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TENOR: What We've Accomplished and What Lies Ahead

by **Frederick F. Greenman, Esq.**

In the last issue of the *Decree*, Bob Tuke and Denny Glad described the four-year effort led by them and Caprice East that culminated in the passage of Tennessee's 1996 adoption law, which gives adult adoptees access to their records as a matter of right. That monumental effort created the terrain upon which the two lawsuits entitled *Doe v. Sundquist* were fought. I joined the effort only after the first of those lawsuits began in June 1996. In this article I want to discuss what we accomplished in those lawsuits and what lies ahead.

Fred Greenman, with birth daughter, Jodi. and birth granddaughter, Drew. Photo by Pam Hasegawa.

Within three days after the first lawsuit began in federal court, AAC created the TENOR fund to help defend the Tennessee law. Within a few more days, AAC retained Harlan Dodson's firm, Dodson, Parker & Behm, to represent the group of birth parents, adoptive parents and adoptees who became *amici curiae* in the case. Denny Glad immediately began assembling that group.

More than three years of often furious activity intervened between that moment and the final decision by the Tennessee Supreme Court. The defenders of secrecy began a second lawsuit in the Tennessee state courts, and the two lawsuits eventually passed through six courts: the federal suit through the District Court in Nashville, the Court of Appeals for the Sixth Circuit in Cincinnati and the U.S. Supreme Court; the state suit through the trial court, the Court of Appeals and finally the Tennessee Supreme Court, all in Nashville. In those lawsuits, we filed 127 affidavits (most of them drafted by Anne Martin of the Dodson firm) and 14 briefs (most of them largely drafted by Julie Sandine of the Dodson firm). I drafted the bulk of a couple of briefs and some of the more technical affidavits. Harlan Dodson supervised the effort. Among the sophisticated legal talents which he masks with his good-ol'-boy manner is an ability not only to spot problems in a brief, but also to tell you how to correct them; the only other lawyer with whom I've worked who could do it as well was Abe Fortas.

What did our efforts accomplish? In the first place, we won *every* substantive issue. The Tennessee statute allows adult adoptees to see almost all of their records concerning themselves and their birth parents, subject to a contact veto. The final decisions by the U.S. Court of Appeals for the Sixth Circuit and by the Tennessee Supreme Court held that the statute violates no right of birth parents (or anyone else) under either the federal Constitution or the Tennessee Constitution.

In particular, the federal and Tennessee courts held that such a statute does not violate any right of

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AAC Mission Statement—The American Adoption Congress is composed of individuals, families, and organizations committed to adoption reform. We represent all whose lives are touched by adoption. Through education and advocacy we promote honesty, openness and respect for family connections in public policy.

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privacy of birth parents, whether under the federal Constitution or the Tennessee Constitution, and whether such a right is called familial privacy, reproductive privacy or confidentiality.

The federal court also held that the Tennessee statute does not violate the federal right to equal protection.

Finally, the Tennessee Supreme Court held that the Tennessee law was not "retrospective legislation" and did not violate any contractual right or other vested right of birth parents.

These decisions by the U.S. Sixth Circuit Court of Appeals and by the Tennessee Supreme Court set unanimous precedents that uphold granting adult adoptees access to their adoption files. They are the only decisions on the subject by appellate courts. They will be cited repeatedly in decisions and debates over granting such access in other states and in the federal government.

As most *Decree* readers know, in 1998 Oregon passed an Initiative sponsored by Helen Hill and Bastard Nation which grants adult adoptees full access to their original birth certificates. The usual suspects (NCFA, LDS Social Services, etc.) organized a lawsuit to enjoin the Initiative; the lawsuit was dismissed by a trial court, and the Oregon Court of Appeals unanimously affirmed that dismissal on December 29, 1999. In its affirmance, the Court of Appeals relied in part on the Sixth Circuit decision.

As most readers also know, a group in Delaware led by Carolyn Hoard induced the Delaware legislature to revise its adoption law and grant adult adoptees retroactive access to their original birth certificates, subject to a birth parent disclosure veto. The statute took effect in January 1999, and there was no lawsuit. Only 2 percent of affected birth parents have filed disclosure vetoes. Over 100 original birth certificates have already been issued to adoptees in that tiny state. It is my hope that the Tennessee and Oregon decisions will discourage any further lawsuits seeking to bar adult adoptees from access to their own records.

Myths Exposed: (1) "Confidentiality"

The benefits of the Tennessee lawsuits go far beyond the precedents they set. The evidence we assembled in the course of these lawsuits disproved the arguments raised by the National Council for Adoption and other partisans of secrecy, and demonstrated for all to see that those arguments were based on lies.

