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Post-Adoption Contact Agreements *To Promote Court-Enforceability or Not?*

BY ERIC FREEBY AND HEIDI COX

Open adoptions have steadily increased over the years. As a result, the post-adoption contact agreement, and its enforceability, is an issue all adoption professionals face. The overriding principle of all post-adoption contact agreements should be the best interests of the child. While there is no one-size-fits-all road map for open adoptions or post-adoption contact agreements, those that allow for flexibility over time have the best chance for success. In most cases, a court order does not allow for the flexibility of an ever-evolving relationship between the child, adoptive parents, and birth parents. While adoptive parents should strive to honor their commitments to the birth parents, a court should not prohibit them from making decisions that are in their child's best interests, or require the adoptive parents to return to court to modify or terminate the agreement when it is no longer workable.

In this article, we will explore some legal and personal thoughts surrounding court-enforceable post-adoption agreements and the adoption professional's role in helping everyone achieve the best outcome possible. The primary focus of this article is on extra-family adoptions, not on intra-family adoptions, which may need a different set of rules to meet the child's best interests.



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The Legal Landscape

The issue of court-enforceable post-adoption contact varies greatly between the states. There are two primary reasons for court-enforceable post-adoption contact agreements. First, in some instances it alleviates concerns over birth parents' sudden separation from their child. Second, it ensures adoptive parents' compliance with an agreement that, in some cases, was drafted before the child was born. However, neither reason places the child's best interests as paramount or recognizes the right and ongoing responsibility of the adoptive parents to act in the child's best interests. Acknowledging a parent's right to make decisions for their children, the United States Supreme Court, in *Troxel v. Granville*, stated,

"...adoption is a means of family formation that is no less fundamental because it is characterized by choice and commitment rather than blood and procreation... The Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." 530 U.S. 57, 66 (2000) (plurality opinion)

Since *Troxel*, high courts in numerous states have also weighed in on this issue. The Colorado Supreme Court held that "adoptive parents have the right as natural parents in controlling the upbringing of their child." *In re Adoption of C.A.*, 137 P.3d 318, 326 (Colo. 2006). The West Virginia Supreme Court of Appeals found that *Troxel* made clear that courts must give special weight to a "parent's own determination." *Visitation of Cathey L.M. v. Mark Brent R.*, 617 S.E.2d 866 (W. Va. 2005 (per curiam)). The Supreme Judicial Court of Massachusetts held that "adoptive parents have the same protected interest in their relationship with the adoptive child as biological parents, and are entitled to the same presumption they will act in the best interests of the child in making decisions regarding the child, including decisions about visitation [emphasis added]." *In re Adoption of Ilona*, 459 Mass. 53, 64 (Mass. 2011). The law affords legal parents great latitude in deciding what is best for their children. To treat adoptive parents differently creates a stigma that their family is not "real" or they are "second class" parents without the ability to make all the decisions of a biological parent. Prospective adoptive parents may be hesitant to move forward with adoption if their decisions regarding visitation and the child's best interests can be overruled by the birth family or a court.

Since all rights and responsibilities are terminated between the child's biological family and the child, and a new legal relationship is created, enforcement of post-adoption contact agreements must be handled as a contract. For any other issue surrounding a child, to argue that a

contractual arrangement controls the parent-child relationship between one family and another unrelated family would be seen as outrageous. Adoption is not a custody arrangement, and it should not be treated as such.

Having drawn a line regarding extra-family adoption agreements, there is room for considering court intervention in intra-family adoptions, where the relationships between the child and other biological relatives will remain. There are several cases examining grandparent adoptions and stepparent adoptions. In these cases, too often, the adoptions were requested as a way to prevent other family members from having a relationship with the child. (A narrative that pits the mother's family against the father's family is common.) Serving the best interests of a child in these specific cases, where the child stays within the biological family, may require greater court scrutiny and ongoing enforceable arrangements. Adoption is not one-size-fits-all, and intra-family arrangements may create different parenting and relational needs for children by virtue of an adoption within the existing family unit.

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An Adopted Adult's Perspective

by Katie W.

As an adult adopted person, I have a unique perspective on court-enforced visitation agreements. Now, with an open line of communication with my biological relatives, I can speak to the fact that a court forcing me and my parents to visit with my biological family would not have been in my best interest. Even though I was not adopted by family members and was instead adopted by "strangers," intra-family adoption was at the time a real possibility. Had my biological grandfather adopted me, court-enforced visitation would have been just as troubling to him as it would have been to my adopting family.

Adoption creates families, but it can also destroy them. Court-enforced visitation agreements can be a cause of a newly formed family's undoing. Adopted children and their new families have a lot of struggles to work through on their own without the added stress of court-enforced visitation with the child's biological family.

Adopted children who are not in contact with their biological relatives are often able to create a fantasy of what their biological family is like in order to cope with their feelings on being adopted. The vision I created of a birth family helped get me through my harder days and always gave me motivation to keep moving forward so that I could connect with them someday in the future. I even attempted to learn German so I could have a conversation with my birth mother in her first language.

Now, as an adult, I have been able to connect with them. I have seen snippets, from my full sister, of what my life would have looked like had my birth mother not made the courageous decision she did to make an adoption plan for me. Hearing what my biological siblings went through as children made me realize the vision I had of my biological family was a beautiful one, but not a reality.

Exposing me at that young age to what my birth relatives were going through on a day-to-day basis would have been very painful and confusing. I know this because hearing it now is hard. If a court had mandated that I visit them, I would have been even more confused about who I was and where I belonged, not to mention the psychological burden it would have imposed.

