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## COMMENTS

# Mediating a Family: The Use of Mediation in the Formation and Enforcement of Post-Adoption Contact Agreements

SOPHIE MASHBURN\*

### I. INTRODUCTION

Society has moved away from idealizing the nuclear family and is becoming more accepting of familial structural diversity.<sup>1</sup> As such, the laws and policies regarding adoption have progressed in tandem with other areas of family law. As open adoption<sup>2</sup> becomes the norm<sup>3</sup> and closed adoptions become a relic of the past,<sup>4</sup> the rules and processes that govern family law continue to develop. Many states facilitate open adoption through the use of post-adoption contact agreements.<sup>5</sup> Post-adoption contact agreements are agreements between birthparents and adoptive parents that dictate the parameters of contact between the two parties

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1. James Kelly, *Challenges to the Traditional Nuclear Family*, 20 SOC. & POL. REV. 11, 12 (2010).

2. Open adoptions refer to adoption arrangements where there is communication between the adoptive family, the adoptee, and the birth family after the adoption has been finalized. See Child Welfare Info. Gateway, *Open Adoption*, WWW.CHILDWELFARE.GOV, 2 <https://www.childwelfare.gov/3pubPDFs/openadoption.pdf> (last visited Sept. 11, 2015) [hereinafter *Open Adoption*].

3. See generally, Leigh Gaddie, *Open Adoption*, 22 J. AM. ACAD. MATRIM. LAW. 499 (2009) (detailing the characteristics, history, and arguments in favor of open adoption and how open adoption and post-adoption contact agreements are related); Cheryl Wetzstein, *Study: Families Trending Towards Open Adoptions*, WASH. TIMES (March 21, 2012), <http://www.washingtontimes.com/news/2012/mar/21/study-families-trending-toward-open-adoptions/?page=all> (stating that 95 percent of all American infant adoptions now contain some level of openness between the adoptive family and the birth family).

4. Annette Ruth Appel, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U.L. REV. 997, 997 (1995) (“The adoption paradigm that has dominated most of this century is one of exclusivity, secrecy, transposition, through which the adoptee—usually an infant—is taken from one family and given to another, with all of the vestiges of the first family removed. . . . Over the past few decades, this adoption model has been challenged by the increasingly widespread recognition that adoption can best be described as a lifelong three-way link between the adoptee and his or her two families.”).

5. Child Welfare Info. Gateway, *Postadoption Contact Agreements Between Birth and Adoptive Families*, CHILD WELFARE, 1 (2014), <https://www.childwelfare.gov/pubPDFs/cooperative.pdf> [hereinafter *Agreements Between Birth and Adoptive Families*].

after an adoption has been finalized.<sup>6</sup> Contact can range from letters and photos to phone calls and visits.<sup>7</sup> Post-adoption contact agreements do not change the effect of adoption finalization,<sup>8</sup> even if they are brought before a court for enforcement.<sup>9</sup> Rather, they conform with the open adoption paradigm<sup>10</sup> by giving structure to the contact that occurs between the parties to an adoption after it has been finalized. States also use mediation to facilitate the formation of post-adoption contact agreements.<sup>11</sup> For example, nine states require parties seeking to modify or enforce post-adoption contact agreements to participate in mediation before returning to court.<sup>12</sup>

This comment will discuss how and why adoption law has evolved into a preference for open adoption, provide a brief history of post-adoption contact agreements, and discuss the current and best practices for utilizing post-adoption contact agreements. Finally, this comment will explore the use of mediation in various states to assist adoptive parents and birth parents in forming and maintaining an agreement they both accept and that furthers the best interests of the children being adopted.<sup>13</sup> Using mediation to further the interests of children, adoptive couples, and birth parents is a positive trend in adoption law that should be encouraged and continued wherever post-adoption contact agreements are used.

## II. THE EVOLUTION OF OPEN ADOPTION

The history of adoption in the United States prior to recent decades was sordid and secretive.<sup>14</sup> In the 1940s, the policy of most, if not all, adoption agencies was to treat adoption as if it never occurred.<sup>15</sup> Common societal consensus was that nondisclosure of adoption provided a better foundation for the adoptive par-

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6. See generally, DC's Children's Law Center, *Fact Sheet: Post-Adoption Contact Agreements*, CHILDREN'S LAW CENTER (May 2011), [http://www.childrenslawcenter.org/sites/default/files/clc/Fact%20Sheet%20Post%20Adoption%20Contact%20Agreement%20\(May%202011\).pdf](http://www.childrenslawcenter.org/sites/default/files/clc/Fact%20Sheet%20Post%20Adoption%20Contact%20Agreement%20(May%202011).pdf) (describing the structure of post-adoption contact agreements).