The secrecy advocates used to argue that most birth parents wanted to hide their identities from their surrendered children. Using statistics compiled by various confidential intermediary programs (most of them under the auspices of state governments), we showed instead that approximately 95 percent of birth parents want to be contacted by their surrendered children. Only about 5 percent want to hide from their children. (While the lawsuits were in progress, these figures were confirmed by data developed separately by the Connecticut Law Revision Commission.)

In short, in place of the revolting lie that birth parents only want to be quit of their children, we have established the truth that birth parents are first of all parents and want to know above all that their children are alive and well.

Another false argument demolished in the litigation was that prior laws authorized promises to birth parents that their identities would be kept secret from their surrendered children, and that such promises were commonly made. As a by-product of the lawsuit, it became clear that no such promise has ever been put in writing anywhere at any time. In July 1998 I finally wrote Bill Pierce of NCFA challenging NCFA to produce any such written promises from the files of their member agencies. They received the letter, but have never replied.

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As the Tennessee decisions confirmed, no adoption agency or individual could have made such a promise without exposing themselves to liability, because courts in Tennessee and elsewhere have always had the power to grant adoptees access to their records, over the objection of birth parents or without even notifying them.

Myths Exposed: (2) Abortion and Access to Records

We also demolished the most despicable argument of the pro-secrecy forces. They claimed that giving adoptees access to their records would increase abortions and decrease adoptions, because birth mothers would abort their children rather than bear them and place them for adoption, if they knew the children could later find them. The fact that 95 percent of birth mothers want to be found was one refutation. The other refutations were statistical comparisons of adoptions and abortions over time and between different states.

For years, NCFA has claimed that adoptions declined and abortions increased in England and in Australia

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because adoptees were granted access to their records in those countries. The claim was repeated in the Tennessee federal complaint, which claimed that adoptions declined and abortions increased after records were opened in England in 1976. It was suspiciously silent about what had happened earlier. With the help of a friend studying at Cambridge University, I obtained the annual statistics of unrelated (i.e., not step-parent) adoptions in England and Wales from 1960 to 1984. They showed that the decline in adoptions began in 1969, long before records were opened. Similarly, statistics compiled by the Alan Guttmacher Institute showed that the increase in abortions started even earlier, in 1962. These statistics, which we submitted to the court, made it clear that opening records did not cause any decline in adoptions or increase in abortions. On the contrary, the statistics showed that if opening adoption records had any effect, it was to ***increase*** adoptions and ***decrease*** abortions.

We also obtained statistics on adoptions in New South Wales, the largest state in Australia, from the Registrar of New South Wales. They showed that the decline in adoptions began in 1973, long before records were opened in 1991. These statistics we also submitted to the court.

Shortly after we submitted these statistics, one of the attorneys for the pro-secrecy plaintiffs in the Tennessee lawsuit said that the case was not about statistics.

The final nail in the coffin of the abortion/adoption argument was a comparison of adoption and abortion rates among states in this country. Kansas and Alaska are the only two states which have long given adult adoptees unrestricted access to their original birth certificates. That comparison showed that the adoption rates in Kansas and Alaska have been higher than those in the United States as a whole and that the adoption rate in Kansas was higher than in all four states that surround it. A comparison of resident abortion rates in the different states also showed that such abortion rates in Kansas and Alaska were ***lower*** than in the United States as a whole and that the rate in Kansas was lower than in any of the four surrounding states. These statistics we also submitted to the court.

These statistics have been widely circulated since we developed them in the litigation. They have helped to educate many anti-abortion groups and advocates that access to adoption records and open adoptions serve to ***reduce*** abortion rates, not increase them.

In its recently issued "Fact Book III" (more appropriately called the "Mythbook"), NCFA has tried to resurrect its statistical arguments about abortion. Hiding behind the skirts of a rather foolish English author named Patricia Morgan, Pierce once again claims that adoptions declined in England after 1975, without looking at what happened before that year. Morgan claims to have been unable to find earlier statistics. Similarly, Pierce tries to evade the state-to-state comparison by using overall abortion rates, without distinguishing between resident and non-resident abortions. Apparently it's somewhat easier to get an abortion in Kansas than in some of the surrounding states; that says precious little about the effect of Kansas's adoption laws on the decisions of Kansas residents.

The final refutation of the secrecy advocates is yet to come. They claim that when adoptees are reunited with their birth parents, the birth parents' lives will be ruined and their marriages disrupted. AAC members know that this argument is hogwash. Those of us birth parents who have been found by our children know that these reunions have generally been our salvation. Anyone watching the television or reading the newspapers or the magazines must also know that there have already been tens or hundreds of thousands of such reunions without any of the ruined lives or disrupted marriages predicted by the secrecy advocates.

