

# ANDRÉ JACQUE

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## *Testimony before the Senate Committee on Human Services, Children and Families*

*State Senator André Jacque*

*January 5, 2022*

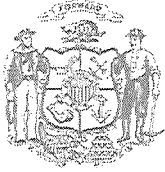
Colleagues on the Senate Committee on Human Services, Children and Families,

I am pleased to testify before you with Rep. Dittrich as the authors of Senate Bill 686, which will allow for the possibility of a formalized agreement between birth and adoptive parents for postadoption contact, often known as “open adoption”, to be recognized in Wisconsin. Such a reform to Wisconsin’s adoption statutes has been a frequent suggestion in my past discussions with adoption stakeholders and has been strongly supported by adoptees, birthparents, adoptive parents, adoption agencies and adoption attorneys and I appreciate the formal support for this bill by the Wisconsin Association of Family and Children’s Agencies.

SB 686 requires a court in a termination of parental rights proceeding to consider the terms of any such postadoption contact agreement, and may approve its terms subject to the following conditions:

- The court has received a favorable recommendation for approval of the agreement from the agency that has supervision of the child, from the child’s guardian ad litem.
- The court determines that the former parent or relative will not undermine the proposed adoptive parent’s relationship with the child and will not act in a manner that is contrary to the adoptive parent’s parenting decisions.
- The court determines that approval of the agreement is in the best interest of the child, considering the child’s relationship with the former parent or relative and whether it would be harmful not to preserve that relationship, and considering the needs and wishes of the child and how the child’s needs would be affected by the agreed-upon postadoption contact.
- The former parent or relative has acknowledged that failure to comply with the terms of the agreement is not grounds to revoke the TPR or the adoption.
- The former parent or relative and proposed adoptive parent acknowledge that, if a dispute arises as to the fulfillment of the terms of the agreement, the parties must participate, or attempt to participate, in good faith, in mediation or an alternative dispute resolution process, with the mediator or arbitrator to be selected by the adoptive parent. If the parties attempt mediation or an alternative dispute resolution process, then the mediator or arbitrator must be selected by mutual agreement of the parties. If the parties cannot agree, then the court must appoint the mediator or arbitrator within 30 days of a request of any party.
- The former parent or relative and proposed adoptive parent state that the parties understand the terms of the agreement, that the agreement was entered into voluntarily, that no promises or threats were made to coerce a party to enter into the agreement, and that no representations were relied upon other than those contained in the agreement.

This legislation offers a way to make it easier to navigate the difficult and uncertain court process faced by prospective birthparents and adoptive parents, and making post-adoption contact agreements enforceable through judicial consent would bring Wisconsin in line with other states, offer protection for birth parents’ interests and give them more autonomy in their adoption plans.



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Under SB 686, a postadoption contact agreement is not enforceable for any period during which the child has been placed outside the adoptive parent's home under the Children's Code or the Juvenile Justice Code, or for any period during which the parent is denied physical placement with the child in an action affecting the family. After a hearing, the court would be able to modify or terminate the agreement if it finds that doing so is in the best interest of the child and that there has been a substantial change in circumstances since the agreement had been approved.

SB 686 specifies that a postadoption contact agreement does not affect a tribal right under the federal Indian Child Welfare Act or the Wisconsin Indian Child Welfare Act, and may not impair a cultural contact agreement or other agreement made between the adoptive parent of a child and an Indian tribe.

Lastly, the bill allows a party to petition for enforcement of the terms of the agreement if the party first attempted mediation or an alternative dispute resolution process in good faith. After a hearing, the court may order specific performance of the terms of the agreement if it finds that enforcement is in the best interest of the child.

Thank you for your consideration of Senate Bill 686.

## CHILDREN & THE LAW SECTION

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To: Senate Human Services, Children and Families Committee Members  
From: Children & the Law Section, State Bar of Wisconsin  
Date: January 5, 2022  
Re: SB 686 – open adoption

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The Children & the Law Section of the State Bar of Wisconsin supports the concept of open adoption in SB 686 and the effort to maintain continued contact by a biological parent or biological relative with a child who has been adopted when it is in the best interests of the child to maintain contact, but suggests some revisions to the legislation.

