

1 **AN ACT** *to amend* 48.426 (3) (c) and 48.92 (2); and *to create* 48.425 (1) (h), 48.43 (2)
 2 (c) and 48.905 of the statutes; **relating to:** agreement by adoptive family for
 3 postadoption contact with the child’s birth parent.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

JOINT LEGISLATIVE COUNCIL PREFATORY NOTE: This draft was prepared for the Joint Legislative Council’s Study Committee on Adoption Disruption and Dissolution.

Under current law, the Wisconsin statutes do not recognize an agreement entered into between a birth parent and a prospective adoptive parent for postadoption contact, commonly referred to as an “open adoption”. Under current law, a termination of parental rights order and an adoption permanently severs the child’s legal relationship with the birth parent and all relatives of the birth parent, and creates the legal relationship of parent and child between the adoptive parent and the adopted child.

However, the Wisconsin Supreme Court has stated that in a proceeding for the termination of a birth parent’s rights, when considering the impact on the child of severing the legal relationship, a court may, in its discretion, afford due weight to an adoptive parent’s stated intent to permit continued visitation between the child and the birth parent or other relatives, while bearing in mind that such a promise is legally unenforceable after the termination of parental rights and adoption. [*State v. Margaret H.*, 2000 WI 42, par. 29–30.]

This draft creates a statutory procedure that allows a prospective adoptive parent and birth parent to enter into an agreement for postadoption contact privileges, if the prospective adoptive parent so chooses. The draft requires a court in a proceeding for the termination of a birth parent’s rights, when considering the impact on the child of severing the child’s relationship with the birth parent or other birth relatives with whom the child has a substantial relationship, to consider the terms of any such postadoption contact agreement.

Under such an agreement, a prospective adoptive parent may allow postadoption contact with the birth parent, which may vary in degree for the nature and frequency of the contact. A court in an action to

terminate parental rights or to grant an adoption may approve a postadoption contact agreement if all of the following apply:

1. The child has consented to the postadoption contact agreement, if the child is 12 years of age or over.
2. The court has received a favorable recommendation for approval of the agreement from the agency that has supervision of the child, from the child's guardian ad litem, and, if the child is an Indian child, from the Indian child's tribe.
3. The court determines that the birth parent will not undermine the prospective adoptive parent's relationship with the child and will not act in a manner that is contrary to the adoptive parent's parenting decisions.
4. The court determines that approval of the agreement is in the best interests of the child, considering the child's relationship with the birth parent and whether it would be harmful not to preserve that relationship, and considering the needs of the child and how those needs would be affected by the agreed-upon postadoption contact.
5. The birth parent has acknowledged that failure to comply with the terms of the agreement is not grounds to revoke the termination of the birth parent's rights or the adoption.
6. The birth parent and prospective adoptive parent acknowledge that, if a dispute arises as to the fulfillment of the terms of the agreement, the parties must participate, or attempt to participate, in good faith, in mediation or an alternative dispute resolution process, with the mediator or arbitrator to be selected by the adoptive parent.
7. The birth parent and prospective adoptive parent state that the parties understand the terms of the agreement, that the agreement was entered into voluntarily, that no promises or threats were made to coerce a party to enter into the agreement, and that no representations were relied upon other than those contained in the agreement.

This draft allows the adoptive parent and birth parent to agree to modify the terms of the agreement, if the adoptive parent so chooses. The stipulation may be approved by a court, without a hearing, if it finds that the modification is in the best interests of the child.

Additionally, this draft allows an adoptive parent to petition the court for modification or termination of the agreement. After a hearing, the court may modify or terminate the agreement if it finds that doing so is in the best interests of the child and that there has been a substantial change in circumstances since the agreement had been approved.

Lastly, this draft allows a party to petition for enforcement of the terms of the agreement if the party first attempted mediation or an alternative dispute resolution process in good faith. After a hearing, the court may order specific performance of the terms of the agreement if it finds that enforcement is in the best interests of the child.

1 **SECTION 1.** 48.425 (1) (h) of the statutes is created to read:

2 48.425 (1) (h) A statement as to whether a postadoption contact agreement has been
3 entered into under s. 48.905. If such an agreement has been entered into, the agency or tribal
4 child welfare department shall attach a copy of the agreement to the report.

NOTE: This SECTION requires a child welfare agency to state in its report to the court in a proceeding for termination of parental rights whether or not a postadoption contact agreement has been entered into, and, if entered into, to include a copy with the report.

