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RETHINKING SOCIAL SEVERANCE: POST-TERMINATION CONTACT BETWEEN BIRTH PARENTS AND CHILDREN

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Upon the termination of their parents' parental rights, many foster children are left without any positive, ongoing relationship with an adult. Some foster children will move from one placement to another and will ultimately age-out of foster care without having been adopted. In light of this reality, courts are beginning to recognize the value of post-termination contact for children with little hope of adoption and strong emotional bonds to their birth parents.

Post-termination contact allows children to retain their social relationship with terminated birth parents when birth parents are unable to care for their children but still play a positive role in their children's lives. Post-termination contact may soften the effect of children's loss of their parents, provide children with unique racial, ethnic, or religious experiences, and may encourage birth parents to voluntarily relinquish their rights in appropriate circumstances.

This Note explores the legal framework that courts have employed to order post-termination contact. Generally, courts have either granted post-termination contact as a right of the child or as a right of the birth parent. Some jurisdictions recognize post-termination contact by judicial decision based upon broad statutes authorizing courts to make orders in the best interests of adjudicated children. In other jurisdictions, legislatures have enacted statutes explicitly creating a right to petition the court for post-termination contact. This Note offers a model statute that brings together the most successful pieces from current post-termination statutes, judicial decisions, and other model statutes.

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While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds . . . it seems to me extremely likely that, to the extent parents and families have fundamental liberty interests in preserving such intimate relationships, so, too, do children have these interests, and so, too, must their interests be balanced in the equation.

- Justice John Paul Stevens¹

I. INTRODUCTION

Since the 1960s, courts have increasingly recognized that children not only have interests that should be “balanced in the equation,”² but also constitutional and statutory rights independent of their parents' rights.³ Despite the increasing recognition of children's rights,⁴ courts are still reluctant to put children's rights on equal footing with those of adults.⁵ Even in termination of parental rights proceedings, in which the focus arguably ought to be on a child's right to be free from harm, parents' rights are lost only to the State's overriding interest in protecting its children.⁶

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¹ *Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting).

² *Id.*

³ See Sarah Harton Clark, Note, *Substantive Due Process In a State Of Flux: Should Courts Develop New Fundamental Rights for Alien Children?*, 72 B.U. L. REV. 579, 582–83 & n.23 (1992) (noting that courts began expanding children's constitutional rights in the 1960s).

⁴ A child is said to have a right where a “legal rule commands some result for the purpose of benefiting” the child, and she has standing to enforce the rule. James G. Dwyer, *A Taxonomy of Children's Existing Rights in State Decision Making About Their Relationships*, 11 WM. & MARY BILL RTS. J. 845, 849 (2003). Professor Dwyer explicates children's rights on a continuum. See *id.* at 852 (explaining that children's rights can be subordinate or absolute). For the purpose of this Note, however, a child's “right” will refer to a legal rule primarily created to protect the child's interests, which also provides the child with legal standing to enforce the legal rule, or what Dwyer terms an “absolute right.” *Id.* at 853 & n.8.

⁵ See MARTIN GUGGENHEIM, WHAT'S WRONG WITH CHILDREN'S RIGHTS 7–8 (2005).

⁶ See JAMES G. DWYER, THE RELATIONSHIP RIGHTS OF CHILDREN 55 (2006) (“The child might be said to possess [in termination of parental rights proceedings], at most, a reliance interest that receives protection, at the state's discretion.”). This is highlighted by the fact that most jurisdictions do not

Children's interests are almost exclusively expressed as parental interests or states' interests, as opposed to children's rights.⁷

In recent years, some courts have recognized a child's right to maintain relationships with parent-like individuals.⁸ Most courts, however, remain reluctant to recognize the independent right of children to maintain relationships, and continue to subordinate these rights to the rights of adults, especially parents.⁹ Some courts even fail to recognize a child's right to maintain relationships with their siblings upon the termination of parental rights,¹⁰ despite the consensus that children incur great benefit from ongoing sibling contact.¹¹

Not surprisingly, juvenile courts are even more reluctant to recognize a child's right to maintain a social relationship with his or her birth parents upon the termination of parental rights. Birth parents and children become legal strangers after the termination of parental rights. Birth parents retain no legal rights or responsibilities in relation to their birth children.¹² Children, similarly, have no corresponding rights or responsibilities relating to their birth parents upon termination.¹³ The child will generally remain in foster care or a state-sponsored residential placement until the

allow children or their representatives to bring termination proceedings against their parents. *Id.* at 54. Rather, the State or a party seeking to adopt the child must initiate the proceedings. *Id.* Professor Dwyer views termination provisions as a right of the parents because the proceedings focus on the behavior of the parent that led to the termination of the parent-child relationship, rather than focusing on a pure best interests of the child analysis. *Id.* Due to the emphasis courts place on parental rights, a child has no right to be relieved of a parent-child relationship that is not in her best interest unless the parent is found unfit by clear and convincing evidence. *Id.* at 58.

⁷ See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 130–31 (1989) (“[The child] claims a due process right to maintain filial relationships with both [her legal and biological fathers]. This assertion merits little discussion [A]t best, her claim is the obverse of [her biological father’s] and fails for the same reasons.”).

⁸ See, e.g., *Brokaw v. Mercer County*, 235 F.3d 1000, 1018–19 (7th Cir. 2000) (recognizing a child’s a constitutional right to “familial relations”); *Meldrum v. Novotny*, 640 N.W.2d 460, 470 (S.D. 2002) (Konenkamp, J., concurring in part) (“Courts are beginning to recognize that a child has an independent, constitutionally guaranteed right to maintain contact with a person with whom the child has developed a parent-like relationship.”) (internal quotation omitted). *But see* Dwyer, *supra* note 4, at 846–47 (noting that “courts in the U.S. [have not] attributed to children a constitutional right of any kind against the state when the state assumes and exercises the awesome power of determining their intimate associations”). For an in-depth discussion of children’s relationship rights with parents and others, see generally DWYER, *supra* note 6.

⁹ Gilbert A. Holmes, *The Tie That Binds: The Constitutional Right of Children to Maintain Relationships with Parent-Like Individuals*, 53 MD. L. REV. 358, 380–81 n.141 (1994).

¹⁰ See, e.g., William Patton & Sara Latz, *Severing Hansel from Gretel: An Analysis of Siblings’ Association Rights*, 48 U. MIAMI L. REV. 745, 747 & n.7 (1994) (citing a court that denied adult siblings standing to petition for visitation with minor siblings living with parents).

¹¹ CHILD WELFARE LAW AND PRACTICE 368 (Marvin Ventrell & Donald N. Duquette eds., 2005).

¹² See, e.g., NEB. REV. STAT. § 43-293 (Reissue 2004) (“An order terminating the parent-juvenile relationship shall divest the parent and juvenile of all legal rights, privileges, duties, and obligations with respect to each other . . .”).

¹³ DOUGLAS E. ABRAMS & SARAH H. RAMSEY, CHILDREN AND THE LAW 381–82 (3d ed. 2007). *But see* Richard L. Brown, *Disinheriting the “Legal Orphan”: Inheritance Rights of Children After Termination of Parental Rights*, 70 MO. L. REV. 125, 131 (2005) (explaining that inheritance rights of children are retained in some jurisdictions after the termination of parental rights).

State finds an adoptive home for the child.¹⁴ Many children remain in “foster care drift” for years and eventually age-out of foster care without ever being adopted.¹⁵

The traditional framework for the termination of parental rights also assumes that children and their birth parents become social strangers.¹⁶ Freeing children for adoption is one of the primary reasons states move to terminate parental rights.¹⁷ Termination is thought to symbolize a child’s newfound freedom from her past and her readiness for a rebirth of sorts, through adoption, in a new family.¹⁸ Legally, it also removes the rights of birth parents from the equation, allowing for the acknowledgement of new parental rights in adoptive parents.¹⁹

Experience informs, however, that it is unrealistic to expect children to forget their birth families entirely and to experience a “rebirth” in foster care or adoptive homes.²⁰ Rather, even young children have ties to their pasts that they carry into their adult years.²¹

This Note proposes that social severance between a terminated parent and child may not always be in the child’s best interests. Part II explores the legal and social consequences children face upon the termination of their parents’ rights.²² Not only are children legally severed from their parents, but children additionally experience the severance of an emotional attachment and social relationship. Post-termination contact may provide some children the opportunity to maintain positive contact with their birth parents. There is a large body of psychological research favoring contact

¹⁴ Cf. ABRAMS & RAMSEY, *supra* note 13, at 432 (noting that children removed from their homes may be placed in foster care until they can be returned to their parents or adopted).

¹⁵ *Id.* at 433; see also Susan Vivian Mangold, *Extending Non-Exclusive Parenting and the Right to Protection for Older Foster Children: Creating Third Options in Permanency Planning*, 48 BUFF. L. REV. 835, 860 (2000) (discussing the failure of federal legislation to address the needs of children who age-out of foster care).

¹⁶ See ABRAMS & RAMSEY, *supra* note 13, at 381 (noting that termination usually severs all ties between parents and children, especially when the child is adopted by strangers).

¹⁷ Candace M. Zierdt, *Make New Parents but Keep the Old*, 69 N.D. L. REV. 497, 501 (1993); see also *Santosky v. Kramer*, 455 U.S. 745, 748 (1982) (noting that New York sought the termination of negative parent-child relationships to free children for adoption). The push for termination of parental rights to free children for adoption reflects the federal government’s priority to provide permanence for children. CHILD WELFARE LAW AND PRACTICE, *supra* note 11, at 363–64. When a child cannot be safely and permanently reunited with a birth parent, adoption is the next preferred permanency option for children. *Id.* at 364.

