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OREGON LAW COMMISSION

MEMORANDUM

DATE: August 19, 2011
TO: Oregon Law Commission Program Committee
FROM: John D. Adams, Law Clerk
RE: Project Proposal: Clarifying Enforcement of Post Adoption Contact Agreements

This project proposal requests the Program Committee to approve the creation of a work group to review the enforcement of post adoption contact agreements (PACA) and to make recommendations for revising Oregon law to clarify the statutory enforcement process specified in ORS 109.305. The ultimate goal of the work group will be to propose legislation for the 2013 legislative session.

1. The Problem

Under ORS 109.305(2), Oregon law provides for written agreements—if approved by the court during the adoption proceeding—allowing continued contact between the adopted child's birth relatives and the child (or the adoptive parents). The increased use of this provision has led to greater reliance on the enforcement of these agreements via subsection (8), which states "an agreement . . . may be enforced by a civil action," after a good faith mediation requirement is met. However, the statute provides no details on the procedural requirements or remedies of that "civil action." The lack of clear statutory language on the details of the "civil action" that is appropriate to redress these disputes results in limited guidance to the courts. Traditionally, specific performance and contempt are the typical remedies for non-compliance with a court-sanctioned agreement, but because of the lack of guidance and because children's best interests are at stake, courts may be reluctant to grant these remedies. Inconsistent outcomes that result from these situations harm the birth parents' ability to exercise their rights under the agreement. This detriment is further aggravated by a post-adoption environment that is slanted against the birth parents due to the adoptive parents' unilateral control over contact with the child, and because the statute specifies that failure to comply with a PACA is not a ground for setting aside a judgment of adoption or revoking written consent.¹

Ultimately, availing this open adoption option to birth parents with faulty results produces more disputes for the courts to resolve and undermines the work of the agencies and officials who rely on this mechanism—most notably, the Department of Human Services—to promote successful adoptions.

2. History of Reform Efforts

The Oregon Supreme Court's 1953 holding in Whetmore v. Fratello made PACAs

¹ See 109.305(7).

unenforceable.² In 1993, however, the Legislature revised ORS Chapter 109 to specifically allow for PACAs. According to legislative history as interpreted by the Court of Appeals in Fast v. Moore, the legislature intended the changes to the law to allow that PACAs could be enforced as long as they were approved by the court during the adoption proceeding.³ Further, the Court determined the motivation for the change to the statute was that without a mechanism for enforcement, the birth parents had no leverage to compel the adoptive parents to honor the agreement. Regrettably, the Oregon Courts have not addressed the question of what form of civil action should be pursued after the mediation requirement has been fulfilled by the party seeking enforcement of the agreement.

The present confusion of how to redress non-compliance of an agreement between the birth parents and the adoptive parents under ORS 109.305 continues to undermine the value of PACAs. More fundamentally, the statute fails to meet birth parents' needs because it does not adequately balance the adoptive parents' leverage compared to the birth parents' position. Where the adoptive parents can rely on the irreversible nature of the adoption and their actual control over the child during a dispute over the birth parents' contact with the child, the birth parents cannot even access their statutory right to bring a civil action until they have met the burden of showing they participated in good faith efforts to resolve the dispute via mediation. Conversely, the birth parents consent—which was perhaps predicated on the PACA styling the arrangement as an open adoption—cannot be revoked by the birth parents following the adoptive parents' non-compliance with the PACA. These contrasting positions highlight the unequal footing of the two parties as they approach resolving a dispute over the PACA terms.

While such deference to the adoptive parents' position could have previously been explained by the belief that no future contact between the birth parents and child was the best public policy, the legislature abandoned that stance when it chose to recognize continuing contact agreements in ORS 109.305.

