San Diego Law Review

Volume 44 | Issue 2 Article 6

5-1-2007

Continuing the Evolution: Why California Should Amend Family Code Section 8616.5 to Allow Visitation in All Postadoption Contract Agreements

Kirsten Widner

Continuing the Evolution: Why California Should Amend Family Code Section 8616.5 to Allow Visitation in All Postadoption Contact Agreements

KIRSTEN WIDNER*

TABLE OF CONTENTS

* J.D. 2007, University of San Diego School of Law; B.S. 2002, University of San Francisco. Thanks to Professors Robert Fellmeth and Laura Adams for their insights and feedback, and to my Comment Editor Philip Askim for his guidance. This Comment is dedicated to Alexander Locke, my inspiration in all that I do, with special thanks to his wonderful parents, Mary and David Locke, for never giving me any reason to worry about the enforceability of our agreement.

I. INTRODUCTION

In the last season of the popular American sitcom *Friends*, two of the main characters, a married couple, discovered that they were infertile and decided to adopt a baby. They were delighted to learn that a potential birth mother[1] wanted to meet them, and then dismayed to learn that there had been a mix-up. She thought they were another couple: a minister and a doctor. The couple pretended to be what the birth mother expected, making up stories about their church and medical practice until the husband was overcome by guilt and confessed their deceit. Feeling betrayed, the birth mother attempted to leave, but the husband stopped her and apologized, explaining that they just wanted to be parents and that his wife was a wonderful mother without a child. The birth mother accepted this explanation and agreed to place her baby with them.[2] Throughout a series of episodes dealing with the adoption process, the show portrayed the infertile married couple as a loving pair who deserved a baby, and portrayed the birth mother as a sweet but scatterbrained girl who was unsure of the identity of the birth father.[3]

---

1. The terms birth mother, birth father, birth parent, and birth relative are used throughout this Comment to refer to the biological relatives of a child placed for adoption. Not all birth parents are comfortable with these terms because some feel that the terms minimize their role. *See, e.g.*, Diane Turski, *Why Birthmother Means Breeder*, http://www.exiledmothers.com/adoption_facts/Why_Birthmother_Means_Breeder.html (last visited June 26, 2007) ("'[B]irthmother' is simply a euphemism for 'incubator' or 'breeder.'"). This Author understands and respects this position and intends no disrespect by the use of these terms. Rather, the terms were selected because they are consistently used in the literature in this area, and are almost universally understood. The treatment of these terms as separate or compound words, "birth mother" versus "birthmother," is inconsistent in the literature. This Author has chosen the former because it allows for less common combinations like "birth relatives," but has left compound uses intact when they appear in quotations from sources that favor that usage.

2. *Friends: The One with the Birth Mother* (NBC television broadcast Jan. 8, 2004).

3. *Id.*; *Friends: The One where Joey Speaks French* (NBC television broadcast Feb. 19, 2004); *Friends: The One with Rachel's Going Away Party* (NBC television broadcast Apr. 29, 2004); *Friends: The Last One* (NBC television broadcast May 6, 2004).

At one level, this story is just another variation on the classic theme of mistaken identity followed by zany antics.[4] At a deeper level, however, it may reflect the way society views the adults who are involved in adoption.[5] That view seems to be that adopting parents are good people, and they are justified in doing whatever needs to be done to give a child a good home. Birth parents, on the other hand, are foolish, immoral, or both, and it is okay to lie to them to get a child because the end goal of parenting is noble, and the child will be better off with the new family. To some extent these ideas also find expression in the adoption laws of this country,[6] but over the last thirty years both this view and the laws governing adoption have been changing.[7]

One element of this change has been an increase in "open adoptions."[8] Ironically, though, as birth parents have gained more power in selection

---

4. This is one of the oldest plot devices in comedy. *See, e.g.*, WILLIAM SHAKESPEARE, THE COMEDY OF ERRORS (T.S. Dorsch ed., Cambridge Univ. Press 1988).

5. *See* David Elkind, *Adolescents, Parenting, and the Media in the Twenty-First Century*, 4 ADOLESCENT MED. 599, 605 (1993) (arguing that media images "reflect and buttress" society's changing views of the family). There is some disagreement among sociologists as to whether society's values influence television or vice versa. For an interesting discussion of this topic, see Michael Morgan et al., *Television and Family Values: Was Dan Quayle Right?*, 2 MASS COMM. & SOC'Y 47 (1999).

6. *See, e.g.*, *In re* Baby Boy M., 272 Cal. Rptr. 27, 32 n.3 (Ct. App. 1990) (criticizing trial judge's praise of the "self-sacrifice" of adopting parents and condemnation of the morals of the birth parents). Of course, the law has never permitted obvious fraud in this context, but it did afford adopting parents broad discretion in making decisions about the adopted child, even where those decisions conflicted with promises made to the birth parent. For example:

> [A]doptive parents have the same right of custody and control of the child as if that child had been born to them and blood parents are relieved of all their legal duties and divested of all their legal rights in respect to the adopted child. An agreement providing for visitation by a third party would impair the adoptive parents' rights. Such an agreement might also impair the new parent-child relationship with very undesirable consequences. We find that such an agreement is unenforceable.

Hill v. Moorman, 525 So. 2d 681, 681–82 (La. Ct. App. 1988) (citations omitted).

7. For an excellent summary of the development of American adoption law and its recent changes, see Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997, 1003–13 (1995).

8. Open adoption is defined as:

> [A] process in which the birthparents and the adoptive parents meet and exchange identifying information. The birthparents relinquish legal and basic childrearing rights to the adoptive parents. Both sets of parents retain the right to continuing contact and access to knowledge on behalf of the child. Within this definition, there is room for greater and lesser degrees of contact between the parties.

of and access to adopting parents through the growth of independent[9] and open adoptions,[10] they have also become more vulnerable to deception by those eager to facilitate adoptions.[11] Because birth parents are more able to negotiate for ongoing contact, adopting parents sometimes feel pressured to promise a level of openness or contact that they do not really desire or intend in order to get a birth parent to place a child with them.[12] However, if they make such a promise and renege on it once the adoption is final, the birth parent may not have legal recourse because postadoption contact agreements are unenforceable in many states.[13]

Annette Baran & Reuben Pannor, *Open Adoption*, *in* THE PSYCHOLOGY OF ADOPTION 316, 318 (David M. Brodzinsky & Marshall D. Schechter eds., 1990). As the Supreme Court of Connecticut noted, the term "open adoption" is something of a misnomer.

> "[O]pen adoption" . . . conveys a misleading impression of what such agreements intend to accomplish. The plaintiff does not seek to "open," to set aside or to diminish in any way the adoptive process that has substituted the defendants as the legal parents of the child. The plaintiff's rights are not premised on an ongoing genetic relationship that somehow survives a termination of parental rights and adoption. Instead, the plaintiff is asking us to decide whether, as an adult who has had an ongoing personal relationship with the child, she may contract with the adopting parents, prior to adoption, for the continued right to visit with the child, so long as that visitation continues to be in the best interest of the child.

Michaud v. Wawruck, 551 A.2d 738, 740–41 (Conn. 1988).

9. The term "independent adoption" refers to adoptions arranged privately between the adopting parents and the birth parents without the assistance of an adoption agency. Actual statistics on the number and types of adoptions have been difficult to collect because there is no comprehensive national data collection system, particularly for private agency and independent adoptions, and because of the privacy protections in place for adoption. However, one study shows that the percentage of independently arranged adoptions declined steadily after adoptions became more formalized in the middle of the twentieth century, reached a low of 21% in 1971, and then increased to 31% in 1986. Kathy S. Stolley, *Statistics on Adoption in the United States*, THE FUTURE OF CHILDREN, Spring 1993, at 26, 30.

10. Specific statistics on this are unavailable for the reasons given in note 9. However, the growing number of state legislatures and courts that have addressed the issue suggests that the practice is common, *see infra* note 13, and most commentators agree, *see, e.g.*, Susan Frelich Appleton, *Adoption in the Age of Reproductive Technology*, 2004 U. CHI. LEGAL F. 393, 445 (2004).

11. *See* Baran & Pannor, *supra* note 8, at 330.

12. Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 917–22 (1991) (arguing that, due to the shortage of adoptable infants, adoption is now a "provider's market" and birth parents can "dictate whimsical requirements for the adoptive home"). For an example of adoptive parents reconsidering the terms of a postadoption visitation agreement after the adoption became final, see Groves v. Clark, 982 P.2d 446, 447–48 (Mont. 1999).

13. Three states have specific statutory provisions prohibiting enforcement of postadoption contact agreements. N.H. REV. STAT. ANN. § 170-B:14 (West, Westlaw through 2007 Reg. Sess.); OHIO REV. CODE ANN. §§ 3107.62, 3107.63, 3107.65 (West, Westlaw through 2007 legislation); TENN CODE ANN. § 36-1-121 (West, Westlaw through 2007 First Reg. Sess.). Another seven states have case law indicating that postadoption contact agreements are not enforceable. *See In re* Adoption of Hammer, 487 P.2d 417, 420 (Ariz. Ct. App. 1971); People *ex rel.* MM, 726 P.2d 1108, 1124–25 (Colo. 1986); *In re* MM, 619 N.E.2d 702, 708 (Ill. 1993); Birth Mother v. Adoptive

This adds to the emotional pain of an already traumatic experience for birth parents,[14] and it cheats other adopting parents, such as the actual minister and doctor in the sitcom example above, of the opportunity to parent that child.