As formerly sealed records in Tennessee are opened to the 3,000 or so adoptees who have asked for them, I expect that there will similarly be no problems. Because the Tennessee lawsuits did not affect the release of records of persons adopted before 1951, over 300 pre-1951 adoptees have already received their records; no adverse consequences have been reported. Similarly, in Delaware, over 100 adoptees have received their original birth certificates since April 1999, without incident. I expect the results in Oregon will be similar, once that case is ended.

As Conan Doyle wrote in *Silver Blaze*:

> *"Is there any point to which you would wish to draw my attention?"*
> *"To the curious incident of the dog in the night-time."*
> *"The dog did nothing in the night-time."*
> *"That was the curious incident," remarked Sherlock Holmes.*

Where Do We Go from Here?

In the States

In Kansas, adult adoptees have unrestricted access to all their adoption records. In Alaska, they have unrestricted access to their original birth certificates. In Tennessee, they now have access to virtually all their adoption records, although reunions are subject to the contact veto. In Delaware, they have access to their original birth certificates, subject to a disclosure veto; that veto is being exercised by only 2 percent of birth parents. In Oregon, as of December 29, 1999, when this article was written, adult adoptees had also obtained unrestricted access to their original birth certificates.

That leaves 45 states (plus the District of Columbia) where adoption records remain generally sealed from the persons whom they most concern—the adoptees. We must work to reform every one of those laws, so that adult adoptees will no longer be treated as second-class citizens. The facts we developed in the Tennessee lawsuit should help persuade the legislatures and the voters that reform is long overdue. The Tennessee and Oregon decisions should assure that once a state's laws have been reformed by the legislature or by popular vote, the reform will not be further delayed by a lawsuit.

In drafting and negotiating reform legislation, we should bear in mind that in most states adoption records fall into three time periods. Originally, adoptees had access to their original birth certificates and other records. In many states, that access continued until recently. In Alabama, for instance, adult adoptees had unrestricted access to their original birth certificates until 1990. In Massachusetts they had access until 1974. In Pennsylvania, until 1985. All persons adopted earlier in these states were entitled to access to their records when they reached the age of majority; their birth parents knew or should have known it when they surrendered their children. There is no legitimate argument for continuing to deny these adult adoptees access to their records in those states.[1]

Originally, adoptees had access to their original birth certificates and other records.

The second group of adoptees are those whose adoptions were finalized after the adoption law in a particular state was amended to deny adoptees access to their own records, and before the adoption law in that state will be reformed to restore access. It is only as to those persons adopted in this middle period that any argument can be made (however fallaciously) that a few of their birth parents expected that their identities would be kept secret from their children. It is only as to this middle group of adoptees that any compromise measures, such as contact or disclosure vetoes, should be considered.

The third group of adoptees are those who are adopted after the law is reformed to restore adoptees' access to their records. For such adoptees, there is no reason to accept compromise measures such as contact or disclosure vetoes. Indeed, accepting any such compromises with respect to future adoptions creates the danger that someone will later argue that the birth parents in such adoptions had a "vested right" to a contact veto or disclosure veto. Such arguments are unlikely to prevail, but it could take another three years of litigation to defeat them.

In short, compromises such as disclosure vetoes and contact vetoes should be limited to adoptions that took place after adoptees were denied access to their records and before such access is restored.

In Congress

In the year 2000 the big fight over access to records will be in Congress. The forces of secrecy have recognized that they are losing in the states, and they are attempting a counteroffensive on the federal level. This involves no small hypocrisy on their part; in the past they regularly argued that adoption was a matter for the states alone. That position lasted only until they started losing in the states.

The major battle in Congress is over the Hague Convention on Intercountry Adoption, and particularly the statute that will be needed to implement it if it is ratified. The Hague Convention is a proposed treaty which sets up requirements for intercountry adoption that apply to both the country from which the adoptee emigrates (the "country of origin") and the country to which the adoptee immigrates (the "receiving country"). The Hague Convention has already been ratified by some countries such as Romania, from which many children have been adopted into the United States. Many adoption agencies that arrange international adoptions, such as Holt, fear that if the United States does not ratify the Hague Convention, they will be unable to continue to arrange these adoptions. Consequently they are lobbying intensely for ratification of the Hague Convention. Pierce, NCFA and their allies are trying to use the Hague Convention to set a federal precedent for secrecy of adoption records. Pierce was a member of the U. S. delegation which participated in the drafting of the Hague Convention, and he attempted unsuccessfully to have secrecy written into the Convention. Fortunately he failed, and the Convention now provides that adoptees should have access to their records "in so far as is permitted by the law of" the receiving country. Pierce, NCFA, and their allies in Congress are seeking to take advantage of the quoted phrase and of the eagerness of Holt and other adoption agencies for ratification of the Hague Convention, to include in the implementing statutes provisions which will impose secrecy on intercountry adoptees.

