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# Getting the Whole Truth and Nothing but the Truth: The Limits of Liability for Wrongful Adoption

Marianne Blair

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# Getting the Whole Truth and Nothing But the Truth: The Limits of Liability For Wrongful Adoption

D. Marianne Brower Blair\*

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## I. INTRODUCTION

They were the answers to their dreams. The children they had always wanted and never been able to conceive. Some were infants, others were older children. The parents decorated a room, bought teddy bears, and welcomed the children joyously when the adoption agencies placed them in their homes. The agencies had assured the parents that there were no significant health problems. Desperate to have a family and realizing how fortunate they were to be able to adopt at all, perhaps they had not probed.

The majority of these families lived happily ever after—but not all.<sup>1</sup> For some unfortunate adopted children and their adoptive families, the placement became a nightmare. Adoption agencies, either intentionally or negligently, failed to transmit critical

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1 Because this Article focuses on adopted children with severe physical or psychological impairments, it is important to note at the outset that the majority of adopted children do not have significant impairments and are well adjusted.

One California study of agency and independent adoptions in 1981-82 determined that 11% of the children placed by private agencies and 34% of the children placed by public agencies had health problems. NATIONAL COMMITTEE FOR ADOPTION, ADOPTION FACTBOOK 203 (1989) [hereinafter ADOPTION FACTBOOK]. See also Kathlyn Marquis & Richard Detweiler, *Does Adoption Mean Different? An Attributional Analysis*, 48 J. PERSONALITY & SOC. PSYCHOL. 1054, 1062, 1064 (1985). (Research study of nonclinic population of 46 adopted and 121 nonadopted persons between the ages of 13 and 21 found that the adopted group felt more confident, more in control of their lives, and more positive about others than the nonadopted group.); Robin Henig, *Body and Mind: Chosen and Given*, N.Y. TIMES, Sept. 11, 1988, § 6, at 70 (quoting Dr. David Brodzinsky, a psychologist who has conducted one of the largest studies of adopted children, who reports that the majority "do very well in life").

medical and psychological background information to the adoptive parents. As a result, the children did not receive appropriate medical or psychological treatment when it was needed, often resulting in permanent or more severe impairment.<sup>2</sup> The adoptive families, unprepared to meet their child's special needs, were emotionally and financially devastated.<sup>3</sup>

In 1986, the Ohio Supreme Court, in *Burr v. Board of County Commissioners*,<sup>4</sup> became the first American appellate court to recognize a right to compensatory damages against an adoption agency for misrepresentations to adoptive parents concerning their child's medical history. The *Burr* decision unleashed a wave of litigation<sup>5</sup> filed by adoptive parents on behalf of themselves and their adopted children seeking damages<sup>6</sup> from adoption agencies and other

2 See *infra* notes 138-39, 142-45, 185-86 and accompanying text.

3 See *infra* notes 151-57, 199-213 and accompanying text.

4 491 N.E.2d 1101 (Ohio 1986).

5 E.g., *Griffith v. Johnston*, 899 F.2d 1427 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 712 (1991); *Collier v. Krane*, 763 F. Supp. 473 (D. Colo. 1991); *Michael J. v. County of Los Angeles, Dep't of Adoption*, 247 Cal. Rptr. 504 (Cal. Ct. App. 1988); *Wallerstein v. Hospital Corp. of America*, 573 So. 2d 9 (Fla. App. 1990); *Roe v. Catholic Charities, No. 5-89-0411*, 1992 WL 29911 (Ill. App. Ct. Feb. 14, 1992); *Krueger v. Leahy*, No. 89L 18751, (Cook Cty. Civ. Ct., Ill. filed Dec. 28, 1989); *Mohr v. Massachusetts*, No. 87-0152 (Bristol Cty. Super. Ct., Nov. 4, 1991); *M.H. v. Caritas Family Servs.*, 475 N.W.2d 94 (Minn. Ct. App. 1991), *review granted* (Minn. Nov. 13, 1991); *Foster v. Bass*, 575 So. 2d 967 (Miss. 1990); *Allen v. Children's Services*, 567 N.E. 2d 1346 (Ohio App. 1990); *Wristen v. Jansen*, No. 86CV-10-6421, (Ct. C.P. Franklin Cty., Ohio filed Oct. 15, 1986); *Gibbs v. Ernst*, No. 90003066, (Ct. C.P., Bucks Cty., Pa. filed April 4, 1990); *In re Lisa Diane G.*, 537 A.2d 131 (R.I. 1988); *Richards v. Texas Dept. of Human Servs.*, No. 476799, (Travis Cty. Dist. Ct., Tex. filed April 18, 1990); *Martin v. Methodist Home*, No. 90-07815, (Dallas Cty. Dist. Ct., Texas filed July 2, 1990); *Phillips v. Texas Dept. of Human Services*, (Travis Cty. Dist. Ct., Tex.); *Meracle v. Children's Serv. Soc'y*, 437 N.W.2d 532 (Wis. 1989).

