

Members of the Senate Judicial Proceedings Committee
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RE: Support for Senate Bill 0331

Members of the Judiciary Committee,

I write in support of Senate Bill 0331, the adoptees' rights bill. I am a professor emeritus at the University of Baltimore School of Law, where the subjects I have taught include constitutional law and family law. Since the 1990s much of my research and writing has focused on adoption law, including the history and current state of the law governing adoption records. Citations to this work are provided below.

In summary:

With this Act, the State can join the steadily increasing number of states that have successfully restored the right of adult adoptees to access original birth certificates.¹ The lawmakers in these states have recognized what an accurate history of adoption records demonstrates: birth parents have never been guaranteed lifelong anonymity by federal or state constitutions or by state laws.

Birth mothers during the last century were not given a choice about whether to remain forever unknown to their children. To the contrary, they neither retained nor received any rights. Records were closed to protect adoptive families. Birth mothers understood, and commonly promised in writing, that *they* were not to seek information about their children. When birth mothers desired confidentiality, they sought to conceal their pregnancies either from their families or their communities rather than to conceal their identities forever from their children or to deny themselves any chance of learning how their children fared in life.

That history is consistent with today's realities. Openness is now the norm in domestic infant adoption; birth parents are more open to placing their children *if* there will be some degree of openness. Studies and surveys conducted since the 1980s show that overwhelmingly large majorities of birth parents, up to 95 percent and above, approve of access and are open to various kinds of contact with their children. Many birth parents as well as adult adoptees spend years, and considerable sums of money, searching for information about one another. Many of them are successful in their searches, as countless media stories attest. More and more are finding family connections in popular DNA databases. But other adult adoptees remain frustrated because they lack access to their original birth certificates.

In greater detail:

1. There is no guarantee of lifelong anonymity for birth parents.

As federal and state courts found in cases challenging restored access, lifelong anonymity has not been guaranteed by federal or state constitutions or by state laws sealing court and birth records. And confidentiality has not been promised in the agreements that birth mothers entered into when they surrendered their children

¹ Two states, Alaska and Kansas, have never denied adult adoptees access to original birth certificates. Access for all adult adoptees has been restored in ten states: Alabama, Colorado, Hawaii, Maine, New Hampshire, New York, Oregon, and Rhode Island. Access for almost all adult adoptees has been restored in ten states: Arkansas, Delaware, Illinois, Indiana, New Jersey, Missouri, Ohio, Pennsylvania, Tennessee, and Washington.

for adoption. Adoption records have been accessible by court order without notice to birth parents. It has typically been up to the adoptive parents, not the birth parents, whether to change the child's name (and often even whether to have an amended birth certificate issued). In many adoptions, the adoptive parents received copies of documents with identifying information about the birth mother.

When the first two states restored access for adult adoptees -- Tennessee and Oregon -- their laws were unsuccessfully challenged in the courts. The Oregon courts held that under state and federal constitutions, restoring access neither unconstitutionally impairs the obligation of contract nor invades a guaranteed privacy right. Oregon's adoption laws never "prevented all dissemination of information concerning the identities of birth mothers. At no time in Oregon's history have the adoption laws required the consent of, or even notice to, a birth mother on the opening of adoption records or sealed birth certificates." A birth mother does not have "a fundamental right to give birth to a child and then have someone else assume legal responsibility for that child Adoption necessarily involves a child that already has been born, and a birth is, and historically has been, essentially a public event."

Opponents of the Tennessee law argued unsuccessfully in federal court that the law violates constitutional rights of birth mothers to familial privacy, reproductive privacy, and the non-disclosure of private information. In subsequent state court litigation, the Tennessee Supreme Court upheld the statute, deciding under the state constitution that the law neither impaired birth mothers' vested rights nor violated their right to privacy. The court noted that early state law did not require sealing records, and that later law permitted disclosure upon "a judicial finding that disclosure was in the best interest of the adopted person and the public" with no requirement that birth parents be notified or have an opportunity to veto contact. The court found that "[t]here simply has never been an absolute guarantee or even a reasonable expectation by the birth parent" that records would never be opened.²

2. Choices were not offered to birth parents, and promises were not made to them in surrender documents.

Opponents of adult adoptee access to original birth certificates have never produced a copy of a document that promises a birth mother even confidentiality on the part of the agency. This fact inspired me to investigate what the surrender agreements did provide. I collected documents from birth mothers who had been given copies of the documents they signed; many birth mothers were not. I analyzed 77 documents signed by birth mothers from the late 1930s to 1990, the date the last state passed a law denying access to adult adoptees. These documents' provisions are similar from decade to decade and from state to state.

