

THE MYTH OF OPEN ADOPTION: The Perils of Policy

by Christine P. Costantakos



The following is based on the author's professional experiences, as well as the experiences of other attorneys, in attempting to implement the Nebraska statutes which provide for continued contact and communication agreements in connection with adoptions. The following anecdote is fictitious and not intended to depict any specific person or case, but is included simply to portray one fact-pattern that is relevant to issues under consideration in this article.

Once upon a time there was a woman named Carol. She had daughter named Shelley. Carol loved Shelley very much, but life not easy. Years earlier, she had been diagnosed with a psychiatric illness. Nevertheless for years Shelley had lived with her mother at their home, where Carol prepared meals for her, read stories to her, got her ready for bed, awakened her each morning, and took her to the park to play. But there were other times — when Carol was not up to the challenges of caring for Shelley — that she sought the help of friends or members of her extended family and had Shelley stay with them.

Carol's behavior began to deteriorate. She took Shelley to a movie theater. After the show, Carol lingered in the lobby of the theater with the child for nearly two hours, finally attracting the attention of the theatre employees. When the manager told her she needed to leave, Carol became loud and belligerent. The manager called the police. When the police arrived, there was a verbal confrontation between them and Carol. Shelley was

removed from her care and taken into State custody. Shortly thereafter, a child protection proceeding was filed by the State in the juvenile court regarding Shelley and Carol. The State alleged that Shelley lacked proper parental care by reason of Carol's mental illness.

Carol was ordered by the court to participate in outpatient psychiatric treatment, individual therapy, and a day treatment program. She was granted supervised visitation with Shelley. Her progress was poor. When Shelley fell and broke her arm at the foster home where she had been placed, Carol became furious that she had not been informed of this fact until several days after the incident by the social worker assigned to her case. In a fit of rage, she called him, and left a message advising that either she or friends would "get him."

When untreated, Carol's mental illness could be characterized by explosive outbursts of anger. In truth, Carol's rage was purely verbal. She had no history of physical violence, and had never acted upon any verbal threat she had made, nor did she on that occasion.

Carol was admitted to an inpatient psychiatric treatment center. Her new psychiatrist discovered two things: she had been misdiagnosed previously, and that the medications which she had been prescribed in the past had been inadequate to treat her condition. Changes were made and Carol began to improve. After several months, she was discharged from the program to an intensive day treatment aftercare program, specifically designed and staffed to assist individuals with severe and persistent mental illness.

Carol continued to progress under guidance of the aftercare program. She resumed her supervised visits with Shelley. She obtained her own apartment. She remained compliant with taking her prescribed medications and also with all of the orders of the juvenile court. Her visitation time with Shelley increased.

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Carol expressed understanding not only of how her mental illness had affected her ability to care for her daughter but also of the impact her parental shortcomings had upon her daughter. Her visits were increased from supervised to semi-supervised. Parenting instruction and guidance was provided to Carol, and she was able to understand and apply many of the parenting concepts and skills. Shelley in turn, appeared to enjoy spending the increasing time with her mother.

However, Carol simply could not meet the challenges of managing her own mental illness plus parenting Shelley on a full-time basis. Carol was gravely concerned, however, that she not lose her bond with Shelley, and wanted to be able to continue to see and visit with the child from time to time, to call her and talk with her, and to send her cards and gifts, for holidays and birthdays.

Carol sought a way to obtain judicial recognition of the fact that while she cannot parent Shelley 100%, she has established a significant and beneficial bond with the child such that it would be in Shelley's best interest for the child to have continued contact and communication with her mother if the child is adopted.

History of "Openness"

Exchange of Information and "Openness" Agreements

In 1988, the Nebraska Legislature enacted Neb. Rev. Stat. § 43-155-160, which authorized exchange of information agreements with respect to children in foster care who were adopted through the Department. Prior to that time, there was no statutory authorization for a biological parent to obtain information regarding a child after the child was adopted. The important features of these "exchange of information" agreements generally were and still are:

1) Information regarding the child, such as photographs and letters containing information regarding the child, can be obtained by the biological parent after the fact of the child's adoption. Such information is provided to the biological parent either directly by the adoptive parents, or indirectly, through the Department.

2) The parties to this agreement are the biological parent, the adoptive parent, and the Department, all of whom must sign the written agreement.

3) Entry into these agreements is wholly voluntary. If any one party is not interested, then no agreement can result.

4) The agreement lasts for 2 years. It is renewable, but only if all three parties are in agreement with the renewal.

5) The determination as to whether or not the best interest of a child would be served by an exchange of information agreement is totally discretionary with the Department.

Under Neb. Rev. Stat. 43-155-160, a biological parent has absolutely no right or leverage to judicially pursue the formation of such an agreement, although once signed, the agreement is enforceable by any signatory in a court of law. Nothing in Neb. Rev. Stat. §43-155-160 specifically allows or precludes visitation between the biological parent and a child after adoption, incidental to these agreements.

Prior to and after the enactment of these "exchange of information statutes," the Department would sometimes arrange "openness" agreements between a parent who already had relinquished his/her parental rights and the adoptive parents. These "openness agreements" also called "gentleman's agreements," actually consisted of informal, unwritten, non-enforceable verbal agreements, which could include post-adoptive visitation and contact and communication with a child. In some situations, a writing might be used to memorialize the terms of the "openness," but these, too, were regarded by the Department as "non-court approved" agreements, and therefore, wholly unenforceable. The Department still recognizes "non-court approved agreements" as one of the forms of "open adoption," as evidenced in the Department's current "Adoption Guidebook:"

Non-Court Approved Agreement

This type of agreement may be between the prospective adoptive parent(s) and the birth parent(s), or, any birth relative of the child. An agreement may

also be made between adoptive families of siblings who were adopted. The court is not involved but a written contract with the terms of contact and communication is signed by both families. This contract is not legally binding. The Department should be involved and should retain a copy for the records. An agreement may include changes of address and a method for maintaining contact.