See also accounts of wrongful adoption suits filed by Linda and John Murphy for \$4.1 million in Massachusetts, Daniel Golden, *When Adoption Doesn't Work*, BOSTON GLOBE, June 11, 1989 (Magazine) at 16; by Tom and Janice Colella in California, *Id.* and Dianne Klein, *An Adopted Boy—And Terror Begins*, L.A. TIMES, Jan. 4, 1988, part 1, at 3; and by Thomas Tinor and Elisabeth Novakovich against Bethany Christian Services in Illinois, *\$1 Million Sought in Adoption Suit*, CHI. TRIB., May 23, 1990 (Chicagoland) at 3. Prof. Neil Cogan of Southern Methodist University has filed twelve wrongful adoption actions, including the three actions listed above. Telephone Interview with Neil Cogan (Oct. 2, 1991).

At least two unsuccessful cases were filed prior to the *Burr* decision. See *Richard P. v. Vista Del Mar Child Care Serv.*, 165 Cal. Rptr. 370 (Cal. Ct. App. 1980); *Allen v. Allen*, 330 P.2d 151 (Or. 1958).

6 The focus of this Article is the extent to which liability for *compensatory damages* should be imposed upon adoption agencies or other intermediaries for failure to accurately transmit health-related information to adoptive parents.

Some lawsuits brought by adoptive parents alleging misrepresentation or nondisclosure of health information have sought specific relief in addition to, or instead of, com-

intermediaries<sup>7</sup> for failure to provide essential medical and psy-

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pensatory damages. In some cases adoptive parents sued for revocation of the adoption in addition to monetary damages. See *In re Lisa Diane G.*, 537 A.2d 131 (R.I. 1988) (adoption revoked, adoptive parents withdrew request for damages). Telephone Interview with Stephen Cicilline, attorney for plaintiffs (Aug. 8, 1990); *Allen v. Allen*, 330 P.2d 151 (Or. 1958) (relief denied); see also account of suit by Tom and Janice Collella seeking both revocation and damages in Golden, *supra* note 5 (Adoption was revoked and adoptive parents settled the case for \$70,000). Others just seek revocation of the adoption. *Christopher C. v. Kay C.*, 278 Cal. Rptr. 907 (1991) (court affirmed revocation of adoption in action brought by minor child appealing revocation and challenging constitutionality of revocation statute). See also *M.L.B. v. Department of Health & Rehab. Serv.*, 559 So. 2d 87 (Fla. Dist. Ct. App. 1990) (holding one year period to attack adoption judgment on grounds of "irregularity" did not bar motion to set aside adoption on grounds of fraudulent concealment of child's psychiatric problems by agency); *County Dept. of Pub. Welfare v. Morningstar*, 151 N.E.2d 150 (Ind. Ct. App. 1958) (court annulled adoption based on fraud perpetrated upon adoptive parents regarding child's background); *In re Leach*, 128 N.W.2d 475 (Mich. 1964) (court denied revocation based upon fraud); *In re Anonymous*, 213 N.Y.2d 10 (N.Y. Surr. Ct. 1961) (refused to annul adoption on ground natural father failed to disclose mental illness in family); *In re Adoption of Haggerty*, No. CA-741, 1991 Ohio LEXIS 3004, (Ohio Ct. App. June 7, 1991) (request to vacate adoption on basis of fraud denied because motion not timely filed).