¹⁸ Marsha Garrison, *Parents’ Rights vs. Children’s Interests: The Case of the Foster Child*, 22 N.Y.U. REV. L. & SOC. CHANGE 371, 387 (1996).

¹⁹ Cf. CHILD WELFARE LAW AND PRACTICE, *supra* note 11, at 365 (noting that adoptive parents have all the rights and responsibilities of birth parents, and thus adoption is the permanency plan of choice upon termination).

²⁰ See *In re Guardianship of J.C.*, 608 A.2d 1312, 1321 (N.J. 1992) (“Although natural parents can be a disruptive influence for children who have been adopted, some commentators and psychologists believe that trying to eliminate the natural parents from the children’s lives and memory is impossible, and therefore wrong.”).

²¹ Zierdt, *supra* note 17, at 507.

²² See *infra* Part II.

between children and their birth parents in appropriate cases,²³ and the importance of establishing a strong empirical foundation for post-termination contact cannot be understated.

Part III discusses the benefits and limitations of a child-centered approach to post-termination contact and proposes a more practical solution, suggesting that similar results may be achieved by granting standing to birth parents to pursue continued contact. This Note then explores the adoption of a statutory framework in some states and the components of those statutes that are most and least effective.²⁴ In Part IV, this Note discusses the importance of enforcement and modification mechanisms for post-termination orders, as the birth parent-child relationship may change over time.²⁵ Finally, the Appendix to this Note provides the reader with a model statute compiled from the most effective sections of currently enacted and model post-termination statutes.²⁶

II. POST-TERMINATION CONTACT IN CONTEXT

A. *The Child Welfare System and the Termination of Parental Rights*

Each state has *parens patriae* authority to step into the constitutionally protected sphere of familial privacy²⁷ to remove children temporarily or permanently upon finding that a child is in risk of harm.²⁸ Upon the temporary removal of a child, a state is required to make “reasonable efforts” to reunify the family, unless extraordinary circumstances exist.²⁹ Reasonable efforts include providing intensive services and aide to both parents and children, such as housing subsidies.³⁰ Furthermore, both parents and children have a right to visitation during a child’s removal from custody, again absent extraordinary circumstances.³¹

²³ See *infra* Part II.B.1 (providing empirical support for post-termination contact for children).

²⁴ See *infra* Part III.C.

²⁵ See *infra* Part IV.

²⁶ See *infra* Appendix (providing a model statute for post-termination contact).

²⁷ See *Pierce v. Society of Sisters*, 268 U.S. 510, 530, 534–35 (1925) (holding that a law requiring public school attendance “unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control”); *Meyer v. Nebraska*, 262 U.S. 390, 399–400, 403 (1923) (holding that a law restricting language instruction in schools violates the Fourteenth Amendment substantive due process rights of parents and teachers).

²⁸ ABRAMS & RAMSEY, *supra* note 13, at 283.

²⁹ The Adoption and Safe Families Act, 42 U.S.C. § 671(a)(15)(B) (2000) (“[R]easonable efforts shall be made to preserve and reunify families (i) prior to the placement of the child in foster care, to prevent or eliminate the need for removal of the child from his home, and (ii) to make it possible for a child to safely return to the child’s home.”); *id.* at § 671(a)(15)(D) (not requiring reasonable efforts when a parent has subjected the child to “aggravated circumstances,” committed enumerated serious crimes, or has had parental rights of a sibling involuntarily terminated).

³⁰ ABRAMS & RAMSEY, *supra* note 13, at 380–81; see also CHILD WELFARE LAW AND PRACTICE, *supra* note 11, at 228–29 (explaining that case plans detailing the services the state will provide to families are required by federal law).

³¹ See *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 828 (1977) (“The

Upon a court's finding of abuse or neglect, the court has jurisdiction to enter a dispositional order in the dependency proceeding.³² An adjudication of abuse or neglect does not necessitate the termination of parental rights; rather, there are a number of alternative dispositions, termination being the most severe.³³ The Adoption and Safe Families Act of 1997 (ASFA), however, has accelerated the timeframe within which the termination of parental rights must be sought against parents with children in state custody.³⁴ When parental failure to rehabilitate results in a child's placement in foster care for fifteen of the previous twenty-two months, ASFA requires a state to petition the court to terminate parental rights to free the child for adoption.³⁵

Termination of parental rights severs all legal rights and responsibilities between the parent and child, legally ending the parent-child relationship.³⁶ The State becomes the statutory parent of the child until the child is adopted or reaches the age of majority as a "legal orphan."³⁷

Traditionally, the severance of all ties between terminated parents and children, following the adjudication of parental unfitness, has been viewed as consistent with children's need for permanence and stability.³⁸ The traditional line of thinking posits that only once a child's relationship, both legal and social, with her birth parents has ended is the child able to integrate fully into a new home, with new parents.³⁹ Furthermore, there is concern that adoptive parents prefer to adopt children without ties to their birth parents; thus, contact with birth parents may restrict the pool of prospective adoptive parents.⁴⁰

natural parent has not only the right but the obligation to visit the foster child"); Dwyer, *supra* note 4, at 945-46 & n.301, 302; see also *In re Lisa*, 429 A.2d 1197, 1199 (Pa. Super. Ct. 1981) ("A parent is rarely denied the opportunity to visit with his or her child even if he or she delays in asserting that right Thus, it is clear that visitation rights of a parent not in custody must be carefully guarded.") (internal quotations and citations omitted).

³² *Santosky v. Kramer*, 455 U.S. 745, 748 (1982).

³³ MARK HARDIN & ROBERT LANCOUR, *EARLY TERMINATION OF PARENTAL RIGHTS* 3-4 (1996).

³⁴ CHILD WELFARE LAW AND PRACTICE, *supra* note 11, at 156.

³⁵ The Adoption and Safe Families Act, 42 U.S.C. § 675(5)(E) (2000). Though expedited termination is justified by a child's interest in achieving permanency and stability as quickly as possible, courts do not necessarily consider the likelihood that the child will be adopted in a termination proceeding. See *In re Welfare of J.M.*, 574 N.W.2d 717, 724 (Minn. 1998) ("While . . . no one can predict with complete accuracy if or when the . . . children will be adopted, we also recognize the absolute certainty that if . . . parental rights are not terminated, the . . . children will never be adopted.").

³⁶ *Santosky*, 455 U.S. at 749 & n.1.

³⁷ Upon the termination of parental rights, children may be referred to as a "legal orphans." Brown, *supra* note 13, at 126 & n.5.

³⁸ CHILD WELFARE LAW AND PRACTICE, *supra* note 11, at 365.

³⁹ Garrison, *supra* note 18, at 388.

⁴⁰ See Joan Heifetz Hollinger, *Overview of Legal Status of Post-Adoption Contact Agreements*, in FAMILIES BY LAW 160 (Naomi R. Cahn & Joan Heifetz Hollinger eds., 2004) (noting that some prospective adoptive parents want "the same constitutionally protected autonomy and privacy as other legal parents enjoy" and thus may not be amenable to a child's continued contact with a birth parent).

Adoption, the prospect of entering a new family for a fresh and stable beginning, is seen as ultimately furthering children's best interests.⁴¹ The traditional thinking therefore suggests that when birth parents are not able or willing, as determined by a court, to accept their children back into their homes within the statutory timeframe, the state must petition for termination of parental rights.⁴² The severance of any parent-child social relationship is the consequence of the termination of legal rights.

B. *Post-Termination Contact: A Solution for Some Children*

In recent years, some courts have recognized the value of post-termination contact⁴³ between children and their birth parents.⁴⁴ While the complete finality of termination proceedings serves the best interests of some children, it does not adequately address the reality of many children's experiences in the child protection system. The trend in court-ordered post-termination contact suggests courts increasingly acknowledge that many children will benefit from contact with their birth parents, despite the adults' inability to care for their children as legal parents.⁴⁵

Post-termination contact may include a wide array of direct and indirect communications between children and their birth parents. Contact may consist of a birth parent receiving reports of a child's progress or a birth parent providing a child's guardian with medical or other information of interest.⁴⁶ Contact may also include direct communication between birth parents and children, such as phone calls, the exchange of letters and

⁴¹ See Garrison, *supra* note 18, at 388 (noting that "[t]he 'fresh start' offered by adoption may even confer psychological benefits").

⁴² See *id.* at 374 ("In foster care, however, the noncustodial parent is typically seen as a threat to the child's relationship with her foster parent or her opportunity to obtain adoptive parents; termination of parental rights is urged whenever the child's return home cannot be accomplished quickly.").

⁴³ For purposes of this Note, post-termination contact refers to any contact between children and birth parents after birth parents' parental rights have been legally terminated. The term post-termination contact is used to refer to contact between children and their birth parents, regardless of whether the children have been adopted. While the existence of adoptive parents changes the analysis and thus will be discussed *infra* Part II.B.2., the emphasis of this Note is on the child's right to post-termination contact regardless of the existence of competing adult interests or rights. Furthermore, post-termination contact expressed as a child's right is assumed to be court-ordered, rather than contracted for by other parties in a child's life, unless otherwise noted.