[“Adoption Guidebook of Nebraska Health and Human Services System,” Section X]

Thus, prior to 1993, an “open adoption” was considered on a case-to-case basis, but arranged only after a parent had either relinquished his or her parental rights, or such parental rights had been terminated by a court. In other words, if the social worker assigned to a given case felt that the biological parent and child had established a bond that was beneficial for the child, the social worker might explore with the new prospective adoptive parents their willingness to allow the biological parent to retain a limited connection with the child after the fact of adoption.

Important features of pre-1993 open adoptions:

1] Whether or not openness would even be pursued or explored with the prospective adoptive parent resided within the sole discretion of the social worker. Thus, there was no assurance of any consistency of this process from case to case. A social worker in one case might pursue an openness agreement, while a different social worker in another case might not, although nearly identical facts and circumstances and a positive relationship between parent and child might be involved in both cases.

2] The actual terms of the arrangement of openness were brokered, and often suggested by the social worker who would be the one to communicate with the proposed adoptive parent regarding the possibility of openness.

3] Whether or not any degree of openness ultimately would be granted to the biological parent was the

unilateral decision of the proposed adoptive parent. Because the biological parent had already relinquished his or her parental rights, or because those parental rights had been judicially terminated, the biological parent had no legal standing or actual leverage to negotiate with the prospective adoptive parent regarding the actual terms the openness, or to legally enforce those terms.



1993: A New Law: Agreements for Continued Contact and Communication

In 1993, the Nebraska Legislature enacted statutes included as a part of the adoption code, specifically authorizing a parent to enter into an agreement with prospective adoptive parents which agreement would provide for continued contact and communication with a child after the child’s adoption.

The Legislature clarified its intent behind the enactment of the new statutes, Neb. Rev. Stat. §43-162-165:

“The following constitutes the reasons for this bill and the purposes sought to be accomplished thereby:

“It is the intent of this legislation – to encourage and facilitate the adoption of children who are in the custody of the Department of Social Services.

“LB 531 would allow for a biological parent to relinquish their parental rights with the knowledge that they may continue communication regarding the child should both the biological parent and prospective adoptive parents agree that such communication is in the best interests of the child. The amount and type of

communication would be stipulated by a written contract approved by the court.”

[from “Introducer’s Statement of Intent,” LB 531, February 11, 1993, Ninety-Third Legislature, First Session]

The Legislature’s intent behind the new laws made three things apparent: 1) the law applied to children who were in the custody of the Department; 2) any agreement regarding continued communication was to be negotiated purely between the biological parent and the prospective adoptive parents, but ultimately subject to approval by the adoption court; and, most important, 3) a relinquishing parent was entitled to know, at the time of executing the relinquishment, that he or she would, indeed, have continuing communication with the child after adoption.

Child in the Custody of the Department

Neb. Rev. Stat. §43-162-165 applies to children who are in the

Department’s custody. Most typically, this situation results where a child has been determined to be within the jurisdiction of the Nebraska Juvenile Code and the juvenile court has placed the child in the temporary custody of the Department pending further proceedings before the Court. There are, however, situations where initially a child may be placed in the temporary custody of the Department but for good reason, be placed later with another agency. Indeed, in a February 11, 1993, memo to the Members of the health and Human Services Committee, Legal Counsel Gina Dunning expressed concern regarding the fact that that the law appeared to be limited to children who are in the Department’s custody:

“The bill needs to be clarified as to its effect on non-DSS custody adoption agreements.”

Although these statutes have been revised as recently as 1998, they have not been amended to apply to children who are in the custody of a private person, or the custody of agencies or entities other than the Department.

Agreement Subject to Court Approval

The statute authorizes the biological parent to enter into a written agreement with the prospective adoptive parent(s) before the adoption regarding terms of continued contact and communication with the child on the part of the biological parent after the adoption. Should the biological parent and the prospective adoptive parent(s) agree that such is in the best interest of the child, the matter can proceed further for presentation of the written agreement to the adoption court for approval.

Unlike the “exchange of information” agreements, the Department is not a proper party to this agreement nor does the statute require the Department to sign the agreement at all. Nor is the written or verbal approval of the Department required before the agreement can be drafted and signed by the biological parent and the prospective adoptive parent. This statute clearly contemplates that the biological parent and the prospective adoptive parent(s) have access to each other for the purpose of communicating with each other in order to negotiate the terms of a possible agreement. This represents a departure from the Department’s pre-1993 protocol regarding “open adoption” where it was the social worker who, functioning as intermediary between the biological parent and the prospective adoptive parent(s), would broker the openness agreement, and at times propose or even limit the terms of any agreement.

Neb. Rev. Stat. § 43-163 makes it clear that any agreement entered into between the biological parent and prospective adoptive parents is subject to approval by the court. The “court” here is not the juvenile court, but the adoption court. Indeed, §43-162-165 are integral parts of the Nebraska Adoption Code, not the Juvenile Code.

Presentation of the actual written agreement to the adoption court takes place in conjunction with the child’s adoption proceeding itself. The statute authorizes either party — the biological parent, or the prospective adoptive parent(s) — to present the written contact and communi-

cation agreement to the adoption court for approval. It is at this point in time, that the Department, as well as the child’s guardian ad litem, have standing to express to the adoption court concurrence with or objections to the terms of the written agreement. Thus, the ultimate decision as to whether or not the agreement will be accepted as written, or rejected outright, or accepted with modifications, is within the exclusive province of the adoption court, and not the juvenile court.

Neb. Rev. Stat. §43-165 makes it clear that once approved by the adoption court, a written contact and communication agreement is a legally binding . . . contract.

Parent Relinquishes “With Knowledge.”

