familial relationship. However bizarre and unworkable this might sound, this "disconnect" from biological reality can be an immutable characteristic of the lives of many adoptees.

Because California requires the agreement of the birth parents to be found,[7] if the California Attorney General wishes to argue that the 1994 law is inapplicable to prior adoptions, he or she is still free to do so. It is not known how all California courts would rule if requested to open pre-1994 adoption records. Most have refused to do so thus far.

In instances where the only known birth parent is deceased, if courts refuse to open the records of pre-1994 adoptees, there is apparently no recourse. Therefore, even for pre-1994 adoptions, adoptees who search for their birth families could find that the door is, and will remain, tightly closed.

It is interesting to note that none of the documents utilized by the California Department of Social Services for adoptions give birth parents any express written guarantees of either confidentiality or anonymity. The Adoptions Information Act Statement utilized by the state social worker simply asks the birth parent to indicate whether or not they want their name and address to be disclosed to the child once it turns 18.[8] Even if a birth parent does not want future contact with their child, no enforceable right of privacy can conceivably arise from checking the appropriate box on this form. The apparent legislative intent to allow anonymity to birth parents who are unwilling to face their children in the future has, therefore, not been clearly expressed in the documents which form a part of the vehicle for the adoption process.

The anomaly in the application of the law which makes it unclear as to which adoptees can trace their birth families with the sole criterion being the

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5. TENN. CODE ANN., § 36-1-127(c)(1).

6. TEX. HEALTH & SAFETY CODE, § 192.008 [S.B. 1445 and H.B. 1835].

7. CAL. FAM. CODE, § 9203 (West 1994) (effective January 1, 1994).

8. State of California, Health & Welfare Agency Form AD 908BI (Jan. 1994) (copy on file with author).

date of their adoption has a discriminatory effect on adoptees who are presently more than three or four years old. This anomaly compounds the restriction in access which may be imposed by birth parents, whether or not they do so volitionally or unwittingly.

The author submits that regardless of the interests sought to be protected, because the effect of the present law is arbitrary, it serves no rational, consistent purpose and it is therefore fundamentally unfair.

This proposition is not intended to casually brush aside the issue of the privacy of birth parents as currently protected by California law. Rather, it is intended to give weight to the pressing needs of adoptees who were the only truly helpless participants in a process which separated them from their families of origin.

Pioneers in the "open" adoption arena spoke of the "adoption triangle," which included birth parents, adoptees, and adoptive parents. With an increase in contact between birth families and adoptive families nationwide, this initial definition has mutated into what could better be described as an adoption cosmos. The environment of adoption in the United States has relaxed dramatically during the past fifteen years.

The image of birth parents demanding participation in the daily life of their child who became an adoptee has been portrayed by our news media as a rule rather than as the highly unusual exception that it is. Those prospective adoptive parents who are haunted by this image could easily fear that a child whom they worked so hard to find might be spirited away if the birth parent knew where they were. These fears could conceivably be reinforced by well-meaning family members and friends who lack any connection with, or substantive knowledge of, adoption. To a well-informed adoptive parent, these fears are not well-founded.

Although the stated legislative history indicates a desire to safeguard the emotional development of the adoptee, it would be naive to assume that the idea of a financially needy, and perhaps impetuous, birth parent potentially destroying the equilibrium of adoptive parents' lives played no part in sealing adoption records initially.

Even if one accepts, *arguendo*, the pointed notion that the recklessness and imprudence of birth parents is the primary cause of all adoptees' problems, acknowledgement of this "mistake" cannot justify a birth parent's desire to be more than an equal player in the game of genealogical hide-and-seek. To be fair, birth parents are themselves often sucked into an adoption industry which thrives on relatively affluent adoptive parents which offer "help" to needy or desperate birth parents. Sometimes the help offered to birth parents can be devastating for them. The loss of a child is incompensable, even if the birth parent knows that the child will have a more comfortable and stable existence with an adoptive family.

If birth parents are indeed participants in an industry, it should be remembered what the product is and that products are usually accompanied by by-products. If any of the by-products in anyone associated with the adoptive placement are despair, remorse, anger, and depression, then the author submits that the Legislature has an obligation to society to take the long view and deal with these emotions by addressing their causes.

Many mental health professionals informally suggest that there is a disproportionate number of adoptees receiving psychotherapy, enrolled in residential treatment centers, and circulating in the juvenile justice system. Whether this suggestion has ever been convincingly confirmed is a matter of debate. It is beyond debate by the professionals that low self-esteem can be a primary cause of emotional difficulties and the problems derived therefrom.

