



**Families for
Private Adoption**

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Newsletter

The Newsletter of
FAMILIES FOR PRIVATE ADOPTION

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Post Adoption Contact Agreements in Open Adoption by Jennifer Fairfax, Esq.

As Bob Dylan wrote, "The Times They Are a-Changin'." And changin' they are when it comes to open adoption practices. Until recently, the idea of either an open adoption or a post adoption contact agreement ("PACA") was unheard of among practitioners. Previously, the only agreements between adoptive and birth parents regarding on going post adoption contact were non-binding "moral contracts" Today, however, many states, including Maryland, Virginia and the District of Columbia, have enforceable, post adoption contracts, which generally mean that they are enforceable, provided the court finds them to be in the best interest of the child.

The shift to open adoptions with enforceable post adoption contact agreements means that adoptive and birth parents alike have to consider their respective comfort levels with openness and by initiating discussion about post adoption contact early in the process.

So what exactly does 'openness' mean? Rather than a legal term, openness follows a continuum of contact which can be as minimal as meeting one another and exchanging names, to spending time together from pre-birth to post-adoption. Given this broad spectrum, it is important for both adoptive and birth parents to have a discussion with their respective attorneys about what openness means to them; what level of openness they are comfortable with; and how they see it playing out into the future. Openness has so many variables that I

often advise adoptive parents to be flexible with their comfort level but, at the same time, to never agree to a level of openness that they will not honor.

Throughout the adoption journey, on-going conversations around post adoption contact agreements and openness are necessary and healthy. Usually the level of contact sought by a birth parent is reasonable and often such continued open communication is requested to give the birthparent comfort in knowing that the child is medically, physically and developmentally well after the baby has been adopted. While some adoptive parents prefer to have limited or no post adoption contact, the research shows that adoptees whose parents have a good relationship with their birthparents, or at minimum, the ability to obtain information from a birthparent, are not adversely impacted. The research further indicates that children find it helpful also to have such access.

Post adoption contact agreements set clear boundaries on contact. They remove uncertainties for the parties about when the birth parent might contact the adoptive parents, and for the birth parent, when an update might arrive. This helps create a positive relationship and strengthen the underlying trust inherent in every adoption. And since there are no restrictions on what can be included in a post adoption contact agreement (other than it be in the best interest of the child), they can be very creative terms regarding contact.

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What kind of terms should you avoid? All parties should avoid any term that they are not willing, at the time of the contract, to make a good faith effort to honor. Similarly, if you know you will not be able to honor a specific term, then do not agree to it. As a latter example, if you agree to annual visits with a birthmother who lives within a few hours but you know your family is making a long distance move within a year, you should not agree to those terms without including the anticipated move so that the birthmother can consider other satisfactory terms for seeing the child (e.g., Skype). The terms of post adoption contact are all negotiated, and while a birthparent is usually in the driver's seat with regard to contact, a birthparent does not necessarily dictate the terms. Good attorneys, one for adoptive parents and one for birthparents, can assist the parties in coming to mutually acceptable terms when the initial positions are not fully aligned. This, of course, assumes the parties have shared their feelings about contact throughout the process and relationship ("openness") so that the parties are somewhat in sync about their idea of post adoption contact before they progress too deeply into the relationship.

What are some terms you should ask to be included? There are several to consider that protect all the parties, but most importantly, the child. These include:

- Clauses that forbid posting pictures, identity or information about each other or the child on social media or the Internet.
- A clause that requires a birthparent to notify the adoptive parent if the child contacts the birthparent via social media, text, e-mail or through any other avenue of communication. This is meant to ensure that the child and birthparent are not communicating without the adoptive parent's knowledge.
- A clause that says a court cannot increase the level of contact should the issue ever be before a court.

What does enforcement of a PACA look like? This is probably the most commonly asked questions by both birthparents and adoptive parents, alike. In the best world, enforcement would mean that each party adheres to the terms. Should that not happen, the party seeking enforcement (usually the birthparent) would file an action to enforce the agreement in the court where the adoption was finalized (or the state where the agreement was entered into). The adoptive parents

would then be served with the court action. A hearing would follow where the burden is on the birthparent to show that the contact being denied is in the child's best interest. Ultimately, the judge will determine what is in the child's best interest and will order contact accordingly.

It is important to understand that any breach of a post adoption contact agreement will not impact the legality of the adoption or consent, and that most birthparents are generally looking for confirmation that their baby is doing well. As such, every state makes clear that violation of a post adoption contact agreement will not void a consent or an adoption. As previously underscored, because on-going contact with birthparents that is properly structured and negotiated in good faith almost always has a positive impact on the child, there is little reason to not enter into a PACA. Maryland, Virginia and the District of Columbia all have statutory provisions that allow for these contracts to be enforced and in these three jurisdictions the contracts are usually negotiated and signed before the revocation period expires which, in some cases, is pre-birth. But in all three jurisdictions the general terms and expectations are understood by the parties prior to the birth of the child.

About Jennifer Fairfax

Jennifer Fairfax is an adoption attorney, fellow of the American Academy of Adoption Attorneys, and one of FPA's professional members. For more information visit www.jenniferfairfax.com.

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