The legislative intent behind the enactment of Neb. Rev. Stat. §43-162-165 makes it crystal-clear that the new law was intended to allow a biological parent to execute a relinquishment with the knowledge — at the time of his or her execution of the relinquishment — that he or she will have continued contact and communication with the child after the adoption. This marks a significant departure from the Department’s usual protocol of obtaining the relinquishment from the parent first, and only after the child is legally free for adoption, exploring whether openness might be a possibility. Because the primary purpose of the legislation is “to encourage and facilitate” the adoption of children who are in the custody of the Department, knowledge that the relinquishing parent will, in fact, have some type of continued contact and communication with the child after the fact of adoption, appears to have been intended by the legislature as an appropriate inducement for the biological parent’s execution of a relinquishment. Under these statutes, this “knowledge” takes the form of a written agreement between the biological parent and the prospective adoptive parent(s)

Neb. Rev. Stat. §43-165 makes it clear that once approved by the adoption court, a written contact and communication agreement is a legally binding, legally enforceable contract. The statute provides for the

right to enforce the agreement by means of a civil action, and explicitly allows the court to award attorneys fees to the prevailing party. Again, this marks a dramatic change from the Department’s pre-1993 protocol that all such “openness” agreements be in the form of either non-enforceable gentleman’s agreements, or written “non-court approved agreements” which are also neither legally binding nor legally enforceable.

Finally, the order approving a contact and communication agreement is not engraved in stone. The order can be modified, even to the point of termination, upon a showing that modification is in the best interests of the child and upon either: 1) agreement by the adoptive parent(s) and the

biological parent, or, if there is no agreement, then 2) upon a showing of exceptional circumstances. Rev. Stat. §43-165.

The Stumbling Blocks

Carol’s case portrays a scenario familiar to many attorneys who practice for any length of time in the area of juvenile law. Year after year, the number of cases filed by the State where a parent cannot fulfill the requisites of adequate parenting is increasing. Legally, the answer is clear. If the parent cannot be “rehabilitated” after reasonable efforts have been made under the direction of the juvenile court within a certain amount of time, then terminate the parental rights of the parent and free the child for a placement that will assure permanency. Yet where a bond of positive significance has been established between an inadequate parent and a child, the “answer” of termination of parental rights raises a serious moral and emotional dilemma, especially because the child will lose that bond, as well as the ability to have any kind of continuing connection with his or her parent.

Where the State seeks to terminate parental rights, two compelling, but competing interests are involved. The public has a compelling interest in the safety and well-being of children. The parent has a fundamental liberty interest in a relationship with his or her child. The public’s compelling interest is subject to the parent’s fundamental interest, and

vice-versa. The dance between these two interests characterizes every juvenile proceeding where the termination of parental rights is sought. Resolution of the tension usually turns upon the evidence before the juvenile court. Where termination is ordered, appeals are driven not so much by a sense of disgruntlement, but by the nature of the fundamental liberty interest at stake and the absolute nature of the deprivation. The Nebraska Supreme Court recognizes that a parent's interest in the accuracy and justice of a decision to terminate parental rights is "a commanding one." In *Re Interest of Kassara M.*, 258 Neb. 90, 601 N.W. 2d 917 (1999). Thus, while fundamental rights work their way through the appellate process, permanency for children involved is necessarily delayed.

Clearly, Neb. Rev. Stat. Sec. 162-165 appears to offer an answer. It would involve the primary result of achieving permanency for the child and, in appropriate cases, also assuring contact and communication with a child after adoption. The secondary effect of reducing caseloads for judges, social workers, attorneys, prosecutors, and saving taxpayer money would also be achieved. Right?

Well, not exactly. In the experience of this writer as well as that of numerous attorneys she has interviewed, they have encountered great resistance to their attempts to utilize the provisions of Neb. Rev. Stat. §43-162-165. But it is not coming from social workers, tough-minded prosecutors, or judges. Curiously, it is coming from the Department, the original inventor of the "openness" agreement.

Block #1: Relinquish first, talk later

Because the provisions of Neb. Rev. Stat. § 43-162-165 apply to children who are in the custody of the Department, the Department, as a State administrative agency, is charged with a corresponding legal duty to enact appropriate policies to administer and implement those statutes.

In order to be valid, an administrative rule or regulation must be consistent with the statute under which the rule or regulation

is promulgated. Specifically, an administrative agency cannot use its rule-making power to modify, alter, enlarge or negate the provisions of a statute which it charged with administering. *Creighton St. Joseph Hospital v. Nebraska Tax Equalizations and Review Commission*, 260 Neb. 905, 620 N.W. 2d 90 (2000); *Dodge County on behalf of Memorial Hospital of Dodge County v. Department of Health of State of Nebraska*, 218 Neb. 346, 355 N.W. 2d 775 (1984).

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Departmental policies which fail to accommodate the realities of Neb. Rev. Stat. §43-162-165, create an incredible obstruction to the implementation of these statutes. Consider the problems raised by the Department's current policy on openness:

"Openness"

Openness will be based on the child's best interest. Details of the child's degree of openness is only determined after the child is free for adoption, although assessment of what is best for the child can begin earlier. The Department will have input into an openness agreement between prospective adoptive parent and the birth parent of a prospective adoptee.

Statutory Reference: Neb. Rev. Stat. §43-138 through 141, and 43-146. [from Nebraska Health and Human Services Manual; Rev. November 10, 1998; Manual Letter #68-98; 390 NAC 6-002.06]

First, the "Statutory Reference" identified in this policy, namely Neb. Rev. Stat. § 43-138-141, and 43-146, is the first clue that this policy has absolutely nothing to do with written agreements between a biological parent and prospective adoptive parents providing for continued contact and communication with a child after adoption. Neb. Rev. Stat. § 43-138-141, and § 43-146, which were initially

enacted in 1980, have always pertained to the right of an **adult adopted person** to make application to the Department for the purpose of obtaining information regarding his or her relatives, or specific information from his or her birth certificate. While obtaining such information ultimately might lead to the initiation of contact between the adopted adult and the relative, this is a far cry from the intent and purpose of Neb. Rev. Stat. § 43-162-165.