At first blush it may seem that this problem could be avoided because, as voluntarily entered agreements with consideration—the placement of the baby with a particular family in exchange for a promise of continuing contact by the adoptive parent—such arrangements would be enforceable under normal contract law.[15] However, adoption is a creature of state statutory law,[16] and for both this reason and important public policy reasons,[17] adoption is not governed by general common law contract

---

Parents, 59 P.3d 1233, 1235–36 (Nev. 2002); *In re* Guardianship of K.H.O., 736 A.2d 1246, 1259 (N.J. 1999); Lowe v. Clayton, 212 S.E.2d 582, 587 (S.C. 1975); Stickles v. Reichardt, 234 N.W. 728, 730 (Wis. 1931). Seven states have statutory provisions allowing some limited enforcement, but excluding many agreements involving adoptions of infants voluntarily relinquished at birth. CAL. FAM. CODE § 8616.5 (West, Westlaw through 2007 Reg. Sess.); FLA. STAT. ANN. § 63.0427 (West, Westlaw through 2007 First Reg. Sess.); IND. CODE ANN. §§ 31-19-16-1 to 31-19-16-9 (West, Westlaw through 2007 Pub. Laws); LA. CHILD. CODE ANN. art. 1269.1 (West, Westlaw through 2006 Sess. Acts); MONT. CODE ANN. § 42-5-301 (West, Westlaw through 2005 Reg. Sess.); OKLA. STAT. ANN. tit. 10, § 7003-5.6f (West, Westlaw through 2007 First Reg. Sess.); R.I. GEN. LAWS § 15-7-14.1 (West, Westlaw through 2006 legislation). Only ten states have statutory provisions providing for the enforcement of all voluntary postadoption contact agreements, subject to a "best interests of the child" standard. ALASKA STAT. § 25.23.180(j), (l) (2005); CONN. GEN. STAT. ANN. §§ 17a-112, 45a-715 (West, Westlaw through Jan. 2007 Reg. Sess.); MD. CODE ANN., FAM. LAW §§ 5-308, 5-3A-08, 5-3B-07 (West, Westlaw through 2007 Reg. Sess.); MASS. GEN. LAWS ANN. ch. 210 § 6C (West, Westlaw through 2007 Sess.); MINN. STAT. ANN. § 259.58 (West, Westlaw through 2007 Reg. Sess.); N.M. STAT. ANN. §32A-5-35 (West, Westlaw through June 2007 Reg. Sess.); N.Y. DOM. REL. LAW § 112-b (West, Westlaw through 2007 legislation); OR. REV. STAT. ANN. § 109.305 (West, Westlaw through 2005 Reg. Sess.); S.D. CODIFIED LAWS § 25-6-17 (West, Westlaw through 2007 Reg. Sess.); WASH. REV. CODE ANN. § 26.33.295 (West, Westlaw through 2007 legislation). The remaining states lack explicit statutory provisions or clear case law on the subject.

14. Anne B. Brodzinsky, *Surrendering an Infant for Adoption: The Birthmother Experience*, *in* THE PSYCHOLOGY OF ADOPTION, *supra* note 8, at 295, 304 ("[F]or many women, the experience of surrendering an infant for adoption is a nearly intolerable loss.").

15. For a contract to be valid in California, it must have (1) parties capable of contracting; (2) consent; (3) a lawful object; and (4) consideration. CAL. CIV. CODE § 1550 (West, Westlaw through 2007 Reg. Sess.). For a definition of consideration, see RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981).

16. *In re* Baby Boy M., 272 Cal. Rptr. 27, 29 (Ct. App. 1990) ("The law of adoptions is purely statutory." (citing *In re* Adoption of McDonald, 274 P.2d 860 (1954))).

17. *In re* Jaren's Adoption, 27 N.W.2d 656, 660 (Minn. 1947) ("[T]he public, as well as those immediately concerned, have vital interests in matters of this nature, since, obviously, it is a matter of immediate concern to all members of the state.").

principles.[18] Thus the enforceability of postadoption contact agreements varies widely from state to state.[19] This body of state law is evolving every year as legislatures and courts continue to struggle with competing policy considerations regarding how much openness to permit and protect in adoption.[20]

California's statute on postadoption contact agreements[21] provides an excellent illustration of this evolution. California began regulating agreements for postadoption contact by allowing "kinship adoption agreements" in 1997.[22] Kinship adoption agreements were intended to encourage adoptions of youth in the dependency system by family members.[23] The law was changed in 2000 to allow "postadoption contact agreements" in all adoptions where they are voluntarily entered into by all parties and are in the best interests of the child.[24] These agreements are currently enforceable under California Family Code section 8616.5, but they are limited to sharing information about the child and cannot include visitation if the birth relative and the child did not have an existing relationship before the adoption.[25] Moreover, although in adoptions out of the dependency system the social worker is to inform the birth parents of the opportunity to form postadoption contact agreements,[26] in all other adoptions there is

---

18. *See, e.g.*, Birth Mother v. Adoptive Parents, 59 P.3d 1233, 1235 (Nev. 2002) ("[W]ithout such a specific Nevada statutory provision [allowing agreements for postadoption contact], the agreement between the birth mother and the adoptive parents is unenforceable.").

19. *See supra* note 13. This inconsistency makes negotiating postadoption contact especially difficult in interstate adoptions because the parties must determine which state's laws will control and how that state views these agreements.

20. For example, Maryland has recently enacted a bill that provides broad enforcement of postadoption contact agreements. MD. CODE ANN., FAM. LAW §§ 5-308, 5-3A-08, 5-3B-07 (West, Westlaw through 2007 Reg. Sess.). This is not necessarily a departure from prior practice. Maryland courts have recognized that these agreements could be enforced in equity since the 1980s, but it does signal new recognition of the value of these agreements. *See* Weinschel v. Strople, 466 A.2d 1301 (Md. Ct. Spec. App. 1983).

21. CAL. FAM. CODE § 8616.5 (West, Westlaw through 2007 Reg. Sess.).

22. *Id.* § 8714.7.

23. 1997 Cal. Stat. ch. 793. Kinship adoption agreements preceded and are different from "Kin-GAP" guardianships. Kin-GAP guardianships provide another arrangement, short of adoption, to make it easier for family members to provide care for children who would otherwise be in the foster care system. *See* CAL. WELF. & INST. CODE §§ 11360–11375 (West, Westlaw through 2007 Reg. Sess.).

24. 2000 Cal. Stat. ch. 910.

25. CAL. FAM. CODE § 8616.5(b)(3) (West, Westlaw through 2007 Reg. Sess.).

26. *Id.* § 8715(b). The corresponding regulations clarify that the agency must inform both the adoptive and birth parents of the availability of postadoption contact agreements. CAL. CODE REGS. tit. 22, § 35179.1 (2005). Notably, these regulations have not been updated to reflect the new terminology or expanded scope of these agreements, but rather refer to them as kinship adoption agreements which apply only to relatives. *Id.*

no affirmative duty on California courts or adoption facilitators to inform birth parents of this option.[27]

This Comment argues that California should continue the evolution of its statutory scheme by: (1) allowing and enforcing visitation terms in all adoption agreements that meet the statutory requirements of voluntariness and the best interests of the child,[28] and (2) requiring that the consent process inform all birth parents of the possibility of these agreements. Part II explores the history and current status of California's treatment of postadoption contact agreements, including the protections provided for adoptive parents and adopted children. Part III demonstrates that the current limitation on visitation is arbitrary and unnecessary and that important policy considerations support removing it. Part III also analyzes the arguments against expanding the law to allow visitation and concludes that these concerns are outweighed by the policies favoring expansions. Part IV focuses on the need to inform all birth parents of their options in this regard. Finally, Part V provides specific recommendations for amending the California postadoption contact agreement statute to better serve the interests of all parties and the State's public policy goals. Though this Comment focuses on California law, the ideas explored here are applicable to all states.[29]

II. HISTORY AND CURRENT STATUS OF CALIFORNIA LAW

Prior to 1997, California had no statutory provision directly related to postadoption contact agreements, and the State's case law had not clearly addressed the enforceability of such agreements. Two California Court of Appeals cases decided in 1984 and 1985 held that courts could not award visitation to a birth relative after the child had been adopted, but neither involved a prior voluntary agreement between the adoptive

27. The legislature has not yet required notice of this option in other adoptions, and in the absence of a statutory requirement, it does not rise to the level of a due process right. *See In re* Kimberly S., 83 Cal. Rptr. 2d 740 (Ct. App. 1999); *In re* Zachary D., 83 Cal. Rptr. 2d 407 (Ct. App. 1999).

28. CAL. FAM. CODE § 8616.5(b)(1) (West, Westlaw through 2007 Reg. Sess.).

29. This discussion is particularly relevant to Indiana, Louisiana, and Rhode Island, which have all limited enforcement of postadoption visitation agreements to situations where the adopted child has some sort of relationship with the birth parent. IND. CODE ANN. § 31-19-16-2 (West, Westlaw through 2007 Pub. Laws); LA. CHILD. CODE ANN. art. 1269.1 (West, Westlaw through 2006 Sess. Acts); R.I. GEN. LAWS § 15-7-14.1 (West, Westlaw through 2006 legislation).

parent and the birth relatives in question.[30] Several other cases acknowledged the existence of open adoptions, but none specifically ruled on the enforceability of agreements for ongoing contact.[31]

Thus, the legislature was dealing with a clean slate when it made its first foray into this area with the passage of California Family Code section 8714.7 in 1997.[32] This statute allowed formal, enforceable agreements for ongoing contact in cases where children were being adopted by a relative, and was intended to promote adoption out of the foster care system.[33] The legislature made this intention explicit in section 8714.5 of the Family Code:

> It is the intent of the Legislature to expedite legal permanency for children who cannot return to their parents and to remove barriers to adoption by relatives of children who are already in the dependency system or who are at risk of entering the dependency system.
>
> This goal will be achieved by empowering families, including extended families, to care for their own children safely and permanently whenever possible, by preserving existing family relationships, thereby causing the least amount of disruption to the child and the family . . . .[34]

The 1997 law was both popular and successful. The California Adoption Initiative Update issued by the Department of Social Services credited section 8714.7 as one of the reforms that allowed them to increase the number of public agency adoptions in California by 88% over three years, and to increase the proportion of children adopted from long term foster care by 42%.[35]

Inspired by the success of kinship adoption agreements, the legislature amended the law in 2000, changing the name of the agreements to "postadoption contact agreements" and expanding their applicability to all adoptions, regardless of whether the child was related to the adopting parent.[36] This version of the statute allows for enforcement of agreements for visitation between the child and various birth relatives with whom he

---

30. Huffman v. Grob, 218 Cal. Rptr. 659 (Ct. App. 1985); Marckwardt v. Superior Court, 198 Cal. Rptr. 41 (Ct. App. 1984).