See also accounts of the following revocation actions: Revocation action by Anthony and Dona Ricci, who were never told of psychological report prior to adoptive placement that advised against adoption, Golden, *supra* note 5; Termination of parental rights granted to adoptive parents of Monica Shoemaker, after her medical bills and institutionalization became financially overwhelming, because agency concealed family history of schizophrenia, although court also awarded them visitation rights, Dianne Klein, "Special Children, Dark Past can Haunt Adoptions, L.A. TIMES, May 29, 1988, § 1, at 1; Action by Roberta and Clem Wendling to surrender custody of adopted child, Lisa Belkin, *Adoptive Parents Ask States for Help With Abused Young*, N.Y. TIMES, Aug 22, 1988, § 1, at B8; Attempted revocation of adopted child by the Marvelli family to obtain assistance with medical care of child, Marshall Marvelli & Sylvia Marvelli, *Tom and Janice Colella*, PEOPLE, August 1, 1988, at 6.

The propriety of revocation of adoptions on grounds of fraud is a related but separate issue from suits for damages and will not be the focus of this Article. For recent literature addressing the problems with permitting revocation of adoption, see, e.g., Elizabeth N. Carroll, *Abrogation of Adoption By Adoptive Parents*, 19 FAM. L.Q. 155 (1985); Ann. H. Howard, Note, *Annulment of Adoption Decrees on Petition of Adoptive Parents*, 22 J. FAM. L. 549 (1983-84); see also John R. Maley, Note, *Wrongful Adoption: Monetary Damages as a Superior Remedy to Annulment of Adoptive Parents Victimized by Adoption Fraud*, 20 IND. L. REV. 709 (1987).

A different type of specific relief was sought in one recent "wrongful adoption" case, *Griffith v. Johnston*, 899 F.2d 1427, 1434 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 712 (1991). The plaintiffs requested that the public adoption agency be ordered to disclose to them the contents of the agency's files, with appropriate privacy omissions, to facilitate medical treatment. Appellants Brief at 6, *Griffith*. The need for this relief became moot when the Texas legislature enacted legislation while the suit was pending which enabled the adoptive parents to have access to the records they were requesting. 899 F.2d at 1434.

7 Throughout this Article the term "adoption intermediaries" is used to refer to both adoption agencies and other professionals, primarily attorneys, who assist in the placement of children for adoption as facilitators, see generally DAVID LEAVITT, COUNSELING

chological history. Although brought under a variety of legal theories, these suits have often been denominated as actions for "wrongful adoption."

This Article explores the extent to which liability should be recognized for failure to provide complete and adequate health-related information<sup>8</sup> to adoptive parents. In *Burr* liability was imposed against an adoption agency for intentional misrepresentations regarding an infant's background. The court found the adoption agency had literally made up a story about their child's birth parents that was totally untrue, thereby hiding the high risk of hereditary impairment that existed.<sup>9</sup> Courts,<sup>10</sup> commentators,<sup>11</sup> and adoption experts<sup>12</sup> have unanimously approved the imposition of liability for intentional misrepresentations of this nature. Similar unanimity does not exist, however, as to whether

CLIENTS IN INDEPENDENT ADOPTIONS (1980), or as counsel for adoptive parents in adoption proceedings, see generally JOAN HOLLINGER ET AL., ADOPTION LAW AND PRACTICE §§ 6.01, 6.02, 6.04 (1990).

8 Health-related information should include the medical history of the child, including prenatal and neonatal history; diagnosis and treatment for physical, psychological, and emotional problems; dental treatment; diagnostic test results; immunization records; and a developmental history of the child. It should also include the medical and genetic history of parents and other biological relatives; the social and educational history of the child; and relevant social history of the biological parents and ancestors, such as race, ethnic or tribal heritage, religion, occupation and talents; and any familial relationship between the parents. For a more detailed discussion of the nature of health-related information that should be disclosed, see D. Marianne Blair, *Lifting the Genealogical Veil: Blueprint for Legislative Reform of the Disclosure of Health-related Information in Adoption*, 70 N.C. L. REV. 681, 732-42 (1991).

9 491 N.E.2d 1101, 1103-04 (Ohio 1986).

10 Michael J. v. County of Los Angeles, Dep't of Adoptions, 247 Cal. Rptr. 504, 512-13 (Cal. Ct. App. 1988); Foster v. Bass, 507 So. 2d 967, 980-81 (Miss. 1990); Roe v. Catholic Charities, No. 5-89-0411, 1992 WL 29911 (Ill. App. Ct. Feb. 14, 1992).