Second, a review of previous Departmental policies maintained in the archives of the Secretary of State reveals that **word for word**, 390 NAC 6000.02 is the very same policy on "openness"

which the Department adopted shortly after the enactment of the 1988 statutes authorizing "exchange of information" contracts. (Neb. Rev. Stat. § 43-155-60). The "openness agreements" referenced by this policy in 1988 were in the nature of either legally enforceable "exchange of information contracts" (now found at §43-155-160) or "non-court approved agreements," (described earlier in this article) regarding contact and communication, which are not legally binding. Thus, the 390 NAC 6-000.02 has not been revised at all in order to accommodate the substantive changes heralded by the statutes enacted in 1993, which authorize written, legally enforceable agreements for continued contact and communication with a child after adoption.

Third, the manner in which 390 NAC 6-000.02 is presently being applied by the Department perpetuates its **pre-1993** mind-set regarding open adoption arrangements. Indeed, every single Departmental case manager, supervisor, attorney, and administrator, with whom this writer has visited about this specific policy has given absolute assurance that the phrase "after the child is free for adoption," means that the parent must sign a relinquishment of parental rights, or parental rights must be terminated — first — before the Department will explore or determine any openness arrangement.

Fourth, while 390 NAC 6-000.02 provides that openness will be based upon the child's "best interest," the policy does not set forth any objective criteria or factors by which a social worker is to determine the child's "best interest" when considering post-adoptive openness. A Departmental representative who is knowledgeable regarding adoption policies, was asked how to avoid the problem that one social worker might refer to her or his own set of factors in determining "best interest" while a completely different social worker might use completely different factors. She responded that in her opinion, continuity would be maintained by having the social worker consult with his or her supervisory, and/or the adoption specialist, and/or the Departmental legal staff.

Attorneys who have worked in this area of juvenile practice for any length of time know that this does not solve the problem. The practice of having a social worker consult with her/his supervisor or Departmental staff, without resort to written and uniformly established criteria to determine "best interest," can only breed subjectivity and inconsistency with respect to the process of determining whether post-adoptive openness is or is not in the best interest of a child.

In other words, while cases with like facts and circumstances might be expected to result in like decisions when determining the question of "best interest," the Department's lack of objective criteria for determining best interest in this situation, in effect, relegates the matter to "luck of the draw," depending upon which social worker and which supervisor are assigned to the case, or which additional Departmental personnel might be consulted.

Another Departmental policy signifies an intent that adoption will provide families with "an opportunity to plan for permanence for their child:"

6.002 ADOPTION

When a child cannot be reunited with his/her family, adoption is the preferred alternative to long-term foster care or guardianship. When a child cannot

return home, considering adoption as a permanency choice gives families an opportunity to plan for permanence for their child. Adoption as a plan is always based upon the child's best interests and specific needs.

[Nebraska Health and Human Services Manual, Rev. November 10, 1998; 390 NAC 6 -002]



One can only wonder what opportunity for "planning" is really provided to a parent who desires to retain some type of continued contact and communication with the child after adoption, if this matter of "openness" resides purely within the discretion of the Department and remains a wholly unknown commodity until after the parent has relinquished his/her parental rights?

In one situation, the father who had established a positive bond with his children knew and admitted that he could not parent all of the children. (The mother's parental rights had been terminated.) He signified an intent from the outset to enter into an arrangement which would provide for continued contact and communication after their adoption. The father's attorney requested the Department to assess the propriety of an arrangement for adoption-plus-continued contact and communication and to begin planning toward that goal. The Department case manager as well as her supervisor informed the father's attorney that because the case was being handled in the "ongoing case" unit of the Department, no such planning or arrangements could be made until the case was transferred to the adoption unit. When the attorney requested that the case be transferred to the adoption unit, the attorney

was advised that the case could not be transferred to the adoption unit until the father's parental rights were first relinquished or terminated. This is nothing more than the dog chasing his tail.

The need for updating is not limited to Departmental policies, but also includes Departmental attitudes. The same Departmental representative referred to above was asked if it was her understanding that one of the purposes behind Neb. Rev. Stat. §43-162-165, is to allow a parent to execute a relinquishment **with the knowledge at the time of the relinquishment** that the parent will have continued contact and communication with the child after the adoption. She responded in the negative.

Once a relinquishment has been accepted from a parent who desires an agreement for continued contact and communication, not only is there no guarantee that an adoptive family will be found who will agree to continued contact and communication, but there is also no guarantee that the Department will even **attempt** to find such an adoptive family. Indeed, once the relinquishment has been accepted from a parent who has made known to the Department his/her desire to have continuing contact and communication with the child, the Department is perfectly free to oppose such continued contact or communication, if it so chooses.

By requiring that the child be legally free for adoption **before** any "openness" will be determined, 390 NAC 6-000.02 obstructs one of the key legislative purposes underlying Neb. Rev. Stat. §43-162-165, which is to allow a parent to execute a relinquishment with the knowledge that the parent will have continued contact and communication with the child after the adoption. A parent can have no "knowledge" or certainty that he or she will have any contact or communication with the child after adoption, if this matter is not even going to be considered or arranged by the Department until after the relinquishment is signed.

Historically, the Department's preferred practice has been to have the parent sign and deliver the relinquishment to the

Department well in advance of entering into any agreement for continued contact and communication. Departmental representatives have indicated to this writer and other attorneys that it should be done in this manner in order to avoid the appearance that the parent's relinquishment is somehow "conditional" upon the promises that the parent will have any continued contact and communication with the child after adoption.