Birth parent advocacy groups have become frustrated with the enforcement of post adoption agreements in recent years. Post adoption contact agreement statutory provisions would have been amended slightly by HB 2904 (2011). However, that bill, which sought primarily to promote a birth parent's informed consent to place a child for adoption, died in committee before receiving a public hearing. However, in informal meetings held with interested groups to discuss the bill, these agreements became a key point of concern of the various groups. Robin Pope, an adoption attorney who has worked on Commission work groups in the past, was present at some of these meeting and suggested that the Commission include review of PACAs along with a larger law reform project covering other adoption law issues.

3. Scope of the Project

The Commission has already accepted a project to review Oregon's adoption record statutes, and a project regarding consent and revocation by birth mothers is also under consideration. These three projects could easily be merged into a larger adoption reform initiative for a single work group. The main goal for the group's members would be to resolve

² 197 Or. 396, 397, 252 P.2d 1083 (1953) (post adoption contact agreements void as against public policy, as the principle underlying adoption is to promote the welfare of the child, and that cannot be done when having to sustain a split relationship.)

³ 205 Or.App. 630, 135 P.3d 387 (2006).

how the statute could provide the best possible process for the enforcement of PACAs so that successful adoptions are promoted and enforcement is predictable and straightforward. While review and modification of the enforcement clause of ORS 109.305(8)(a) will need to be the focus, subsection (8)(b) that allows for modification procedures of a PACA will need to be reviewed for consistency with any changes to the enforcement. The members will also need to keep the balance in mind between birth parents' concerns of being able to exercise their right to contact under the agreement, and also the adoptive parents' interest in ensuring that the PACA will not jeopardize the adoption itself, their relationship with the child, and the child's best interest and safety. The group should strive to create a proper balance to avoid a chilling effect on adoptions.

The statutes of several other states should be considered as almost half of the states either provide for post adoption contact agreements and their enforcement, or at minimum, do not specifically prohibit such agreements.⁴ Notably, at least two states—Washington and Oklahoma—allow their courts to award attorney fees to the prevailing party in suits for PACA enforcement.⁵ Oregon's ORS Chapter 109, governing the parent and child relationship, contains several provisions allowing for the award of attorney fees, including instances where the adoptive parents fail to pay the birth parent's uninsured adoption-related counseling expenses under ORS 109.346.⁶ Other examples of statutory remedies for PACA enforcement include specific performance (Massachusetts) and contempt of court (Virginia).⁷

4. Law Commission Involvement

This is an appropriate project for the Commission because it would continue the tradition of accepting projects that impact agencies within the judicial system and the families that access those services. Specifically, the Department of Human Services, members of the Oregon Bar, the Oregon Department of Justice, and families using adoptive services all have an interest in clarifying the existing statutes to improve the administration of justice. Importantly, all of the goals outlined above conform to the Commission's mandate to engage in the revision, reform and improvement of Oregon's laws.

5. Project Participants

In the unlikely event that this proposal is accepted as a unique project (i.e. separate from the adoption consent and revocation project), the Commission should reach out to the Department of Human Services, members of Oregon State Bar family law and juvenile law sections (especially those who practice adoption law), and representatives from the Department of Justice to identify individuals who are interested in joining the work group. Otherwise, the same entities that have a stake in the larger adoption consent project and/or adoption records project should be involved in this project.

⁴ See: http://www.childwelfare.gov/systemwide/laws_policies/statutes/cooperative.cfm#_ftnref5 (as of 2009, 24 states allowed or provided for continuing contact agreements).

⁵ See Washington Rev. Code § 26.33.295 and Oklahoma Ann. Stat. Tit. 10, § 7505-1.5.

⁶ ORS 109.347 "Civil action for failure to pay for counseling; attorney fees. A birth parent aggrieved by the failure of a prospective adoptive parent or adoptive parent to pay the uninsured costs of adoption-related counseling required by ORS 109.346 may file a civil action in circuit court for payment or reimbursement of the uninsured costs of adoption-related counseling. The court shall award reasonable attorney fees and costs of the action to a prevailing birth parent."

⁷ See Massachusetts Gen. Laws Ann. Ch. 210, §§ 6C; 6D