⁴⁴ See *infra* Part III.A. In addition, the U.S. Children's Bureau has also recommended that state laws authorize their courts to approve agreements for post-termination and post-adoption contact for children in foster care with individuals, including birth parents, who have "a significant emotional tie to the child." U.S. Children's Bureau, *Guidelines for Public Policy and State Legislation Governing Permanence for Children*, in FAMILIES BY LAW, *supra* note 40, at 172.

⁴⁵ Judge Douglas F. Johnson, *Parent-Child Visitation After Termination of Parental Rights*, THE JUDGES' PAGE NEWSL. (The Nat'l CASA Ass'n & the Nat'l Council of Juv. and Fam. Ct. Judges), June 2006, at 22-24, available at http://www.nationalcasa.org/download/Judges_Page/0606_family_visitation_issue_0036.pdf.

⁴⁶ CHILD WELFARE LAW AND PRACTICE, *supra* note 11, at 368.

pictures, or periodic visitation.⁴⁷

1. *The Benefit of Post-Termination Contact*

Post-termination contact enables birth parents and children to continue a social relationship, lessening the psychological harm incurred from the ultimate separation of parent and child.⁴⁸ The benefits of post-termination contact are most likely to result when children have established a significant emotional bond with their birth parents⁴⁹ and are old enough to express a desire for continued contact.⁵⁰

For adolescents, continued contact with birth parents can lead to a better understanding of self. The absence of post-termination contact may “enhance the child’s tendency toward self-blame or exaggeration; the child may idealize the absent parent, blame herself for disruption in the relationship, or exaggerate the parent’s flaws.”⁵¹ The children of birth parents whose parental rights have been terminated, especially those who are older at the time of the termination, undoubtedly grow up with questions regarding their birth parents and the events leading to the termination of the parent-child relationship.⁵² Children requesting contact with their birth parents may be less likely to run away from a placement or adoptive home if the child receives such contact.⁵³

⁴⁷ *Cf. id.* (noting that it is in some children’s interest to maintain some contact after adoption and that birth parents’ participation can have a positive impact on adoption).

⁴⁸ See CHILD WELFARE LAW AND PRACTICE, *supra* note 11, at 70–73 (summarizing the current research on the damaging effects of the separation of primary caretakers and children, especially during the early years of a child’s life); DWYER, *supra* note 6, at 285 (“Particularly with noninfants, complete severance of an existing parent-child relationship, even though it is insufficiently nurturing, can leave a child bewildered and with a lifelong sense of loss and uncertain identity.”); *cf.* Sonia Russell, *Issues Relating to Long-Term, Out-of-Home Care for Children of Parents with Mental Illness*, in CHILDREN OF PARENTS WITH MENTAL ILLNESS 2: PERSONAL AND CLINICAL PERSPECTIVES 158–60 (Vicki Cowling ed., 2004) (suggesting that the termination of parental rights of parents with mental illness is not always an ideal solution, even if the child has been in long-term foster care); Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 425 (1983) (arguing that available evidence suggests that a placement in which a foster child is free to continue contact with her birth parents is preferable to any placement that requires complete severance of contact with the birth parent).

⁴⁹ Indeed, the Supreme Court has recognized the importance of emotional attachments created in biological families, noting that “the importance of the familial relationship . . . stems from the emotional attachments that derive from the intimacy of daily association . . . as well as from the fact of blood relationship.” *Smith v. Org. of Foster Families for Equality & Reform*, 431 U.S. 816, 844 (1977).

⁵⁰ *Cf. Dep’t of Children and Family Servs. v. M.J.*, 889 So. 2d 986, 988 (Fla. Dist. Ct. App. 2004) (holding that termination of parental rights was warranted, but remanding the case to the trial court to consider whether post-termination communication would be in the children’s best interests because the children expressed interest in continued contact with their mother).

⁵¹ Garrison, *supra* note 18, at 382.

⁵² See Annette Baran & Reuben Pannor, *Perspectives on Open Adoption*, in FAMILIES BY LAW, *supra* note 40, at 164 (discussing the negative effects of closed adoptions, especially on adolescents).

⁵³ U.S. Children’s Bureau, *supra* note 44, at 172–73; see also CHILD WELFARE LAW AND PRACTICE, *supra* note 11, at 379 (“Youth occasionally vote with their feet and run from foster care to be with their extended family, including the parents whose parental rights were previously terminated.”).

Furthermore, post-termination contact may soften the transition that follows the loss of a parent.⁵⁴ Upon termination of parental rights, most children do not simply forget the existence of their birth parents and the circumstances surrounding the severance of the relationship.⁵⁵ Rather, children continue to question and grapple with the issues surrounding the termination and their identities as the biological children of their birth parents.⁵⁶ Continued contact with birth parents may facilitate children's ability to integrate the prior relationship and experiences into their lives as foster children or adoptees.⁵⁷ Furthermore, the exchange of family medical and health information between birth parents and children's guardians is easier within an ongoing relationship between birth parents and children.⁵⁸

Continuing contact may also provide children with racial, cultural, ethnic, or religious knowledge and experiences offered by their birth parents but absent from their foster or adoptive homes.⁵⁹ Minority children are disproportionately represented in the child protection system,⁶⁰ and post-termination contact provides children with exposure to the cultural and religious experiences of their birth parents without limiting their pool of prospective adoptive families to those families with similar racial, cultural, ethnic, or religious backgrounds.⁶¹

A birth parent's unfitness does not necessarily signify his or her inability to play a positive role in the child's life, nor does it necessarily signify the absence of an emotional bond or attachment between the child and parent.⁶² Likewise, a birth parent's ability to play a positive role in a child's life does not necessarily indicate that termination is not in the best interests of the child.⁶³ Rather, post-termination contact with birth parents enables some children to feel connected to their pasts while also allowing

⁵⁴ See Garrison, *supra* note 18, at 383.

⁵⁵ Professor Annette Ruth Appell likened adoption of older children to marriage, as opposed to birth, because "adoptees come to the adoption with life experiences that they and their adoptive family must incorporate into the new relationship." Annette Ruth Appell, *Blending Families Through Adoption: Implications for Collaborative Adoption Law and Practice*, 75 B.U. L. REV. 997, 1012 (1995).

⁵⁶ *Id.* at 999.

⁵⁷ See Annette Ruth Appell, *Increasing Options to Improve Permanency: Considerations in Drafting an Adoption with Contact Statute*, in FAMILIES BY LAW, *supra* note 40, at 175 (noting that cooperative adoption allows "adoptees to integrate birth relationships or knowledge about those relationships into their developmental process").

⁵⁸ U.S. Children's Bureau, *supra* note 44, at 172.

⁵⁹ *Id.*

⁶⁰ See generally U.S. GOV'T ACCOUNTING OFFICE, AFRICAN AMERICAN CHILDREN IN FOSTER CARE: ADDITIONAL HHS ASSISTANCE NEEDED TO HELP STATES REDUCE THE PROPORTION IN CARE (2007) (noting that a significantly greater proportion of minority children are in foster care settings).

⁶¹ Cf. David D. Meyer, Lecture, *Palmore Comes of Age: The Place of Race in the Placement of Children*, 18 U. FLA. J.L. & PUB. POL'Y 183, 185-86 (2007) (noting the use of race, in some jurisdictions, as a guide in making placements in adoptive homes).

⁶² Zierdt, *supra* note 17, at 511.

⁶³ See *id.* ("A child may receive more benefit from a realization that although her parent is not able to care for her on a full time basis, the parent loves her . . .").

for the removal of circumstances surrounding the birth parent-child relationship that were previously unhealthy for the children.⁶⁴ Even very limited post-termination contact may provide information to children and their guardians known only by birth parents. Information regarding medical histories or children's ancestral backgrounds can be communicated through letters or other media that are minimally intrusive to the birth parents and adoptive or foster parents.⁶⁵

Finally, a court's authority to order post-termination contact in the best interests of the child may increase the likelihood that birth parents will consent to termination and voluntarily relinquish their parental rights.⁶⁶ A birth parent's knowledge of potential post-termination contact may assure the birth parent that she may not lose all contact with her child and thus decrease her opposition to termination. A birth parent's consent to an inevitable termination eliminates the negative effects of a drawn out and contested termination trial, including the postponement of stability for the child and the consumption of scarce judicial resources.⁶⁷

2. *Factors Supporting Post-Termination Contact for Children*

Post-termination contact is not in the best interests of every child. Many children will benefit from the permanency and stability of terminating all ties with their birth parents and forming emotional bonds with their foster or adoptive families. Birth parents may not be willing or able to maintain contact with their children in a healthy manner, or a child may have developmental or psychological needs supporting the severance of the birth parent-child social relationship.⁶⁸ Infants and very young children who have not formed strong emotional bonds with their birth parents and have high prospects for adoption may have their best interests served by severing contact with their birth parents.⁶⁹ There are children,

⁶⁴ Appell, *supra* note 55, at 1015.

⁶⁵ *See id.* at 1058 (arguing that birth parents wishing to sever all contact with their children should receive counseling regarding the importance of providing information about the birth family to the child or adoptive parents).

⁶⁶ *See id.* at 1021 (noting that permitting open adoption may encourage birth parents to relinquish their parental rights). *But see* McCormick v. State, 354 N.W.2d 160, 161–62 (Neb. 1984) (concluding the parents had relinquished their rights by coercion because they falsely believed that they would be guaranteed the right to continue to visit their child upon the relinquishment of their parental rights).

⁶⁷ U.S. Children's Bureau, *supra* note 44, at 173; *see also* Appell, *supra* note 55, at 1022 (stating that children whose parents consented to termination are "more likely to experience smoother adoptions" as compared to those children whose parents did not consent and had their rights terminated through litigation).