The Department's concern regarding "conditionality" is derived from Nebraska case law, which generally holds that a conditional relinquishment of parental rights, or a relinquishment which is conditioned upon the return of some parental rights is not valid. See *Yopp v. Batt*, 237 Neb. 779, 467 N.W. 2d 868 (1991); *Auman v. Toomey*, 368 N.W. 2d 459, 220 Neb. 70 (1985); *McCormick v. State*, 218 Neb. 338, 354 N.W. 2d 160 (1984).

This black-letter legal principle is reflected in §43-164, which specifically provides that breach of a court-approved agreement for continued contact and communication shall not be grounds to set aside a decree of adoption, or a consent to adoption once approved by the adoption court. This statute also makes it clear that once the Department has accepted a relinquishment in writing, it cannot be revoked by a parent on the ground that there has been a failure to comply with the terms of a court-approved agreement for continued contact and communication.

Thus, Neb. Rev. Stat. § 43-164 resolves all questions of "conditionality" relating to a parent's execution of a relinquishment in conjunction with, or after, the parent's execution of an agreement for continued contact and communication. Nevertheless, while §43-164 dispels the notion of conditionality of a relinquishment by providing that once it has been accepted by the Department, such relinquishment cannot be revoked by the parent for non-compliance with a contact and communication agreement, this illustrates one of the most highly problematic situations for a relinquishing parent. Indeed, in many instances, there can be a significant lapse of time between the

events of the Department's acceptance of an executed relinquishment, and the actual approval of the contact and communication agreement by the adoption court. A parent who desires to secure continued contact and communication and who has also executed and delivered a written relinquishment of parental rights to the Department, is at grave peril if the prospective adoptive placement disrupts before the actual adoption occurs. But under §43-164 no revocation of the relinquishment is possible on the grounds that there is or will be non-compliance with the agreement.

Indeed, absent fraud or duress, once a parent has executed a relinquishment which has been accepted by the Department, all parental rights are effectively negated, and the parent retains no legal standing to negotiate or contract for any matter regarding that child. If the child's adoptive placement were to

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disrupt prior to the adoption, the biological parent does not retain the right to re-negotiate yet another agreement for continued contact and communication with the next prospective adoptive parents. Thus, all hope of continued contact and communication evaporates, not due to any fault or circumstance within the control of the relinquishing parent, but due to the singular fact that the adoptive placement has been changed. Because the written continued contact and communication agreement is personal to the parties who sign it, the agreement fails if there is a change in prospective adoptive parents. Under Neb. Rev. Stat. §43-162-165, rights of continued contact and communication do not "travel with the child" but must be contracted for individually with the persons who ultimately will adopt the child.

That the Department needs the flexibility to change adoptive placements is beyond challenge. If prior to the actual adoption, the prospective adoptive parent were to become addicted to illegal drugs or alco-

hol, engage in illegal activity, or die, or mistreat the child, or simply change their minds regarding their desire to adopt, then clearly the Department must have the freedom to remove the child from the original prospective adoptive placement. Notwithstanding the extensive criminal history checks, social and background investigations, and adoptive home studies performed on prospective adoptive parents, such freak things have happened.

A recent situation illustrates the potentially tragic dimensions of this problem. A biological mother had entered into a written agreement with the prospective adoptive parents providing for her continued contact and communication with the child after the adoption. To this end, the mother also executed a separate written relinquishment of parental rights, which was delivered to and accepted by the Department. Subsequently, the child was removed from the proposed adoptive

placement for good reason, and placed in another proposed adoptive placement. The mother believed that the same post-adoptive rights of continued contact and communication would obtain with respect to the new placement. However,

if the new prospective adoptive parents indicate that they are not interested in entering into such an arrangement with her, she has no legal recourse whatsoever, because the relinquishment of parental rights executed by the mother is absolute and irrevocable. Thus, she has no leverage *vis-à-vis* the Department to press the issue with the new prospective adoptive parents, or to require the Department to find a different prospective adoptive placement which would be willing to accord her a right of continued contact and communication with the child. Nor is the Department legally obligated to do so. While this result is legally correct, it is unconscionable.

One method for avoiding this problem, is for the parent to refrain from delivering the original of an executed relinquishment to the Department until such time as the prospective adoptive parent files for the adoption. The executed relinquishment could be "held in escrow," so to speak, by a neutral person or by the child's guardian

ad litem until such time as it is needed in connection with the adoption hearing. This, of course, presumes the clear understanding and resolute cooperation of juvenile court prosecutors in an appropriate case, who are willing to either dismiss or forestall the filing of termination actions, in order to provide a meaningful opportunity for a parent to avail himself or herself of the provisions of Neb. Rev. Stat. § 43-162-165. Should the prospective adoptive placement disrupt prior to adoption, then the parent would at least retain the opportunity to negotiate a new agreement with the new prospective adoptive parents for continued contact and communication with the child.

The Department's current policy on "openness" also mandates that the Department "will have input into an openness agreement" between the birth parent and the prospective adoptive parent. [390 NAC 6-000.02] This is further evidence that Departmental policy perpetuates a practice which was in place prior to the 1993 enactment of Neb. Rev. Stat. § 43-162-165. While under § 43-163 the Department clearly has the right to express recommendations to the adoption court regarding an agreement signed by the prospective adoptive parent(s) and the biological parent, it has no proper part in actually negotiating or prescribing the substantive provisions of the agreement. Neb. Rev. Stat. § 43-162 does not provide for this, nor does it require the agreement to be signed by the Department. If the Department is to have input into the substantive terms of the continued contact and communication between the biological parent and the prospective adoptive parent, then, in all fairness, the Department should be required to sign the agreement and legally bind itself to those promises which it has played a role in shaping and producing.

While 390 NAC 6-002.06 appears to be the only Departmental policy which relates to post-adoptive openness agreements, the Department's "Adoption Guidebook," does contain a guideline, set forth below, which refers to a "court approved agreement." (While the Department's duly adopted policies carry

the force of law, "guidelines" do not.)