7. See Michael Goldstein, *Post Adoption Contact Agreement C*, N.Y. ST. CITIZEN'S COALITION FOR CHILDREN, <http://nysccc.org/wp-content/uploads/PACA-C.pdf> (last visited Feb. 23, 2015) (sample post-adoption contract agreement detailing the exchange of information and photographs between the birth mother and the adoptive parents).

8. FLA. STAT. ANN. § 63.0427 (West 2015) (stating that continuing validity of the adoption is not contingent upon compliance with a post-adoption contract agreement).

9. *Birth Mother v. Adoptive Parents*, 59 P.3d 1233, 1235 (Nev. 2002) (holding a post-adoption contract agreement legally unenforceable).

10. Gaddie, *supra* note 3. (explaining the benefits of open adoption and how it is the preferred modern adoption scheme).

11. See *infra* note 94 (New Mexico is an example of a state that integrates mediation into the statutory scheme of post-adoption contact agreements).

12. *Agreements Between Birth and Adoptive Families*, *supra* note 5 at 3.

13. *Agreements Between Birth and Adoptive Families*, *supra* note 5 at 2.

14. Lucy S. McGough & Annette Peltier-Falahahwazi, *Secrets and Lies: A Model Statute for Cooperative Adoption*, 60 LA. L. REV. 13, 18 (1999). See also Annette Ruth Appell, *Blending Families Through Open Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997 (1995) (describing the secretive history of adoption).

15. See Jason Kuhns, *The Sealed Adoption Records Controversy: Breaking Down the Walls of Secrecy*, 24 GOLDEN GATE U.L. REV. 259, 261 (1994) (discussing the historical, institutionalized secrecy surrounding adoptions around the turn of the century).

ents to bond with their child without interference from the birth family.<sup>16</sup> Adoptive families and society cloaked the adoption process in secrecy.<sup>17</sup> The shift from secrecy to openness occurred circa 1960.<sup>18</sup> Prior to the 1980s, adoptions were usually closed and records were sealed.<sup>19</sup> Semi-open and open adoption arrangements increased in frequency in the 1980s and 1990s.<sup>20</sup> Today, open adoption comprises the majority of all adoptions.<sup>21</sup> Since *Roe v. Wade*,<sup>22</sup> adoptions have decreased, and the ability to control the terms of an adoption, at least initially, has shifted from agencies and adoptive parents to the birthparents.<sup>23</sup>

Less than a century ago, adoptees often had no way of accessing critical information regarding their health history and genetic background or to reconnect with their biological family.<sup>24</sup> Even today, closed adoption schemes deny adoptees access to significant personal information.<sup>25</sup> Social workers and other professionals who specialized in child welfare raised concerns that closed adoption schemes would lead to greater confusion for adopted children, and would enable and exacerbate identity crises caused by the inability to seek information about their genetic roots.<sup>26</sup> Counselors to birthmothers also noted that by opening up adoption and allowing contact with the child they were giving up, birthmothers would experience less grief, and the loss they experienced in placing their child would not deliver such a strong emotional blow.<sup>27</sup> Having information about their child, being able to participate in their placement, and being able to reach out to the adoptive family may also relieve the guilt that often accompanies the act of relinquishing a child into the custody of another family.<sup>28</sup>

In spite of the ongoing debate over open adoption, available research suggests open adoptions have brought positive results. For example, studies suggest that birthmothers are less hesitant to relinquish a child when they know they will be able to maintain contact.<sup>29</sup> Even though some question remains as to whether or not open adoptions result in higher levels of insecurity among adoptive parents,<sup>30</sup> research suggests many adoptive couples support open adoption as being in the

16. Solangel Maldonado, *Permanency v. Biology: Making the Case for Post-Adoption Contact*, 37 CAP. U. L. REV. 321, 324 (2008).

17. Elizabeth J. Samuels, *The Idea of Adoption: An Inquiry Into the History of Adult Adoptee Access to Birth Records*, 53 RUTGERS L. REV. 367, 370-71 (2001).

18. *Id.*

19. *Id.* at 369.

