

A New Concept

*Enforceable
Post-adoption
Contact Agreements
Come to Tennessee*

*By Michael S. Jennings
& William H. Vetterick*



In 2018, the Tennessee legislature passed and then-Gov. Bill Haslam signed a legislative package that brought significant changes to Tennessee's adoption code.¹ The 2018 legislation is referred to by adoption practitioners as the "First in Adoption Act" (FIAA).

In 2019, the Tennessee Bar Association Adoption Section proposed two new adoption bills. The first bill was principally a corrections bill supplementing FIAA.²

The second bill, however, introduced an entirely new concept to Tennessee adoption law by authorizing enforceable post-adoption contact agreements (PACAs).³ Both bills passed both chambers of the Tennessee legislature without opposition and were signed by Gov. Bill Lee on March 22, 2019. While the corrections bill is effective July 1, 2019, the PACA

legislation became effective immediately upon the governor's signature. The PACA legislation is a substantive change in Tennessee law that brings potential benefits to all parties to an adoption, but a Tennessee adoption practitioner must be fully aware of the implications of the new legislation before proceeding with a PACA for his or her client.

This article was first published in the May 2019 Tennessee Bar Journal, a publication of the Tennessee Bar Association. It is used with permission.

Legal Framework

The United States Supreme Court, in acknowledging the right of parents to make decisions for their children, has recognized that this fundamental right is the same for adoptive parents as it is for biological parents:

[A]doption is a means of family formation that is no less fundamental because it is characterized by choice and commitment rather than blood and procreation. . . . The Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children.⁴

It is clearly the case under Tennessee law that adoptive parents have the same rights to their adopted children as a biological parent has to a biological child.⁵ This would include the rights to make decisions regarding the upbringing of their child and the child's contact with others.

Historical Treatment of PACAs in Tennessee

Since the legal relationship between the child and the child's biological parents is terminated as a result of an adoption, any arrangement involving contact after the adoption of necessity involves the voluntary agreement of the parties. Since 1996, parties to an adoption in Tennessee have been able to enter into voluntary contact agreements, but by statute those agreements were not enforceable. In fact, former Tennessee law went so far as to say that "[a]ny provision in an order of the court or in any written agreement or contract between the parent or guardian of the child and the adoptive parents requiring visitation . . . shall be void and of no effect whatsoever. . . ."⁶ That same statute, however, recognized the ability of adoptive parents to enter into "open adoptions" allowing visitation or other post-adoption

contact between the biological family and the adopted child, while clearly stating that any such open adoption agreement cannot establish enforceable rights.⁷

The rationale for the traditional prohibition against enforceable PACAs is multilayered. For one, the historical concern over treating a child as a commodity in the laws of this and every other state prohibits the payment of money to a biological parent in exchange for his or her written consent to an adoption.⁸ A logical extension of this rationale suggests that adoptive parents should not be able to give a biological parent any consideration for their consent, and that would include a court-enforceable promise allowing post-adoption contact.

Moreover, as an adoption terminates an existing family and creates a new family, an enforceable contract allowing post-adoption contact by the biological family suggests tones of a custodial relationship between the parties. An adoption, of course, is not a custodial arrangement, and any inference of such is conceptually offensive to adoptive parents.

Finally, in many if not most adoption situations, there is a significant disparity between the adoptive parents and a biological parent when it comes to education, connections and financial resources. Because the parties are not similarly situated, giving a biological parent an enforceable PACA is viewed by many as an illusory arrangement, i.e., giving a biological parent a right that they realistically do not have the ability to enforce.

National Trend

Tennessee's historical position on the nonenforceability of PACAs was formerly shared by most states, and many states still maintain that position.⁹ However, over the last 10 years close to a majority of states have moved to allow some type of enforceable PACA. The laws of the different states vary significantly, and enforceability sometimes depends upon variables such as

whether the adoption is a relative adoption (Alabama),¹⁰ an adoption through the state's Department of Children's Services (Florida),¹¹ or the age of the child (Indiana).¹²

Rationale for Enforceable PACAs

There are public policy considerations that suggest the desirability of enforceable PACAs. Any attorney who has ever tried to mediate a contested termination of parental rights case will understand the value that an enforceable PACA brings to that arena. Heretofore, only a grandparent in a relative or stepparent adoption in Tennessee could maintain court enforceable contact with the adopted child after the adoption, and that only in specific circumstances.¹³ It is difficult to resolve a contested termination where by statute there is simply no common ground. A termination case is a "zero-sum" game where by definition there is a winner and there is a loser. However, the prospect of an enforceable PACA positions a biological parent to voluntarily relinquish rights to a child in exchange for an enforceable PACA.

Altogether separate from the arena of a contested termination, an adoption practitioner representing a biological parent in a voluntary placement can now provide a biological parent with an enforceable PACA to quell any concern that the adoptive parents are making representations about post-adoption contact that they do not intend to keep.