31. *See In re* Sylvia R., 64 Cal. Rptr. 2d 93, 95 (Ct. App. 1997); *In re* Teneka W., 43 Cal. Rptr. 2d 666, 668 (Ct. App. 1995); *In re* Alma B., 26 Cal. Rptr. 2d 592, 595 (Ct. App. 1994); *In re* Baby Boy M., 272 Cal. Rptr. 27, 33 (Ct. App. 1990); *In re* Angela R., 260 Cal. Rptr. 612 (Ct. App. 1989).

32. 1997 Cal. Stat. ch. 793.

33. *Id.*

34. CAL. FAM. CODE § 8714.5(a)(1), (a)(2) (West, Westlaw through 2007 Reg. Sess.) (section numbers omitted).

35. *Dependent Children: Postadoption Contact Agreements: Hearing on S.B. 2157 Before the S. Judiciary Comm.*, 1999–2000 Leg., Reg. Sess. 1–2 (Cal. 2000), *available at* CA B. An., S.B. 2157 Sen., 3/28/2000 (Westlaw) (bill analysis commenting on purpose of legislation).

36. 2000 Cal. Stat. ch. 910.

or she had an existing relationship.[37] Birth relatives who did not have an existing relationship with the child can have postadoption contact agreements, but these must be limited to the sharing of information about the child.[38]

The 1997 and 2000 versions of the statute resided in Chapter 2 of the Adoption Division of the Family Code, which pertains to agency adoptions, specifically those out of the dependency system.[39] To make clear that the postadoption contact agreement section applies to all adoptions, not just those out of dependency, in 2003 the legislature renumbered it to place it in the general provisions of Chapter 1, giving it its current section number of 8616.5.[40] In 2004, the legislature made an additional amendment to allow Indian Tribes to be parties to postadoption contact agreements where the child being adopted is American Indian.[41] Thus, the current law provides the option of postadoption contact agreements for birth relatives and Indian Tribes in all adoptions, but limits the agreements to exchange of information about the child in situations where there is no existing relationship between the child and the birth relative. The Family Code does not define "existing relationship,"[42] but it seems clear that this provision intends to prohibit visitation by birth parents who surrender their children at birth.[43]

---

37. CAL. FAM. CODE § 8714.7(b)(1)(A) (West, Westlaw through 2007 Reg. Sess.).

38. *Id.* § 8714.7(b)(2).

39. There is some indication that the legislature initially only intended the statute to apply to adoptions from the dependency system, and felt it was unnecessary for private adoptions. *Dependent Children: Postadoption Contact Agreements: Hearing on S.B. 2157 Before the Assemb. Comm. on Human Servs.*, 1999–2000 Leg., Reg. Sess. 3 (Cal. 2000), *available at* CA B. An., S.B. 2157 Assem., 6/21/2000 (Westlaw) ("Postadoptive contact agreements are routinely utilized in the private adoption system. This bill authorizes the use of open adoption agreements for the adoption of youth in the juvenile dependency system in the same manner they are used in the private adoption system.").

40. 2003 Cal. Stat. ch. 251.

41. 2004 Cal. Stat. ch. 858. Additional minor amendments to clarify these provisions relating to Indian Tribes recently became law. 2006 Cal. Stat. ch. 838, § 9.

42. *See* CAL. FAM. CODE §§ 8500–8548 (West, Westlaw through 2007 Reg. Sess.).

43. Other states with similar statutory limitations on postadoption contact use slightly clearer language. IND. CODE ANN. § 31-19-16-2 (West, Westlaw through 2007 Pub. Laws) (allowing postadoption contact privileges where "the child is at least two (2) years of age and the court finds that there is a significant emotional attachment between the child and the birth parent"); LA. CHILD. CODE ANN. art. 1269.1 (West, Westlaw through 2006 Sess. Acts) (enforcing agreements where "[t]he child has an established, significant relationship with that person to the extent that its loss would cause substantial harm to the child"); R.I. GEN. LAWS § 15-7-14.1 (West, Westlaw through 2006 legislation) (requiring a finding by the court that there is a "significant emotional attachment between the child and the birth parent").

The restriction on visitation is not the only limitation on postadoption contact agreements. The statute has always provided significant protections for adoptive parents and adopted children who are parties to these agreements. Most importantly, the agreement must be voluntary, in writing, and in the best interests of the child.[44] This means that (1) adopting parents cannot be forced by the courts to allow visitation to which they have not willingly consented;[45] (2) birth relatives cannot make spurious claims of agreement where none exists in writing; and (3) the court must scrutinize any agreement before it to ensure it will not be harmful to the child involved. The child is considered a party to the agreement and, if twelve or older, is required to give written consent.[46] This gives the child some protection against being forced to continue a relationship with a birth relative with whom he or she does not wish to retain contact.[47] The adoption cannot be set aside for failure to comply with the agreement,[48] nor can monetary damages be granted for breach.[49] Thus, the worst result facing a party who breaches the agreement is an order enforcing visitation, and even this can be avoided if the breaching

---

44. CAL. FAM. CODE § 8616.5(b)(1) (West, Westlaw through 2007 Reg. Sess.).

45. Though the courts have not yet considered the constitutional implications of this aspect of voluntariness, it should prevent the statute from running afoul of Fourteenth Amendment protection of a parent's right to "make decisions concerning the care, custody, and control of their children." Troxel v. Granville, 530 U.S. 57, 66 (2000). The *Troxel* Court held that in the absence of a finding of parental unfitness, court-ordered visitation for birth grandparents is unconstitutional. *Id.* at 70. The visitation in that case is distinguishable from postadoption contact agreements because it was not voluntarily consented to by the parent. For a fuller discussion of *Troxel* and parental autonomy, see *infra* text accompanying notes 156–161.

46. CAL. FAM. CODE § 8616.5(d) (West, Westlaw through 2007 Reg. Sess.). Though it is progressive of California to make the child a party to the contract, the choice of age twelve seems arbitrary. Is a ten-year-old any less interested in this decision or less able to understand the situation? Though it may be arbitrary, California's position is consistent with other states that make the child a party to these contracts, such as Indiana and Rhode Island, which both also use age twelve. IND. CODE ANN. § 31-19-16-2(6) (West, Westlaw through 2006 Pub. Laws); R.I. GEN. LAWS § 15-7-14.1(b)(5) (West, Westlaw through 2006 legislation).

47. CAL. FAM. CODE § 8616.5(d) (West, Westlaw through 2007 Reg. Sess.). This section does provide an exception to the requirement that a child give consent if the court finds, by a preponderance of the evidence, that the agreement is in the best interests of the child. It seems unlikely, however, that the court would make such a finding if the child were strongly opposed to the contact.

48. *Id.* § 8616.5(e)(1), (k).

49. *Id.* § 8616.5(g). Subsection (g) references subsection (e) which provides warnings that must be included in the postadoption contact agreement. *Id.* The contents of these warnings are not otherwise set out in the statute, but, based on both the importance of their contents and the cross-references to them, they seem to be intended as independent provisions as well as warnings.

party can demonstrate that enforcement would not be in the best interests of the child.[50]

The legislature also limited the potential financial burden of enforcement actions. Petitioners must at least attempt to mediate the dispute in good faith prior to bringing a court action,[51] and the costs for mediation or dispute resolution are borne by each party, excluding the child.[52] Thus, even if the birth relative accuses the adoptive parents of breaching the agreement, a costly trial can be avoided by resolving the matter in mediation. In the event that mediation fails and the dispute does end up in court, costs can be minimized because neither testimony nor an evidentiary hearing is required.[53] The person bringing the action must bear the costs of litigation unless it is found that a party, other than the child, breached the agreement without good cause.[54]

There have been no published cases interpreting the current version of section 8616.5. Two notable cases did weigh in on the original kinship adoption agreement statute,[55] however, and seem to apply to postadoption contact agreements. These cases, *In re Kimberly S.*[56] and *In re Zachary D.*,[57] both held that birth parents losing their parental rights did not have to be told that kinship adoption agreements could provide them an option for ongoing contact with their children. The Third District Court of Appeals acknowledged that, at least in some cases, notification would be desirable, but found that the legislature had not required it.[58] The Fifth District Court of Appeals noted that birth parents had no due process right to notification.[59]

---

50. *Id.* § 8616.5(h). Although this Comment began by suggesting that the adoptive parents may be the ones tempted to breach the agreement, the statutory language suggests that the agreement is enforceable against all parties, including the birth relatives, if it is in the best interests of the child.

51. *Id.* § 8616.5(f).

52. *Id.* § 8616.5(i).

53. *Id.* § 8616.5 (f), (h)(2)(C). Protection from unexpected costs is a vital part of this statute. Adopting parents might otherwise be deterred from entering into a postadoption contact agreement for fear of having the expense of litigating it if something goes wrong, and birth parents often have fewer financial resources, and may not be able to afford an expensive trial to enforce their rights under an agreement.

54. *Id.* § 8616.5(i).

55. *Id.* § 8714.7.

56. 83 Cal. Rptr. 2d 740 (Ct. App. 1999).

57. 83 Cal. Rptr. 2d 407 (Ct. App. 1999).

58. *Id.* at 408, 410.

59. *In re Kimberly S.*, 83 Cal. Rptr. 2d at 747. It should be noted that both *Kimberly S.* and *Zachary D.* were dependency cases, where the birth parents' parental

Following *Kimberly S.* and *Zachary D.*, the state legislature passed the 2000 amendments to what is now the postadoption contact agreement statute. One of the amendments requires that the social study conducted for the court in dependency cases address whether or not the social worker discussed a postadoption contact agreement with the child's birth parents.[60] However, this language applies only to adoptions out of the dependency system, and it does not reach birth parents who are voluntarily relinquishing children in independent or private agency adoptions.[61]

III. THE CASE FOR EXPANDING THE AVAILABILITY OF VISITATION TO ALL ADOPTIONS

Several important public policy considerations favor expanding the visitation provisions of California Family Code section 8616.5. These include the best interests of the child, the well-being of the birth parent, fairness considerations, and the encouragement of adoption.