20. See Gaddie, *supra* note 3 (describing the chronology of open adoption and its increase in popularity over time); Wetzstein *supra* note 3 (same).

21. *Id.*

22. *Roe v. Wade*, 93 S.Ct. 755 (1973).

23. See Marianne Bitler & Madeline Zavodny, *Did Abortion Reduce the Number of Unwanted Children? Evidence from Adoptions*, 34 PERSP. ON REPROD. HEALTH 1 (Jan./Feb. 2002). <https://www.guttmacher.org/pubs/journals/3402502.html> (concluding that the legalization of abortion led to a dramatic decrease in infant adoptions).

24. Kuhns, *supra* note 15, at 261.

25. Joanna L. Grossman, *Secrets and Lies: A New Ohio Law Opens the Adoption Closet*, VERDICT.JUSTIA.COM, (Jan. 21, 2014), <https://verdict.justia.com/2014/01/21/secrets-lies-new-ohio-law-opens-adoption-closet>.

26. Kuhns, *supra* note 15, at 272-73.

27. Marianne Berry, *Risks and Benefits of Open Adoption*, 3 FUTURE OF CHILD.: ADOPTION 125, 127 (1993) (stating that the pool of infants increases when birthmothers feel more secure about placing the child for adoption and having control in the process).

28. *Id.*

29. *Id.* at 129.

30. *Id.* at 128.

best interests of the child,<sup>31</sup> particularly where the child is of a different ethnicity or from a different cultural background than the adoptive parents. In fact, one study suggested that the more frequent and direct the contact between the adoptee and the birth family, the less insecure the adoptive couple felt about their relationship with the adoptee.<sup>32</sup>

Open adoption has also had a noteworthy impact on adoptees. Child psychology studies of adoptees younger than eleven years old suggest that contact between adopted children and birth families prior to adolescence should be handled with caution and care,<sup>33</sup> but children older than eleven who maintained contact with their birth families were less likely to display abnormal behaviors such as hyperactivity or aggression.<sup>34</sup> A study that measured behavior scores based on observations of adoptive parents indicated that children in open adoptions performed significantly better than children with no access to information about their birth families.<sup>35</sup> Another study conducted by the Minnesota and Texas Adoption Research Project in the early 90's found that none of the adolescent adoptees that maintained contact with their birth families felt any fear, hatred, surprise, anger, or confusion about who their parents were.<sup>36</sup> Rather, the open adoption scheme assisted them in feeling satisfied with their identities as adopted individuals.<sup>37</sup>

Open adoption is still not without its critics. Open adoption may lead to increased insecurity amongst adoptive parents.<sup>38</sup> Some studies have suggested that the adopted child's fear and insecurity regarding the relationship with his or her birth parents may inhibit bonding with adoptive parents.<sup>39</sup> Some studies have also noted that open adoptions do not ameliorate grief amongst birth parents.<sup>40</sup> Rather, it can prolong the grieving process by keeping contact open with the adoptive family.<sup>41</sup> Most importantly, one of the greatest concerns about open adoption is that it will lead to greater confusion on the part of the adopted child and will hamper healthy development as well as the child's concept of identity.<sup>42</sup>

As open adoption has been studied over the past few decades, research has confirmed that it is a positive option for many adoptions based on the perceptions of birthmothers, adoptive parents, and adoptees alike.<sup>43</sup> Because of the growing use and acceptance of open adoption, the way post-adoption contacts are structured is important to all parties involved.

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31. *Id.* at 130.

32. *Id.* at 131.

33. Berry, *supra* note 27, at 132 (attributing the age difference to children knowing adoption is different between the ages of 8 and 11, and after age 11 are more confident in their identity as an adoptee).

34. *Id.*

35. *Id.* at 133.

36. Independent Adoption Center, *Research about the Impact of Openness on Adoptees*, ADOPTIONHELP.ORG, <http://www.adoptionhelp.org/open-adoption/research> (last visited Mar. 16, 2015) [hereinafter *Impact of Openness on Adoptees*].

37. *Id.*

38. Berry, *supra* note 27, at 128.

39. *Id.*

40. *Id.* at 131.

41. *Id.* at 129.

42. *Id.*

43. *Id.* at 133.