The birth mother surrenders all of her parental rights and is relieved of all of her parental obligations. She does not retain or receive any rights. While an adoption of the child is an aim of the surrender, there is no promise that the child will be adopted. Many documents spell out the possible alternatives of foster care or institutionalization. The birth mother has no right to notice of any future proceeding and therefore will never know if the child is successfully adopted. If the child is not adopted, there will be no amended birth certificate.

None of the documents promise the birth mother confidentiality or lifelong anonymity, the latter of which an agency of course could not guarantee. Responsible adoption services providers have known at least since the 1970s that adoption experts increasingly supported adult adoptee access to information and that legislative efforts were underway to restore access in those states in which it had been foreclosed.

² The quotations in this and the previous paragraph are taken from and cited in pages 432-434 of my 2001 article, which is cited at the end of this testimony.

Forty percent of the documents do contain promises about future access to information or future contact. *It is the birth mother who promises that she will not seek information about the child or interfere with the adoptive family.*

3. Birth mothers who sought confidentiality were not seeking lifelong anonymity.

As a commission appointed by the governor of Maryland found in 1980, the birthmother “had no choice about future contact with her relinquished child;” “[s]ecrecy was not offered her, it was *required* . . . as a condition of the adoption.” The evidence is that birth mothers sought confidentiality to conceal their pregnancies from their families or from members of their communities.

4. Records were closed to protect adoptive families.

When adoption records around the United States gradually were closed to inspection by the parties to the adoption as well as to the public, they were closed to protect adoptive families’ from the stigma of illegitimacy, to protect their privacy, and to protect them from possible interference or harassment by birth parents.

In the 1940s and 1950s, many states followed the recommendation of adoption and vital statistics experts to make adoption court records, and original birth certificates, generally available only by court order, but to keep original birth records available on demand to adult adoptees. That was the recommendation of the first Uniform Adoption Act, promulgated in 1953. Similarly, the position of the United States Children’s Bureau was that an adopted adult has a “right to know who he is and who his people were.”

Despite the experts’ recommendations, many states did begin to close original birth certificates to adult adoptees as well as others. By 1960, 26 states had done so, although in a few of those states, court records remained available for some time after that date to either adoptive parents or adult adoptees or both. In the states in which access to court and birth records had become available only by court order, the reason given for closing records to the parties was the need to protect adoptive families, not birth parents.

Of the states that in 1960 still recognized adult adoptees’ right to original birth certificates on demand, four states closed the original birth records in the 1960s, six states closed them in the 1970s, and seven more did so only after 1979. Alabama was the last state to pass a law foreclosing access, in 1990; in 2000 it restored access.

5. Restoring access has proved beneficial.

States’ legal systems in which adult adoptees have access to their original birth certificates are operating successfully, including those systems in which records have always been open and those systems in which formerly closed records have been opened to adult adoptees. In all of those states, adult adoptees are not arbitrarily separated into two groups -- adoptees who are able to find information about their origins without access to their birth certificates and adoptees who cannot. Birth parents in a number of those states have been afforded a means, contact preference forms, that they formerly lacked to alert adult adoptees about their wishes; adult adoptees have obtained fundamental information about themselves; and in cases in which adoptees and birth relatives have wished to meet and become acquainted, access has led to countless fulfilling reunions.

Related references:

Surrender and Subordination: Birth Mothers and Adoption Law Reform, 20 Michigan Journal of Law and Gender 33 (2013). (Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2233400.)

The Strange History of Adult Adoptee Access to Original Birth Records, 5 *Adoption Quarterly* 63 (2001). (Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1281475.)

The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records, 53 *Rutgers L. Rev.* 367-437 (2001). (Available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=275730.)

[*How Adoption in America Grew Secret*](#), Op-Ed, *Wash. Post*, Oct. 21, 2001, at B5.