Court Approved Agreement
The birth and prospective adoptive parents agree to terms of contact or communication or both by way of a signed written agreement presented to the county court where the adoption is finalized. The court may enter and order approving the agreement for openness if it determines it would be in the best interest of the prospective adoptee. The Department and the guardian ad litem will make recommendations regarding the agreement. The signed agreement becomes a legally binding contract. A contract approved by the court may only be done with the birth parents and not extended family.



This guideline appears to have been designed to address the provisions of Neb. Rev. Stat. § 43-162-165. However, it does nothing more than restate the substance of the statutes, and provides no practical guidance as to how to implement or administer this option.

Block #2: "Open Adoption" Not a legitimate permanency objective

Frustrated by the fact that the Department clings to its pre-1993 policy and protocol that "openness" still resides in the discretion of the social worker and that parents must relinquish their parental rights before any arrangements toward post-adoptive continued contact and communication will be explored by the Department, some attorneys have sought to force the issue of implementation of

Neb. Rev. Stat. §43-162-165. One method has been to file in the juvenile court a motion to change the permanency objective for the child to one of "open adoption," that is, adoption which would include an agreement for continued contact and communication between the biological parent and the child. Typically, these motions have been resisted by the Department which asserts that "open adoption," per se, is not recognized by the Department in its written policies as a legitimate permanency objective for children.

The written policies relating to permanency objectives, including adoption are set forth:

Every child committed to HHS-OJS and his/her family will have an appropriate permanency objective which identifies the main focus of the case plan and services. Determination of the permanency goal will be done with the family and take into consideration the best interests of the child. Services to children will be offered in their family home whenever possible. The permanency goals are as follows:

1. Family preservation pending return of legal custody to parent(s);
2. Reunification;
3. Adoption;
4. Legal guardianship;
5. Long-term foster care;
6. Independent living (child must be 16 years of age or older);
7. Self-sufficiency with supports.

[Nebraska Health and Human Services Manual, Rev. November 10, 1998; 390 NAC 6-001]

PERMANENCY CHOICES

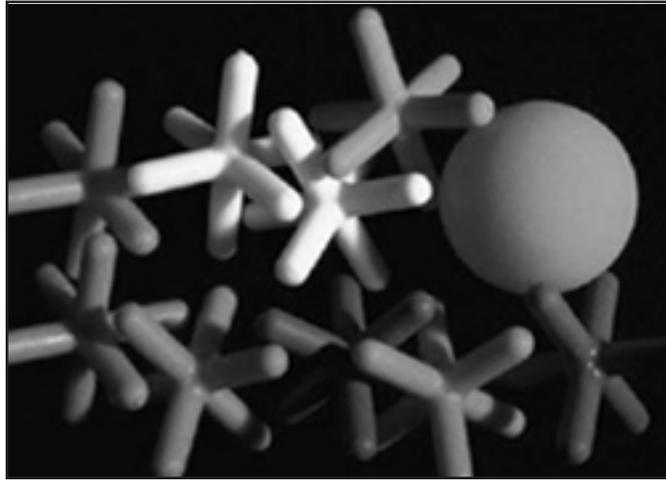
3. Adoption.
When reunification efforts have been exhausted or when reunification is not appropriate, the permanency objective to be considered is adoption. This objective is selected when a parent has relinquished parental rights or when the court has terminated a parent's rights, even if this decision is under appeal or action has not been taken on the other parent.

Nowhere do the Department's policies actually prohibit a permanency objective of adoption, which would specifically include an agreement for continued contact and communication between the biological parent and the child. Departmental representatives point out that its duly adopted administrative policies have the "force of law," somehow implying that it would be illegal for a case manager to recommend a permanency objective of adoption, which adoption would specifically include an agreement for continued contact and communication between the biological parent and the child.

While the policy states that the permanency objective of adoption is selected "when a parent has relinquished parental rights or when a court has terminated a parent's rights" this is not reflected in actual practice. How many attorneys can attest that a permanency objective of adoption has been recommended in their cases by the social worker and ordered by the juvenile court, either as a primary or a concurrent permanency objective, long before a parent's rights were extinguished?

Departmental representatives emphasize that while "open adoption" is not a recognized permanency objective, "open adoption" is conceptually included and therefore possible within the ambit of its permanency objective, "adoption." NAC 6-002.06 authorizes the Department to begin assessing "whether openness is in the child's best interest "earlier," that is, prior to the time a child is free for adoption. Thus, there is really no reason why case managers/social workers cannot and should not, in an appropriate case, be able to recommend in their juvenile court reports whether it is in the child's best interest for an arrangement of post-adoptive openness to be pursued, despite the fact that they technically might not be permitted to recommend "open adoption," per se, as the permanency objective for any child.

Although Departmental policies do not recognize open adoption, or adoption with continued contact and communication, as a separate permanency objective, Neb. Rev. Stat. §43-285 clearly allows the juvenile court to order **any permanency objective** which the Court deems to be in the child's best



interest. Ostensibly, after motion and an evidentiary hearing at which it is shown to the court that the parent-child bond is of positive significance and that the parent is willing to relinquish parental rights and to enter into an arrangement whereby he/she might retain continued contact and communication with the child after adoption, there is no reason why the juvenile court could not find and order that to pursue an adoptive arrangement which will include post-adoptive continued contact and communication is in the child's best interest. The power of a juvenile court judge to ascertain what is in the child's best interests should not be hamstrung by omissions within Departmental policies regarding the implementation of the provisions of Neb. Rev. Stat. §43-162-165. The fact that Departmental policies neither include nor address a permanency objective of "open adoption" constitutes a failure of policy, rather than a valid basis for prohibiting the juvenile court from ordering any permanency objective it determines as being in the child's best interest.