## III. CURRENT PRACTICE STATE-BY-STATE

The history of post-adoption contact agreements runs parallel to the history of open adoptions since contact between the parties is an element of open adoption. In 1982, the Independent Adoption Center was founded for the purpose of promoting open adoptions in California.<sup>44</sup> In 1988, Nebraska implemented “exchange of information contracts,” allowing for limited contact between adoptive parents and birth families for two years at a time.<sup>45</sup> In 1993, Oregon was the first state to allow legally enforceable open adoption contracts.<sup>46</sup> Through the rest of the 1990s and into the 2000s, multiple states<sup>47</sup> followed Oregon’s lead in allowing enforceable open adoption contracts.<sup>48</sup>

In 2003, Texas allowed for legally enforceable post-adoption contact agreements.<sup>49</sup> In 2010, Pennsylvania and Virginia followed suit, as did Georgia in 2013. Today, parties in most jurisdictions can create post-adoption contact agreements, but the structure and enforceability of the agreements vary from state to state.<sup>50</sup>

A. *Post-Adoption Contact Agreement Formation*

Each state statute regarding post-adoption contact agreements varies with respect to which types of adoptees are covered, whose approval is needed to validate a post-adoption contact agreement, and which persons can legally have contact with an adoptee after the adoption has been finalized.<sup>51</sup> Arizona, Maryland, Massachusetts, Montana, New Mexico, New York, Oregon, Rhode Island, South Dakota, Washington, and West Virginia allow all types of adoption to involve post-adoption contact agreements.<sup>52</sup> Connecticut, Nebraska, and Utah only permit post-adoption contact agreements with adoptions arising from foster care, which typically involve older children who have previously developed relationships with their natural families.<sup>53</sup> Indiana specifically singles out children over the age of two who have “significant emotional attachments to their birth parents.”<sup>54</sup> Vermont used to only allow post-adoption contact agreements in the context of step-parent adoptions,<sup>55</sup> but does not place that limit anymore.<sup>56</sup> The contrast between

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44. *Impact of Openness on Adoptees*, *supra* note 36 (citing three major longitudinal studies about the positive impact of open adoption on adoptees, adoptive parents, and birth parents alike).

45. Independent Adoption Center, *The Open Adoption Timeline*, ADOPTIONHELP.ORG, <http://www.adoptionhelp.org/open-adoption/timeline> (last visited Aug. 28, 2015) [hereinafter *Open Adoption Timeline*].

46. *Id.*

47. See generally Child Welfare Info. Gateway, *Postadoption Contact Agreements Between Birth and Adoptive Families*, CHILD WELFARE, 4-43 (2014) <https://www.childwelfare.gov/pubPDFs/cooperative.pdf> [hereinafter *Postadoption Contact Agreements*] (listing all relevant state laws governing post-adoption contact agreements for all 50 states).

48. *Open Adoption Timeline*, *supra* note 45.

49. *Id.*

50. All adoptions are based on the laws of the states in which they occur. *Postadoption Contact Agreements*, *supra* note 47, at 4-44.

51. *Id.*

52. *Id.*, at 4-44 (listing the statutes that address private and public adoptions).

53. *Id.*

54. *Id.* at 13.

55. *Id.* at 38.

allowing post-adoption contact agreements in all types of adoptions as opposed to only in specific types of adoptions speaks to the different perceptions of open adoption and to whether or not continued contact with the birth family harms or benefits the adoptee and his or her relationship with the adoptive parents.

The majority of states that incorporate post-adoption contact agreements into their statutes require court approval of the agreement for the terms to be legally binding.<sup>57</sup> Only Montana allows the consent of the birth parent and the adoptive parent to be binding without the court's approval.<sup>58</sup> In deciding whether or not to validate the post-adoption contact agreement, courts are governed by what is in the best interests of the child and by the consent of all parties to the adoption.<sup>59</sup> Some states also require the child's consent to the agreement if the child is over the age of 12.<sup>60</sup>

The scope of how far the birth-family tree extends into the post-adoption contact agreement varies as well. All states that allow post-adoption contact agreements involve contact with birth parents.<sup>61</sup> Some states also consider broader birth family connections. For example, in California, Minnesota, and Oklahoma, children adopted from an Indian tribe are allowed continued contact with members of that tribe if they have a pre-existing relationship with the tribe from which they were adopted.<sup>62</sup> Some states include birth grandparents or siblings with whom the adoptee already has an existing relationship, and others include foster parents.<sup>63</sup>

Every state that includes post-adoption contact agreements in its statutes indicates an acknowledgement of the shift in adoption law within the past century to be more accepting of open adoptions and of continued visitation and contact with genetic parents.

