FOCUS ON
FAMILY LAW

Openness is not access

BY JUDY VAN RHIJN
For Law Times

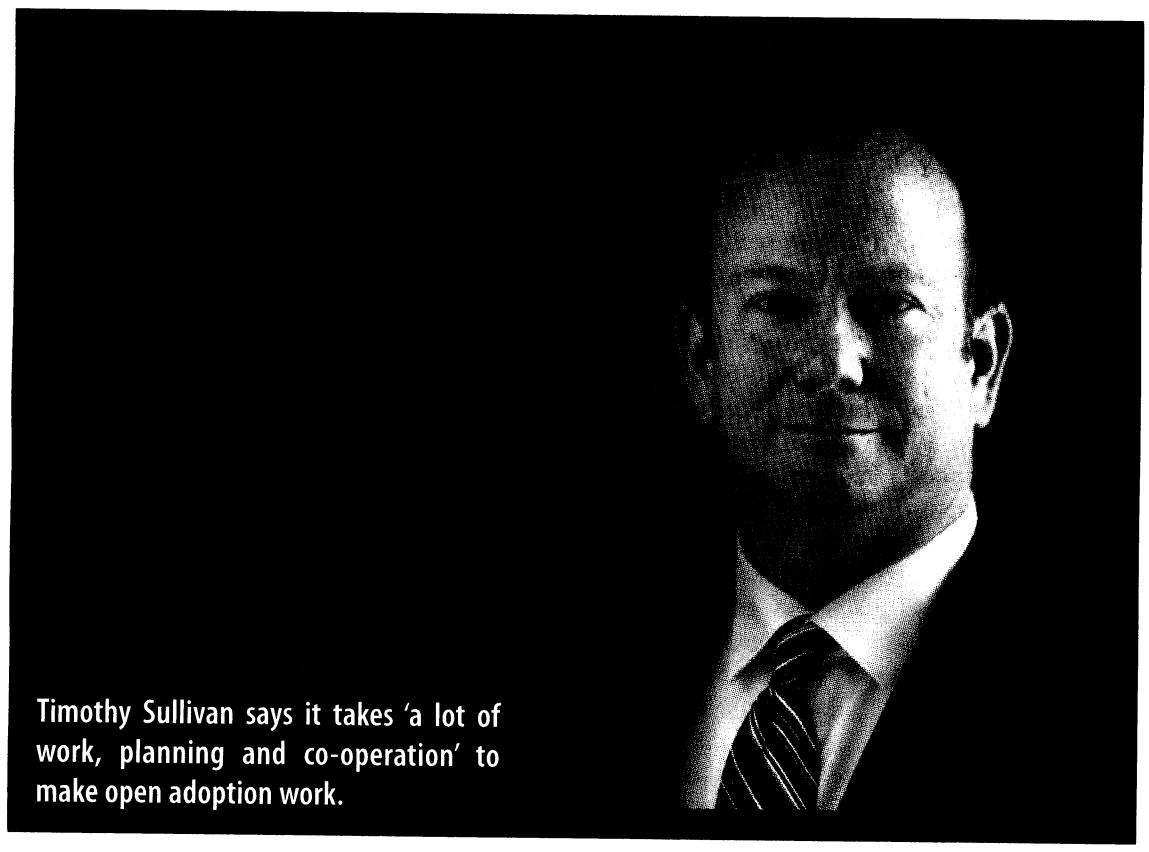
Open adoptions have allowed children in the welfare system to escape the erasure of their family history, but the boundaries of the arrangement are still being drawn. A recent case, *S. (N.P.T.) v. Catholic Children's Aid Society of Toronto,* 2016 ONCJ 242, clarifies that openness does not always mean access.

"Openness is about a child moving into adoption being able to maintain pre-adoption connections with family or with a caregiver," explains Pat Convery, executive director of the Adoption Council of Ontario. "It absolutely is where we ought to be. It is the best thing that has happened in permanence planning."

