AB 372 – Revisions to discontinue state sanctioned sealed records!
Stephanie R. Williams
Executive Director Quarterly Update:

**SEEKING ACCESS TO ORIGINAL BIRTH CERTIFICATES – AB 372 (February 23)**

As AB 372 moves through the California lawmaking process, individuals who came together to provide adoptees with access to their original birth record have obtained the facts about adoption reform in California. C.A.R.E. was not the first special interest group at the lawmaking table with designs on determining the legal balance of access to information about an adopted citizen and a birthparent who relinquished their child. C.A.R.E. sought complete access modeled after Oregon but initiated the release of in information in the courts by exempting adoptees over 18 years old from a necessitous standard and started in the court system where current records are released.

The California Codes that pertain to adoption records sealed the original record of birth in 1935. Reversing the 1935 decision to seal the original birth certificate was a reversal in state policy, but the arguments strongly favored updating adoption policies with current adoption practices. Elected officials genuinely tried to strike a balance towards equity between the adopted adult's right to their identity which is absent in law and the birthparents right to privacy which is expressed in law. Current law is skewed completely towards birthparent privacy and against and adopted person's access to information about themselves.

C.A.R.E. carefully crafted the first version of AB 372 to require courts to release the record upon a notarized request and payment of a fee. This mechanism is the least expensive as courts are funded, they can demand that the record be presented by the Department of Public Health and they can notify the requestor that the record is available for pick up or mail.

This mechanism was simple and initial language provided an adult adoptee at age 18 their original birth certificate upon request.

**WHO GOT HERE FIRST?**

The first version of AB 372 was a straightforward release of the record. When the bill was revised by legislative council to incorporate an existing birthparent disclosure veto, C.A.R.E. learned that adoption reform took place in 1984.

Current law requires birthparents to "opt-in" to the state releasing their name and address to an adoptee at 21 years old. Unless the birthparent "opts-in" information about their identity cannot be released. At this time, they are apprised that the door is open to come back and revisit the decision regarding access to their identifying information. This document is a contract with the state. Agencies that release documents without the consent of the individual are subject to employee termination, invasion of privacy suits and other civil liability. This law was passed without the opposition.

A binding contract with the state is not reversible. While C.A.R.E argued that the far majority of birthparents want this record open, the state has knowledge of exactly how many birth parents

selected their preference. There was still room to open the original birth certificate going forward for those who selected their name and address to be released, and those that didn't decline release could not be counted by the state as affirmative in this disclosure.

C.A.R.E adoption veterans were not aware of this provision and had to stop and search the archives to figure out what other surprises went unnoticed in state laws that were enacted impacting passage of a bill that provides access for adoptees to their original birth certificate.

More restrictive laws were on the horizon, laws that didn't surface in the 2001 legislative attempt in California.

## HOW DID ADOPTION RECORDS AND A BIRTH PARENTS IDENTY BECOME A PROTECTED RECORD UNDER THE CALIFORNIA CONSTITUTION?

Uncovering the "Informational Practices Act of 1977" was and is the largest setback we encountered as we perused the multitude of codes related to adoption. The state adopted the following policy on information pertaining to an individual in 1977.

CA Civil Code: 1798. This chapter shall be known and may be cited as the Information Practices Act of 1977.

1798.1. The Legislature declares that the right to privacy is a personal and fundamental right protected by Section 1 of Article I of the Constitution of California and by the United States Constitution and that all individuals have a right of privacy in information pertaining to them. The Legislature further makes the following findings:

(a) The right to privacy is being threatened by the indiscriminate collection, maintenance, and dissemination of personal information and the lack of effective laws and legal remedies.

(b) The increasing use of computers and other sophisticated information technology has greatly magnified the potential risk to individual privacy that can occur from the maintenance of personal information.

(c) In order to protect the privacy of individuals, it is necessary that the maintenance and dissemination of personal information be subject to strict limits.

## INFORMATION PRACTICES ACT - Personal Information Subject To Strict Limits

The state's Fair Information Practices Act gives citizens the right to see and correct state files about them. State agencies may disclose personal information only in limited circumstances or face individual termination or civil liability. Unlike other states, California permits invasion-of-privacy lawsuits against a person who intentionally discloses personal information that he/she should knows came from a state or federal agency in violation of law. (Smith, 1992, 1994)

The protected personal data contained in the Act covers a variety of administrative, medical and criminal records. Each agency responsible for collecting such personal information shall maintain the source or sources of the information. Disclosure may only occur upon prior written consent, to a duly appointed guardian or conservator, or to officers, employees, attorneys, or volunteers of the agency which has custody of the information. (Cal. Civil Code 1798)

The 1977 restrictions related to privacy went so far as to directly mention in Civil Code 1798.24(q) the state prohibition on releasing adoption records. The law prohibits the release of the record in the above mentioned section and specifically prohibits release:

**(q) To an adopted person and is limited to general background information pertaining to the adopted person's natural parents, provided that the information does not include or reveal the identity of the natural parents.**

The Fair Information Privacy Act was implemented as constitutional amendment. The fact that it was never litigated under a civil right claim 32 years ago impacts the ability to argue this law. A law passed to implement a constitutional amendment trumps other laws. Worse, this statute allows parties whose records are released without their permission to sue the state under invasion of privacy. A legislative remedy that opens up state liability is not a remedy that elected officials and government will support.