### B. Enforceability

In general, post-adoption contact is allowed between birth parents and adoptive parents.<sup>64</sup> However, the enforceability of the terms by which parties agree to continue communication varies. As of 2014, 28 states and the District of Columbia provide for enforcement of post-adoption contact agreements in some capacity.<sup>65</sup> The interpretation of post-adoption contact agreements typically hinges upon the traditional "best interests of the child" standard.<sup>66</sup> However, courts vary widely on what that standard means, and some have rendered agreements unenforceable.

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56. 2015 Vt. Acts & Resolves 60; S. 9, 2015 Leg., 73rd Biennial Sess., (Vt. 2015).

57. *Postadoption Contact Agreements*, *supra* note 47, at 4-44.

58. *Id.* at 20.

59. *Id.* at 3.

60. *Id.*

61. *Id.* at 2.

62. *Id.* at 3.

63. *Postadoption Contact Agreements*, *supra* note 47, at 2-3.

64. *Id.*

65. *Id.*

66. *Ford v. Ford*, 371 U.S. 187, 193-194 (1961) (quoting *Mullen v. Mullen*, 188 Va. 259, 269 (1948)) ("In Virginia, we have established the rule that the welfare of the infant is the *primary, paramount, and controlling consideration of the court in all controversies over the custody of their minor children. All other matters are subordinate.*") (emphasis added).

ble.<sup>67</sup> Some courts consider post-adoption contact agreements to be entirely voluntary or at the discretion of the adoptive parents to strengthen the bond between adoptive parents and the adoptee.

In a Nevada case, a birth mother filed an action against adoptive parents and an adoption agency for specific performance of the post-adoption contact agreement that had been negotiated between the parties.<sup>68</sup> The Supreme Court of Nevada dismissed the complaint holding the agreement was unenforceable.<sup>69</sup> The agreement stated that the adoptive parents would agree to call the birth mother when they got home with the child and for the first three months the child was in their custody.<sup>70</sup> Thereafter, the adoptive parents would provide the birth mother with pictures and letters on the progress of the child's development and growth.<sup>71</sup> The adoptive parents also consented to allow the birth mother to visit the child near each of the child's first three birthdays and to send the birth mother a videotape when the child began to walk.<sup>72</sup>

After the adoptive couple complied with the agreement, the birth mother expressed that she wanted the child back, and the adoptive couple refused to continue contact.<sup>73</sup> Shortly thereafter, the birth mother filed for specific performance of the agreement.<sup>74</sup> The court acknowledged that an adoption terminates all rights of the natural parent and confers all of the rights onto adoptive parents.<sup>75</sup> The court reasoned that post-adoption contact agreements are disfavored because "natural parents may . . . believe they have a right to post-adoption contact with the child," but their "[r]ights are terminated upon adoption and *any contact with the child may be had only upon the adoptive parents' permission.*"<sup>76</sup>

Other courts have taken a different approach. In *Michaud v. Wawuck*, the Supreme Court of Connecticut held that post-adoption contact agreements did not violate public policy.<sup>77</sup> The court refused to set aside an agreement between adoptive parents and birth parents and stated the following:

Traditional models of the nuclear family have come, in recent years, to be replaced by various configurations of parents, step parents, grand parents, and adoptive parents. We are not prepared to assume that the welfare of children is best served by a narrow definition of those whom we permit to continue to manifest their deep concern for the child's growth and development.<sup>78</sup>

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67. *In re Adoption of T.J.F.*, 798 N.E.2d 867, 873 (2003) (holding that the court could not force biological siblings to maintain contact per a post-adoption contact agreement).

68. *Birth Mother v. Adoptive Parents*, 59 P.3d 1233, 1234 (Nev. 2002).

69. *Id.* at 1235.

70. *Id.* at 1234.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Birth Mother*, 59 P.3d. at 1234.

75. *Id.*

76. *Id.* at 1236 (emphasis added).

77. *Michaud v. Wawuck*, 551 A.2d 738, 741 (Conn. 1988).

78. *Id.* at 742 (citations omitted).



This reasoning reflects the shift in adoption law and policy from valuing closed arrangements that involve a nuclear family dynamic between the adoptive parents and the adoptee to more inclusive arrangements.