A. Best Interests of the Child

Under the statute, the best interests of the child standard can be used to protect against unhealthy postadoption contact.[62] However, in many cases, the best interests of the child will be served by an ongoing relationship with a birth relative. By knowing the birth relative, the adoptee will be better able to navigate through the unique identity issues adoptees face and will have easy access to medical and family background information.

---

rights were terminated by the court. In California, attorneys are generally appointed for parents in these cases, so arguably the birth parents should have been informed of the availability of kinship adoption agreements by their counsel. *See* CAL. WELF. & INST. CODE § 366.26 (West, Westlaw through 2007 Reg. Sess.). *But see In re Kimberly S.*, 83 Cal. Rptr. 2d at 747 (holding that counsel's failure to advise about availability of kinship adoption agreements did not require reversal of order terminating parental rights).

60. 2000 Cal. Stat. ch. 930 ("This bill would require the social study to also contain a specified discussion regarding the parent's option to enter into a postadoption contact agreement, thereby imposing new duties on local personnel and creating a state-mandated local program."); *see also Dependent Children: Postadoption Contact Agreements: Hearing on S.B. 2157 Before the S. Rules Comm.*, 1999–2000 Leg., Reg. Sess. 5 (Cal. 2000), *available at* CA B. An., S.B. 2157 Sen., 7/03/2000 (Westlaw) ("This would ensure that birth parents are aware of this option, and thus perhaps alleviate their concerns and resistance to placing their child for adoption."). Although it is not explicitly stated in the legislative history, the timing indicates that the amendment may be a reaction to the courts' holdings in *Kimberly S.* and *Zachary D.*

61. CAL. FAM. CODE § 8715(b) (West, Westlaw through 2007 Reg. Sess.). The need to expand this provision to reach these other types of adoptions is discussed further in Part IV of this Comment. *See infra* Part IV.

62. *See, e.g.*, CAL. FAM. CODE § 8616.5(f) (West, Westlaw through 2007 Reg. Sess.) ("The court may not order compliance with the agreement absent a finding that . . . the enforcement is in the best interests of the child.").

Psychologists have identified several identity issues unique to adoptees[63] which can lead to shame, embarrassment, and lowered self esteem.[64] Two of these identity issues can be alleviated, at least partially, by allowing the child to build a relationship with a birth relative. The first is prolongation of family romance fantasy, a typically brief period in normal development when children doubt they are their parents' children and imagine other, better parents.[65] It develops as a way of coping with disappointment and ambivalence toward parents.[66] For adoptees, this fantasy has a dimension of reality because there *are* other parents. In closed adoptions, the child can become fixated on imagining the unknown parents, impeding their overall identification process.[67] If the child is allowed visitation with the birth parent, however, then they cannot create a new image from whole cloth. Though the child may still fantasize about life with the birth parents, these fantasies will be more grounded in reality, and the adoptive parents are likely to compare more favorably than they would to a fiction.

The second identity issue that visitation can address is "genealogical bewilderment."[68] This term was coined by H. J. Sants in 1964,[69] and many psychologists have since built upon it.[70] Though descriptions vary somewhat, this bewilderment can be summed up as confusion and uncertainty resulting from lack of knowledge of the adoptee's background, inability to identify with the adoptive parents because of hereditary differences in appearance or intelligence,[71] and impaired identity formation "because an essential part of himself or herself has been cut off and remains unknown."[72] This concept is not unique to psychological literature; it is also a theme of the open adoption records movement, or

63. Although there is no consensus that identity problems are more severe for adoptees than for other children, resolving identity issues is more complex for adopted adolescents. Janet L. Hoopes, *Adoption and Identity Formation*, *in* THE PSYCHOLOGY OF ADOPTION, *supra* note 8, at 144, 149.

64. Baran & Pannor, *supra* note 8, at 318.

65. Hoopes, *supra* note 63, at 152.

66. *Id.*

67. *Id.*

68. *Id.*

69. H. J. Sants, *Genealogical Bewilderment in Children with Substitute Parents*, 37 BRIT. J. MED. PSYCHOL. 133, 133 (1964).

70. *See* Hoopes, *supra* note 63, at 152–53.

71. Sants, *supra* note 69, at 136, 138. Sants described this as a lack of "biological link." *Id.* at 138.

72. Hoopes, *supra* note 63, at 152.

"search movement."[73] Betty Jean Lifton, an adoptee and prominent search activist, calls it "cosmic loneliness" and explains:

> Without concrete information about the circumstances of your birth, especially about the woman who gave you life, the adoptee often has the sense of not having been born at all. . . . The adoptee feels alone in the world. Connected to his adoptive home by the fragmentary adoption narrative and disconnected from his real biological narrative, he has lost his place on the intergenerational chain of being.[74]

Some argue that the need to know one's origins is not as universal as these psychologists and search activists would have us believe, but this does not diminish the fact that it is a very real need for many adoptees.[75]

Birth relative visitation clearly and directly addresses the genealogical bewilderment problem. Instead of being "cut off" from their origins,[76] children who visit with their birth relatives can receive direct answers to their questions and learn their full biological "narratives."[77] Additionally, visitation can help relieve the sense of rejection that is often conveyed by a birth parent's absence.[78]

In additional to these psychological benefits, a personal relationship with the birth relative supports physical health by providing ready access to medical information. Although many states require that background medical information be provided at the time of adoption,[79] this information may be incomplete because many hereditary diseases develop later in adulthood and may not have shown up by the time of the adoption.[80]

---

73. *See* KATARINA WEGAR, ADOPTION, IDENTITY AND KINSHIP 8–10 (1997). The "search movement" was a social movement, primarily made up of adoptees, but also some birth parents, seeking more openness in adoption records. For an excellent history of this movement, see Elizabeth J. Samuels, *The Idea of Adoption: An Inquiry into the History of Adult Adoptee Access to Birth Records*, 53 RUTGERS L. REV. 367 (2001).

74. BETTY JEAN LIFTON, JOURNEY OF THE ADOPTED SELF: A QUEST FOR WHOLENESS 46–47 (1994).

75. Katarina Wegar states:

> Arguments based on the *real desire* of adoptees to know or meet their biological relatives need not be based on essentialist or universalist assumption of innate sources. Considering the weight attributed to the biological underpinnings of parent-child relationships in this society, it is both cruel and unreasonable to expect adoptees and their biological parents to feel otherwise.

WEGAR, *supra* note 73, at 136–37.

76. Hoopes, *supra* note 63, at 152.

77. LIFTON, *supra* note 74, at 47.

78. Elizabeth J. Samuels, *Time to Decide? The Laws Governing Mothers' Consents to the Adoption of Their Newborn Infants*, 72 TENN. L. REV. 509, 531 (2005).

79. *See, e.g.*, CAL. FAM. CODE § 8706 (West, Westlaw through 2007 Reg. Sess.).

80. Many of the leading causes of death are hereditary and do not take strike until middle age or the senior years. The University Hospital, Adult Onset Disease Program Introduction, http://www.theuniversityhospital.com/adultgenetics/intro.htm (last visited July 2, 2007).

In summary, allowing the maximum amount of contact agreeable to the parties supports a child's best interests by promoting his or her mental, emotional, and physical well-being.

B. Well-being of the Birth Parent

The child is not the only party whose best interests may be served by postadoption visitation.[81] Birth parents may also benefit from knowing their child and seeing them happy and successful in the adoptive environment.[82] The old view, that closed adoption helps birth parents put an unfortunate experience behind them and get on with their lives, has proved to be fiction.[83] Social workers and psychologists now recognize that "[g]iving birth to a child and being that child's birth mother is a fact of life that cannot be wiped out."[84]

It is not simply that the birth experience cannot be wiped out; it produces an intense and ongoing sense of loss which has long-term consequences for the life of the birth mother.[85] For example, one study found that 71% of birth mothers believed that their experience had negatively impacted their subsequent marital relationships.[86] Although most formal studies have focused on birth mothers, there is clinical evidence that birth fathers also experience this sense of loss, which results in feelings of grief and anger.[87] This feeling of loss stems, at least in part, from the absence of the child from the birth parent's life.

The birth parent experiences grief similar to that encountered by someone facing the death of a loved one.[88] This problem may be

81. Though this section focuses on the well-being of the birth parents, an open relationship can benefit the adoptive parents as well. At a minimum, the adoptive parents can benefit from the increased well-being of their child and access to their medical history. *See supra* text accompanying notes 62–80. They can also benefit by developing a relationship with someone with whom they share a unique bond: their love of the child.

82. Baran & Pannor, *supra* note 8, at 329 ("Birthmothers, who are comfortable with their decision and able to know how that child is progressing, are better able to move forward.").

83. VIVIAN B. SHAPIRO ET AL., COMPLEX ADOPTION AND ASSISTED REPRODUCTIVE TECHNOLOGY 148 (2001); *see also* Brodzinsky, *supra* note 14, at 295–300 (discussing historical perspectives on the birthmother experience and their development).

84. Baran & Pannor, *supra* note 8, at 329.

85. *See* Brodzinsky, *supra* note 14, at 300–03.

86. *Id.* at 301.

87. SHAPIRO ET AL., *supra* note 83, at 155.

88. Brodzinsky, *supra* note 14, at 310–14 (suggesting a bereavement model based on mourning norms after a death to help birth parents deal with their loss).

compounded in the adoption context because if the child was relinquished at birth, birth parents may be unable to avail themselves of some of the most important salves of the grieving process, including reminiscing about the lost love one, sharing stories, and receiving sympathy from others who share the loss.[89] Visitation can provide these tools of mourning back to the birth parent by giving them stories to tell about the child and a connection with others who care about the child.

While openness in adoptions, including visitation, will help some birth parents cope with the loss of a child, it will not help all of them. Some find the closure of a closed adoption helpful in the immediate moment of loss.[90] But for some birth parents openness provides important benefits. As one text put it:

> Open adoption enables some birth parents to internalize a less negative sense of themselves because they have chosen the adoptive parents whom they feel will value and treasure their child. The separation from the baby can be less traumatic, relieving guilt and allowing the birth mother to move on more easily with her own development.[91]

It is true that visitation is not strictly necessary for the birth parent to benefit from openness. Different degrees of contact will work better for different sets of birth parents and adoptive parents.[92] Still, knowing that visitation may mitigate the negative impact of adoption for some birth parents, we should allow them the flexibility to negotiate for the degree of contact that they feel is appropriate.

