It has become fairly common practice for adoptive parents and birthparents to make agreements providing for various degrees of openness after the adoptive placement. Agreements range from annual photographs of the child with written updates in the early childhood years, to frequent birthparent visits with the child and family throughout childhood. During the past few decades, some states have created legal statutes relating to more formalized agreements for post-adoption contact between adoptive parents and birthparents. These agreements are often referred to as Enforceable Contact Agreements (hereafter referred to as an ECA). An ECA typically is a court-enforceable contract between adoptive parents and a birthmother and/or birthfather to share specified information and/or establish direct contact between birthparents, adopted child, and adoptive family.

An ECA is a written agreement (or contract) that is typically binding and may be monitored by a court. In some states, if one party breaks any terms of the agreement, another party can seek remedies in the form of a court order to force compliance, or perhaps even some other form of damages. Oftentimes, mediation (during both the establishment of an agreement and in resolving conflicts) is encouraged by the court.

At this time, 18 states are known to have some kind of statutory provisions making adoptive parents subject to legal sanction for not adhering to agreements regarding ongoing birthmother contact. These states are: Arizona, California, Connecticut, Florida, Indiana, Louisiana, Massachusetts, Minnesota, Montana, Nebraska, New Mexico, New York, Oregon, Rhode Island, South Dakota, Vermont, Washington, and West Virginia. It is important to note that most of the state statutes include language that says the validity of an adoption itself cannot be challenged based only on non-compliance to an ECA. Also, some ECA statutes apply to adoptions of every kind, while others reference only special needs or older child adoptions. Some statutes require the consent from the placing adoption agency. Some statutes contain no provisions for how non-compliance will be enforced. Three other states, Missouri, Ohio, and Tennessee have some form of recognition of non-binding open adoption agreements.

Of course, adoptive parents and birthparents should not enter into agreements they do not intend to keep. It seems difficult to understand, for example, why adoptive parents would not be able to provide promised annual updates. However, seeking court-enforcement for ongoing contacts between adoptive families and birthparents is harmful in several ways. Court-enforceable contact agreements can potentially:

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mandated by court enforcement can be disruptive and harmful to the adoptive family, the adopted child, and even the birth parents.

Risk the child’s best interests and well-being. The bedrock principle guiding adoption policy has always been to serve the best interests of the child. It is clearly not in the child’s best interests to create a situation where parties outside of the family can dictate, demand, or force contact with the child. In some cases ongoing birthparent contact throughout childhood creates confusion in a child’s mind regarding his or her true parents, family, and identity. Court-enforceable open-adoption agreements can promote ongoing birthparent contact that undermines a child’s sense of belonging and create unhealthy ambivalence, especially when birthparents and adoptive parents disagree or reach an impasse regarding the appropriate amount of interaction.

Increase costs to state government and clog courts: Allowing court enforcement of ongoing birthparent contact agreements substantially increases costs to states, due to added human resources and expenses associated with processing claims and conducting hearings. It would also further delay adoption processes by adding to an already clogged docket with contact enforcement claims. Given strained state budgets, and the judicial delays already suffered by children in foster care, states need to devise ways to streamline and make the adoption process more, not less, efficient.

An ECA could potentially influence a birthparent and/or an adoptive couple to feel obligated to act in such a way as to negatively impact the grieving or attachment and bonding processes, or to act in a way that is not in the best interests of the child. It is paramount that the presumption of who may best determine the best interests of the child regarding all aspects of its life, including all aspects of the sharing of post-adoption information, rightly belongs to the adoptive parent. The adoptive parents are in the best position to assess all the potential variables and determine the best needs of the child. Over time, an ECA may not be able to
appropriately and accurately anticipate the changing needs and best interests of the child. Many in the adoption field oppose ECAs involving infant children due to the potential concerns inherent in a binding agreement that cannot anticipate the complex and changing needs of all the parties involved. In addition, the differences between the various established statutes, the lack of clarity and consistency within many of the statutes themselves, and the lack of empirical research or other studies on the outcomes of ECAs poses additional concerns.

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In most every case, decisions related to sharing of information and the kinds and levels of disclosure and contact between adoptive families and birthfamilies is best left to flexible good-faith agreements based on the mutual understandings, insights, and needs of each party that naturally change and develop over time. This gives the adoptive parents the presumption of determining the best interests of the child.

Some post-adoption contact agreements can be helpful when applied in situations involving the adoptive placement of older children where there is a substantial established relationship with other caregivers. In these situations, any agreements should be limited and applied only to immediate caregivers.

The value of having options to varying degrees of openness in sharing post-adoption information and contact between adoptive parties is well documented. Options for sharing both identifying and non-identifying information can be an important tool in the bonding and attachment of adoptive parents and also in the grieving process for the birth family. At the same time, the potential risks associated with a mandated formula for post-adoption contact poses potential significant ethical and practical concerns.