⁶⁸ *See* Appell, *supra* note 55, at 175 (noting that children with fears or insecurities related to either their birth parent or the permanency of a placement may not benefit from post-adoption contact); Garrison, *supra* note 18, at 383 (suggesting that parental contact should not continue when the child's safety is threatened or there exists serious conflict between the birth parents and the foster or adoptive parents).

⁶⁹ Garrison, *supra* note 18, at 383.

however, whose chance for stability and permanency is low,⁷⁰ and courts should have authority to order post-termination contact when it serves these children's best interests. In an imperfect child protection system, post-termination contact will be some children's best chance for stability, and their only chance for continuity.⁷¹

Some circumstances suggest that post-termination contact is more likely to be in a child's best interests. But, as in many analyses that require a determination of the best interests of the child, no one factor is determinative. Rather, the existence of the enumerated factors below suggests that post-termination contact is more likely to be in the child's best interests, whereas the failure of a given situation to meet the identified factors suggests that the complete severance of the parent-child social relationship is not in the child's best interest.

Factors suggesting that a child may benefit from post-termination contact include: (1) the foster child is older in age;⁷² (2) the nature and strength of the ongoing relationship between the birth parent and child; (3) the existence of important medical or family history known to the birth parent;⁷³ (4) any unique cultural, ethnic, religious, or racial experiences or knowledge offered by the birth parent;⁷⁴ (5) the child's expressed desire to maintain a social relationship with the birth parent; (6) the ability and willingness of the birth parent to continue a relationship with the child;⁷⁵ and (7) the likelihood the foster or adoptive parents will assent to and support the post-termination contact.⁷⁶

While the benefit conferred on the child by post-termination contact is paramount, birth parents, foster parents, and adoptive parents may also

⁷⁰ CHILD WELFARE LAW AND PRACTICE, *supra* note 11, at 233.

⁷¹ See Garrison, *supra* note 48, at 461–64 (citing research findings that children in long-term foster care who were visited by their birth parents were better off than those with no contact with their birth parents, even when the visitation was infrequent and the parents were inadequate caregivers).

⁷² Though the age of a child is enumerated as a relevant factor, it mainly serves to emphasize other factors that correlate highly with age. An older child has the capacity to express her desire to maintain contact, has had a longer time to develop an emotional bond with her birth parent, and has been party to the parent-child relationship for a longer period of time. Older children are also less likely to be adopted after the termination of parental rights. Alice Bussiere, *Permanence for Older Foster Youth*, 44 FAM. CT. REV. 231, 236 (2006).

⁷³ See *supra* note 58 and accompanying text.

⁷⁴ See CHILD WELFARE LAW AND PRACTICE, *supra* note 11, at 368 (noting that it may be in the child's best interest to maintain a connection to her birth parents to facilitate knowledge and understanding of her ethnic background).

⁷⁵ The parent's positive feelings toward the prospect of continued visitation with the child is important because, as it stands, a child may be compelled to maintain a relationship with an adult but an adult cannot be compelled to maintain a social relationship with a child. Dwyer, *supra* note 4, at 985.

⁷⁶ Cf. JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTEREST OF THE CHILD 37–38 (1979) (arguing that primary caretakers, in the divorce context, should be the sole decision-makers for their children because conflict over visitation is more damaging to children than separation from noncustodial parents).

benefit from post-termination contact.⁷⁷ Continuing contact may diminish birth parents' feelings of loss upon termination and allow foster and adoptive families to have access to information to which they would not otherwise.⁷⁸ Children with birth, adoptive, or foster parents exhibiting approval of their post-termination contact will incur further benefits as their caregivers and birth parents exhibit, and the child internalizes, their approval.⁷⁹

III. CHOOSING A LEGAL FRAMEWORK FOR POST-TERMINATION CONTACT

Post-termination contact may be achieved by different legal frameworks.⁸⁰ States differ on the availability of post-termination contact and, where available, the manner in which it may be achieved. Post-termination may be ordered pursuant to a specific statute detailing the conditions of visitation, or it may be judicially ordered pursuant to a court's broader statute authorizing the court to make orders in the best interests of the child.⁸¹ Furthermore, courts and legislatures may approach post-termination contact as either a birth parent's right or a child's right.⁸²

Vesting the right in children provides both practical and symbolic significance,⁸³ but, traditionally, children's rights have lagged behind those of adults.⁸⁴ As a result, the advantages of allowing children to petition a court for post-termination contact may be outweighed by states' hesitancy to expand children's rights.⁸⁵

⁷⁷ Hollinger, *Overview of Legal Status of Post-Adoption Contact Agreements*, in FAMILIES BY LAW, *supra* note 40, at 159.

⁷⁸ *Id.*

⁷⁹ See generally GOLDSTEIN ET AL., *supra* note 76.

⁸⁰ Post-termination may also occur informally. For example, a child may take the initiative to call her birth mother or a child in kinship care may see her birth father at family events. The focus of this Note, however, is on creating legal rights that enable individuals to pursue and enforce post-termination contact in court.

⁸¹ Compare TEX. FAM. CODE § 161.2061 (Vernon Supp. 2007) (detailing the conditions under which a court may order limited post-termination contact), with *In re Adoption of Vito*, 728 N.E.2d 292, 299 (Mass. 2000) ("Our Probate Courts . . . [possess] inherent powers apart from statutory authorization. These powers are broad and flexible, and extend to actions necessary to afford any relief in the best interests of a person under their jurisdiction.").

⁸² Compare *In re Stacey D.*, 684 N.W.2d 594, 604 (Neb. App. Ct. 2004) (approaching post-termination contact as the birth parent's right), with *In re Adoption of Vito*, 728 N.E.2d at 302 (approaching post-termination contact as the child's right).

⁸³ See generally Michael King, *Children's Rights as Communication: Reflections on Autopoietic Theory and the United Nations Convention*, 57 MOD. L. REV. 385 (1994) (noting the symbolic value of recognizing children's rights).

⁸⁴ See *supra* note 6 and accompanying text (noting that children's rights have not been recognized to the full extent to which adults' rights have been recognized).

⁸⁵ See Sharon Balmer, *From Poverty to Abuse and Back Again: The Failure of the Legal and Social Services Communities to Protect Foster Children*, 32 FORDHAM URB. L.J. 935, 960 (2005) (noting courts' hesitancy to recognize children's rights).

A. *A Child-Centered Model*

Standing to petition a court for post-termination contact may be vested exclusively in children, rather than granting birth, foster, or adoptive parents standing to move for post-termination contact, or relying on adoptive parents' discretion to allow continued contact.⁸⁶

This model has the benefit of assuring children's interests in relationships and continuity are served over the interests of the adults in their lives. Allowing birth parents or other interested third parties to petition the court for continued contact enables adults to exploit children to satisfy their own needs and interests. Children would have to rely on adults to seek contact, precluding a child's guardian *ad litem* or attorney from pursuing post-termination contact in court. Though post-termination contact may incidentally benefit the birth parent, vesting the ability to petition the court in the child is consistent with the growing child-centered approach in family law.⁸⁷ This model also carries with it symbolic value,⁸⁸ it reminds the court and all parties involved that the child's best interests are paramount, not the wishes of foster, birth, and adoptive parents.

Furthermore, granting birth parents standing to petition the court for post-termination contact is inconsistent with termination proceedings, as it fails to truly divest parents of all legal rights in relation to their birth children.⁸⁹ Adults with a personal interest in their relationship with foster children, such as birth parents, foster parents, or adoptive parents, may also be focused on the needs the child fulfills in their own lives.⁹⁰ Rather than furthering the best interests of the child, an adoptive parent may be more concerned with having complete parental control over the child, or a birth parent may try to block adoption by petitioning the court for continued contact as a condition to adoption.

A child-centered model necessarily renounces open adoption contracts between birth and adoptive parents. Although allowing for many of the same benefits as court-ordered post-termination contact, the legal right does not ultimately belong to the child. In open adoptions, post-adoption contact is wholly a construction of the contractual relationship between birth and adoptive parents. In contrast, the child-centered model requires a court to order post-termination contact when it is in a child's best interests,

⁸⁶ Cf. *In re Adoption of Vito*, 728 N.E.2d at 302 (noting that post-adoption contact is "grounded in the over-all best interests of the child . . . not in the rights of the biological parent").

⁸⁷ Appell, *supra* note 55, at 1002.

⁸⁸ See generally King, *supra* note 83 (noting the symbolic value of recognizing children's rights).

⁸⁹ Hollinger, *Overview of Legal Status of Post-Adoption Contact Agreements*, in *FAMILIES BY LAW*, *supra* note 40, at 160 (noting that post-adoption contact agreements are often presumed to be inconsistent with the "essential meaning" of adoption).