C. Fairness

Principles of fairness also support a broader scope of visitation in postadoption contact agreements for two reasons. First, California's own forms are unfairly misleading under the current law. Second, because visitation agreements are created irrespective of the current statute, their unenforceability can create situations of deceit and unfair gain.

The fact that California Family Code section 8616.5 does not provide for visitation in situations where the birth relative does not have an existing relationship with the child does not prevent people from bargaining for and agreeing to visitation in placements at birth. Outside of the

---

89. *Id.* at 312.

90. SHAPIRO ET AL., *supra* note 83, at 156 ("For some, closure is helpful in the immediate crisis. This defense may continue for many years; even at a point later in life, some birth parents cannot express feelings about the adoption and do not wish to deal with the subject."). The authors note, however, that this response to the loss may "come at a great emotional cost to future recovery." *Id*.

91. *Id*. (citation omitted).

92. *See id*. at 169.

statute, there is no clear indication in the public materials published by the State that there is any limitation on the types of contact to which the parties can agree.

For example, the California Courts website provides self-help access to a variety of forms to help adopting parents.[93] Included on this site is a standard form for postadoption contact agreements.[94] This form lists visitation as one of several options that the involved parties choose from in structuring their ongoing contact, making no mention of the statutory prohibition for birth parents who did not have an existing relationship with the child.[95] In fact, the form does not refer to the current statute at all, though it does reference the old kinship adoption statute which was even more limiting.[96] The self-service web page also contains forms for: requesting enforcement of a postadoption contact agreement;[97] answering an enforcement request;[98] and for the judicial order to enforce, end, or change a contact agreement.[99] All of these forms mention other requirements of the statute, such as the requirement to attempt mediation before requesting judicial enforcement,[100] but they make no mention of any limitation on enforcement of visitation based on prior relationship with the child. A party to a postadoption contract made using these forms would have no idea that it would not be enforceable under the law.

Refusing to enforce an otherwise valid voluntary agreement made in apparent compliance with the State's own forms appears unfair. Courts may disagree because the form does reference a statute and because

93. California Courts Self-Help Center, Adoption Forms, http://www.courtinfo.ca.gov/selfhelp/family/adoption/adoptforms.htm (last visited July 2, 2007).

94. JUDICIAL COUNCIL OF CAL., CONTACT AFTER ADOPTION AGREEMENT (rev. 2003), http://www.courtinfo.ca.gov/forms/fillable/adopt310.pdf.

95. *Id.*

96. *Id.*

97. JUDICIAL COUNCIL OF CAL., REQUEST TO: ENFORCE, CHANGE, END CONTACT AFTER ADOPTION AGREEMENT (rev. 2003), http://www.courtinfo.ca.gov/forms/fillable/adopt315.pdf.

98. JUDICIAL COUNCIL OF CAL., ANSWER TO REQUEST TO: ENFORCE, CHANGE, END CONTACT AFTER ADOPTION AGREEMENT (rev. 2003), http://www.courtinfo.ca.gov/forms/fillable/adopt320.pdf.

99. JUDICIAL COUNCIL OF CAL., JUDGE'S ORDER TO: ENFORCE, CHANGE, END CONTACT AFTER ADOPTION AGREEMENT (rev. 2003), http://www.courtinfo.ca.gov/forms/fillable/adopt325.pdf.

100. CAL. FAM. CODE § 8616.5(h)(2)(C) (West, Westlaw through 2007 Reg. Sess.).

citizens are presumed to know the law.[101] Most would agree, however, that people should not be entitled to gain from promises they do not intend to keep.[102] It follows, then, that birth parents who select specific adoptive parents for placement of their child in reliance on a promise of visitation should have recourse if that visitation is revoked without good cause. Justice Rose said as much in her dissent when the Nevada Supreme Court refused to enforce such an agreement:

> I . . . believe it is patently unfair to have a biological parent agree to the adoption of her or his child on the basis that continued contact will be permitted, but upon approval of the adoption, refuse to enforce the continued contact agreement. A parent may specifically agree to an adoption of a child based on the ability to have periodic contact with the child. The enforcement of the adoption agreement without also recognizing the contact provision leaves the biological parent with an adoption she or he never would have agreed to otherwise. We should not permit birth parents to be so misled.[103]

Other courts have held that such a misleading promise amounts to coercion, and have invalidated adoptions on this basis.[104] Though this response deals with the fairness issue, it seems to ignore the best interests of the child. Surely the child's interests are most often better served by enforcing the agreement and allowing the child to remain in the home he or she has become accustomed to, with the only parents he or she may have ever known, rather than by reversing the adoption.[105] Fairness is important but should not overshadow the child's interests.

D. Encouraging Adoption

As mentioned in Part II of this Comment, the purpose of the original kinship adoption agreement statute was to encourage adoptions from the

---

101. Atkins v. Parker, 472 U.S. 115, 130 (1985) ("The claim that petitioners had a . . . right to better notice . . . is without merit. All citizens are presumptively charged with knowledge of the law . . . .").

102. This situation is generally considered at best deceit, and at worst fraud. *See, e.g.*, Graham v. L.A. First Nat. Trust & Sav. Bank, 43 P.2d 543, 545 (Cal. 1935) ("A promise made without any intention of performing it constitutes actual fraud and deceit." (citing Boulevard Land Co. v. King, 13 P.2d 864 (Cal. Ct. App. 1932); Greenberg v. Du Bain Realty Corp., 42 P.2d 628 (Cal. 1935))).

103. Birth Mother v. Adoptive Parents, 59 P.3d 1233, 1237 (Nev. 2002) (Rose, J., dissenting).

104. Hill v. Moorman, 525 So. 2d 681 (La. Ct. App. 1988) (recognizing that such a challenge could be brought but dismissing the instant action as untimely); McCormick v. State, 354 N.W.2d 160 (Neb. 1984).

105. For a thorough discussion of the legal and psychological reasons that a child needs a stable environment, and the critical importance of continuity of care from his or her caregiver, see generally JOSEPH GOLDSTEIN ET AL., THE BEST INTERESTS OF THE CHILD: THE LEAST DETRIMENTAL ALTERNATIVE (1996).

foster care system by family members.[106] It succeeded, and the legislature cited this success in extending postadoption contact agreements to all adoptions.[107] The bill analysis indicates that the legislature was still focused on facilitating adoptions out of foster care and hoped to reduce birth parents' resistance to voluntarily relinquishing their rights.[108] Though adoptions from voluntary relinquishments present a somewhat different set of concerns than foster care adoptions, the California Supreme Court has asserted that the State has a "clear interest in encouraging such adoptions [by voluntary relinquishment] and providing stable homes for children."[109] The court also noted that "[t]he state's interest in this matter is particularly important in light of the large number of children born to unwed parents: some 25[%] of all children born in the United States between July 1989 and July 1990—approximately 913,000 out of 3,900,000—were born out of wedlock."[110] The court does not explain why being born out of wedlock presents a special problem for the State, but it is presumably due to the economic realities of single motherhood.[111]

These realities are reflected in the most recent census reports. As of 2004, over 30% of people living in households headed by single mothers were living below the poverty line.[112] In contrast, adoptive parents tend

106. 1997 Cal. Stat. ch. 793; CAL. FAM. CODE § 8714.5(a)(1), (a)(2) (West, Westlaw through 2007 Reg. Sess.).

107. *Dependent Children: Postadoption Contact Agreements: Hearing on S.B. 2157 Before the S. Judiciary Comm.*, 1999–2000 Leg., Reg. Sess. 2 (Cal. 2000), *available at* CA B. An., S.B. 2157 Sen., 3/28/2000 (Westlaw) (bill analysis commenting on purpose of legislation).

108. *Id.*

109. Adoption of Michael H., 898 P.2d 891, 898 (Cal. 1995).

110. *Id.*

111. Though children that might otherwise be placed for adoption sometimes live with their fathers, single-mother families are far more common, and therefore are the focus here. *See* TERRY A. LUGAILA, U.S. CENSUS BUREAU, MARITAL STATUS AND LIVING ARRANGEMENTS: MARCH 1998 (UPDATE) (1998), http://www.census.gov/prod/99pubs/p20-514.pdf.

> The majority of children who lived with a single parent in 1998 lived with their mother (84.1 percent). About 40.3 percent of these children lived with mothers who had never been married. Children who lived with their father only were more likely to be living with a divorced father (44.4 percent) than with a never-married father (33.3 percent).

Id.

112. *See* U.S. CENSUS BUREAU, HISTORICAL POVERTY TABLES, TABLE 2, POVERTY STATUS OF PEOPLE BY FAMILY RELATIONSHIP, RACE, AND HISPANIC ORIGIN: 1959 TO 2005, http://www.census.gov/hhes/www/poverty/histpov/hstpov2.html (last visited July 2, 2007).

to be financially well off.[113] Thus, the State's interest in encouraging adoption may be linked to a desire to minimize the number of children living in poverty.[114] Some studies show that placing a child for adoption also has economic and educational benefits for the birth mother.[115] Whatever the reasons, to the extent that the State does hope to encourage adoptions from voluntarily relinquishment, it should extend the same opportunities for visitation that have been effective in encouraging adoptions from foster care.[116]

Though the preceding reasons clearly support an increase of the scope of birth relative visitation, it may also be helpful to explore reasons that have been given for limiting it. These reasons vary but can be classified into three categories: (1) fear of a chilling effect on adoptions; (2) concern that adoptions would be disrupted or revoked; and (3) desire to protect the newly created family unit and with it the new parents' autonomy.

E. Chilling Effect

Some argue that allowing visitation agreements in all adoptions would discourage potential parents who might otherwise adopt from pursuing domestic adoption. In fact, it has been argued that recent increases in birth parent rights in the United States have led to the increase in international adoptions.[117] Evidence supporting this theory is scant. Proponents tend to cite the increasing numbers of international adoptions and the declining number of domestic adoptions as indicative of this problem, but these correlations do not show that increasing openness and birth parent bargaining power is the cause.[118] The true source of this trend is more likely a decline in the number of American women who are willing to carry babies to term and then relinquish them for adoption.[119]

---

113. *See* Stolley, *supra* note 9, at 38.