Currently, under *State v. Margaret H.*, 2000 WI 42 ¶¶ 29-30, a court may consider a post-adoption contact agreement between a biological parent and adoptive parent when considering whether it is in the best interests of a child to terminate parental rights. However, any agreement for post-adoption contact is unenforceable.

SB 686 allows for an enforceable agreement between an adoptive parent and a biological parent or relative and requires the trial court to consider the terms of any post adoption contact agreement when it determines whether it would be harmful to a child to sever a substantial relationship with a parent or other family member. The Section has no concerns with these provisions.

The legislation further establishes who must be a party to the agreement, the requirements of the agreement, the standards that need to be met for court approval, and the requirements for modification or termination of the agreement. To this end, the Section believes that a child, through their guardian ad litem, should be a party to any post-adoption contact agreement and supports an amendment to ensure this representation. This is particularly important when children are twelve years of age and older. Similarly, if a modification or termination of the post-adoption agreement is sought, a guardian ad litem should be appointed to represent the interests of the child prior to any action being taken on an agreement.

The proposed legislation also requires the agreement to contain a provision that if a dispute arises, the parties shall participate in mediation or arbitration with a mutually agreed upon mediator or arbitrator. The Section believes that this provision should be reviewed, and consideration be given as to how parties of limited financial resources could effectively use this dispute resolution process.

Lastly, the Section suggests replacing “clear and convincing evidence” with “a preponderance of evidence” when petitioning the court to modify or terminate the postadoption contact agreement. This is to maintain consistency with the burden of proof in other sections of the Children’s Code, for example, when parental visitation is suspended.

The Children & the Law Section supports the concept of open adoption, but would like to see the aforementioned revisions incorporated before supporting SB 686.

If you have questions or concerns, please do not hesitate to contact our Government Relations Coordinator, Lynne Davis, [ldavis@wisbar.org](mailto:ldavis@wisbar.org) or 608-852-3603.

*The State Bar of Wisconsin establishes and maintains sections for carrying on the work of the association, each within its proper field of study defined in its bylaws. Each section consists of members who voluntarily enroll in the section because of a special interest in the particular field of law to which the section is dedicated. Section positions are taken on behalf of the section only.*

*The views expressed on this issue have not been approved by the Board of Governors of the State Bar of Wisconsin and are not the views of the State Bar as a whole. These views are those of the Section alone.*



STATE BAR OF WISCONSIN



**TO:** Chair Jacque, Vice-Chair Ballweg, and Honorable Members of the  
Senate Committee on Human Services, Children, and Families

**FROM:** Amanda Merkwae, Legislative Advisor

**DATE:** January 5, 2021

**SUBJECT:** 2021 Senate Bill 686

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The Department of Children and Families (DCF) appreciates the dedication of legislators to issues affecting Wisconsin children and families involved in the child welfare system. Thank you for the opportunity to provide written comments for information on Senate Bill 686, which would establish a legally enforceable post-adoption contact agreement.

Under the bill, the court must consider the terms of such an agreement when considering the termination of parental rights (TPR) dispositional factor of the impact on the child of severing the child's relationship with the parent or other relative.<sup>1</sup> After the approval of an agreement, an adoptive parent may agree to modify or may petition to modify the agreement, and any party may petition the court for enforcement of the terms of the agreement after attempting mediation or an alternative dispute resolution with a mediator or arbitrator's fees paid equally by the parties.

DCF supports and encourages open adoptions when it is safe and freely supported by both the birth and adoptive parents, and many families in Wisconsin choose to continue supporting birth family relationships post-adoption. However, the bill treats adoptive parents differently than all other parents by limiting the adoptive parents' authority to make decisions about how and with whom their children spend time. Further, if a postadoption contact agreement can only be entered into at the time of TPR or adoption finalization, it creates a commitment that does not account for changes in relationships, stability, or circumstances that may occur after the child is stabilized in their adoptive home. Under the bill, the agreement is unenforceable during a period when a child has been placed outside of the adoptive parents' home under chapter 48 or 938 but does

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<sup>1</sup> A termination of parental rights proceeding consists of two phases: (1) the grounds phase regarding the allegations in the TPR petition decided by a judge or jury and (2) the dispositional phase, where the judge must consider a number of factors under s. 48.426(3) in considering whether termination of parental rights is in the child's best interests.



not address how an agreement should be renegotiated if there is a disruption in the adoption and the child is placed within the child welfare system.