Amendments to the Child and Family Services Act in Sept. 2011 provided that an access order to a crown ward will be terminated upon an adoption, but the party with the access order may apply for an openness order.

Convery recalls that prior to the 2011 amendments "crown wards with access" moved on to a closed adoption or remained wards to allow access to continue.

"The Children's Aid Society realized people were aging out of care without a family. An access order didn't turn into a secure, safe connection because of the family problems," she says. "Kids ended up without any family. Now we say every child is adoptable, even 'crown wards with access.' No child should need to grow up in foster care."



Timothy Sullivan says it takes 'a lot of work, planning and co-operation' to make open adoption work.

Courts are now involved in considering the parameters of an open adoption. They are clarifying that openness does not mean that access will continue and are warning first families not to assume that it will.

In *S. (N.P.T.) v. Catholic Children's Aid Society of Toronto,* 2016 ONCJ 242, Justice Carole Curtis considered a situation of grandparent adoption where the access to the mother was causing extreme behavioural issues and insecurity in the two children.

She found that the mother was undermining the permanence and nature of the role of the adoptive parents and, therefore, continued access was not in their best interests. Justice Curtis said, "An openness arrangement is not intended to serve the interests of the biological parent."

"A case like this is insurmountably tricky," says Timothy Sullivan of Sullivan Law in Ottawa.

"CAS has come to some kind of opinion on the fitness of the parent. That only creates more challenges. It's always better to be in contact with family, but family members are sometimes the problem."

Andrew Feldstein of Feldstein Family Law Group of Markham, Ont. agrees. "The problem here was that the court found that the mother's relationship was not a positive influence," he says.

"I think that, practically speaking, if CAS is putting a child up for adoption because they think the child should be placed elsewhere, the likelihood of it being positive is not good. The fact pattern starts off from a pretty bad place."

Sullivan has experience with the situation through his work and through a friend's experience.

"I've run into what they are calling open adoption both ways. It takes the birth parent and the adopting family, it takes the children and everyone involved, including family and close friends, to make it work. It requires a lot of work, planning and co-operation," he says.

Convery observes that a lot of disputes are being played out well before the adoption occurs.

"People are making decisions at the crown wardship access stage who know nothing about openness," she says. "Adoption workers get it, but it might be a year afterwards until they become involved."

Sullivan confirms that "open adoption is not the same as access.

"It's a separate concept. One defines dates and times. One is quasi-custodial that is not well defined," he says.

"When first families, lawyers and CAS are looking at openness, they say there's been access once a month for the last four years, and expect that to continue," says Convery, "but openness is a whole different thing. Families typically get together three times a year at McDonald's or for a summer picnic. The adoptive family sends emails to advise of a child's progress and the birth family keeps in touch. The child has the best of both worlds. But people get stuck. They don't know how to get to that."

Convery points out that after adoption, the adoptive families are on their own managing access.

"While the children are crown wards, CAS still had control of what access looked like," she says.

"The [adoptive] parents have to take on mental health problems, addictions and a myriad of people. There might be five different children in different homes. It's a huge learning curve. They need help to make plans and help when they get stuck."

Convery points out that it is also a huge challenge for first families.

"How does a first family, after a four-year fight with CAS, change to being sweet and loving? How do they accept Mom and Dad, and accept that their role is different?" she asks. "It is all manageable, but there is a huge amount of commitment that families have to take on.

"There are opportunities in the system, but it hasn't got organized yet. The provision of post-adoption support is already in the legislation. The system needs to identify the pieces needed to make it happen," she says. "Mediation is one option, which is funded by the Ministry, but it's a different kind of mediation. Mediators need Adoption 101."

The ACO has been contracted by the Ontario Association of Family Mediators to provide two days of mandatory training for mediators. Convery believes there should be similar intensive training for intake workers, family service workers, child service workers, mental health professionals and judges and lawyers as well. **LT**