114. Poverty is not the only hazard the children of unwed mothers face. For example, even accounting for factors like poverty and low parent education, adolescents raised without fathers are more likely to be incarcerated than their peers who have fathers in the home. Cynthia C. Harper & Sara S. McLanahan, *Father Absence and Youth Incarceration*, 14 J. RES. ON ADOLESCENCE 369 (2004).

115. MADELYN FREUNDLICH, THE MARKET FORCES IN ADOPTION 67–68 (2000) (citing multiple studies).

116. *Dependent Children: Postadoption Contact Agreements: Hearing on S.B. 2157 Before the S. Judiciary Comm.*, 1999–2000 Leg., Reg. Sess. 2 (Cal. 2000), *available at* CA B. An., S.B. 2157 Sen., 3/28/2000 (Westlaw) (bill analysis commenting on purpose of legislation).

117. *See, e.g.*, Alison Fleisher, Note, *The Decline of Domestic Adoption: Intercountry Adoption as a Response to Local Adoption Laws and Proposals to Foster Domestic Adoption*, 13 S. CAL. REV. L. & WOMEN'S STUD. 171 (2003).

118. *Id.* at 181–82.

119. Fleisher acknowledges as much:

The number of American families seeking to adopt domestically greatly exceeds the number of available infants in the United States.[120] Thus, even if some potential adoptive parents were deterred from adopting domestically because of birth parents' desire for visitation, it is unlikely that this would have any real impact on American infants' prospects for adoption.[121] Moreover, there is a critical shortage of adoptive parents for foster children, who are often older or have special needs.[122] If families who are not interested in or cannot afford international adoption are deterred from adopting a domestic infant by the prospect of a postadoption contact agreement, perhaps they will consider adopting from this needier population. Many of the children freed for adoption out of the foster care system achieve this status through the court's termination of parental rights. Since termination is involuntary, the birth parents have much less leverage to negotiate a postadoption contact agreement if the adopting parents do not want one.

> The number of American pregnancies is lower [now] than [it was] at any point in the last two decades. . . . At the same time, innovations in and access to contraceptive technology, cultural values, and constitutional law have transformed the institution of adoption. In addition, recent statistics show that 22% of pregnancies are terminated by abortion. Another factor is that infertility has significantly risen, partly due to a 50% decrease in sperm counts over the last century. Furthermore, fewer children born to single parents are relinquished for adoption. Hence, as contraception, abortion, infertility, and the tendency of single parents to keep their children have increased, there have been fewer domestic infants available for adoption.

Id. at 174–75 (internal quotations and footnotes omitted).

120. According to a National Adoption Information Clearinghouse estimate, less than 14,000 children were voluntarily relinquished in the United States in 2003, and in 1995 the number of American women seeking to adopt was over 200,000. NAT'L ADOPTION INFO. CLEARINGHOUSE, VOLUNTARY RELINQUISHMENT FOR ADOPTION 1 (2005), http://childwelfare.gov/pubs/s_place.pdf [hereinafter VOLUNTARY RELINQUISHMENT]; NAT'L ADOPTION INFO. CLEARINGHOUSE, PERSONS SEEKING TO ADOPT 3 (2005), http://childwelfare.gov/pubs/s_seek.pdf [hereinafter PERSONS SEEKING TO ADOPT]. A large number of these would-be parents are looking for a "domestically born white baby." Samuels, *supra* note 78, at 521. The ratio of prospective adopters to available white American infants has been estimated at six-to-one. *Id.*

121. Indeed, some argue that this imbalance between supply and demand justifies treating adoption as a "market" and allowing birth parents to negotiate for a variety of benefits, including compensation, in exchange for placing their child with a specific family. Richard A. Posner, *The Regulation of the Market in Adoptions*, 67 B.U. L. REV. 59, 60–61 (1987). Judge Posner also suggests that by providing an incentive for women to place children for adoption, payment could reduce the number of abortions and increase the available supply of infants for adoptions to everyone's benefit. *Id.* at 63–64.

122. Samuels, *supra* note 78, at 510–11.

It is possible, though entirely speculative, that enforcing postadoption visitation agreements could deter some potential parents from adopting. However, the specter of a chilling effect should not cause much concern, at least under a law like California's. First, in California, postadoption contact agreements must be entered into voluntarily by all parties,[123] so adopting parents can choose what, if any, degree of contact they are comfortable with, and select or negotiate with a birth mother accordingly. Second, not all birth mothers are interested in visitation. Some may not be interested in ongoing contact at all.[124] Third, the option of international adoption remains open to those who have difficulty connecting with a domestic birth mother with whom they can agree about ongoing contact.[125]

F. Harassment and Adoption Revocation Concerns

Some adopting parents shy away from open adoption because they worry that the birth parent will constantly besiege them,[126] or, worse, will try to get the child back.[127] It seems that a fear of some sort of harassment might have been the root of the California legislature's concern in creating section 8616.5's limitation on visitation where there was no existing relationship. The bill analysis states that this provision of the statute is intended to "ensure[] that the child and the adoptive parents are not subjected to continuing contact with birth relatives with whom the child had no relationship at the time of adoption."[128]

---

123. CAL. FAM. CODE § 8616.5 (b)(1) (West, Westlaw through 2007 Reg. Sess.).

124. SHAPIRO ET AL., *supra* note 83, at 156. While this Comment agrees with the cited authors that ongoing contact is generally better for the child, the specific wants and needs of the individual parties involved in a particular adoption are important considerations as well. This Comment advocates open adoptions only to the extent that they are truly voluntary for the parties involved.

125. Few international adoptions include birth parent contact. While it is true that international adoption is more expensive, and therefore may not be available to all would-be parents, it is a viable alternative for many who prefer to avoid dealing with birth parents. *See* Fleisher, *supra* note 117.

126. Baran & Pannor, *supra* note 8, at 328 (noting a common fear of "interference, intrusive behavior, and rivalry").

127. A 2002 survey of adoption attitudes in America found that 82% of respondents would have a "major concern," if they were planning to adopt, about "being sure that the birth parents could not take the child back." This would be a "minor concern" for 12% and "no concern at all" for only 6%. HARRIS INTERACTIVE, NATIONAL ADOPTION ATTITUDES SURVEY 29 (2002), http://www.adoptioninstitute.org/survey/Adoption_Attitudes_ Survey.pdf. This fear persists even though most challenges to completed adoptions fail. *See* Samuels, *supra* note 78, at 548–66 (recounting various failed attempts to challenge adoptions).

128. *Minors: Adoptions/Dependent Children: Hearing on A.B. 2921 Before the S. Rules Comm.*, 1999–2000 Leg., Reg. Sess. 6 (Cal. 2000), *available at* CA B. An., A.B. 2921 Sen., 8/22/2000 (Westlaw) (bill analysis commenting on purpose of legislation). The analysis provides no further elaboration on why being "subjected" to continuing contact might be bad. *Id*.

The protections afforded by the current California statute should alleviate most harassment and adoption revocation concerns. Birth relatives are unable to harass the adoptive parents by constantly dragging them to court to litigate the agreement. The law provides that there can be no court enforcement unless there has first been a good faith effort at mediation,[129] and the parties must pay their own mediation expenses.[130] If mediation fails and the matter goes before the court, the party bringing the action is responsible for all costs unless the other party is found to have violated the agreement without good cause.[131] The law does not allow actions for monetary damages,[132] and the court cannot order a burdensome investigation by a public or private agency absent a clear finding that it is necessary and is the only way to protect the child's interests.[133] Thus the cost of bringing a frivolous action is high and there is no possibility of monetary gain, so it is extremely unlikely that a birth parent could use the agreement in an unfairly harassing way. Some adoptive parents may see any enforcement attempt as harassment. But while a legitimate enforcement attempt may be an annoyance, it is one that the adoptive parents have bargained for. If this is a concern for lawmakers, it would be better addressed by requiring counseling services and legal disclosures for adoptive parents similar to those required for birth parents[134] to ensure that their decisions to agree to visitation are deliberate and fully informed.

It should also be noted that the class of birth parents who are arguably the most likely to cause problems are already allowed to enter visitation agreements, if the adopting family consents. Those who have had their children taken away because they are unstable, abusive, dependent on alcohol or drugs, or severely mentally ill will generally qualify as having an existing relationship with the child because the child lived with them prior to removal.[135] In contrast, available data shows that most women

129. CAL. FAM. CODE § 8616.5(f) (West, Westlaw through 2007 Reg. Sess.).
130. *Id.* § 8616.5(i).
131. *Id.*
132. *Id.* § 8616.5(g).
133. *Id.* § 8616.5(f).
134. *See infra* text accompanying notes 194–208.
135. Because the California statute does not clearly define "existing relationship," it is unclear what age a child must achieve to be considered capable of having a relationship. According to the U.S. Department of Health and Human Services, 10% of children awaiting adoption in California foster care in 2003 were less than one year old. U.S. DEP'T OF HEALTH & HUMAN SERVS., CHILD WELFARE OUTCOMES 2003, at VI-35 (2003), http://www.acf.hhs.gov/programs/cb/pubs/cwo03/cwo03.pdf. This is the group

who voluntarily relinquish infants at birth have both higher income and education levels and higher career and educational aspirations.[136] Yet these are the birth parents excluded from visitation under the current law.[137] If harassment is the concern, the choice of this population to exclude from visitation seems arbitrary at best.

Still, some adoptive parents may be concerned that because women relinquishing at birth tend to be younger[138] they may be less mature and therefore more inclined to change their minds and want their children back. However, there is no empirical evidence to support this fear, and some experts believe that birth parents in open adoptions are better able to accept the situation than those who never get to see their children thriving in their new homes.[139] And once an adoption is final, it is extremely unlikely to be reversed.[140] This is particularly true in California because of the explicit terms of the postadoption contact agreement statute. Its most important protection guarantees that the adoption cannot be set aside for failure to comply with a postadoption contact agreement.[141] Therefore a postadoption contact agreement poses no threat to the finality of an otherwise properly completed adoption.