Block #3: Our Hands Cannot Be Tied

The Department has also argued that if a permanency objective of "open adoption" is ordered by the juvenile court, then this will "tie the hands" of the Department in two ways: 1) by limiting adoptive placement options for the child to those where

prospective adoptive parents are willing to enter into an agreement with the biological parent for continued contact and communication with the child, and 2) by restricting the Department's ability to remove the child from an adoptive placement if such removal should be in the child's best interest.

If continued contact and communication with a parent after adoption is truly in the child's best interests, why so much resistance from the Department? After all, isn't the Department bound by its own policy to base the plan of adoption on the **specific needs** of the child and the **child's best interest**? [NAC 6-002] Granted, to find prospective adoptive parents who will be willing to enter into a continued contact and communication agreement with the biological parent might be more challenging than obtaining

a placement without such qualification. But can the search to find such adoptive placements really be any more daunting than the variety of other placements secured by the Department, historically the consummate expert in finding adoptive placements for children- For years, the Department has obtained placements for all kinds of children, including those with special needs and circumstances, such as physical disabilities, unique medical needs, psychiatric and psychological problems, behavioral disorders, learning disabilities and cognitive deficits, or unique cultural issues, or the need for maintaining contact with siblings who are separately placed. Indeed, at this time, the matter of identifying and recruiting adoptive placements is often sub-contracted out by the Department to other organizations or entities which profess a specialty in the area of searching for adoptive placements.

If it is truly in a child's best interest to have continued contact and communication with a biological parent after adoption, why isn't such child viewed by the Department as simply one more species of a "special needs" child, requiring a placement which is appropriate to meet this special or unique need? Failure to regard such children in this light is to single out these children as somehow less deserving of the Department's efforts as compared to other children in

Departmental custody who exhibit what are regarded as more traditional and accepted special needs.

About four years ago, this writer met with two Department supervisors, one case manager, and an attorney for the Department, and another attorney, to discuss the issue of open adoption under Neb. Rev. Stat. §43162-165. Prior to the meeting, this writer had mistakenly assumed that the meeting might help resolve what had been perceived as minor confusion about the mechanics of implementing continued contact and communication agreements under this law.

To the surprise of this writer, she encountered not confusion, but profound resistance to the concepts inherent in the new law. One supervisor asked rhetorically, “for example, why would we want to turn a mentally ill parent loose on adoptive parents?” As if to offer a solution to this question, the other supervisor suggested that perhaps the Department needed to request the Legislature to create a special fund, so that in each adoption where an agreement for continued contact and communication has been signed, a financial subsidy can be provided to the adoptive parents to hire an attorney in order to “break” these agreements.

Attitudes such as these suggest a feeling of resentment on the part of Department representatives regarding the fact that the Legislature ever dared to intrude into an area which, for years, has been the exclusive domain of social workers. Indeed, why would we want to allow a mentally ill parent to have continued contact with a child after adoption? Well, for one reason, because not all mental illnesses are alike, either in their nature or their degree of incapacitation. Another reason would be that the facts and circumstances of the individual case might show, that despite an inability to fulfill the demands of custody, such a mentally ill parent is and has been quite capable of assuming other incidents of the parental relationship, such as communication, companionship, affection, social and emotional support for a child. All of these things tip the scales of justice in favor of giving consideration to some form of post-adoptive continued contact

and communication.

Like speed, attitudes can kill. The manner and style in which the matter of continued contact and communication is presented by the Department to prospective adoptive parents can often spell the difference between interest and intrigue, versus “no sale.” One suspects not a lot of serious marketing has taken place in this regard.

The Department needs to revise and update its written policies to reflect the legal realities of Neb. Rev. Stat. §43-162-165.

The Future — What Can Be Done

The Department is to be commended for demonstrating the insight, and the foresight, to initiate post-adoptive openness in certain situations, long before there was statutory recognition of this need. But since the enactment of the 1993 statutes regarding post-adoptive contact and communication agreements, there appears to have been a transition in attitude, but not of policy.

In this writer’s perception, current Departmental policies wholly fail to implement and administer the substantive changes wrought by Neb. Rev. Stat. § 43-162-165, which authorize the formation of a written, legally enforceable agreement providing for continued contact and communication between the biological parent and the child. As long as the Department is allowed to stand behind outmoded policies that do not accommodate the reality of Neb. Rev. Stat. Sec. 43-162-165 — namely, that a parent can relinquish parental rights **with the knowledge at the time of the relinquishment that he or she will have continued contact and communication with the child after adoption** — then implementation of the provisions of Neb. Rev. Stat. §43-162-165 will remain mythical. Attitudes, also, play a pivotal role as to the manner in which policies are applied to Neb. Rev. Stat. §43-162-165.

The following are proposals offered for consideration and discussion, in an effort to address these obstacles to enforcement of Neb. Rev. Stat. §43162-165:

1. The Department needs to revise and update its written policies to reflect the legal realities of Neb. Rev. Stat. §43-162-165. Its current adoption policies which relate to

“openness” are nothing more than a restatement of its past policies which were in place prior to the Nebraska Legislature’s enactment of Neb. Rev. Stat. §43-162165. In both their content and their current application, these policies still regard post-adoptive “open-

ness” as a matter primarily within the discretion of the Department and do nothing to accommodate the formation of an enforceable, legally binding contract between the prospective adoptive parent and the biological parent. Because these policies still require that a parent must execute a relinquishment, or have his/her parental rights terminated, as a **prerequisite** to any consideration or planning by the Department for post-adoptive openness, they defeat the clearly stated intent of the Nebraska legislature in enacting Neb. Rev. Stat. §43-162-165 (Reissue of 1998), which is to allow a parent to execute a relinquishment with the knowledge that he/she will have continued contact and communication with the child after adoption. The Department cannot seriously contend that its present policies really do anything to implement or administer the provisions of Neb. Rev. Stat. §43-162-165. In fact, just the opposite is true.