Scope of New Legislation

There is a broad range of items that can be addressed in an enforceable Tennessee PACA. *New Tenn. Code Ann.* Section 36-1-145(b) references without limitation "visitation with the child, contact with the child, sharing of information about the child, or sharing information about biological parents or adoptive parents." The parties may permit contact under a

continued on page 22

ADOPTION

continued from page 21

Tennessee PACA with not only a biological parent, but also with any “legal relative” as that term is defined in the Adoption Code.¹⁴

New Tennessee PACA Limitations

In considering the new PACA legislation there are several things that an adoption practitioner should keep in mind.

First, there is no requirement under the law for the parties in an adoption to enter into any kind of agreement addressing post-adoption contact.

Second, the new legislation does not eliminate the ability of the parties to enter into a written agreement that spells out expectations but by agreement has no enforcement mechanism. In other words, if you like the way you were doing PACAs before, you can continue to do so as long as your agreement is expressly designated as a moral agreement only and states that it is not intended to be legally enforceable.¹⁵

Third, if the parties agree to enter into an enforceable PACA under the new legislation, there are several points of particular interest to adoptive parents. For one, a birth parent is expressly prohibited from attempting to modify the agreement after it has been entered into.¹⁶ However, the adoptive parents — having the parental responsibility of identifying and pursuing the best interest of their child — can initiate a modification of the agreement if they conclude such to be in their child’s best interest. Moreover, and of fundamental value, is the fact that a violation of an enforceable PACA does not in any way threaten the status of the adoption itself. Even a willful violation of the PACA is then not a basis to set aside a surrender or a termination or an adoption decree itself.¹⁷

Enforcement Mechanism

Of particular interest is the way in which Tennessee PACAs under the new legislation can be enforced. In what appears to be first of its type legislation, the initial enforcement costs in a Tennessee PACA are shifted to the adoptive parents, and the courthouse is not the first stop in that

enforcement process.

Instead, a birth parent seeking enforcement or an adoptive parent seeking modification must first deliver a letter to the other party “stating with reasonable particularity the enforcement or modification sought and reason for such request.”¹⁸

If the presenting issue is not satisfactorily resolved by the parties within 30 days thereafter, the adoptive parents then must obtain a written opinion from a licensed psychological professional as to the child’s best interest on the issues being raised, together with a resulting recommendation. If the parties are thereafter unable to reach agreement within the time specified in the statute, the parties must attend mediation to resolve the presenting issue. If there is still no resolution of the issue after up to two mediation sessions or if a party refuses to participate in mediation, the moving party then may petition the court for enforcement.¹⁹

Of particular note in this process is the fact that the adoptive parents must pay the costs associated both with obtaining the licensed professional’s opinion and conducting the mediation process. This concept is without precedent but was included by the drafters in an effort to provide a meaningful remedy to an aggrieved biological parent. It is also intended to sober any adoptive parent who might otherwise enter into a Tennessee PACA without an actual intent to comply with its terms.

Should the enforcement process reach the stage of court enforcement, the court has discretion to tax court costs and attorneys’ fees to the parties based upon their good faith and means.²⁰

While every adoption practitioner in Tennessee should be aware of the availability of court enforceable PACAs, they should not be entered into lightly, and it is likely the case that they will be the exception rather than the rule in Tennessee adoptive placements.

“Open adoptions” across the country and in Tennessee are growing in frequency, but not every open adoption will require

an enforceable PACA, and even then that PACA may address limited issues of communication (such as pictures and updates, as opposed to actual contact with the child).²¹ It may well be that provisions involving actual contact with the child have more utility in a relative adoption context. Regardless, the new Tennessee PACA legislation advances this concept in a new and progressive way that is designed to protect adoptive placements, while simultaneously empowering biological parents who are making the extraordinary sacrifice of permanently releasing a child for adoption. ⚖️



MICHAEL S. JENNINGS is a partner in the Chattanooga firm of Samples, Jennings, Clem & Fields PLLC, where adoption law is the principle focus of his practice. He is a graduate of the University of Georgia School of Law and is

a fellow in both the American Academy of Adoption and Assisted Reproduction Attorneys and the Georgia Council of Adoption Lawyers. Jennings has worked with enforceable PACAs in his Georgia practice since they became lawful in that state in 2013. He is the 2019-2020 chair of the TBA Adoption Law Section.



WILLIAM H. VETTERICK is an associate with Samples, Jennings, Clem & Fields PLLC, where he works extensively with adoption law issues. He is a graduate of the University of Tennessee College of Law, and a

member of the Executive Council of the TBA Adoption Law Section.

NOTES

1. For an explanation of the 2018 legislative changes see Coppock and Jennings, “Tennessee’s New Adoption Law,” *Tennessee Bar Journal* (July 2018).

2. HB 0287 (Carter, R-Ooltewah), SB 0208 (Haile, R-Gallatin).

3. HB 0288 (Carter, R-Ooltewah), SB 0207 (Haile, R-Gallatin), added new §36-1-145 to the Tennessee Code.

4. *Troxel v. Granville*, 530 U.S. 57, 66 (2000).

continued on page 29

described was impossible. And the terrifying inference knocked the breath from his lungs: the three men were innocent — and two of them were likely to die in jail.