---

of children that seem most likely to be outside that definition. In 2003, 35.8% of children awaiting adoption in California foster care were between one and five years-of-age. *Id.* Some of these children would arguably have had existing relationships with their birth relatives at the time they were removed from their families. The remaining 54.2% of children on which data was provided were six years old or older and, depending on how long they had been in foster care, most of these children would likely have had "existing relationships" with their birth parents. *Id.*

136. VOLUNTARY RELINQUISHMENT, *supra* note 120, at 1.

137. CAL. FAM. CODE § 8616.5 (West, Westlaw through 2007 Reg. Sess.) does not define "existing relationship," but it seems clear that a child relinquished at birth is outside of the visitation provision. For other states' attempts to define the degree of relationship required, see IND. CODE ANN. § 31-19-16-2 (West, Westlaw through 2006 Pub. Laws) (requiring that the child be "at least two (2) years of age" and that "there is a significant emotional attachment between the child and the birth parent"); LA. CHILD. CODE ANN. art. 1269.1 (West, Westlaw through 2006 Sess. Acts) (requiring "an established, significant relationship" whose loss "would cause substantial harm to the child"); R.I. GEN. LAWS § 15-7-14.1 (West, Westlaw through 2006 legislation) (requiring "a significant emotional attachment between the child and the birth parent").

138. Statistical information on birth parents is spotty and incomplete. Most of the existing research focuses on unwed teen parents who relinquish their children at birth. Though these studies are most likely underinclusive, authorities seem to accept that these younger mothers make up the majority of those voluntarily relinquishing infants. *See* VOLUNTARY RELINQUISHMENT, *supra* note 120, at 1.

139. SHAPIRO ET AL., *supra* note 83, at 156 ("[B]irth mothers who choose open adoption may be better able to tolerate feelings of loss and ambivalence. A mother can take great comfort in knowing her child as he or she grows up, while accepting that she cannot be the primary parent.").

140. *See* Samuels, *supra* note 78, at 557–65 (reviewing cases from around the country in which birth mothers have sought, usually unsuccessfully, to set aside their consents to adoption).

141. CAL. FAM. CODE § 8616.5(e)(1) (West, Westlaw through 2007 Reg. Sess.).

G. Protection of the New Family Unit and the New Parents' Autonomy

The third argument against broadening birth relative visitation agreements is that the newly formed family needs to be protected and allowed to develop as a natural family would. Many courts, when refusing to enforce postadoption contact agreements, have reasoned that the agreements violate public policy by interfering with a new family unit that has all of the rights and obligations of a biological family unit.[142] For example, a Louisiana court taking this view stated:

> [A]doptive parents have the same right of custody and control of the child as if that child had been born to them and blood parents are relieved of all their legal duties and divested of all their legal rights in respect to the adopted child. An agreement providing for visitation by a third party would impair the adoptive parents' rights. Such an agreement might also impair the new parent-child relationship with very undesirable consequences.[143]

However, this view of adoption is becoming increasingly anachronistic.[144] Since the mid-1970s, the adoption process has become increasingly open. Most adoptive parents tell their adopted children about their biological origins,[145] and adoption records are increasingly open.[146] Both trends reflect that adoptive families no longer rely on the fiction that the child, in order to thrive, must be treated "as if that child had been born to

---

142. *See, e.g.*, *In re* W.E.G., 710 P.2d 410, 415 (Alaska 1985) ("The theory of the adoption statute is that such welfare will be best promoted by giving an adopted child the status of a natural child . . . . Public policy demands that an adoption carry with it a complete breaking of old ties . . . .") (omissions in original) (quoting Browning v. Tarwater, 524 P.2d 1135, 1139 (Kan. 1974)); *In re* Adoption of Hammer, 487 P.2d 417, 420 (Ariz. Ct. App. 1971); *In re* Fox, 567 P.2d 985, 986 (Okla. 1977) ("The purpose of adoption proceedings is to terminate all legal relationships and rights between a minor child and its natural parents, and to establish these rights in the adoptive parents . . . . Public policy requires the severance of all old ties.") (citing *Browning*, 524 P.2d 1135); Whetmore v. Fratello, 252 P.2d 1083, 1083 (Or. 1953) ("The principle underlying adoption is primarily to promote the welfare of the child, and, unquestionably, this would not be subserved by having a split relationship."); Stickles v. Reichardt, 234 N.W. 728, 730 (Wis. 1931); *In re* Adoption of RDS, 787 P.2d 968, 970 (Wyo. 1990).

143. Hill v. Moorman, 525 So. 2d 681, 681–82 (La. Ct. App. 1988) (citation omitted).

144. For example, since *Hill* Louisiana has adopted a statute similar to California's allowing enforcement of some postadoption contact agreements. LA. CHILD. CODE ANN. art. 1269.1 (West, Westlaw through 2006 Sess. Acts).

145. *See* E. WAYNE CARP, FAMILY MATTERS: SECRECY AND DISCLOSURE IN THE HISTORY OF ADOPTION 137 (1998).

146. WEGAR, *supra* note 73, at 17–20 (1997) (recognizing this trend although "most states and agencies have *not* unsealed their records.").

them."[147] Moreover, some studies indicate that adoptive families who acknowledge the differences inherent in their situation function better than those that deny them.[148]

Additionally, alternative family structures are becoming more common and accepted. Experience with these different types of family structures shows that children are able to adjust to many kinds of complex extended family relationships, including open adoptions.[149] The Connecticut Supreme Court observed as much in a case upholding an open adoption agreement:

> Traditional models of the nuclear family have come, in recent years, to be replaced by various configurations of parents, stepparents, adoptive parents and grandparents. We are not prepared to assume that the welfare of children is best served by a narrow definition of those whom we permit to continue to manifest their deep concern for a child's growth and development.[150]

Still, many adoption professionals and commentators believe that the traditional nuclear family is the preferred setting for children,[151] and they see enforcement of visitation rights for birth relatives as "inimical to the meaning of adoption, as creating 'in all respects' a new family to replace the child's birth family."[152]

Indeed, this is the primary reason that the National Conference of Commissioners on Uniform State Laws (NCCUSL) chose not to require enforcement of most postadoption contact agreements in the Uniform Adoption Act (UAA).[153] The UAA only provides for postadoption contact agreements in stepparent adoptions, because "stepparent adoption results in the creation of a legal family that comes as close as possible to the nuclear family."[154] However, the resistance to enforceable postadoption contact agreements among the drafters of the UAA is not simply about a preference for traditional families. It also stems from a desire to allow the adoptive family to be "unfettered,"[155] and to have the "new family protected by legal guarantees of privacy and autonomy."[156]

---

147. *Hill*, 525 So. 2d at 681.

148. *See* Kenneth Kaye, *Acknowledgment or Rejection of Differences?*, *in* THE PSYCHOLOGY OF ADOPTION, *supra* note 8, at 121, 121–22, 131–32 (discussing and updating the findings in H. DAVID KIRK, SHARED FATE (1964)).

149. SHAPIRO ET AL., *supra* note 83, at 154–55.

150. Michaud v. Wawruck, 551 A.2d 738, 742 (Conn. 1988) (citations omitted).

151. Margaret M. Mahoney, *Open Adoption in Context: The Wisdom and Enforceability of Visitation Orders for Former Parents Under Uniform Adoption Act § 4-113*, 51 FLA. L. REV. 89, 107 (1999).

152. Joan Heifetz Hollinger, *The Uniform Adoption Act: Reporter's Ruminations*, 30 FAM. L.Q. 345, 373 (1996).

153. *Id.*

154. Mahoney, *supra* note 151, at 107.

155. Hollinger, *supra* note 152, at 348.

156. Mahoney, *supra* note 151, at 99.

The United States Supreme Court has also stressed the importance of parental autonomy and freedom from interference. In *Troxel v. Granville*[157] the Court invalidated a Washington State statute which permitted any person to petition the court for visitation of a child, and allowed a judge to order such visitation over a parent's objections if the judge felt visitation was in the best interests of the child.[158] In making this determination, the Court clarified that "it cannot now be doubted that 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."[159] The Court concluded that this right encompassed the power to make decisions about whether or not the child's grandparents could have visitation.[160]

However, even if California expands its postadoption contact agreement, as this Comment recommends, the statute would not run afoul of the constitutional right of parents to make decisions about "the care, custody, and control of their children"[161] because such agreements would be the result of voluntary decisions by the adoptive parents. The Court stressed in *Troxel* that the Washington law was "breathtakingly broad" because "a parent's decision that visitation would not be in the child's best interest is accorded no deference" but rather "the best-interest determination [was placed] solely in the hands of the judge."[162] If California were to remove its restriction on visitation for birth relatives who did not have an existing relationship with the child, however, the adoptive families would still be deciding whether or not to allow visitation.[163] Section 8616.5 does infringe upon adoptive parents' autonomy to some extent by not allowing them to change their minds once they commit to allow visitation, but it reserves autonomy over that initial commitment. The adoptive parents' privacy will only be invaded to the degree they agree to visitation up front. And, as has already been

157. 530 U.S. 57 (2000).
158. *Id.*
159. *Id.* at 66.
160. *Id.* at 68.
161. *Id.* at 66.
162. *Id*. at 66–67.
163. While the statute at issue in *Troxel*, *id*. at 67, and the UAA's stepparent visitation provision in Mahoney, *supra* note 151, at 96, both allow courts to issue visitation orders even where the adopting parent does not agree, the California postadoption contact agreement statute requires voluntary agreement. CAL. FAM. CODE § 8616.5(a) (West, Westlaw through 2007 Reg. Sess.). This Comment does not advocate a change to that requirement.

demonstrated, this limited invasion of autonomy is more than warranted by compelling public policy considerations.[164]

Of course, there may be situations where ongoing visitation will not work because of serious personality conflicts or birth relatives who exceed agreed-upon boundaries. In these cases the adoptive parents and adopted child are protected by the requirement that the postadoption contact agreement be in the best interests of the child.[165] If a birth relative's behavior is unduly intrusive or disrupts the functioning of the new family, and attempts to mediate the problem fail, the adoptive parents can file for termination of the agreement on the grounds that such termination is in the child's best interests.[166] However, since the birth relatives' involvement is often motivated by concern for the child, this will normally be unnecessary; the impact on the child and the potential loss of contact should be enough to inspire them to modify their behavior.