SB-686 requires parties to first participate in mediation or arbitration proceedings before a motion to enforce could be filed with the court. From an equity lens, this requirement presents challenges for families who do not have the financial means to seek legal assistance for the creation of an agreement or pay for mediation or arbitration services when enforcement is needed. Notwithstanding the dispute resolution provisions, it is unclear how enforcement would be monitored and the repercussions of non-compliance.

DCF would recommend the following amendments to SB-686 to address outstanding concerns:

1. Replace the establishment of a legally-enforceable post-adoption agreement with a non-legally binding post-adoption agreement to be used by birth parents and adoptive parents to establish mutual expectations and understanding of what a post-adoption contract could entail. Add a requirement in s. 48.84 for DCF to develop and publish on its website a voluntary post-adoption agreement template, to be used as a resource by families if desired, and a requirement that the training topics for pre-adoptive parents include the benefits of post-adoption contact between adopted children and birth parents.
2. Exclude the post-adoption contract as a consideration in a TPR decision and allow the post-adoption contact agreement to be concluded only at the adoption proceeding to (a) reduce the risk that a post-adoption contact agreement could be used to coerce a voluntary TPR and (b) avoid complications due to a change in pre-adoptive placement post-TPR.
3. Require signature of the agreement by the adopted child, if the child is 10 or older to ensure the agreement accounts for the child's wishes.
4. Clarify that a post-adoption contact agreement is not required before adoption may be finalized to ensure that discussions and negotiations of a post-adoption agreement do not delay an adoption and permanency for the child.
5. Clarify that a post-adoption agreement does not affect the legal parental decision-making rights of the adoptive parents.

Thank you for the opportunity to provide written comments about this legislation. Please do not hesitate to contact me at [amanda.merkwae1@wisconsin.gov](mailto:amanda.merkwae1@wisconsin.gov) or (608) 513-7604 if there are any questions.



## Waukesha County

**To:** Senate Committee on Health and Human Services  
**From:** Alex Ignatowski, Legislative Policy Advisor  
**RE:** Senate Bill 686, Post-Adoption Agreements  
**Date:** January 5, 2022

Chair Jacque and Committee Members,

Thank you for the opportunity to provide written testimony on SB 686 to this Committee. SB 686 would allow for a potential adoptive parent and a birth parent or other relative with a substantial relationship to the child to enter into a postadoption agreement. The court would then be allowed to approve this agreement. Under the bill, these agreements would outline contact privileges and may control the types and frequency of such contacts. The bill also stipulates that several requirements need to be met before the agreement can be approved by the court. A few of these requirements include:

- A favorable recommendation for approval from the agency that is responsible for the child
- The agreement is in the best interest of the child
- The court determines that the former parent or other relatives will not undermine the adoptive parent's relationship or act in a matter contrary to the adoptive parent's parenting decisions

I would like to discuss how Waukesha County proceeds with an alternative approach in these situations. We utilize a voluntary process called Child Permanency Mediation. We have trained and approved mediation attorneys that assist birth parents, adoptive parents, social workers, and legal parties with resolving any barriers to permanency. This process may include informal or non-binding agreements related to the birth parent maintaining some type of contact with the child. We have found that in cases where partial or full agreement can be reached during mediation, that it resulted in eliminating the need for a court trial or significantly reducing the issues being argued to the court, thus decreasing the time to permanence. We have found that utilizing Child Permanency Mediation with birth parents and adoptive parents has offered them an opportunity to have greater agency over decision making and resulted in better outcomes for children. Waukesha County utilizes the state's Title IV-E reimbursement program for legal services to offset the cost of Child Mediation which has a 40% reimbursement rate for adoption cases.