11 Claire G. Combs, Case Note, *Wrongful Adoption: Adoption Agency Held Liable for Fraudulent Representations*, 56 CINN. L. REV. 343, 354-55 (1987); Shannon M. Connelly, Note, *The Need for Disclosure Laws: A Survey of the Wrongful—Adoption Cause of Action and Statutory Remedies for Adoption Fraud*, 10 REV. LITIG. 793, 797-800 (1991); Janet H. Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter*, 38 UCLA L. REV. 917, 957-958, 962-63 (1991); Susan K. LeMay, Comment, *The Emergence of Wrongful Adoption as a Cause of Action*, 27 J. FAM. L. 475, 488 (1988-89); Maley, *supra* note 6, at 734; Michele Schiffer, Comment, *Torts: Fraud in the Adoption Setting*, 29 Ariz. L. Rev. 707, 710, 722 (1987).

12 See UNIF. ADOPTION ACT art. 10, § 10(e) (Proposed Draft Aug. 9, 1991) which suggests sanctions for failure to provide health information and further provides:

The penalties provided . . . do not preclude an adoptive parent or adoptee from bringing a common law action in tort against a person [other than a birth parent or guardian?] who negligently or intentionally fails to perform the duties required under Article 3, Section 16 [Disclosure of Information on Background].

liability should be imposed upon adoption intermediaries for intentionally withholding adverse medical or psychological history from adoptive parents when no affirmative misrepresentation has been made. Nevertheless, the three appellate courts to directly face this issue have been willing to recognize liability for such intentional nondisclosure.<sup>13</sup> Disagreement also exists about whether liability should extend to negligent misrepresentation, which was recently found sufficient to justify a cause of action against an adoption agency by the Wisconsin Supreme Court.<sup>14</sup> A further extension of liability against an adoption intermediary would be to recognize a cause of action for negligent failure to discover or to transmit to adoptive parents critical health-related information. Recognition of liability in this context would impose a duty to make reasonable efforts to investigate, and adoption intermediaries would be expected to accurately transmit not only the information they have, but also that which they reasonably *should* have, to adoptive parents. No published opinion has yet recognized liability against an agency on this basis, although suits of this nature have recently been brought.<sup>15</sup>

Part II of this Article presents the history of disclosure of health-related information in adoption. Examination of this history reveals substantial fluctuation in the attitudes of American courts and legislatures toward the confidentiality of adoptions and a corresponding fluctuation in the revelation of background information about a child to his or her adoptive parents.<sup>16</sup> In recent years, the majority of adoption agencies, prompted by unanimity among adoption experts, professional guidelines, and significant statutory reform, have endorsed, at least in theory, a policy favoring disclosure of health-related information in adoption.<sup>17</sup> Nevertheless, many families who have adopted during the last few de-

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13 *Michael J.*, 247 Cal. Rptr. 504; *Roe v. Catholic Charities*, No. 5-89-0411, 1992 WL 29911 at \*12 (Ill. App. Ct. Feb. 14, 1992) (opinion addressed both intentional misrepresentation and intentional nondisclosure); *M.H. v. Caritas Family Servs.*, 475 N.W.2d 94, 99 (Minn. Ct. App. 1991), *review granted*, (Minn. Nov. 13, 1991).

14 *Meracle v. Children's Serv. Soc'y*, 437 N.W.2d 532 (Wis. 1989). *See also* *Wallerstein v. Hospital Corp. of America*, 573 So. 2d 9 (Fla. Dist. Ct. App. 1990); *M.H.*, 475 N.W.2d at 98.

15 *Foster v. Bass*, 575 So. 2d 976 (Miss. 1990), rejected liability on this basis. In California, a wrongful adoption action seeking damages for failure to investigate, *Muir v. Children's Home Soc'y*, was recently settled. Telephone Interview with Sheldon Rosenfield, attorney for plaintiffs (Sept. 25, 1990), and with his office, (Oct. 8, 1991).

16 *See infra* notes 23-31 and accompanying text.