Whatever one's perspective might be, it seems more likely that an adoptee's self-esteem would be bolstered by enabling the tracking of their genetic footprints rather than by obscuring them. If access by adoptees to their adoption records will help reduce the distress they might feel when they cannot identify their biological roots, then a change in the law to accommodate that need seems obligatory.

Quite often birth parents place a child for adoption because they already have a child or children and they cannot afford to raise another. For others it is their first child. In general, a maternal birth parent will not forget the child or the circumstances of its birth. The same is true of a paternal birth parent who knows of the birth. To ignore the psychological damage done to birth parents by placing any child for adoption at all, let alone with strangers with whom the birth parent will never have contact, is a serious blunder. Increasingly, research among reunited adoptees and birth families shows unexplained biological phenomena which are triggered by the reunion. This seems to suggest the existence of some unquantifiable connection between direct biological relatives.

The fact that society at large, and possibly the birth parents' own families, will consider the placement a mistake and a shame is a problem of immense psychological and emotional significance to birth parents and adoptees. Laws which seal adoption records are designed to prevent the shame from returning to the birth parents' doorstep. Laws which unseal adoption records allow adoptees to affirm their reality rather than denying its existence.

As a practical matter, the encouragement that birth parents receive from adoptive parents may be the only encouragement they ever get. From the adoptee's point of view, the knowledge that their adoptive parents encouraged and supported the birth parents in their decision, rather than bargained for their acquisition, must be comforting.

Clearly, it is essential to avoid any inkling on the part of an adoptee that they were "thrown away" by their birth parents. This is especially true if they believe that financial inducement accompanied their transfer. However horrific that concept may sound when associated with the adoptees we know or with whom we are acquainted in our own lives, that notion can easily arise in the adoptees' minds without any convincing explanation to the contrary.

Children cannot determine their own character-building skills by themselves. They must be based on their experience and their learning. Whether their learning environment is truly a place where they can have free access to information can have a monumental effect on where their emotional parameters will be set.

For a birth parent to reach an emotional place where they can treat open adoption as a privilege is a constructive goal. This goal is beyond the reach of those who do not know where their child is or whose child cannot find them. If adoptees can find their birth parents without having to navigate a bureaucratic maze, this goal is more easily reached.

There are, of course, compelling medical reasons for access by adoptees to their adoption records. At its most gross level, without being able to find their biological parents, some adoptees are barred from obtaining vital hereditary medical information that could literally save their lives. In addition, there are some strong indications that adoptees who were adopted through "closed" adoptions suffer psychological harm by having information about their birth families kept from them. A common diagnosis of this problem is attachment disorder. It is axiomatic, however, that one cannot have an attachment disorder by oneself. If an adoptive parent is perceived to be keeping important information from an adoptee about their birth parents, it is easy to see how a so-called attachment disorder can begin to develop. It is understandable that adoptive couples who commence an adoption with unresolved infertility issues tend to predispose themselves and their adopted children to living in an environment where an attachment disorder is almost inevitable.

It should also be remembered that because somewhat enhanced rights to inspect sealed adoption records in California only came into being in recent years and the applicable statutes are not retroactive to cover adoptions which occurred before their enactment, the adoptees whose records are kept from them are, in most cases, no longer children but adults. Adult adoptees do not need the protection of the state. If they want information about their biological roots, there is no public policy reason which should bar them from finding it.

In any event, adoptees face the same familial problems of physical and mental illness, criminal conduct, and emotional pressures as do individuals

who are raised by their natural parents. To deny adoptees access to information about their own natural parents is to stigmatize them as incapable and less worthy than non-adoptees.

Arguments are made by proponents of sealed adoption records to the effect that if a birth parent knew the child they placed for adoption would be able to find them in the future, birth parents would be discouraged from making adoptive placements. It is further argued that this would encourage illegal abortion and infanticide. We are painfully reminded of this phenomenon when babies are found abandoned in garbage dumpsters. The answer to the frightening problem of infanticide and the discarding of newborns can only be found by carefully researching the reasons that lead new parents to murder. The professionals who counsel individuals in this position are the lifeline for those children and their adoptive parents. This is not a new role for them. It is part of their everyday landscape. It is submitted by the author that the perception that it is a general rule that a mother is likely to kill her newborn child rather than place it for adoption simply because she is afraid it will find her later in life is implausible and negates basic humanity.

For the reasons discussed herein, it is the author's position that adoption records in California should be opened without restriction to adoptees but with appropriate safeguards to prevent access by non-parties to the adoption.