In the case of this legislation, court ordered agreements could produce some possible unintended consequences. In some cases, a postadoption agreement might disincentivize prospective adoptive parents. The adoption process might become longer and more drawn-out with the potential of future legal costs and mediations. These agreements might also require county HHS departments to re-engage in the event of modifications or terminations. This process can be very traumatic for the children, adults and families involved.

Thank you for your time today and please feel free to reach out to me if you have any questions.

Alex Ignatowski  
Legislative Policy Advisor  
[aignatowski@waukeshacounty.gov](mailto:aignatowski@waukeshacounty.gov)  
(414) 610-0844



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**TESTIMONY ON SENATE BILL 686**

Submitted to:

THE WISCONSIN SENATE COMMITTEE ON HUMAN SERVICES FAMILIES AND  
CHILDREN

January 5, 2022

Chairman Jacque & Committee Members:

**The Nation appreciates and supports the tribally focused language of SB-686 and could support passage of this legislation if the distinguished author accepts these proposed edits and modifications.**

The practice of open adoption can at times be a tool to limit the amount of trauma a child faces because it allows a child to maintain ties to their birth family. Research shows that even non-Indian adoptee children tend to have higher instances of mental health and substance use disorders. “Adoptees had higher odds for lifetime SUDs than nonadoptees in this study using NESARC data. Despite the advantages of adoptees’ higher educational levels probably due to being raised by higher educated, higher income adopting parents, adoptees are still at higher risk to lifetime SUD.” As such, we support the practice of open adoption- of bio & adoptive parents having long-lasting relationships for the children’s benefit, but we still have the following two concerns:

- Duress/coercion being used to make parents sign away rights (“If you sign away your rights, we will enter into a post-adoption parental contact agreement”).
  - This section would be created under Subchapter XIX for adoption of minors. So, this would occur after the parent’s rights are already terminated. The Judge appears to thus be making clear and convincing evidence findings without the bio-parents being there- and solely off the written document. This is of concern when trying to rule out coercion.
  - There should be a separate hearing on the post-adoption agreement, wherein a full colloquy can be performed with the bio-parent. Thus,

it makes sense that this would occur earlier in the process- during the TPR stage. This of course is assuming an adoptive home has already been identified and those potential adoptive parents are involved at the TPR stage of proceedings.

- There have been successful applications of post-adoption visitation agreements in the state of Wisconsin even without this Bill language though. This is through the use of a two-step process. Step-one being contractual, which could limit some of the coercion concerns. The parties enter into a written contract to agree to the jurisdiction of the family court for the purpose of ordering a Wis. Stat. § 767.43 visitation agreement under a “person who has maintained a relationship similar to a parent-child relationship with the child.” The juvenile court judge agrees to address the family court visitation order. After the TPR, then the Court addresses the Wis. Stat. § 767.43 visitation order.
- Bio-parents and Bio-family are placed at a disadvantage by oftentimes not having funds to fight for enforcement, as mediation and court battles require funds.

Some of the Indian specific language needs to be tightened up. Under Section 1, we do not believe the Court can mandate the Tribal child welfare department do this under sovereignty principles. The burden on ICWA cases to do active efforts is on the county agency. They would be the ones mandated to present this type of information to the court. Under their Section 4 (48.905(2)(a)), it would be helpful if they added at the end of that sentence “, as there are separate revocation rules applicable under those statutes.” It will help clarify for a reader why this is the case- particularly a pro se litigant.

Thank you for considering the proposed changes to SB-686. We would be happy to meet and work with Senator Jacque to improve the bill.

Thank you.





TO: Chair Jacque and Members of the Senate Committee on Human Services, Children and Families

FROM: The Coalition for Children, Youth & Families

DATE: December 29, 2021

RE: Support for Senate Bill 686 (Relating to Post-adoption Contact Agreements)

Thank you for the opportunity to provide input on the adoption legislation before you today. The Coalition for Children, Youth & Families, Inc. supports Senate Bill 686, which would give adoptive and biological parents the option to create a post-adoption contact agreement.