Another concern regarding the enforceability of post-adoption contact agreements is that consent to an adoption by the birth parent could be conditioned on the terms of the post-adoption contact agreement. In *Smith v. Hartman*,<sup>79</sup> a Washington trial court held it was proper to incorporate an order for continued contact between children and their natural father where their stepfather was legally adopting them.<sup>80</sup> The father consented to the adoption, and the court affirmed his visitation rights on the basis that it was in the best interests of adoptees to know their natural parents, especially where there was an already-established parental relationship.<sup>81</sup> In other instances, courts have disfavored conditioning the consent to termination of parental rights upon the formation of a post-adoption contact agreement.<sup>82</sup> Rather, the two legal actions remain separate. If any party seeks enforcement of the agreement the primary guiding determination would be what the judge deems to be in the best interests of the child.<sup>83</sup>

#### IV. MEDIATION IN POST-ADOPTION CONTACT AGREEMENTS

##### *A. Benefits of Mediation in Family Law & Adoption*

Mediation is now a well-established alternative dispute resolution practice in the area of family law,<sup>84</sup> particularly in the context of divorce.<sup>85</sup> Though adoption is a different cause of action, it stands to benefit from alternative dispute resolution as well. Mediation is a cost-effective alternative to litigation that allows both parties in a dispute to voice concerns and negotiate their interests.<sup>86</sup> The informal setting, flexibility, and adaptability of mediation can make it a preferable dynamic in which adoptive and birth families can negotiate.<sup>87</sup>

Thus far, mediation has been considered a success by family law attorneys, judges, and parties alike. One survey in Florida found that two-thirds of respondents rated their first experience with mediation as “excellent” or “good.”<sup>88</sup> Roughly 63 percent of attorneys who participated in the survey ranked best interests of

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79. *Smith v. Hartman*, 1928 Wash App. LEXIS 2508 (1982).

80. *Id.*

81. *Id.*

82. Danny R. Veilleux, *Post-Adoption Visitation by Natural Parent*, 78 A.L.R. 218, 243 § 14(b) (1990) (citing *Smith v. Hartman*, 30 Wash App. 1038 (1982) (holding that conditioning adoption upon post-adoption visitation was inconsistent with adoption statutes)).

83. *Postadoption Contact Agreements*, *supra* note 47, at 3. See also *In re Heidi E.*, 68 A.D.3d 1174, 1175 (N.Y. App. Div. 2009) (holding that an evidentiary hearing on the best interests of the child was required before determining the enforceability of a post-adoption contact agreement).

84. Susan W. Harrell, *The Mediation Experience of Family Law Attorneys*, 20 NOVA L. REV. 479, 480 (1995).

85. See generally Elena B. Langan, *We Can Work it Out: Using Cooperative Mediation-A Blend of Collaborative Law and Traditional Mediation-to Resolve Divorce Disputes*, 30 REV. LITIG. 245, 246 (2011) (discussing the use of mediation in divorce law).

86. Kenneth R. Feinberg, *Mediation: A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. S5, S5-6 (1989).

87. *Id.* at S41.

88. Harrell, *supra* note 84, at 484.

the child as a reason mediation was an effective tool in family law.<sup>89</sup> Other benefits included saving the client money and time and “temper[ing] the attitudes of unreasonable clients.”<sup>90</sup>

Even though an adoption is not a “dispute” in the traditional sense, both sides have meaningful interests at stake. Like other family law issues, adoption has emotional and personal dimensions that other types of disputes might not possess.<sup>91</sup> According to the guidelines promulgated by the Oregon Department of Human Services, “[m]ediation is a process that can play an important role in developing effective communication between those families seeking to participate in a cooperative adoption planning process.”<sup>92</sup> Additionally, mediation is considered “most successful when the adoptive parent(s) and biological parent(s) participate voluntarily.”<sup>93</sup>

Birth parents’ parental rights are behind them, and they seek to secure future contact with their progeny. For adoptive parents, mediation can offer an environment to discuss their level of comfort and concerns about contact with the birth parents. Under the governance of the best interests of the child standard, these separate interests are addressed in a less adversarial and more collaborative environment. Establishing rapport between birth parents and adoptive parents is essential to the continued success of a post-adoption contact agreement.