⁹⁰ See Appell, *supra* note 55, at 1023 ("[T]here is no guarantee that [birth and adoptive parents] will be able to rise above their own needs, fears, interests, and understandings to protect the child's needs . . .").

regardless of whether the birth and adoptive parents are willing to contract for the contact. Equally, it requires a court to abstain from granting post-termination contact, despite an existing contract to the contrary, when it is not in the best interests of the child. Upon court-ordered post-termination contact, the child is a party to the order and not merely a third-party beneficiary.⁹¹ The attitudes of birth parents and adoptive parents should bear heavily on the best interests of the child analysis, but they should not be determinative of the post-termination contact order.⁹²

This model also enables children to petition for the modification of post-termination contact orders as their needs change and they become integrated in a life that largely does not involve their birth parents. An order for post-termination contact that allows for continuing jurisdiction⁹³ in the case of changed circumstances allows the nature and extent of the post-termination contact to change as a child's developmental and emotional needs change.⁹⁴ Most importantly, as a child nears adulthood, courts should consider the child's wishes and reassess the desirability of court-ordered continued contact between the birth parent and the child.⁹⁵

The child-centered model requires either that a child's constitutional right to post-termination contact is recognized or that children have statutory standing to pursue continued contact in court. In states that have precluded children from seeking post-termination contact under their statutory schemes, children must assert a constitutional right to post-termination contact based on their substantive due process right, under the Fourteenth Amendment's Due Process Clause, to maintain relationships with their birth parents and other parent-like individuals.⁹⁶

As Justice Stevens asserted in his dissenting opinion in *Troxel v. Granville*, a child may very well have a liberty interest in her familial ties.⁹⁷ Supreme Court jurisprudence has repeatedly recognized a fundamental liberty interest in familial relationships for adults, but has

⁹¹ *Id.* at 1049–50.

⁹² *But see id.* at 1054–55 (“[T]he stress placed on a child whose adoptive or birth parents cannot accept each other may make visits more damaging than empowering for the child.”); Garrison, *supra* note 48, at 446–49 (describing Goldstein, Freud, and Solnit's theory of permanence, which posits that “the risks of conflicting parental loyalties outweigh the advantages of maintaining contact”).

⁹³ A court ordering post-termination contact should also retain continuing jurisdiction for purposes of enforcing the order.

⁹⁴ Appell, *supra* note 55, at 1023 (indicating that one limitation to post-adoption contracts is their rigidity in light of a child's changing developmental needs). Note also that some states even allow for the reinstatement of parental rights after termination. *E.g.*, MICH. COMP. LAWS SERV. § 712A.20 (LexisNexis 2005).

⁹⁵ *E.g.*, *In re Alyssa W.*, 619 S.E.2d 220, 223–24 (W. Va. 2005).

⁹⁶ *See* Holmes, *supra* note 9, at 362–63 (arguing that children should be afforded “an independent liberty interest in their relationships” with parent-like individuals).

⁹⁷ *See Troxel v. Granville*, 530 U.S. 57, 88 (2000) (Stevens, J., dissenting) (“While this Court has not yet had occasion to elucidate the nature of a child's liberty interests in preserving established familial or family-like bonds . . . it seems to me extremely likely that . . . so, too, do children have these interests, and so, too, must their interests be balanced in the equation.”).

failed to recognize *children's* liberty interest in their familial relationships.⁹⁸ Courts have given preference to adults' rights, especially those of parents, over children's rights, despite having recognized that children possess constitutional rights in other contexts.⁹⁹

In *Michael H. v. Gerald D.*, Victoria, a child, and Michael, her biological (but not legal) father, brought concurrent substantive due process claims to protect their fundamental liberty interest in their relationship.¹⁰⁰ The U.S. Supreme Court found Michael's claim to be without merit and dismissed it. The Court also dismissed Victoria's claim, merely stating that it was weaker than Michael's claim and noting that there was no tradition compelling the Court to recognize multiple fatherhood.¹⁰¹ The Court provided no further insight into children's liberty interest in their familial relationships, nor did the Court preclude the future possibility of such a claim.¹⁰²

Given the Court's opinion, written by Justice Scalia, that only traditionally protected liberty interests are to be recognized,¹⁰³ a child's liberty interest to maintain a relationship with a birth parent whose legal rights have been terminated may not fare well. Traditionally, the termination of parental rights has resulted in the termination of both the legal and social parent-child relationship.¹⁰⁴

There is a marked inconsistency in the Court's acknowledgement of the strength of children's constitutional rights in some spheres, such as juvenile justice¹⁰⁵ and free speech,¹⁰⁶ but not in other spheres, such as their right to maintain relationships with family members, biological or otherwise.¹⁰⁷ Most alarming is the innocence of children in the dissolution of their families through the termination of parental rights.¹⁰⁸ Children are not responsible for their parents' unfitness, yet upon the dissolution of parent-child relationships, courts do not recognize children's liberty interest in furthering a social relationship with their birth parents.

Legal parents presumably have a substantive due process right to

⁹⁸ Holmes, *supra* note 9, at 363, 370.

⁹⁹ See, e.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985) (acknowledging a child's rights under the Fourth Amendment); see also Holmes, *supra* note 9, at 381, 385.

¹⁰⁰ *Michael H. v. Gerald D.*, 491 U.S. 110, 113 (1989).

¹⁰¹ *Id.* at 130–31.

¹⁰² Holmes, *supra* note 9, at 372–73.

¹⁰³ *Michael H.*, 491 U.S. at 123.

¹⁰⁴ See, e.g., NEB. REV. STAT. § 43-293 (Reissue 2004) (“An order terminating the parent-juvenile relationship shall divest the parent and juvenile of all legal rights, privileges, duties, and obligations with respect to each other . . .”).

¹⁰⁵ E.g., *New Jersey v. T.L.O.*, 469 U.S. 325, 341–42 (1985).

¹⁰⁶ *Tinker v. Des Moines*, 393 U.S. 503, 505 (1969) (recognizing children's right to wear armbands in protest of the Vietnam War).

¹⁰⁷ See *Michael H.*, 491 U.S. at 130 (declining to state that “a child has a liberty interest, symmetrical with that of her parent, in maintaining her filial relationship”).

¹⁰⁸ Holmes, *supra* note 9, 382–83, 392 (noting the child's noninvolvement in creating the “‘legal’ barriers” that courts use to rationalize the denial of a child's due process claim).

visitation with their children, though the U.S. Supreme Court has never ruled on the issue.¹⁰⁹ Upon the dissolution of marriage, both parents retain parental rights with respect to their children.¹¹⁰ And even when a court order divests parents of visitation rights, they retain standing to petition a court for visitation with their children.¹¹¹

Why should children, by no fault of their own, be afforded less of a right to the same parent-child relationship upon the permanent dissolution of their family? Though the state proves by clear and convincing evidence that the parent-child legal relationship is not in the best interests of the child in a successful termination,¹¹² courts should make a separate examination of the parent-child social relationship upon a child's motion. A child's right to petition for post-termination contact follows from courts' recognition of children's substantive due process rights in other contexts and their recognition of legal parents' right to visitation.

Individuals with substantive due process rights in familial relationships have standing to proceed under that right.¹¹³ Accordingly, any court recognizing a child's liberty interest in a relationship with a birth parent, must grant standing to a child seeking such a relationship.¹¹⁴ Furthermore, if the U.S. Supreme Court were to recognize a child's liberty interest in post-termination contact, every state would have to grant standing to children in this context.¹¹⁵ States would be compelled to amend or enact third-party visitation or post-termination contact statutes to afford children standing to petition the court.¹¹⁶

A second approach to child-centered post-termination contact is through judicial decision. A state's statutory authority to enter orders in the best interests of adjudicated children provides the basis for judicially imposed post-termination contact.¹¹⁷ To make such orders in the best interests of a child, a court must first establish that it has jurisdiction over the child.

States generally confer exclusive original jurisdiction over children in

¹⁰⁹ See, e.g., *Swipies v. Kofka*, 419 F.3d 709, 713–14 (8th Cir. 2005) (holding that a non-custodial father's liberty interest was violated when his daughter was removed from his custody without due process).

¹¹⁰ David D. Meyer, *The Constitutional Rights of Non-Custodial Parents*, 34 HOFSTRA L. REV. 1461, 1482 (2006).

¹¹¹ Merle H. Weiner, *Inertia and Inequality: Reconceptualizing Disputes over Parental Relocation*, 40 U.C. DAVIS L. REV. 1747, 1827 n.367 (2007).

¹¹² *Santosky v. Kramer*, 455 U.S. 745, 747–48 (1982).

¹¹³ Holmes, *supra* note 9, at 396–97 & n.210.

¹¹⁴ *Id.* at 396–97.

¹¹⁵ *Id.* at 397.

¹¹⁶ *Id.* at 397 & n.211.

¹¹⁷ See, e.g., *In re Christina L.*, 460 S.E.2d 692, 701 (W. Va. 1995) (holding that a circuit court may continue visitation with an unfit parent after parental rights are terminated if it is in the best interests of the child).

dependency proceedings in juvenile courts by statute.¹¹⁸ Upon adjudicating a child dependent, a juvenile court has jurisdiction to determine the disposition of the case, including, but not limited to, the termination of parental rights.¹¹⁹ The disposition of termination of parental rights gives a juvenile court continuing jurisdiction over the adjudicated or dependent child until the child reaches the age of majority or is adopted.¹²⁰

The Massachusetts Supreme Judicial Court has taken a broad and child-centered approach to its authority to order post-termination contact and contested post-adoption visitation between birth parents and children. Post-termination or post-adoption contact is decided in every case in which either the parent or child raises the issue,¹²¹ and is decided according to the best interests of the child.¹²² In “those circumstances when termination proceedings occur and there is . . . no preadoptive parent identified,” the court further notes that “the equitable authority of the judge may be especially important in safeguarding the child’s best interests.”¹²³ Thus, the court’s authority to order post-termination contact is greater where an adoptive family has not been identified for the child.

