

POST ADOPTION CONTACT AGREEMENTS IN NEW YORK STATE  
(2010)

Recent amendments to the Family Court Act and the Domestic Relations Law in New York provide for court enforcement of the terms of post adoption contact agreements between adoptive parents and birth parents in agency adoptions in New York State.

Although agreements for continued contact or communications between birth parents and adoptive parents are nothing new, until the new amendments, such agreements were considered “Good Faith” agreements because, ultimately, there was no mechanism or clear right to enforce the agreement against a breaching party.

The new law makes it explicit that when the requirements of the law are met, the Court which ordered the adoption maintains jurisdiction *after finalization of the adoption* to enforce an agreement for post adoption contact made by the parties at the time the adoptive child was surrendered to the agency. The court accomplishes this by incorporating the post adoption contact agreement into the Order of Adoption at the time of the finalization.

It is important to stress at the outset that the sanction for breach of a post adoption contact agreement is NEVER to overturn the adoption. Once an adoption is finalized it is as sacrosanct as ever and the legality and stability of the parental relationship established by the Order of Adoption is in no way diminished by allowing for enforcement of post adoption contact agreements.

What has changed, however, is that if an agreement is properly created and approved, it will become part of the Order of the Court and the parties to the

agreement will be permitted to return to court to seek enforcement of the agreement even after the final Order of Adoption.

In order for a post adoption contact agreement to be incorporated into an Order of Adoption requirements set forth in the statute must be met:

1) Since it is considered a condition of the birth parent's surrender, the agreement must be made before or at the time of the surrender. Accordingly, a birth parent should not sign the surrender until the terms of the post adoption agreement have been agreed to and signed by the adoptive parents, the agency and the birth parent. The terms of the post adoption contact agreement should also be set forth in the surrender instrument itself .

2) After the post adoption contact agreement and the surrender have been signed, the agreement will *not* be enforceable unless both the surrender and the agreement are approved by a court. Under ideal circumstances, the agency will request a court to approve the surrender instrument and the post adoption contact agreement in a separate proceeding that takes place shortly after the surrender is signed. At the approval proceeding, the court will give the birth parent and anyone else whose consent to the adoption may be required an opportunity to be heard.

The court will approve a proper surrender if the Court feels it was knowingly and voluntarily made. However, the court will also scrutinize the post adoption contact agreement to determine if the agreement is in the best interests of the adoptive child. Typically, the court will appoint a Law Guardian to represent the adoptive child's interest before the court. The Law Guardian should sign the agreement if, from the child's point of view, the agreement serves the child's best

interest. If the Court determines the agreement to be in the child's best interest, the Court will issue an Order Approving the Surrender and the Agreement.

In the event the Court does not feel the agreement is in the child's best interest, the Court could still approve the surrender but refuse to approve the agreement. If this happens, the birth parent MUST be given an opportunity to withdraw her/his surrender. This scenario creates the possibility that surrender could be withdrawn even after the 30 day revocation period has expired. Although unlikely to occur, this is a stern reminder that post adoption contact agreements should always be written with the best interests of the child being paramount.

3) When the Petition for Adoption is filed (after the three month period of supervision) if there has been an approval proceeding, the Order approving the Surrender and the post adoption agreement are submitted to the court where the Petition for Adoption is filed. The "finalization court" is bound by the "approval court's" prior Order and must accept the post adoption contact agreement. If the "finalization court" determines that the adoption by the adoptive parents is in the child's best interest, the finalizing court will issue an Order of Adoption declaring the adoptive parents to be the legal parents of the child. The Order of Adoption will refer to the post adoption contact agreement and will incorporate it into its Order of Adoption. At the same time that the court issues the Order of Adoption, the court will also issue an Order Incorporation of Post-Adoption Contact Agreement and order that the adoptive parents the birth parents and any other parties that signed the agreement be served with a copy of the Order. This is the point at which the post adoption contact agreement truly becomes enforceable.

4) If at any time during the life of the agreement any party feels that another party is failing to live up to the terms of the agreement, the aggrieved party can return to the court that finalized the adoption with the Order of Incorporation

and petition the Court to enforce the agreement against the breaching party. At this point the Court must determine whether enforcement of the terms of the agreement continues to be in the best interests of the adoptive child. If the court agrees that it is, it will order the breaching party to live up to the terms of the agreement.

There are many issues presented by these new procedures and the possibility of enforcing an agreement made at the time a child is placed for adoption. How to create an agreement that speaks to the needs of the birth parents, adoptive parents and the best interests of the adoptive child and can also stand the test of time will require thoughtfulness and flexibility on the part of all concerned.