**PLAN B – CHANGE THE LAW REPEALING SECTION 1798.24(q)**

C.A.R.E. evaluated repeal of the above section (q) and brought out the wrath of adoption agencies, civil rights advocates, Department of Social Services, Department of Public Health, the CA Bar Association and a multitude of other opponents. No single group unrelated to C.A.R.E. indicated support of AB 372 (3-26-09) which was rewritten to release records in the same manner that Oregon's Ballot Initiative did, through the state agency and the same mechanisms that birth records are released that are not sealed.

Civil right arguments for the unfettered release of the original birth record, that contain identifying information about birthparents, were rejected by civil right special interest groups and the California Bar Association. Organizations that regularly represent civil rights – most importantly the American Civil Liberty Union (ACLU) – opposed this measure. The ACLU has credibility with the Judiciary Committees in both the Senate and Assembly because they are present every year for every issue related to civil rights whereas unrecognized groups that broach single issues, such as adoption records, are quickly dismissed and encouraged to try their arguments in the courts.

**ASSESSMENT OF PLAN B**

C.A.R.E.'s "Unconstitutional…Plan B" to repeal section 1798.24(q) was identified and determined unconstitutional by numerous agencies, special interests groups that represent family law experts and the lawyers that staff the Judiciary Committee. There was not a single legislator that was willing to vote for a bill that violated the Fair Information Privacy Act and the state constitution. Upon assessing an earlier attempt at unfettered access to the original birth certificate, it became clear that our effort would see the same fate as the 2001 effort without a willingness to read, understanding and create a complimentary approach to modify existing laws.

C.A.R.E. set out to restore access to the adoptees original birth certificate. Two laws and the state constitution stand in the way of a "rights-based" strategy – that is because the right was given to the birthparents in 1977.

If the mission of C.A.R.E. is to provide access to original identity, we had to create a legal mechanism that would not conflict with existing privacy laws or the disclosure veto.

**MOVING FORWARD INCREMENTALLY**

Without a change in law, not a single record can be released unless a court finds a medical necessity. Medical necessity is the status quo. Changing the minds of elected officials will require an assurance the state will not be sued for the release of original birth certificates. AB 372 (4-21-09) created a mechanism to balance the existing birthparent privacy right that was delegated by the state in 1977. C.A.R.E argued that a "return receipt" proof of service notifying that the birthparent has to take an action to continue the state sanctioned sealing of the original birth certificate was sufficient to meet current law. Should this mechanism prevail in law, the birthparent must take an action to continue the states blanket privacy protection.

Is this unfettered access to the original birth certificate? Unfettered access to the original birth certificate is 180 degrees different than the law on the books in California. How do we change the balance in current law? There are only a few remedies: 1) a mechanism to inform birthparents that state law has changed and an action by them must be taken to continue the record to be sealed, 2) redact the birth parents names or 3) pass a constitutional amendment repealing this special right to privacy contained in Civil Code 1798.24(q).

Rights are usually balanced in law. Current law errs on the side of birthparent privacy and has for at least 32 years. Asking a state which has selected a policy that is unbalanced on the birthparent right to privacy to completely disregard 32 years of regulatory practices and revert to a balance that errs on the side of adoptee rights lacks an implementation strategy. No matter how much we want to provide adult adoptees access to their information, wanting it does not change the reality that a legislative strategy is not apparent to facilitate access in a single action.

**INCREMENTAL ACCESS IS THE ONLY NEAR TERM STRATEGY IN CALIFORNIA**

Those who have their identity, their story, their "Chapter One" may believe that providing all records instead of some records is the only strategy. They can afford to wait another 10, 20 or 30 years or even a lifetime – they know their own Chapter 1.

Are they honest with those who don't have their truth; those they block forever getting their information by their "take no prisoners" approach? The statistics in California are staggering, a Judiciary Committee in 2001 rejected release of the original birth certificate. In 2009, ten new faces and a new committee consultant again are unanimous in rejecting reversal of state policy.

What is the trigger for legislative change in California? Why are the "no compromisers" not revealing their strategies to engage those who work on all levels of civil rights (ACLU) to convince them that their issue belongs in the civil rights camp? What is the dialogue that will bring forward open records by "the take no prisoners" that is superior to AB 372? No action is inaction. C.A.R.E. initiated AB 372 to take action that will lead to incremental change.

**INCREMENTAL STEPS FORWARD!**

What can we do, now? Initiate and pass a law that stops the automatic sealing of adoption records. AB 372 has been revised and efforts are underway to release as many records as possible beginning in 2010. The first change to California law will be that the state shall inform a birth parent that at the age of 21, an adult adoptee will receive their informational birth certificate upon request. If a birth parent does not want their name released on this record, they must take an affirmative action to prevent disclosure. The state will no longer make that decision for them.

While C.A.R.E. at its inception was focused on retroactive change, after months of research and strategic examination, prospective change is the best first step forward.