In cases involving children with identified pre-adoptive families, the Massachusetts Supreme Judicial Court held that “the equitable powers of courts in this area permit a judge, in her discretion, to evaluate an adoption plan proposed by the department that apparently did *not* contemplate visitation by the [birth] mother, and decide whether visitation is in the child’s best interests.”¹²⁴ Post-termination contact in these circumstances, however, must be “carefully and narrowly crafted,” which is not a requirement in cases not involving prospective adoptive families.¹²⁵

¹¹⁸ See, e.g., COLO. REV. STAT. § 19-1-104(1) (2007) (“Except as otherwise provided by law, the juvenile court shall have exclusive original jurisdiction in proceedings: (b) Concerning any child who is neglected or dependent . . .”).

¹¹⁹ See, e.g., *id.* (“[T]he juvenile court shall have exclusive original jurisdiction in proceedings: (d) To terminate the legal parent-child relationship . . .”).

¹²⁰ See Louise Gruner Gans, *Priorities for Family Court Reform*, 40 COLUM. J.L. & SOC. PROBS. 629, 631 n.9 (2007) (“Through the introduction of the concept of the court’s continuing jurisdiction, a child’s progress from placement to discharge or to proceedings for termination of parental rights and adoption is tracked through what is in effect a single process, which now includes repeated planning conferences and permanency reviews.”).

¹²¹ See *In re Adoption of John*, 759 N.E.2d 747, 754 (Mass. App. Ct. 2001) (holding that the trial judge must make findings, although not extensive findings, regarding the appropriateness of post-termination visitation when the issue arises).

¹²² In deciding whether post-termination contact is in the child’s best interests, the court is to consider “significant, existing bonds between the child and a biological parent.” *In re Adoption of Vito*, 728 N.E.2d 292, 303 (Mass. 2000). Courts will also consider the history of parent-child visitation. *In re Adoption of Flora*, 801 N.E.2d 806, 810–11 (Mass. App. Ct. 2004). For children hoping to be adopted in the future, the court should be cognizant of the negative impact post-termination contact may have on the pool of prospective adoptive families. *In re Adoption of Vito*, 728 N.E.2d at 303. Finally, the court should consider whether the child is living in a potential adoptive home and the emotional attachment the child has formed to her pre-adoptive family. *Id.* at 303.

¹²³ *In re Adoption of Vito*, 728 N.E.2d at 301.

¹²⁴ *Id.* at 298–99.

¹²⁵ *Id.* at 304.

According to the court, the authority to order continued contact is not based in any statutory authority, but rather the court's broad equitable powers to assure the child's best interests.¹²⁶ The court further held that post-termination contact is the child's right and not the birth parent's right.¹²⁷ Therefore, both children and birth parents in Massachusetts may petition the court for post-termination contact, but the contact is ultimately considered the child's right.

The Supreme Court of West Virginia similarly held that post-termination contact between a child and her birth parent is the right of the child, rather than a right of the birth parent.¹²⁸ In recognizing the child's right, the court cited cases recognizing a child's right to "continued association with those with whom he or she shares an emotional bond."¹²⁹ The West Virginia Supreme Court has repeatedly recognized a child's right to post-termination contact,¹³⁰ instructing the trial court to consider the child's wishes when determining whether contact is in the best interests of the child.¹³¹

B. *A Birth Parent-Centered Model*

Post-termination contact will never be in the best interests of a child unless his or her birth parent is not only willing to maintain contact, but is also committed to and invested in maintaining contact. A court cannot force terminated parents to see their children, and a court should not subject children to rejection by parents who no longer retain parental rights.

The importance of a birth parent's commitment to post-termination contact allows a court to grant standing to birth parents, rather than

¹²⁶ *Id.* at 299 ("Our Probate Courts . . . [possess] inherent powers apart from statutory authorization. These powers are broad and flexible, and extend to actions necessary to afford any relief in the best interests of a person under their jurisdiction.") (quoting *In re Moe*, 432 N.E.2d 712, 718 (1982)).

¹²⁷ *See id.* at 302 (noting that a judge should focus on "emotional bonding and other circumstances of the actual personal relationship of the child and the biological parent, and not on the rights of the biological parent nor the legal consequences of their natural relation").

¹²⁸ *In re Christina L.*, 460 S.E.2d 692, 701 & n.9 (W. Va. 1995). The Supreme Court of Appeals of West Virginia instructed the lower court, on remand, to consider whether "a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request." *Id.* at 701.

¹²⁹ *Id.* at 701 & n.9. While it is beyond the scope of this Note, the Court's language here suggests that the Court would similarly acknowledge a child's relationship with other parent-like individuals and siblings.

¹³⁰ *See, e.g., In re Alyssa W.*, 619 S.E.2d 220, 223–24 (W. Va. 2005) (recognizing a child's right to post-termination visitation when it is in her best interests, but noting that it is usually granted to older children who have had time to establish emotional bonds); *In re Katie S.*, 479 S.E.2d 589, 601 (W. Va. 1996) ("[P]ost-termination visitation, either with siblings or parents, may be in the best interest of the child, especially when there is a close bond and the child maintains love and affection for either her siblings or parents.").

¹³¹ *In re Alyssa W.*, 619 S.E.2d at 224.

children, with little practical effect.¹³² Enabling birth parents to petition the court avoids standing barriers that arise with children in some states and reinforces the understanding that post-termination contact is only beneficial to children when birth parents are committed to maintaining contact. This model requires a statute or judicial decision recognizing birth parents' standing to petition the court.¹³³

For example, the Nebraska Court of Appeals held that its juvenile court has continuing jurisdiction over adjudicated children to enter orders in their best interests, including post-termination contact orders, until they are adopted or reach the age of majority.¹³⁴

Initially, in *In re Stacy D.*, a trial court found that it lacked jurisdiction to order post-termination visitation as part of termination proceedings.¹³⁵ The Nebraska Court of Appeals reversed, however, reasoning that the trial court had jurisdiction because the mother requested continued visitation *prior to* the termination of her parental rights.¹³⁶ The Court of Appeals noted that the timing of the mother's request was the probative factor that gave the court jurisdiction to enter a post-termination contact order; parents have no standing to petition for continued contact after termination of their rights.¹³⁷ Thus, Nebraska is willing to recognize that post-termination contact benefits children in certain circumstances; however, only birth parents may petition the court.

The birth-parent-centered model, nevertheless, does raise compelling questions regarding adoption and the rights of adoptive parents. Upon the termination of parental rights, the most preferred permanency goal for children is adoption.¹³⁸ Therefore, it should be made clear to both birth parents and children that, notwithstanding a post-termination contact order, it is in the best interests of the children that they remain available for adoption.

Birth parents may be more willing to relinquish their parental rights if courts are willing to enter post-termination contact orders.¹³⁹ Moreover, if

¹³² Vesting the right in birth parents rather than children may have a symbolic effect. See King, *supra* note 83, at 385–86 (noting the symbolic value of recognizing children's rights).

¹³³ For a proposed statute granting birth parents standing to petition a court for post-termination contact upon or after their parental rights are terminated, see Appendix, *infra*.

¹³⁴ *In re Stacey D.*, 684 N.W.2d 594, 604 (Neb. Ct. App. 2004). Stacey and Shannon's case provides an excellent example of children (aged nine and eleven at time of termination) who may benefit from both the termination of their parents' rights and continued visitation. Their mother, Pam, abused substances and had not been able to provide consistent and adequate housing for her daughters. *Id.* at 597. Pam, however, had consistently visited the children throughout their placement in foster care. *Id.* at 600. Experts at the termination proceedings agreed that it was in the children's best interests to have continued contact with their birth mother pending an adoptive placement. *Id.* For the trial judge's perspective, see Johnson, *supra* note 45, at 22–24.

¹³⁵ Johnson, *supra* note 45, at 24.

¹³⁶ *In re Stacey D.*, 684 N.W.2d at 603.

¹³⁷ *Id.*

¹³⁸ CHILD WELFARE LAW AND PRACTICE, *supra* note 11, at 364.

¹³⁹ Appell, *supra* note 55, at 1021.

courts are willing to do so, children may be less likely to resist their new adoptive homes.¹⁴⁰ However, some courts have expressed concern that children with post-termination contact orders may appear less desirable to adoptive parents and are thus less likely to be adopted.¹⁴¹ It is impossible to predict whether prospective adoptive parents will be affected by the prospect of adopting a child in contact with her birth parents. Additionally, post-termination contact may actually increase the likelihood that adoptive parents will adopt children into stable and permanent homes in some circumstances.

It is especially important for courts to recognize that older foster children are less likely to be adopted than younger foster children,¹⁴² and while adoption may still remain a preferred placement, retaining a relationship with a child's birth parent may allow the child to have a continuous adult relationship that would otherwise be absent. In ordering post-termination contact for foster children, courts must also consider the infringement of post-termination contact on the constitutional rights of adoptive parents.¹⁴³ A statutory model for ordering post-termination contact in the best interests of children, therefore, must consider possible constitutional challenges.

Upon a child's adoption, states vest adoptive parents with all of the legal rights and responsibilities of birth parents.¹⁴⁴ This includes the well-established constitutional right of parents to have custody of and control over their children, free from unreasonable government intrusion.¹⁴⁵ Thus, a court order for post-termination contact may result not only in resentment on the part of adoptive parents wishing to make traditional decisions concerning their children, including with whom the child will have contact, but such a court order may also have significant constitutional implications for adoptive parents' rights.¹⁴⁶

Adoption, however, is a state created status that changes the relationship of legal strangers into that of a relationship mirroring the birth

¹⁴⁰ See U.S. Children's Bureau, *supra* note 44, at 172–73 (noting that children requesting continued contact are less likely to resist placements if they receive continued contact).

