

Adoption: when should contact continue?

Key questions for a psychologist giving expert evidence on post-adoption direct contact.

by Richard Woolfson, Rebecca Adam

Introduction: psychologists' criteria

When birth parents wish to have continued direct contact with their child after the child has been removed from their care and adopted (post-adoption contact), but the adoptive parents oppose such an arrangement, court cases are typically highly contentious.

Woolfson (2014)(1) explained the psychological reasons for this. On one hand, the birth parents face the possibility of losing both their parental rights and all forms of contact with their child when the adoption is granted. Such a significant loss is likely to have a huge emotional impact on the birth parents. On the other hand, it is likely that the adoptive parents have waited a long time for a child of their own, and know that the child had a very difficult home life prior to the adoption. Therefore, it is understandable that the adoptive parents may prefer their child to have a fresh start, so that the child can begin their new life without any encumbrance from the past. It is the court's responsibility to resolve such disputes, which are made even more challenging if the child is too young to express their own opinion.

Woolfson (2014) summarised the potential psychological advantages and disadvantages of continued direct contact in these circumstances, and highlighted the key criteria that a psychologist as expert witness might use in such cases, when making a recommendation about continued direct contact after adoption. Most of these criteria were specified by Triseliotis (1991)(2), namely: the child should appear to enjoy direct contact and benefit from it; the birth parents should have a positive view of direct contact; the birth parents should not use direct contact to undermine the adoption; and there should be an existing secure attachment between the birth parents and their child.

However, a fifth criterion for psychologists to consider when making a recommendation about post-adoption contact was identified by Woolfson (2014),

namely, the adoptive parents should have a positive view of direct contact post-adoption. Research studies have found that when the adoptive parents are “communicatively open” (that is, they are willing to promote communication about adoption within and beyond their family)(3), direct contact after adoption is more likely to be a positive experience for the child.(4) Conversely, when adoptive parents do not have an open and positive attitude towards direct contact post-adoption, the commitment to maintaining direct contact is more likely to diminish.(5) Many adoptive parents are concerned that the child’s direct contact with their birth parents could stop the child settling into their new family, could confuse the child, and may even expose the child to further harm and abuse from the birth parents.(6) With such concerns it is not surprising that adoptive parents may be at best cautious, and at worst hostile, to direct contact post-adoption. Thus, adoption agencies and local authorities have a major role in helping prospective adoptive parents develop a positive attitude towards direct contact.(7)

It stands to reason that if adoptive parents vigorously oppose post-adoption contact arrangements, then such arrangements are not likely to be positive for the child. Thus, in practice, this criterion is taken very seriously by the courts in Scotland when considering post-adoption contact. From a psychological perspective, however, the position is not so straightforward. After all, if the first four criteria are satisfied (which means that the child enjoys contact with their birth parents and has a secure attachment with them), blocking continued contact after the adoption could potentially cause the child significant emotional distress and upset.

Even when prospective adoptive parents agree to post-adoption contact between their adopted child and the child’s birth parents, they may decide to break the agreement once the adoption is granted. Several reasons could underlie such a change of position. For example, the adoptive parents may have agreed to post-adoption contact because they thought it would ensure the granting of the adoption. It is possible that they may go back on such an agreement towards the finalisation of the adoption. Additionally, they may be influenced by friends and relatives to remove all contact after the adoption is granted, despite their original intentions. In such circumstances, our courts do not have a role in enforcing the original agreement – in other words, it is voluntary.

The American perspective – agreement enforcement

In the USA, the legal position is somewhat different, however. Approximately 26 US states have passed laws that allow for written and enforceable post-adoption contact agreements. These written agreements specify the type of contact (direct, indirect, postbox) and the frequency of such contact, and are signed by the birth parents and the adoptive parents prior to the finalisation of the adoption (Child Welfare Information Gateway, 2011)(8). For the agreements to be enforceable, though, they have to be approved by the court that has jurisdiction over the adoption procedure. In most instances, all parties to the agreement must give their consent in writing to all terms of the agreement prior to the adoption being granted. Indeed, the court will only approve such an agreement if three conditions are met, namely: all parties must agree on its provisions; the court must find that the agreement is in the best interests of the child; the agreement arrangements must be designed to protect the safety of the child and the rights of all the parties to the agreement.

Listed below are additional facts about the US position:(9)

- Some states limit the enforceability of these post-adoption contact agreements based on factors such as the type of adoption, the age of the adoptive child, or the nature of the contact. For example, Connecticut and Nebraska limit agreements to children who have been adopted from foster care. Wisconsin limits such agreements to adoptions by step-parents and relatives. Indiana limits enforceable contact agreements to children aged two and older.
- In Arizona and Louisiana, the court must obtain and consider the wishes of the child if they are 12 years or older. Six states require the written consent of the adoptive child who is age 12 years or older. In four states and the District of Columbia, consent must be obtained from the adoptive child if they are 14 years or older.
- Most laws permit post-adoption contact or communication for birth parents, but some states also allow other birth relatives who have significant emotional ties to the child to be included in the agreement, including grandparents, aunts, uncles and siblings. Minnesota permits former foster parents to petition for contact privileges.
- in California, Minnesota, and Oklahoma, when the case involves an Indian child, members of the child's tribe are included among the eligible birth relatives. California, Florida, Indiana, Louisiana, Maryland, and New Mexico have provisions for sibling participation in an agreement.