NCFA's congressional allies include Representatives Tom Bliley of Virginia, Christopher Smith of New Jersey and James Oberstar of Minnesota. Rep. Bliley is chairman of the Commerce Committee, Rep. Smith is one of the ranking Republicans on the International Relations Committee and Rep. Oberstar is the ranking minority member

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of the Transportation and Infrastructure Committee (which approves road projects in every district). All three wield a great deal of power in Congress. Rep. Bliley, in particular, has demanded that the implementing legislation for the Hague Convention include secrecy provisions, and the adoption agencies (including Holt, the Child Welfare League, and the Joint Council on Intercountry Services) have knuckled under to him. In effect, he is holding hostage several thousand foreign children and the U.S. residents seeking to adopt them. It has remained for AAC, Bastard Nation, Adopt America Advocates, the Adoptive Parents Committee of New York, and the American Academy of Pediatrics to oppose this power play.

Rep. Bliley has testified that he is only trying to prevent us from setting a federal precedent in favor of openness. This is a smokescreen. AAC has pointed out in testimony that federal legislation allowing intercountry adoptees access to their adoption records will set no precedent for domestic adoptions because the birth parents live abroad; any expectations they may have about secrecy depend on their own countries' laws, and the Hague Convention itself requires those countries to delete identifying information from the adoption records forwarded to the United States, if those countries' laws impose such secrecy requirements. This has not satisfied Rep. Bliley and his confederates, however. Clearly they are trying to set a federal precedent for secrecy. Unless they are stopped, they will undo a great deal of the good that we have accomplished in Tennessee, Delaware and Oregon.

For this reason, AAC is urging all its members to contact their federal representatives and senators and express their concern that any legislation implementing the Hague Convention should allow adult adoptees full access to their adoption records. The best form of contact is a personal meeting at your representative's or senator's home office in your own state. The second best is a letter (preferably handwritten) or a telephone call. The least effective is e-mail; many congressmen give e-mail little or no attention, because they get so much of it.

The Senate bill implementing the Hague Convention is S. 682, sponsored by Senators Helms and Landrieu. The House bill is H.R. 2909, sponsored by Representative Gilman and over thirty other representatives (including Representatives Bliley, Oberstar and Smith). Both bills, as presently drafted, would deny intercountry adoptees access to their own records. They must be amended to allow access.

The AAC's statement urging amendment of H.R. 2909 is posted on our website (*http://www.american-adoption-cong.org*). I hope that all of you who have so well supported TENOR will read our statement and then contact your representatives and senators, urging them to support openness and honesty in intercountry adoption. That is the next battle and one which we must win.

Footnote:

[1] Indeed, the laws that retroactively sealed adoption records may well be unconstitutional because they retroactively (or "retrospectively") denied adoptees a vested right. However, as the Tennessee and Oregon lawsuits demonstrate, the law concerning retrospective legislation and vested rights is anything but clear. Before anyone rushes to start such a lawsuit, I hope they will consult with me. As I hope I have demonstrated above, and as Brother Pierce and his friends have learned over the last three years, constitutional litigation is a two-edged sword and you can lose very big.

Fred Greenman is a New York attorney who holds a B.A., an LL.B., and an LL.M. from Harvard. He served in the U.S. Army and was an assistant U.S. attorney, S.D.N.Y. He has been with Deutsch Klagsbrun & Blasband since 1969. Their practice is commercial litigation, primarily related to music and literary publishing and copyrights. His daughter was born out of wedlock in July 1959. She was surrendered for adoption in 1960, and they were reunited in 1991. He is active now in adoption reform and helped win the federal and state cases defending Tennessee's new law.

Birth parents: Were you falsely promised that you could contact your child, or that your child could contact you or learn your identity, when he or she reached adulthood?

Adoptive parents: Were you falsely promised that your child could get his/her records or contact birth parents when he or she reached adulthood?

If so, please contact AAC Legislation Director Carolyn Hoard as soon as possible at choard@herc.com or phone her at 302-325-2903. Please include the state and year of surrender, and a phone number. None of this information will be released without your consent and it will be used only as described below.

We need a database listing birth parents and adoptive parents who were told that their children could learn the birth parents' identities when the children reached majority. The purpose is to be able to submit these parents' statements in subsequent lawsuits or lobbying, in order to counter the usual argument about promises of secrecy. We will need to be able to extract the relevant names from the database and contact them quickly when lawsuits begin or lobbying is needed, in order to obtain permissions and further information. We will therefore need to have on file the names, telephone numbers or e-mail addresses (preferably both), and state and year of surrender for each of these misled parents. Carolyn has offered to maintain this database.