#### *B. Current Mediation Practice in The Context of Post-Adoption Contact Agreements*

“Open Adoption Mediation” is the process of using a trained mediator to assist adoptive parents and birth parents in working through the terms of the post-adoption contact agreement.<sup>94</sup> The mediator is trained to present contact options to the parties to an adoption that are consistent with the best interests of the child.<sup>95</sup> Typically, only the birth parents and the adoptive parents are involved in the mediation, but sometimes other parties, such as biological siblings or grandparents, may be included in the mediation.<sup>96</sup>

Mediation is beginning to be used more frequently in the process of creating and negotiating post-adoption contact agreements. Currently, nine states and the District of Columbia require parties wishing to form a post-adoption contact agreement to participate or attempt to participate in mediation before enforcement or modification of the agreement can be brought before the court.<sup>97</sup> New Hampshire law allows parties to an adoption to negotiate post-adoption contact agreements through a court-approved mediation program, and Florida, Georgia, Mary-

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89. *Id.* at 488.

90. *Id.*

91. *Id.* at 480.

92. Oregon Department of Human Services, *Openness and Post Adoption Communication Through Legal Assistance Mediation Services*, WWW.DHS.STATE.OR.US, 3, [https://www.dhs.state.or.us/policy/childwelfare/manual\\_1/i-g16.pdf](https://www.dhs.state.or.us/policy/childwelfare/manual_1/i-g16.pdf) (last visited Mar. 31, 2015).

93. *Id.*

94. New Mexico Courts, *Open Adoption Mediation*, CCMEDIATION.NMCOURTS.GOV, <https://ccmediation.nmcourts.gov/index.php/open-adoption-mediation.html> (last visited Mar. 31, 2015).

95. *Id.*

96. *Id.*

97. *Postadoption Contact Agreements*, *supra* note 47, at 3.

land, and Massachusetts permit parties seeking to enforce a post-adoption contact agreement to participate in mediation.<sup>98</sup>

*C. Best Practices in Using Mediation in Post-Adoption Contact Agreements: New Mexico*

Because only nine states have incorporated mediation into their post-adoption contact agreement statutes, it is difficult to gauge what best practices might look like. New Mexico courts have outlined what best practices in its jurisdiction are.<sup>99</sup> In New Mexico, there is a court-ordered mediation program that is used to mediate post-adoption contact agreements.<sup>100</sup> Best practices suggest the caseworkers counsel birth families and adoptive families, educate them about the mediation process, and determine their feelings and objectives moving forward with adoption.<sup>101</sup> Once it is established that an adoption is moving forward, the case is referred to the open adoption mediation program in New Mexico and the parties undergo an educational meeting with a mediator.<sup>102</sup> The second meeting between the parties and the mediator involves ironing out the terms of the agreement and what both sides are willing to accept.<sup>103</sup> The mediator then drafts a document outlining the agreeable terms, and the adoptive parent's or parents' attorney drafts the initial post-adoption contact agreement and allows each party to review it.<sup>104</sup> Follow-up sessions may occur, but once each party agrees to the terms of the agreement, it is signed and filed with the court.<sup>105</sup> Though New Mexico is the only state whose court system has drafted a best practices guide on post-adoption contact agreement mediation, adoption and family law practitioners may find alternative dispute resolution best practices guides for family law attorneys useful in determining what a mediation in the post-adoption contact agreement context should look like.<sup>106</sup>

V. COMMENT: MEDIATING THE POST-ADOPTIVE FAMILY

Adoption is a process often wrought with intense emotions.<sup>107</sup> Since open adoption is the status quo,<sup>108</sup> particularly in the case of foster care adoptions, dis-

98. *Id.*

99. Child Protection Best Practices Bulletin, *Open Adoption and Mediated Post-Adoption Contact Agreements*, CHILDLAW.UNM.EDU 1, [http://childlaw.unm.edu/docs/BEST-PRACTICES/Open%20Adoption%20%20\(2011\).pdf](http://childlaw.unm.edu/docs/BEST-PRACTICES/Open%20Adoption%20%20(2011).pdf) (last visited Apr. 26, 2015).

100. *Id.* at 2.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. Child Protection Best Practices Bulletin, *supra* note 99, at 2.

106. See ABA House of Delegates, *Model Standards of Practice for Family and Divorce Mediation*, AMERICAN BAR ASSOCIATION (Feb. 2001), <http://www.americanbar.org/content/dam/aba/migrated/family/reports/mediation.authcheckdam.pdf>.