2. If Neb. Rev. Stat. § 43-162-165 is to be meaningfully implemented, assessment by the Department as to whether an arrangement of adoption-with-continued-contact and communication agreement should be able to be commenced prior to the time the child is free for adoption. The “Catch-22” of no planning or recommendation by the Department

for this option until such time as the child is free for adoption needs to be eliminated. In larger service areas, this will require changes in Department protocol or procedures so that this possibility can be explored by either the ongoing case manager, or else permit the case to be transferred from the ongoing case unit into to the adoption unit prior to the acceptance of an executed relinquishment, or the termination of parental rights, in order to accommodate this type of adoption.

3. "Open adoption" or "adoption with an agreement for continued contact and communication" should be included by the Department as a written, subspecies of the permanency objective 16 adoption," to be recommended and implemented whenever it appears to be in the best interest of the child, or when the juvenile court orders that it is in the best interest of a child either after an evidentiary hearing or upon stipulation by all of the parties, including the Department. After all, if "open adoption" is already conceptually included within the ambit of the Department's existing permanency objective of "adoption," what is wrong with actually recognizing open adoption as a specific permanency objective? Permanency objectives are just that: objectives. They are not always achieved and they can be changed, if circumstances change. Once ordered by the juvenile court as a permanency objective, "open adoption" or "adoption with an agreement for continued contact and communication" would free case managers to take the steps necessary to explore and make arrangements directed at achieving this goal.

4. Legislative changes.

a. Neb. Rev. Stat. §43-162 (Reissue of 1998) should be revised to apply to children not only in the custody of the Department, but also in the custody of any other licensed adoptive child placement agency.

b. The Nebraska Juvenile Code should be revised to include a

provision for a mandatory case staffing of attorneys, parents, guardian(s) ad litem, the Department case manager(s), and any other interested parties involved in a case to take place within thirty (30) days after a juvenile has been adjudicated to be a child within Neb. Rev. Stat. §43-247(3) (a). The purpose of the staffing would be to ask the singular question of whether or not open adoption should be considered as an appropriate permanency objective or course to be pursued for the child. It is at this initial staffing that certain cases might be distinguished early for this permanency objective. Upon approval by the court, planning and implementation of this goal could begin quickly.

If the staffing does not result in a recommendation for open adoption, the results of such staffing need not be reported to the court. There are many reasons why, at the outset of a case, no one may know whether adoption with a contact and communication agreement should be considered as a permanency objective for the child, especially where a parent has not had an opportunity to avail himself/herself of services, or evaluations may need to be completed. The issue could be revisited at any time in the future by another staffing requested by any party, or by motion filed by any party with the juvenile court, requesting that the permanency objective be changed to open adoption.

c. It is at the point where the executed relinquishment of parental rights is actually accepted by the Department or other adoptive placement agency, that the relinquishment becomes legally binding, and therefore, irrevocable. As illustrated above, there are sound reasons for a parent to execute, but not deliver, the written relinquishment until such time as the prospective adoptive parents are



filing the actual petition for adoption, thereby minimizing the risk that the relinquishing parent will lose all opportunity for continued contact and communication, should the prospective adoptive placement disrupt before the adoption takes place.

Accordingly, the Nebraska Juvenile Code Neb. Rev. Stat. §43292.02(3) should be amended to include as an additional exception to the filing of proceedings for termination of parental rights the following:

"the permanency objective recommended by the Department is one of adoption with continued contact and communication between the biological parent and the child, or the juvenile court has found such arrangement to be in the best interest of the child, and the parent has executed a written relinquishment of parental rights which has not yet been delivered to the Department or other appropriate child placement agency."

This would relieve the County Attorney and/or guardian *ad litem* of the obligation to file for termination of parental rights, in cases which pose what are primarily logistical problems which need to be solved before



an open adoption can be finalized. It would address several situations: 1) where the Department or adoptive agency has not had an opportunity to recruit a prospective adoptive placement for the child; 2) where the biological parent and the prospective adoptive parent have not had an adequate opportunity to negotiate or execute an agreement providing for continued contact and/or communication; 3) where the child is in a prospective adoptive placement but has not resided in the adoptive home for the requisite 6 months, (which is a jurisdictional requirement for the entry of a decree of adoption); 4) where the proposed adoptive placement has disrupted and another adoptive placement has not yet been obtained by the Department or adoptive agency.

d. Neb. Rev. Stat. § 43-162-165 should be amended to include objective criteria to be considered when making a determination as to whether an arrangement of post-adoptive continued contact and communication is in the best interest of a child.

e. The Nebraska Juvenile Code should be revised to provide a method or procedure by which the attorney for biological parent who is interested in relinquish-

ment with an agreement for continued contact and communication may have access to a prospective adoptive parent or his/her attorney, for the purpose of initiating communication in order to explore, discuss, and ultimately negotiate terms of an agreement for continued contact and communication.

Adoption with an arrangement of continued contact and communication pursuant to Neb. Rev. Stat. § 43-162-165 is not appropriate in every case. However, there are certain cases in which it is clear, that an individual who will not likely be able to fully parent, no matter how much time passes and no matter how many services are offered, has, in fact, established a positive, significant bond with a child. This writer is aware of nine cases she has had over the past four years representing this very fact-pattern. In nearly all of them, the parent was honest in admitting parental shortcomings and as a result, was willing to relinquish parental rights if she/he could only obtain assurance of some form of continued contact and communication with the child after adoption. Lacking this assurance, many parents are strongly tempted, even against the advice of counsel, to “fake their chances” in the hope of prevailing in an unwinnable trial, in which the State seeks termination of their parental rights. The complexity of some of these proceedings involve significant consumption of judicial and attorney time and resources, not to mention the delays in permanency for the child engendered by consequent appeals. Finding a method for disposing of these specific kinds of cases expeditiously would secure permanency for the child earlier, reduce the excessive case-loads of social workers, prosecutors, judges, and attorneys, and as a result, realize some financial savings for the State of Nebraska and its taxpayers. 