¹⁴¹ Hollinger, *supra* note 40, at 160. *But see In re Welfare of J.M.*, 574 N.W.2d 717, 724 (Minn. 1998) (holding that the court was not required to consider prospects for adoption when ordering termination).

¹⁴² Bussiere, *supra* note 72, at 236.

¹⁴³ Cf. E. Gary Spitko, *The Constitutional Function of Biological Paternity: Evidence of the Biological Mother's Consent to the Biological Father's Co-Parenting of Her Child*, 48 ARIZ. L. REV. 97, 119 & n.100 (2006) (“The great weight of authority holds that the constitutional protection from state intrusion into the family that is afforded to adoptive parents is the same as that which is afforded to biological parents.”).

¹⁴⁴ *E.g.*, *Ellis v. Hamilton*, 669 F.2d 510, 513 (7th Cir. 1982) (“Adoptive parents have all the legal rights . . . in their children as natural parents.”).

¹⁴⁵ See Spitko, *supra* note 143, at 119 & n.100 (noting that adoptive parents have the same constitutional protection of familial privacy as biological parents).

¹⁴⁶ Appell, *supra* note 55, at 176.

parent-child relationship created by birth.¹⁴⁷ There is an ongoing debate about whether adoption laws should be interpreted to protect the relationship between children and their adoptive parents, or alternatively, interpreted to keep birth parents and children together whenever possible.¹⁴⁸

The Proposed Uniform Adoption Act of 1994 provides that, upon adoption, “each adoptive parent and the adoptee have the legal relationship of parent and child and have all the rights and duties of that relationship.”¹⁴⁹ But, the relationship between adoptive parent and child has not been treated uniformly among the states,¹⁵⁰ nor must it match the status relationship of birth parents and children exactly. As a state created status, adoption is necessarily subject to state control and involvement.¹⁵¹ The state determines who may adopt, who may be adopted, and the legal consequences of adoption.¹⁵² States not only have the authority to regulate adoption, but also the authority to construct the terms of adoptive parents’ rights. Therefore, states, by statute, may limit the rights of adoptive parents to control their adoptive children’s contact with their birth parents, furthering the best interests of the adoptee.

States should not fail to recognize their responsibility to further the best interests of children in fear of potentially infringing on adoptive parents’ rights. Not all children will find adoptive homes, and even those who are adopted may spend a significant amount of time in foster care between termination proceedings and adoption proceedings.¹⁵³ Therefore, children’s best interests should be prioritized regardless of whether it requires the infringement of adoptive parents’ rights to control their children.

This framework is somewhat contrary to the traditional role of termination of parental rights proceedings, which divests birth parents of all legal rights to their children. But it also works to further the purpose of the termination of parental rights framework by furthering the children’s

¹⁴⁷ Naomi Cahn & Jana Singer, *Adoption, Identity, and the Constitution*, 2 U. PA. J. CONST. L. 150, 190 (1999).

¹⁴⁸ Hollinger, *State and Federal Adoption Laws*, in FAMILIES BY LAW, *supra* note 40, at 37.

¹⁴⁹ *Proposed Uniform Adoption Act (UAA) of 1994*, in FAMILIES BY LAW, *supra* note 40, at 77.

¹⁵⁰ See Naomi Cahn & Joan Heifetz Hollinger, *Adoptees’ Inheritance Rights*, in FAMILIES BY LAW, *supra* note 40, at 78 (noting states’ differing treatment of adoptees’ inheritance rights).

¹⁵¹ Cahn & Singer, *supra* note 147, at 190.

¹⁵² *Id.*

¹⁵³ In 2006, 126,967 children in the United States were in foster care and waiting to be adopted. U.S. Dep’t of Health & Hum. Servs., Administration for Children and Families, Children in Public Foster Care Waiting to be Adopted: FY 1999 thru FY 2006, http://www.acf.hhs.gov/programs/cb/stats_research/afcars/waiting2006.htm (last visited Aug. 25, 2008). This does not include children aged sixteen or older whose permanency goal was not adoption. *Id.* Forty-three percent of children adopted after the termination of parental rights proceedings waited one year or longer to be adopted. U.S. Dep’t of Health & Hum. Servs., Administration for Children and Families, The AFCARS Report, http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report14.htm (last visited Aug. 25, 2008).

best interests through judicial orders.

C. *The Statutory Framework for Post-Termination Contact*

Few states expressly provide for post-termination contact by statute.¹⁵⁴ Many more states have enacted legislation allowing for the enforcement of post-adoption contact. The basis for enforcement, however, is not the best interests of the child, but rather the adoptive and birth parents' contractual agreement.¹⁵⁵

Statutory provisions for post-termination contact provide courts with further confidence in termination cases in which children have expressed a desire to remain in contact with their birth parents but preservation of the legal parent-child relationship is not in the child's best interests.¹⁵⁶ It is not suggested that post-termination contact should facilitate the termination of parental rights when not in the best interests of the child. However, allowing courts to recognize children's wishes regarding their permanency plan, while concurrently acting in their best interests, is certainly an advantage to having the statutory authority to order post-termination contact.

Ideally, a statute granting juvenile courts authority to order post-termination contact should: (1) allow both children and birth parents to petition the court; (2) allow the court to order post-termination contact only when it is in the child's best interests; (3) specify factors the court should consider in its determination of the child's best interests; (4) require the court to specify the frequency and the nature of any ordered post-termination contact; and (5) provide the court with continuing jurisdiction over the case for purposes of enforcement and modification.¹⁵⁷

Texas, by statute, grants its courts authority to include a provision for limited continued contact between a birth parent and child in an order terminating parental rights.¹⁵⁸ The statute requires that post-termination contact is in the best interests of the child,¹⁵⁹ and that it may only be ordered upon the voluntarily relinquishment of parental rights¹⁶⁰ and

¹⁵⁴ Cf. FLA. STAT. ANN. § 39.811(7)(b) (West 2003) (providing for post-termination contact, in some circumstances, by statute); TEX. FAM. CODE ANN. § 161.2061 (Vernon Supp. 2007).

¹⁵⁵ See U.S. DEP'T OF HEALTH & HUM. SERVS., POSTADOPTION CONTACT AGREEMENTS BETWEEN BIRTH AND ADOPTIVE FAMILIES: SUMMARY OF STATE LAW 4, 42 (Dec. 2005), available at http://www.childwelfare.gov/systemwide/laws_policies/statutes/cooperativeall.pdf, for a summary of the enforceability of open adoption agreements in the United States.

¹⁵⁶ See Dep't of Child. & Family Servs. v. M.J., 889 So. 2d 986, 988 (Fla. Dist. Ct. App. 2004) (holding that termination of parental rights was warranted, but remanding the case to the trial court to consider whether post-termination communication would be in the children's best interests because the children expressed interest in continued contact with their mother).

¹⁵⁷ See *infra* Appendix for a model statute for post-termination contact.

¹⁵⁸ TEX. FAM. CODE ANN. § 161.2061 (Vernon Supp. 2007).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

agreement between the birth parent and child protective services.¹⁶¹ The terms of the post-termination contact order are not modifiable,¹⁶² and such post-termination orders may not require a subsequent adoption order to include provisions for post-adoption contact.¹⁶³

Though the statute sets the stage for courts to consider post-termination contact orders, the statute has limitations. The first limitation is the provision prohibiting modification of a post-termination contact order.¹⁶⁴ Modification of an order providing for continued contact is necessary to account for the changes that inevitably take place in such a relationship.¹⁶⁵ The needs, behavior, and circumstances of both children and parents will undoubtedly change as they age, and their relationship evolves away from the parent-child model.¹⁶⁶

Finally, though birth parents necessarily need to agree to post-termination contact if they are to participate in a healthy manner, child protective services should not have the authority to preclude continued contact when all other parties agree it is in the child's best interests. Children are required to have their own guardian *ad litem* or attorneys in child protection proceedings, presumably because child protection services have priorities and considerations not wholly consistent with the best interests of every child.¹⁶⁷ The statute also does not require the court or child protection services to consider enumerated factors indicative of a child's best interests.¹⁶⁸ Thus, child protective services and courts may be swayed by the rights of adults or institutional concerns in their consideration of an order for continued contact.

Florida and Louisiana have broad post-termination contact statutes protecting a child's relationships, pending adoption, with birth parents, siblings, and the birth parents' relatives, when it is in the child's best interests.¹⁶⁹ Florida's statute also requires the nature and frequency of the contact to be included in the court's order.¹⁷⁰ The order may be reviewed upon the motion of any party or a prospective adoptive parent, and the

¹⁶¹ *Id.*

¹⁶² *Id.* § 161.2061(e).

¹⁶³ *Id.* § 161.2062(a).

¹⁶⁴ *Id.* § 161.2061(e).

¹⁶⁵ For further discussion regarding the benefit of allowing modification to post-termination orders, see *infra* Part V.

¹⁶⁶ See *infra* Part IV (discussing the importance of enforcement and modification clauses in post-termination contact statutes).

¹⁶⁷ See Leonard P. Edwards & Inger J. Sagatun, *Who Speaks for the Child?*, 2 U. CHI. L. SCH. ROUNDTABLE 67, 68 (1995) (footnote omitted) ("A growing consensus has rejected the traditional assumption that persons involved in legal proceedings will look out for the interests of the child. Even when a child's interests are at stake, the other participants in the proceeding cannot be counted on to speak for the child.")