5 **SECTION 2.** 48.426 (3) (c) of the statutes is amended to read:

6 48.426 (3) (c) Whether the child has substantial relationships with the parent or other
7 family members, and whether it would be harmful to the child to sever ~~these~~ those
8 relationships. In determining whether it would be harmful to the child to sever those
9 relationships, the court shall consider the terms of any postadoption contact agreement that
10 has been entered into under s. 48.905.

NOTE: This SECTION requires a court when determining the disposition of a proceeding for termination of parental rights to consider the terms of a postadoption contact agreement in evaluating the best interests of the child.

11 **SECTION 3.** 48.43 (2) (c) of the statutes is created to read:

12 48.43 (2) (c) A court may approve a postadoption contact agreement entered into under
13 s. 48.905.

NOTE: This SECTION specifies that although an order terminating parental rights severs the legal relationship between the parent and child, a court may approve a postadoption contact agreement.

14 **SECTION 4.** 48.905 of the statutes is created to read:

1 **48.905 Postadoption contact agreement.** (1) PARTIES. A prospective adoptive parent
2 may, if the prospective adoptive parent so chooses, enter into a postadoption contact
3 agreement with a birth parent of the child who is the subject of the adoption.

4 (2) TERMS. A postadoption contact agreement shall contain all of the following
5 provisions:

6 (a) An acknowledgment by the birth parent that failure to comply with the terms of the
7 agreement is not grounds to revoke the termination of the birth parent's rights or the adoption.
8 An acknowledgment under this paragraph is not required if s. 48.028 and the federal Indian
9 Child Welfare Act, 25 USC 1901 to 1963, apply to the proceeding.

10 (b) A statement by each party to the agreement that the agreement was entered into
11 voluntarily, that the terms of the agreement are understood, that no promises or threats were
12 made to coerce a party to enter into the agreement, and that no representations have been relied
13 upon other than those contained in the agreement.

14 (c) Consent to the agreement by the child, if 12 years of age or over.

15 (d) An acknowledgment that if a dispute arises about fulfillment of the terms of the
16 agreement, the parties shall participate, or attempt to participate, in good faith, in mediation
17 or an alternative dispute resolution process, with the mediator or arbitrator to be selected by
18 the adoptive parent.

19 (e) A description of the postadoption contact and frequency of contact agreed to by the
20 prospective adoptive parent. Contact may include any of the following:

- 21 1. Sharing of information about the child between the adoptive parent and birth parent.
- 22 2. Sharing of the birth parent's medical history.
- 23 3. Written, oral, or electronic communication between the child and birth parent.

1 4. Visitation by the birth parent with the child under specified conditions or conditions
2 that may be set by the prospective adoptive parent at the time of visitation.

3 **(3) APPROVAL.** In a proceeding to terminate parental rights or a proceeding to grant an
4 adoption, a court may approve a postadoption contact agreement if it finds all of the following:

5 (a) The agreement contains all of the provisions specified in sub. (2), and the court is
6 satisfied that the prospective adoptive parent and the birth parent understand those provisions.

7 (b) The agreement is signed by the prospective adoptive parent and birth parent, and
8 by the child if 12 years of age or over.

9 (c) An agency having guardianship, legal custody, or supervision of the child, the child's
10 guardian ad litem, and, in the case of an Indian child, the Indian child's tribe, have submitted
11 favorable recommendations for approval of the postadoption contact agreement.

12 (d) The court determines that the birth parent will not undermine the prospective
13 adoptive parent's relationship with the child.

14 (e) The court determines that the birth parent will not act in a manner that is contrary
15 to the prospective adoptive parent's parenting decisions that are related to the child's physical,
16 emotional, educational, or spiritual welfare.

17 (f) The court determines by clear and convincing evidence that approval of the
18 agreement is in the best interests of the child. In considering the best interests of the child
19 under this section, the court shall consider all of the following:

20 1. Whether the child has a substantial relationship with the birth parent, and whether
21 it would be harmful to the child not to preserve that relationship.

22 2. The needs of the child and how those needs would be affected by postadoption contact
23 with the birth parent as provided under the agreement.

24 3. Any other factor that the court determines is relevant to the best interests of the child.