Weighing the arguments for and against expansion of the visitation provision of section 8616.5 demonstrates that this expansion is both warranted and desirable. However, in order for postadoption contact agreements to promote the State's public policy goals, birth parents must be aware of their availability.

IV. THE CASE FOR NOTIFYING BIRTH PARENTS THAT POSTADOPTION CONTACT IS AN OPTION

Under the current law, however, there is no requirement that birth parents who are considering voluntarily relinquishing their children through private agency or independent adoptions be told of this option.[167] California Court of Appeal cases indicate that this is because the legislature did not require notification[168] and because the need for notification does not rise to the level of a due process right.[169]

The Court of Appeal has noted, however, that notice of the opportunity to form a contact agreement would often be appropriate and desirable.[170] State Senators agreed in the case of public agency adoptions.[171] The

164. *See supra* Part III.A–D.
165. CAL. FAM. CODE § 8616.5(f) (West, Westlaw through 2007 Reg. Sess.).
166. *Id.* § 8616.5(h)(2)(A).
167. *In re* Zachary D., 83 Cal. Rptr. 2d 407 (Ct. App. 1999); *In re* Kimberly S., 83 Cal. Rptr. 2d 740 (Ct. App. 1999).
168. *See In re Kimberly S.*, 83 Cal. Rptr. 2d at 747.
169. *See In re Zachary D.*, 83 Cal. Rptr. 2d at 408.
170. *Id*. at 408.
171. *Dependent Children: Postadoption Contact Agreements: Hearing on S.B. 2157 Before the S. Judiciary Comm.*, 1999–2000 Leg., Reg. Sess. 2 (Cal. 2000), *available at*

2000 amendments relating to postadoption contact agreements required that the social study conducted for the court in dependency cases address whether or not the social worker discussed a postadoption contact agreement with the child's birth parents.[172] The bill analysis stated that the purpose of this provision was to "ensure that birth parents are aware of this option, and thus perhaps alleviate their concerns and resistance to placing their child for adoption."[173] Votes on this version of the bill in the Senate were unanimously in its favor.[174] These provisions are still in effect, but apply only in cases of adoptions of children who are dependents of the court.[175] No attempt has been made to extend notification to birth parents outside the dependency system.

California's adoption laws do require that birth parents considering independent adoptions be informed of a host of other things before they consent to the adoption.[176] These include: the alternatives to adoption;[177] the different types of adoption, including the applicable procedures and time frames;[178] their right to separate legal counsel paid for by the adopting parents;[179] and the right to counseling sessions paid for by the adopting parents.[180] This information must be related by an adoption service provider[181] in a face-to-face meeting in which the birth parent has the right to ask questions and have them answered.[182] This meeting must occur at least ten days before the birth parent signs the adoption placement agreement.[183] The adoption cannot be set aside for failure to follow this procedure, but such failure may give the birth parent a cause

---

CA B. An., S.B. 2157 Sen., 3/28/2000 (Westlaw) (bill analysis commenting on purpose of legislation).

172. *Id*.

173. *Id*.

174. *Dependent Children: Postadoption Contact Agreements: Hearing on S.B. 2157 Before the Assemb. Comm. on Human Servs.*, 1999–2000 Leg., Reg. Sess. 1 (Cal. 2000), *available at* CA B. An., S.B. 2157 Assem., 6/21/2000 (Westlaw); *Dependent Children: Postadoption Contact Agreements: Hearing on S.B. 2157 Before the S. Rules Comm.*, 1999–2000 Leg., Reg. Sess. 1 (Cal. 2000), *available at* CA B. An., S.B. 2157 Sen., 4/04/2000 (Westlaw).

175. CAL. FAM. CODE § 8715 (West, Westlaw through 2007 Reg. Sess.).

176. *Id.* § 8801.5.

177. *Id.* § 8801.5(c)(1).

178. *Id.* § 8801.5(c)(2).

179. *Id.* § 8801.5(c)(4).

180. *Id.* § 8801.5(c)(5).

181. *Id.* § 8801.5(a).

182. *Id.* § 8801.5(b).

183. *Id.* § 8801.3(b)(1).

of action for negligence or malpractice against the adoption service provider.[184] Thus, the statutory scheme ensures that the birth parent's consent is informed while protecting the adoption from being overturned.[185]

The provision requiring the birth parent to be informed of the alternative types of adoption available[186] could be interpreted to include a discussion of traditional closed adoption versus open adoption which would extend to a discussion of postadoption contact agreements. However, this is not how the California Administrative Code interprets the provision.[187] Instead, the regulation defines this section as requiring an explanation of the legal types of adoption under the California system, such as standard agency relinquishment adoption,[188] designated agency relinquishment adoption,[189] and independent adoptions.[190]

V. RECOMMENDED AMENDMENTS TO THE CALIFORNIA STATUTORY SCHEME FOR POSTADOPTION CONTACT AGREEMENTS

Public policy considerations favor revising California Family Code section 8616.5 to allow visitation in all postadoption contact agreements.[191] Children's best interests are served by allowing them to have relationships with birth relatives because this enables them to easily access information about their genealogical, personal, and medical histories, and to have a larger support network of people who love them.[192] Birth parents' well-being is protected when the law protects the adoptive placements in which they have carefully planned and invested.[193] Fundamental principles of fairness are upheld by enforcing private agreements that have this level of personal significance and societal importance.[194] Finally, the State's interest in encouraging adoption is served by providing a more palatable alternative for individuals who want to give their children a

184. *Id.* § 8801.5(g).

185. Arguably, the State could go further in protecting birth parents in this regard. As Elizabeth Samuels notes in her excellent analysis of the consent process, though adoption laws attempt to advance two goals, "ensuring that birth parents make informed and deliberate decisions" and "protecting the finality of placements," the latter often takes precedent. Samuels, *supra* note 78.

186. CAL. FAM. CODE § 8801.5(c)(2).

187. CAL. CODE REGS. tit. 22, § 35094.2 (2005).

188. *Id.* § 35094.2(c)(3)(A).

189. *Id.* § 35094.2(c)(3)(B).

190. *Id.* § 35094.2(c)(3)(C), (c)(3)(D).

191. *See supra* Part III.

192. *See supra* Part III.A.

193. *See supra* Part III.B.

194. *See supra* Part III.C.

chance for a stable family life that they cannot currently provide, but who cannot bring themselves to completely sever all ties to their child.[195]

Therefore, the legislature should eliminate section 8616.5(b)(3), which limits postadoption contact agreements to "the sharing of information about the child unless the child has an existing relationship with the birth relative."[196] This simple amendment will allow birth parents and adopting parents to negotiate the level of contact they find appropriate without any arbitrary restrictions. It would leave intact the protections already provided to adoptive parents and adopted children[197] while helping California to promote its interest in encouraging adoptions.[198]

The California legislature also should amend California Family Code section 8801.5[199] and its interpreting regulation[200] to require that birth parents be specifically told that they have a right to negotiate with the adoptive parent for ongoing contact with or regarding the child. The amendment should also require that birth parents be told that if the agreement meets the statutory requirements it will be enforceable, but that the adoption cannot be revoked for failure to comply with an otherwise valid agreement.[201] This will allow the legislature to encourage adoption by increasing awareness of arrangements that may make adoption a more palatable option for many birth parents. It will also reduce the risk that birth parents will regret or contest adoptions by empowering birth parents to make fully informed choices about the placement of their children.[202]

Proactively informing birth parents is important because most people who find themselves involved in an unwanted pregnancy know little or nothing about the law in this area,[203] and birth parents are not required to be represented by their own counsel.[204] Although they must be informed of their right to have the adopting parents pay for separate counsel, they may be too overwhelmed or too trusting of the adopting parents to assert

195. *See supra* Part III.D.
196. CAL. FAM. CODE § 8616.5(b)(3) (West, Westlaw through 2007 Reg. Sess.).
197. *See supra* text accompanying notes 44–54.
198. *See supra* Part III.D.
199. CAL. FAM. CODE § 8801.5 (West, Westlaw through 2007 Reg. Sess.).
200. CAL. CODE REGS. tit. 22, § 35094.2 (2005).
201. CAL. FAM. CODE § 8616.5 (West, Westlaw through 2007 Reg. Sess.).
202. *See* Samuels, *supra* note 78, at 512.
203. Pamela K. Strom Amlung, Comment, *Conflicts of Interest in Independent Adoptions: Pitfalls for the Unwary*, 59 U. CIN. L. REV. 169, 171 (1990).
204. CAL. FAM. CODE §§ 8627, 8800 (West, Westlaw through 2007 Reg. Sess.).

that right. Even in cases where the adopting parents do pay for separate counsel, the attorney will have a potential conflict of interest and may not feel comfortable advocating options to which the adopting parents would be adverse.[205] The State already seems to acknowledge birth parents' general lack of knowledge of the law when it requires the disclosures described above.[206] Requiring information about postadoption contact agreements to be included in these disclosures would further ensure that consents are fully informed.

VI. CONCLUSION

California has enacted a progressive statute that encourages adoptions by recognizing the legitimate needs and desires of adoptees and birth relatives for ongoing contact. However, the current statute draws an unnecessary, arbitrary line by preventing birth relatives who do not have an existing relationship from having postadoption visitation. The California legislature should amend California Family Code section 8616.5 to abolish this limitation and amend California Family Code section 8801.5 to require that birth parents be informed regarding postadoption contact agreements. With these changes, California's law can serve as a model for legislatures across the country and demonstrate how they can balance the needs of all those involved in the adoption process: adoptive parents, adoptees, and birth parents.

---

205. While the Model Rules of Professional Conduct do permit a lawyer to accept payment from a third party, they also acknowledge the potential conflict of interest this can create and require the lawyer to get informed consent to the conflict if the risk is "significant." MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 13 (2005). Samuels notes that adoption is a $2 billion a year industry and that money comes almost entirely from adoptive parents. *See* Samuels, *supra* note 78, at 518–25. As such, social workers and attorneys may feel compelled to favor the paying customer, rather than the usually economically disadvantaged birth parents.

206. *See supra* text accompanying notes 176–85.