¹⁶⁸ TEX. FAM. CODE ANN. § 161.2061.

¹⁶⁹ FLA. STAT. ANN. § 39.811(7)(b) (West 2003); LA. CHILD. CODE ANN. ART. 1037.1(A) (West 2004).

¹⁷⁰ FLA. STAT. ANN. § 39.811(7)(b).

nature and frequency of the contact must be reviewed by the court upon the child's placement for adoption.¹⁷¹ While Florida and Louisiana's statutes allow for recognition of a broad base of children's relationship rights, they lack detail concerning many issues that are likely to arise in post-termination contact orders, such as the factors to consider in the best interests of the child analysis and the enforcement of the order.

Other states have determined, either by judicial decision or statutory enactment, that their courts do not have the authority to order post-termination contact.¹⁷² In a state that has expressly refused to order post-termination contact under its existing statutory framework, a child's right to post-termination contact will only be recognized through a statutory revision or the recognition of a constitutional right to post-termination contact by the Supreme Court.

The South Dakota legislature enacted a law prohibiting courts from ordering post-termination visitation or open adoptions, abrogating an earlier decision by the South Dakota Supreme Court ordering post-termination contact.¹⁷³ The South Dakota Supreme Court previously held in *In re S.A.H.* that a trial court has the authority to order post-adoption contact.¹⁷⁴ The court determined that, while the interests of the adoptive parents should be considered by the trial court, the best interests of the child should be paramount in deciding whether to order an open adoption.¹⁷⁵ In determining whether post-adoption contact should be ordered, the court instructed the trial court to weigh the psychological benefit of knowing the child's cultural and religious background, the effect of the adoption on the child's integration into an adoptive family, and the effect an open adoption would have on the availability of prospective adoptive families.¹⁷⁶

The Supreme Judicial Court of Maine similarly held that the nature of termination proceedings—namely, a final severance of the parent-child relationship—divests the court of any authority to make orders imposing continued contact between the child and the birth parent.¹⁷⁷

¹⁷¹ *Id.*

¹⁷² *See, e.g.*, S.D. CODIFIED LAWS § 25-6-17 (2004) (by statutory enactment); *In re Elizabeth D.*, 888 A.2d 281, 282–83 (Me. 2006) (holding that “an order terminating parental rights deprives the court of any authority to impose a condition that preserves contact between the parent and the child”).

¹⁷³ S.D. CODIFIED LAWS § 25-6-17 (2004) (abrogating the South Dakota Supreme Court decision *In re S.A.H.*, 537 N.W.2d 1 (S.D. 1995), which allowed circuit courts to order open adoptions and post-termination contact).

¹⁷⁴ *In re S.A.H.*, 537 N.W.2d 1, 6 (S.D. 1994).

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 7.

¹⁷⁷ *In re Elizabeth D.*, 888 A.2d 281, 282–83 (Me. 2006) (“The court’s attempt to terminate the mother’s rights to her children and concomitantly to preserve her relationship with them by requiring the Department to provide for continuing visitation was beyond its authority.”) (internal quotation marks omitted).

IV. ENFORCEMENT AND MODIFICATION OF POST-TERMINATION ORDERS

The enforcement of post-termination contact poses potential jurisdictional and logistical constraints. To enforce an order by a court granting post-termination contact, the court must retain continuing jurisdiction over the child.¹⁷⁸ Birth parents may petition the court to enforce or modify a visitation order. As with other child visitation scenarios, courts may appoint guardian *ad litem*s to allow children, through their representatives, to enforce their rights when their caregivers do not facilitate the ordered contact.¹⁷⁹

When termination proceedings and adoption proceedings are ordered by different courts, or there is a lapse between the two orders, the order for post-termination contact, as part of the termination disposition, is not binding on the court granting the adoption.¹⁸⁰ One option courts have for circumventing this jurisdictional problem is to grant adoption orders conditional upon post-termination contact at the time of termination proceedings.¹⁸¹

Providing a mechanism for the modification of post-termination contact orders is crucial to ensure the best interests of the child.¹⁸² Given the unstable nature of the relationship between a child and a birth parent whose parental rights have been terminated, circumstances may change subsequent to the initial order. The birth parent may choose to become less involved in the child's life, the circumstances that led to the termination may worsen, or new adverse circumstances may arise in the parent's life. The child's developmental or psychological needs may change with age, or the circumstances surrounding her permanency plan may change.¹⁸³ Continued evaluation of the child's psychological and developmental needs, the effect of the contact on the child, and the birth parent's ability to

¹⁷⁸ See Appell, *supra* note 55, at 1051 (noting that a court must retain continuing jurisdiction to enforce post-adoption contact).

¹⁷⁹ See, e.g., *In re Adoption of Children by F.*, 406 A.2d 986, 989 (N.J. Super. Ct. Ch. Div. 1979) (appointing a guardian *ad litem* to enforce the court's visitation order with the children's birth father, upon adoption by their stepfather).

¹⁸⁰ Appell, *supra* note 55, at 1045.

¹⁸¹ See *id.* (noting that some courts include plans for postadoption contact in orders terminating parental rights). But see *M.M. v. Parents of M.M.*, 619 N.E.2d 702, 709–10 (Ill. 1993) (holding that the juvenile court did not have jurisdiction over adoptive parents after the termination of the birth parent's rights, and thus could not enter orders binding upon them).

¹⁸² The Massachusetts Supreme Judicial Court has noted that “[t]he purpose of [post-termination] contact is not to strengthen the bonds between the child and his biological mother or father, but to assist the child as he negotiates, often at a very young age, the tortuous path from one family to another.” *In re Adoption of Vito*, 728 N.E.2d 292, 304 (Mass. 2000). Courts ordering post-termination contact for this purpose may encourage modification as children become more settled in their permanent placements. See *id.* at 306 & n.29 (noting that the court may order decreased post-adoption contact, but not increased post-adoption contact).

¹⁸³ See, e.g., *Louisiana ex rel. J.S.W. v. Reuther*, 827 So. 2d 1199, 1205 (La. Ct. App. 2002) (limiting post-termination contact between a child and his birth parent from weekly visits to four times a year because the frequent visits were not in the child's best interests).

have a positive impact on the child is necessary to assure that the continued contact remains in the best interests of the child.

A guardian *ad litem* who suspects that continued contact is no longer in the child's best interests, or upon the request of the child, should petition the court for a review hearing to determine whether the post-termination order should be modified or vacated. All parties involved should have standing to petition the court to modify or vacate the order to ensure that the court has the most complete information possible upon which to base its best interests of the child analysis.

V. CONCLUSION

Though states are beginning to recognize the potential benefit of post-termination contact, many states still do not use their jurisdiction over dependent children to order continued contact in appropriate cases. Post-termination contact may be unprecedented in many jurisdictions, but entering orders to further the best interests of children has long been practiced in juvenile courts across the country.

In light of the number of older children in foster care awaiting adoption, post-termination contact allows children with a strong emotional bond with their birth parents to experience a smoother transition. Continued contact may not serve the best interests of every child, but courts should recognize their jurisdiction to enter such orders where it is in the best interests of the child.

In the absence of a constitutional right to such continued contact, individual jurisdictions should follow states like Louisiana and Massachusetts and recognize children's rights to post-termination contact through either judicial decision or statutory enactment.

Finally, despite the option for open adoption agreements between birth parents and adoptive parents in many states, post-termination contact does not uniformly meet the needs of children unless both children and birth parents have standing to petition the court for contact and enforcement. Only when courts allow the interests of children to override the needs and desires of birth and adoptive parents will our children be properly served.

APPENDIX:

A MODEL STATUTE: POST-TERMINATION CONTACT BETWEEN CHILDREN
AND BIRTH PARENTS

- (1) Upon entering an order terminating parental rights, the court shall consider a petition by the birth parent for post-termination contact between the child and his or her birth parent.
- (2) Any child under the jurisdiction of the court has standing under this statute to bring a petition for post-termination contact or a petition to enforce or modify a prior order for post-termination contact.
- (3) The court shall order post-termination contact upon determination that it is in the best interests of the child.
- (4) Post-termination contact between the child and the birth parent may consist of, but is not limited to, phone calls, the exchange of letters and photographs, the exchange of medical and health information, and supervised or unsupervised visitation.
- (5) The court shall determine whether the post-termination contact is in the best interests of the child by considering:
 - (a) the child's wishes, if the child is of sufficient age or maturity;
 - (b) the birth parent's expressed interest in maintaining contact;
 - (c) the frequency and quality of the visitation between the child and birth parent after the child was removed from the birth parent's care and prior to the termination proceedings;
 - (d) unique racial, ethnic, cultural, or religious knowledge or experience that the birth parent could provide the child;
 - (e) the desirability of maintaining contact for medical purposes;
 - (f) the strength of the emotional bond between the child and the birth parent;
 - (g) the effect post-termination contact may have on the child's pool of prospective adoptive families; and
 - (h) other factors bearing heavily on the appropriateness of post-termination contact between the child and the birth parent.
- (6) Upon entering a post-termination contact order, the court shall include in the order the nature and frequency of the contact determined to be in the best interests of the child.
- (7) Birth parents may petition the court for enforcement or modification of existing post-termination contact court orders.

- (8) Child Protection Services and the child's guardian *ad litem* must continue to evaluate contact ordered pursuant to this statute every 180 days to determine whether continued contact remains in the child's best interests.
- (9) Nothing in this statute shall be construed as affecting the finality of the order terminating parental rights.