1 **(4) STIPULATED MODIFICATION.** At any time after approval of an agreement by a court,
2 an adoptive parent may, if the adoptive parent so chooses, agree to modify the postadoption
3 contact agreement with the birth parent. The modified agreement shall be in writing, signed
4 by the parties and by the child if 12 years of age or over, and shall be submitted to the court.
5 The court may approve the modified agreement, without a hearing, if it finds by clear and
6 convincing evidence that modification of the agreement is in the best interests of the child.

7 **(5) PETITION TO MODIFY OR TERMINATE.** At any time after approval of an agreement by
8 a court, an adoptive parent may petition the court for modification or termination of the
9 postadoption contact agreement. The court shall schedule a hearing on the petition, with
10 notice to the adoptive parent, birth parent, the child if 12 years of age or over, an agency that
11 had guardianship, legal custody, or supervision of the child before the adoption, and, in the
12 case of an Indian child, the Indian child's tribe. The court may modify or terminate the
13 agreement, after a hearing, if it finds by clear and convincing evidence that modification or
14 termination of the agreement is in the best interests of the child and that there has been a
15 substantial change in circumstances since the agreement was approved by the court.

16 **(6) ENFORCEMENT.** A party may petition the court for enforcement of the terms of the
17 agreement after attempting mediation or an alternative dispute resolution process in good faith
18 to obtain specific performance of the terms of the agreement. The court shall schedule a
19 hearing on the petition, with notice to the adoptive parent, birth parent, the child if 12 years
20 of age or over, an agency that had guardianship, legal custody, or supervision of the child
21 before the adoption, and, in the case of an Indian child, the Indian child's tribe. The court may
22 order specific performance of the terms of the agreement, after a hearing, if it finds by clear
23 and convincing evidence that enforcement is in the best interests of the child.

NOTE: This SECTION allows a prospective adoptive parent and birth parent to enter into an agreement for postadoption contact privileges. The provision governs what must be included in the agreement, the conditions for a court's approval of the agreement, the conditions under which the parties may agree to modify the agreement, and the conditions under which the court may modify, terminate, or enforce the agreement.

NOTE: Should the child's consent be required as structured in this draft, or should the child's wishes be considered, instead, among the factors for considering the best interests of the child? If the child's consent is required, should the requirement begin at age 14, rather than age 12? Both ages are used in different sections of the children's code.

Also, in an action to modify, terminate, or enforce a postadoption contact agreement, should the child be given notice of the action with the opportunity to participate, as structured in the draft? Should an Indian child's tribe, and the agency that formerly had guardianship, custody, or supervision of the child, have the opportunity to participate, as structured in the draft?

Should other birth relatives be allowed to enter into a postadoption contact agreement with the prospective adoptive parent? Current law allows a court to order visitation with a birth relative when the relative has maintained a relationship with the child that is similar to a parent-child relationship, if the child is being adopted by another relative. Current law also requires a court to consider the impact of severing the child's substantial relationships with both the birth parent and birth relatives, when determining whether to terminate a birth parent's rights. If other relatives are allowed to enter into a postadoption contact agreement with the adoptive parent, should relatives be limited to those birth relatives who have a substantial relationship or a parent-like relationship with the child?

Lastly, should an adoptive parent whose rights are being terminated be allowed to enter into a postadoption contact agreement with a subsequent adoptive family? The draft is limited to allow only a birth parent to enter into such an agreement.

- 1 **SECTION 5.** 48.92 (2) of the statutes is amended to read:
- 2 48.92 (2) After the order of adoption is entered the relationship of parent and child
- 3 between the adopted person and the adopted person's birth parents and the relationship
- 4 between the adopted person and all persons whose relationship to the adopted person is
- 5 derived through those birth parents shall be completely altered and all the rights, duties, and

1 other legal consequences of those relationships shall cease to exist, unless the birth parent is
2 the spouse of the adoptive parent, in which case those relationships shall be completely altered
3 and those rights, duties, and other legal consequences shall cease to exist only with respect to
4 the birth parent who is not the spouse of the adoptive parent and all persons whose relationship
5 to the adopted person is derived through that birth parent. Notwithstanding the extinction of
6 all parental rights under this subsection, a court may approve a postadoption contact
7 agreement under s. 48.905 or order reasonable visitation under s. 48.925.

NOTE: This SECTION specifies that although an order for an adoption severs the legal relationship between the parent and child, a court may approve a postadoption contact agreement.

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(END)