Seeing all of this in retrospect, I know that my family is the family I was always meant to have. Now that I know my birth relatives, I have a huge new group of friends who are able to answer my questions about ancestry and medical history. My family is expanding, in a good, controlled way, and it's happening on my terms and when I am able to handle it.

A State by State Review of Post-Adoption Contact Laws

Notwithstanding the legal discussion above and personal perspective of an adopted adult, a number of states have some type of court enforceable post-adoption contact. In some states, the enforceability may only apply to children placed at an older age (e.g. Indiana); in other states, court-ordered access to the child may only be allowed in the termination (of parental rights) order when the state is bringing the suit, ending upon the granting of the adoption (e.g. Texas). [This chart](#)^{*} can help you navigate the myriad and varied laws regarding post-adoption contact agreements. This chart is intended as a *starting point* for considering the rules in various states; it is not exhaustive. There may be nuances or additional case law not reflected in the cited statutes. There may also be other, more specific, statutes that could impact a particular adoption. This document should not be used in place of contacting an attorney in the state where the expectant mother resides, as well as the state where the adopting parents reside, in order to obtain the most up-to-date legal direction regarding this important issue.

Role of the Adoption Professional

This article has identified some of the legal and personal reasons that court-enforceable post-adoption agreements are not the best choice

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^{*} Post-Adoption Contact Agreement State Review: <http://www.adoptioncouncil.org/paca-state-review>

for most extra-family adoptions. We will now consider the adoption professional's role in this conversation, and offer some closing thoughts behind opposing court-enforceable arrangements when a child is placed outside the biological family and adopted into a new family.

All relationships are complicated; parent-child relationships, marriage relationships, and in-law relationships all face stressors, miscommunication, and "relationship fatigue." Adoption creates a new, special relationship, with additional stressors. The more open an adoption is, the more complicated the various relationships may become. Adoption is no longer a practice of matching birth and adoptive parents based on appearance or backgrounds. Maneuvering through the relational hurdles, not just through the pregnancy and delivery, but throughout the child's life, is much more important today than ever before. All too often, parents, facilitators, and well-meaning acquaintances connect expectant mothers with adoptive families without considering the long-term implications for all parties. As an agreement of the heart, most (non-enforceable) post-adoption agreements work well for everyone as an acknowledgement of the expectations of the birth and adoptive parents. They also need to remain flexible and modifiable as the child grows and his or her needs change, families grow and possibly move, and birth parents' lives change. Court-enforceable arrangements or even ongoing regular contact may not always work in the best interest of the child at every point in the child's life.

Adopting parents should begin their adoption journey working with an experienced adoption professional. Adoption professionals need to match expectant parents and adoptive parents with the long view. Beginning with the homestudy, adopting parents' attitudes and expectations should be examined, discussed, and challenged in an open, non-judgmental, safe dialogue. Before choosing adoptive parents, expectant parents' (and sometimes the biological grandparents') desires and expectations should be fully understood by the adoption counselor. As with the adopting parents, the expectant parents' expectations of the future relationship should be discussed and challenged in an open, non-judgmental, safe dialogue. After placement, adoptive parents must, to the absolute best of their ability, comply with every agreement they have made, and try to serve any additional expectations or requests of the birth parents, so long as meeting the needs of the birth family does not conflict with the best interests of the child. Birth parents may need ongoing counseling and a sounding board to process changes in the relationship. Again, relationships are complicated. Adoption creates new, intimate relationships, often involving virtual strangers. Helping these new and ongoing relationships be as healthy and successful as possible is best

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done with adoption professionals who are also invested in the success of the adoptive relationship. Relying on a court order created years before, to force actions that may no longer fit the relationship, does not meet the best interests of the child and can create additional barriers between the birth and adoptive parents. Relying on a court order also allows the adoption attorney, facilitator, or agency to avoid responsibility for the long-term outcome for the adoptions they helped arrange, when the adoption professional should have had the expertise at the beginning of the match to help the parties plan for the ups and downs that are likely to come. In addition, an adoption professional should be available to help the families work through any complications that could arise.

This article does not begin to examine the additional issues that arise when a birth parent voluntarily relinquishes his or her rights in lieu of an involuntary termination action initiated by the state; there are even more issues that can complicate these relationships, and court-enforceable post-adoption agreements in state placements can add to the litigation and discourage families from adopting children from foster care.

Conclusion

As a profession, we must be focused on outcomes, not outputs. Matching families, facilitating placements, and then relying on orders and courts to ensure compliance with the expectations of the birth families makes adoption look like a transaction: A child is simply an output. Adoption is more than a transaction for everyone involved, more than an output, more than a custody arrangement. We owe it to birth and adoptive families to understand this completely and to provide access to lifetime services, helping everyone achieve the best outcome possible, for the sake of every birth family, adoptive parent, and child.

ABOUT THE AUTHORS

A principal attorney at Brown Pruitt Wambganss Ferrill & Dean, P.C. in Texas, Eric Freeby's practice is devoted almost exclusively to adoption law, which includes independent domestic adoption, contested adoption, agency domestic adoption, international adoption, interstate (ICPC) adoption, special needs adoption, grandparent, stepparent and other family adoptions, as well as Texas Department of Family and Protective Services/ foster care adoptions, mediation, cases involving the Indian Child Welfare Act and adoption agency representation. Mr. Freeby also practices in the field of assisted reproduction.

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