In June 2011, Swenson's long-form article on the case, "What the Boy Saw," ran on the cover of the *Cleveland Scene*. The article exposed several inconsistencies in Ed Vernon's story (Vernon declined to be interviewed for the article). While the article drew praise, nothing seemed to happen. A year and a half went by. Swenson took another journalism job in Miami. Then, in the fall of 2013, Swenson got a phone call from Brian Howe, an attorney at the Ohio Innocence Project. "Ed has recanted," Howe said.

When the OIP first looked into the case, the legal task seemed insurmountable — there was no DNA evidence that could prove the men's innocence. And under Ohio law, as with the national trend, a mere recantation was not enough. One study, cited by Swenson, found that "of the first 250 DNA exonerations, 190 involved eyewitnesses. In six of those cases, witnesses later came forward to recant, but judges in none of the six reversed the original conviction on the basis of the new testimony."² The Innocence Project attorneys had to come up with an angle. They argued that because Vernon was pressured and threatened by the investigating officers, the police coercion itself was exculpatory evidence that should have been provided to the men's defense attorneys.

Of course, the key to the argument was Ed Vernon. Swenson's telling of Vernon's ultimate recantation reads like a liturgical celebration. Vernon's pastor, Anthony Singleton, read the 2011 *Scene* article and recognized the Ed Vernon in it as the troubled former drug addict in his congregation. Singleton suddenly understood the demons Vernon had been living with for so long.

In one of many high drama moments in *Good Kids, Bad City*, Singleton's outreach to Vernon — at death's door, in a hospital gown — stresses that

there is nothing inevitable about the exoneration of the innocent. Chance occurrences — a reporter taking a call, a pastor glancing at a magazine — may make all the difference.

Good Kids, Bad City deserves your attention. And not merely for the sadly familiar story it tells. It merits reading — dignified with a pair of eyes and a comfortable chair — for the way the story is told. As Swenson reflects: "we're accountable for what we see in the world, and more importantly, we're responsible for what we don't see." Choose to see this story. 

CHRISTOPHER SMITH is a lawyer with David Randolph Smith & Associates in Nashville. His practice centers on civil rights and personal injury matters. He is a 2015 graduate of Belmont College of Law.

NOTES

1. *Good Kids, Bad City: A Story of Race and Wrongful Conviction in America*, p. 4, citing Robert J. Norris, *Exonerated: A History of the Innocence Movement* (New York: New York University Press, 2017).
2. *Id.*, citing Brandon L. Garrett, *Convicting the Innocent: Where Criminal Prosecutions Go Wrong* (Cambridge: Harvard University Press, 2011) 48-49.

ADOPTION

continued from page 22

5 See *Tenn. Code Ann.* §36-1-121(a): "The signing of a final order of adoption ... establishes from that date the relationship of parent and child between the adoptive parent or parents and the adopted child as if the adopted child had been born to the adoptive parent or parents and the adopted child shall be deemed the lawful child of such parent or parents, *the same as if the child had been born to the parent or parents*, for all legal consequences and incidents of the biological relation of parents and children" (emphasis added).

6. *Tenn. Code Ann.* §36-1-121(f).

7. "[T]he permission or agreement to permit visitation or contact shall not, in any matter whatsoever, establish any enforceable rights in the parent or guardian, the siblings or other related persons." *Id.*

8. See *Tenn. Code Ann.* §36-1-109.

9. Existing North Carolina and South Caroli-

na's laws are substantially identical to the historical Tennessee position of nonenforceability [See N.C. Gen. Stat. Ann. §48-3-610 and S.C. Code Ann. §63-9-790, respectively].

10. Ala. Ann. Code §26-10A-30.

11. F.S.A. §63.0427.

12. Ind. Code Ann. §31-19-16-1-3, et seq.

13. Tenn. Code Ann. '36-6-306(d).

14. Tenn. Code Ann. '36-1-102(29).

15. Tenn. Code Ann. '36-1-145(a).

16. Tenn. Code Ann. '36-1-145(j).

17. Tenn. Code Ann. '36-1-145(i).

18. Tenn. Code Ann. '36-1-145(j)(1).

19. Tenn. Code Ann. '36-1-145(j)(5).

20. Tenn. Code Ann. '36-1-145(l).

21. For suggested Tennessee PACA forms (both enforceable and non-enforceable versions), see those posted by adoption practitioner Dawn Coppock at dawncoppock.com.



Forensic Document Investigations

Dianne Peterson is the owner and president of Forensic Document Investigations (FDI). Ms. Peterson is an independent, privately trained, Court Qualified Forensic Document Examiner and Forensic Handwriting Expert. She has been examining questioned document cases since 2009. Dianne has rendered over 600 opinions on questioned document cases both nationally and internationally.

"If you think it's expensive to hire a professional, just wait until you hire an amateur." -Red Adair

888-763-8881 • www.ForensicDocumentInvestigations.com