107. See Child Welfare Information Gateway, *Understanding the Emotional Impact of Adoption on Birth Parents and Relatives*, CHILD WELFARE, <https://www.childwelfare.gov/topics/adoption/preplacement/working-parents-families/understanding-impacts/> (last visited July 26, 2015) (describing various publications that highlight the emotional experiences of birth parents, adoptees, and adoptive couples).

pute resolution tools such as negotiation and mediation will likely be effective in strengthening post-adoption contact agreements and resolving conflicts resulting from one party breaching the agreement. Unlike other types of agreements and contracts such as commercial contracts, post-adoption contact agreements may require a softer touch because of their place in family law. Instead of dealing in terminology regarding shipments of product or using standard form boilerplate language, these agreements are an attempt to govern communication within a family.<sup>109</sup> Post-adoption contact agreements are a good faith effort on the part of all parties involved to ensure that the child retains a sense of identity so he or she feels loved, birth parents feel more secure with their decision, and adoptive parents are comfortable with the terms of communication as they move forward as a new family. These agreements are a noble attempt to navigate one of the messiest areas of the law.

Because post-adoption contact agreements are a relatively new legal tool in adoption, well-received dispute resolution tools stand to assist adoption practitioners and the families they represent. As this comment has shown, adoption has evolved over time to become more inclusive of broader familial relationships with the biological family of the adopted child. As such, defining what that family looks like, how it communicates, and how contact is established and continued ensures open adoption improves outcomes for adopted children.

Adoption attorneys and adoptive families alike should explore all avenues for facilitating post-adoption contact in open adoptions. Mediation is a dispute resolution practice that has been useful to families involved in various legal settings. More studies on the utility of using mediation in post-adoption contact agreements would be helpful in determining best practices and policy. However, the cost-effectiveness, the less adversarial structure of mediation, and the open communication between both parties may prove useful to adoptive couples and birth parents alike. Most importantly, mediating post-adoption contact agreements provides one more way for the legal community to ascertain the best interests of adopted children. Dispute resolution is not a cure-all for adoption law issues, but the sensitive nature and complexity of adoption may require another option for parents who want to formally guide contact between the birth family and the adoptive family.

Since open adoption is established as a common adoption practice, and research supports its continued use, the terms that govern what the level of “openness” looks like should be carefully considered. Using open adoption mediation as a tool for each side of an adoption to thoroughly evaluate their own interests in the adoption is one way of adding structure to a complicated legal process. Mediation provides a forum whereby adoptive parents and birth parents alike can explore their preferred family dynamics and voice concerns in a constructive way.

Additionally, adding a neutral party (i.e. the mediator) whose function is only to facilitate rather than advocate the dialogue between birth and adoptive parents, may allow each side to see the perspective of the other more clearly. Displaying the range of potential contact in an objective way and articulating the interests and

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108. See Gaddie, *supra* note 3 (detailing the modern status quo of open adoption); Wetzstein *supra* note 3 (same).

109. See Family Connections Christian Adoptions, *Open Adoption Plan and Agreement*, WWW.FCAADOPTIONS.ORG, [http://www.fcadoptions.org/files/Sample\\_Open\\_Adoption\\_Agreement.pdf](http://www.fcadoptions.org/files/Sample_Open_Adoption_Agreement.pdf) (last visited July 26, 2015) (sample post-adoption contract agreement).

goals of both sides fosters understanding between birth parents and adoptive parents as opposed to contributing to an adversarial spirit.

Mediation encourages open communication and win-win resolutions. Adoption does not have to be, nor should be, an “us vs. them” legal device. Instead, it is a process where a family is formed. Thus, strengthening empathy and communication between birth parents and adoptive parents in determining the terms of post-adoptive contact is of great importance moving forward in an open adoption. Questions of identity, ethnicity, culture, medical history, etc. are more readily solved within the context of an open adoption. Maintaining contact with biological parents allows these questions and concerns to be raised with the biological parents. Doing so within the confines of a mediated agreement will likely lead to less conflict.

## VI. CONCLUSION

Even though there is little empirical study on the efficacy and use of open adoption mediation, that does not render mediation useless, particularly since adoption is a unique legal action in that it is not inherently adversarial. With the normalization of open adoption and growing societal acceptance for non-nuclear family dynamics, it follows that post-adoption contact agreements are one area of the law that can benefit from alternative dispute resolution tools. Instead of just mediating conflict, open adoption mediation is about mediating a family. States should adopt statutes or court rules that facilitate the use of mediation in the formation, modification, and enforcement of post-adoption contact agreements.