The Coalition for Children, Youth & Families, Inc. is a non-profit organization funded in part by grants from the State of Wisconsin Department of Children and Families. We consider ourselves the single source for neutral, objective, and current information about every aspect of foster care and adoption in Wisconsin; a trusted and continuing presence through every stage of a family's foster or adoption experience.

The unique role of the Coalition for Children, Youth & Families is to

- Advocate for the most vulnerable children,
- Coach foster and adoptive families to achieve resilience, and
- Lead by balancing the needs and interests of all those touched by the foster and adoption ecosystem – children, families, agencies, caseworkers, policymakers, and others.

The Coalition supports Senate Bill 686 because we believe in the critical importance of maintaining connections for children and youth. We encourage families who are fostering, as well as those who have completed an adoption, to work together with the child's birth parents and other biological family members to maintain and care for those relationships when safe and appropriate. We believe that giving adoptive and biological families the opportunity to create and maintain legal post-adoption contact agreements can help minimize the grief and loss that is inextricably linked to adoption; can help promote healing for all members of the family and extended family; and can encourage the strength and resilience of the children and the families.

Thank you for your time and consideration.

Sincerely,

Oriana Carey, CEO  
Coalition for Children, Youth & Families, Inc.

**COALITION FOR CHILDREN, YOUTH & FAMILIES**

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# BARBARA DITTRICH

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STATE REPRESENTATIVE • 38<sup>th</sup> ASSEMBLY DISTRICT

**January 5, 2022**

**Senate Committee on Human Services, Children and Families**

**RE: Senate Bill 686 – postadoption contact agreements**

Thank you Committee Chair Jacque and members of the Senate Committee on Human Services, Children and Families for scheduling a hearing on these bills. I appreciate the opportunity to speak to you on a topic that rarely gets the coverage it should, but is incredibly important to the children of Wisconsin.

The bill before the committee today is the product of the Speaker's Taskforce on Adoption, formed last session to examine ways to get children in out of home care more expeditiously into permanency and stability. I hope that the bill before the committee today will be passed and signed into law, making a real difference in the lives of our children and families all around our state.

Many may not be aware that the majority of adoptions in Wisconsin are public adoptions. This typically means that children arrive at a place of permanency through our child welfare system. It is messy. And there is trauma. What is very apparent is that we have shifted from total disregard for parents to favoring parents over the children who may not be safe in their care. This bill seeks to put that perspective/policy decisions back into balance, seeking both the best welfare of the child while ensuring parents' rights are upheld.

As drafted before the committee today, Senate Bill 686 provides an opportunity for adoptive and biological parents to enter into a voluntary agreement regarding post-adoption contacts. It is important to note, there is nothing in these contracts that would lead any of the parties to believe these contracts are permanent. In fact, the legislation states the opposite. These contracts are entirely voluntary to enter, and terms can be changed at any time via the means laid out in the legislation. The bill also states that tribal rights are not effected and does not impair cultural contact agreements, per the Indian Child Welfare Act (ICWA). All parties involved, including an agency having guardianship or legal custody of the child and, in the case of an Indian child, the Indian's child tribe must approve the agreement for the court to consider said agreement during proceedings.

In consultation with stakeholders including parents, counties, lawyers, and judges my office has been drafting an amendment to address one of the unintended consequences of the bill. The amendment will be finalized and introduced shortly. The main intent of the amendment is to clarify that the postadoption contact agreement can only be considered in the adoption



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# BARBARA DITTRICH

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STATE REPRESENTATIVE • 38<sup>th</sup> ASSEMBLY DISTRICT

proceeding and not the TPR proceeding. This removes the perception of undue influence on the TPR proceeding.

In closing, who of us here want these children languishing in uncertainty and instability longer than need be? Who of us wants to increase the trauma these children face? How many chances are birth parents supposed to be afforded before we put their suffering child first? This bill gives us a chance to make Wisconsin a more “adoption friendly”... and dare I say child friendly state.

Thank you for the opportunity to testify on this bill. It is my hope the committee will move this bill through the legislative process, recognizing the necessity of it. Our children are our most precious gift. Their lives are not “throw away” and we must protect the upcoming generation if we expect our state to continue to move forward in the decades to come.