



**Montana Legislative Services Division**  
**Legal Services Office**

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TO: Task Force on State Public Defender Operations

FROM: Julie Johnson, Legal Services Office

RE: Open Adoptions and Possible Impact on OPD (30, 31, E) Tribal Customary Adoption

DATE: May 11, 2016

At the February 2016 meeting, I was asked to research the possible impact on OPD of allowing "open adoptions" in Montana.

In this context, open adoption means an adoption whereby a parent is allowed to maintain some contact with the child even after the child has been adopted. Currently, the system is "all or nothing", meaning that as soon as a parent relinquishes parental rights or a court terminates parental rights, a parent loses all rights to any contact with the child. The thought behind the concept of an open adoption is that a parent who is faced with the prospect of having his or her parental rights terminated may be more inclined to relinquish parental rights voluntarily if the parent has some ability to maintain a relationship with the child after the parent's rights are terminated.

I have prepared draft language to allow agreements for parents to have contact with their child after they have relinquished their parental rights. As drafted, these agreements between the relinquishing parent and either the State or adoptive parents are unenforceable. Also, in the event either the State or the adoptive parent determines that the contact is not in the child's best interests, the State or parent has the right to suspend or terminate contact.

Here is proposed language that could be amended into statute to provide for agreements allowing a parent to maintain contact after he or she has relinquished parental rights.

**42-2-404. Who may relinquish -- to whom. New (3)**

(3) Prior to a parent's relinquishment of parental rights, the parent may enter into an agreement with the department to allow the parent to maintain contact with the child. The agreement may be suspended or terminated if:

- (a) in the case of a child under the care of the department, the department determines that continued contact with the parent is no longer in the child's best interest; or
- (b) in the case in which a child is subsequently adopted, the adoptive parents determine that continued contact with the parent is no longer in the child's best interest.

**41-3-607. Petition for termination New (6)**

(6) At any point after a petition for termination has been filed pursuant to this section, a parent may relinquish parental rights. Prior to a parent's relinquishment of parental rights, the

parent may enter into an agreement with the department to allow the parent to maintain contact with the child. The agreement may be suspended or terminated if:

(a) in the case of a child under the care of the department, the department determines that continued contact with the parent is no longer in the child's best interest; or

(b) in the case in which a child is subsequently adopted, the adoptive parents determine that continued contact with the parent is no longer in the child's best interest.

#### Open Adoption Laws in Other States

Washington and Oregon have both enacted laws related to open adoptions. However, unlike the draft language above, both states have made the agreements enforceable by civil action. However, as discussed below, making these agreements enforceable in Montana may be problematic given our parental termination procedures.

The Oregon law provides that "An adoptive parent and a birth parent may enter into a written agreement, approved by the court, to permit continuing contact between the birth relatives and the child or adoptive parents." ORS § 109.305(2). These agreements may be enforced by a civil action. ORS § 109.305(8). In order to be enforced, a court must first "find that the party seeking enforcement participated, or attempted to participate, in good faith in mediating the dispute giving rise to the action prior to filing the civil action." Id. Also, "[f]ailure to comply with the terms of an agreement made under this section is not grounds for setting aside an adoption judgment or revocation of a written consent to an adoption." ORS § 109.305(7).

Washington's open adoption law is very similar to that of Oregon. Open adoption agreements also may be enforced by a civil action. The law "does not require the department or other supervising agency to agree to any specific provisions in an open adoption agreement and does not create a new obligation for the department to provide supervision or transportation for visits between siblings separated by adoption from foster care." § RWS 26.33.295(5).

As parental termination procedure in Montana is currently structured, the impact of this kind of open adoption laws in Montana may not bring as much relief to OPD as one would hope or expect. In Montana, the adoption of a child whose parents have had their rights terminated cannot occur until after both parents' rights have been terminated. Therefore, there are no adoptive parents to enter into an agreement with a relinquishing parent.

Finally, California has enacted a law regarding "tribal customary adoption." I am attaching a document from the California Health and Human Services Agency regarding these adoptions for your edification.