In addition to voluntary agreements, there is a law in over 40 US states which enables the court to legally enforce post-adoption contact without the consent of all parties and, in particular, against the adopters' wishes (Appell, 2000a)(10). This statute empowers the court to sustain pre-adoptive visitation rights or enforce post-adoption contact for those who are not parties to the adoption, for example, grandparents and siblings. It may be the case that the birth parents and adoptive parents cannot protect the adoptee's best interests because they are incapable, or reluctant to enter into an enforceable agreement. Perhaps the adoptive parents do not know whether post-adoption contact will be beneficial to the child, or how to come to an agreement about such contact with the birth relatives. Enforceable contact allows the court to consider the child's best interests regarding post-adoption contact when the birth parents and adoptive parents may be unable to do so.

Direct contact should always be in the best interests of the child, and a number of states require that the relatives asking for visitation rights have a significant, close and continuing relationship with the child. Additionally, many states require the court to examine whether continued contact would interfere with the adoptees' relationship with the child; the parent-child relationship is continually the paramount consideration of the courts (Appell, 2000a).

A large majority of these agreements only apply to stepparent, relative or foster care adoption, with only six states extending contact to all adoptees (Appell, 2000a). Five of the six states only allow for court-imposed statutes when visitation was ordered prior to the adoption, under the premise that those who have adopted a child under these circumstances have explicitly or implicitly agreed to the pre-existing contact (Adoption of Vito, 2000)(11). As stated above, it is important to note that if the adoptive parents do not adhere to the rules of the agreement, this will not invalidate the adoption decree or affect their rights to the child.

In instances where the birth parents have been deemed unable to care for the child prior to the adoption, enforceable post-adoption contact becomes more complicated. In these circumstances enforceable agreements allow dependent children to move out of the foster care system and into permanent homes at a quicker rate while allowing for continued valuable contact with their birth families. However, it is difficult to find the correct balance between providing the child's state guardian with the necessary freedom in order to find the ideal adoptive family for the child, and protecting the child's existing relationships with their birth parents. In many

jurisdictions, dependency proceedings in which the birth parents' rights are terminated tend to be held prior to the adoption proceedings and are enacted by entirely separate courts. This means that if the child was legally removed from their birth family under the premise that continued contact would be permitted, the adoption court does not have to reflect this ruling in its decree (Foehrkolb, 2012)(12). Thus, the courts charged with the responsibility to protect a vulnerable child's best interests may not have any control over the formation of an adoptive family.

The practicalities of agreement enforcement in the USA

When the birth and adoptive parents are in dispute about compliance with the post-adoption contact arrangements, or when either party wants to modify the arrangements, this has to be brought before the court. At all times, changes to agreement are only permitted if they are thought to be in the best interests of the child. It is worth noting that even when an agreement about post-adoption contact is reached, a breach of the agreement by either party will not affect the security of the adoption – the integrity of the adoption will always be maintained, in order to preserve the dominance and stability of the adoptive relationship (Appell, 2000b)(13). In other words, no matter what the birth parents or the adoptive parents do about direct contact after the adoption is granted, the adoption stands.

The psychological perspective – five key questions

Since Scottish courts do not follow the American practice, post-adoption contact agreements are not popular. Even when they are reached voluntarily by all the parties involved in the adoption process, they are not enforceable. Therefore, when a psychologist as expert witness is required to make a recommendation about post-adoption contact in cases where the prospective adopters oppose such an arrangement, the psychologist must decide, first, the significance of this disagreement, and secondly, whether the prospective adopters' negative view of post-adoption contact should outweigh the other four factors specified by Triseliotis (1991).

Here are some of the questions that the psychologist might ask in such cases:

1. What is the basis of the prospective adopters' negative view of the child having post-adoption direct contact with their birth parents?

A discussion with the prospective adopters would help the psychologist understand the nature of their objections. For example: they fear post-adoption contact would undermine their relationship with the child; they worry that it might allow the birth parents to cause emotional or physical harm to the child; or they want to provide the child with a fresh start to life, severing all connections with the child's past.

2. Have the prospective adopters considered research findings about the potential advantages and disadvantages of the child having post-adoption direct contact with their birth parents?

The prospective adopters would be able to make a more informed choice if they have a sound understanding of the research findings in this area which highlight potential strengths and weaknesses of such contact. It would also help them to understand that the research findings apply generally, and not necessarily to each individual case.

3. To what extent has the agency processing the adoption explored the implications of different post-adoption contact arrangements with the prospective adopters?

Since it is reasonable to expect that prospective adopters may initially oppose post-adoption direct contact, it would be helpful to know how the adoption agency has discussed the contact options, including the implications of such options; the amount of time they have devoted to discussing this topic; how many times they have discussed it; and the stance taken by the adoption agency on this matter.

4. What is the strength of the prospective adopters' negative view of post-adoption direct contact, and how likely is that view to be resistant to change?

It is human nature that some individuals hold their views more strongly than others. If the prospective adopters have fully considered all the issues involved in post-adoption direct contact and remain absolutely fixed in their opposition to it, they are unlikely to change. Conversely, they may be more flexible in their attitude if they have not fully explored the central issues.

5. To what extent have the prospective adopters taken into account the child's views of post-adoption direct contact with their birth parents?

The child's own views on post-adoption contact should influence the prospective adopters' views. Of course, this only applies when a child is old enough to express their view (for example, over the age of four or five years), but it is reasonable to expect the prospective adopters to demonstrate that they have taken the child's views seriously.

The arena of post-adoption direct contact remains contentious, especially as Scottish courts (in contrast to US courts) do not deal directly with such arrangements. Nevertheless, a psychologist as expert witness can reach an informed recommendation about post-adoption direct contact by seeking answers to five key questions.

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