17 *See infra* notes 49-51 and accompanying text.



cases have failed to receive accurate or complete information about significant health problems their children have experienced.<sup>18</sup>

Part III examines the extent to which liability against adoption agencies and other intermediaries should be recognized on behalf of these families. The central thesis of this Article is that adoption intermediaries should be held liable not only for intentional misrepresentations, but also for intentional nondisclosure, negligent misrepresentations, and negligent failure to investigate and transmit health-related information to adoptive parents, when any of these actions result in harm to adoptive parents or adopted children. Recognition of liability for these types of conduct would not make adoption intermediaries the guarantor of healthy children. It would, however, enforce reasonable standards of conduct upon adoption intermediaries and compensate parents and children injured when those standards are not met. When adoption intermediaries have undertaken reasonable efforts to investigate and have fully and accurately disclosed the health-related information they possess, liability should *not* be imposed solely because physical or mental impairments subsequently become evident in a child after the placement or adoption.<sup>19</sup>

Part III summarizes the extent to which liability to adoptive parents and adopted children for each type of conduct has thus far been recognized by the courts. This section then examines the policy arguments surrounding the recognition of liability for such conduct on the part of adoption intermediaries. Finally, the legal theories on which liability may be imposed and the particular advantages and limitations of each theory are discussed.

When the adoption intermediaries are governmental agencies or private attorneys, additional theories of liability, including Section 1983 actions for deprivation of constitutional rights and malpractice, must be examined. The viability, advantages, and limitations of these theories are explained in Part IV.

The focal point of any discussion regarding the liability of adoption intermediaries must be the conduct of the adoption intermediary and the reasonable expectations society may impose upon those who undertake the important responsibility of creating a family. When evaluating liability in the context of wrongful adoption litigation, one must reject an approach that treats the

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18 See *infra* notes 82-86, 171-75 and accompanying text.

19 See *Allen v. Children's Servs.*, 567 N.E.2d 1346 (Ohio Ct. App. 1990).

child as a product. A child is not a used car, nor can a health impairment be equated with a faulty carburetor. The real issue is whether an adoption intermediary's conduct maximizes the opportunity of adoptive parents to make a choice about the responsibility they are undertaking while providing the child with a family emotionally and financially prepared to meet the child's special needs.

## II. BACKGROUND: THE HISTORY OF DISCLOSURE OF HEALTH-RELATED INFORMATION IN ADOPTION

Adoption, unlike most other American legal proceedings, is not a creature of the common law.<sup>20</sup> Early in our nation's history, adoptions took place through private agreements, like a conveyance of real estate. These agreements were authenticated by making a public record, and in some instances, accompanied by a proceeding for a name change.<sup>21</sup> In 1851, Massachusetts enacted the first American statute that required judicial supervision over the adoption process.<sup>22</sup>

The extent to which health-related information has been transmitted to adoptive parents in America has varied tremendously and has been heavily influenced by the fluctuating emphasis upon confidentiality in the adoption process. Prior to the 1920s, adoptions were often open proceedings; adoption court records, to the extent they were maintained, were not sealed.<sup>23</sup> In fact, newspapers routinely reported details of adoption proceedings during the late 19th century.<sup>24</sup> Adoptees were allowed to obtain copies

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20 Ruth-Arlene Howe, *Adoption Practice, Issues and Laws 1958-1983*, 17 *FAM. L.Q.* 173, 175 (1983).

English society's strong focus on blood relationships as a basis for class distinction, as well as its antipathy toward illegitimacy, deterred the development of adoption practices that resemble American adoption law until well into the 20th century. A general adoption statute was not enacted in England until 1926. HOLLINGER ET AL., *supra* note 7, § 1.02 [1] at 1-18 to 1-19.

Many scholars believe that American adoption practices find their roots in Roman law. *Id.*; Howe, *supra*, at 175.

21 Howe, *supra* note 20, at 173, 175-76; Sanford N. Katz, *Rewriting the Adoption Story*, 5 *FAM. ADVOC.* 9 (1982).

22 HOLLINGER ET AL., *supra* note 7, § 1.02[2], at 1-22; Howe, *supra* note 20, at 175; Katz, *supra* note 21, at 9.

23 HOLLINGER ET AL., *supra* note 7, § 1.03[4], at 1-37, § 13.01[1][b], at 13-5.

24 LINCOLN CAPLAN, *AN OPEN ADOPTION* 85 (1990); HOLLINGER ET AL., *supra* note 7,

of their original birth certificates, if recorded.<sup>25</sup> The earliest statutes interjecting some secrecy into the process, enacted during the second decade of the 20th century, were designed only to shield the adoption and the "fact of illegitimacy" from public view. These statutes did not operate as a barrier between biological parents and adoptive parents, who all retained a right of access to the files and records.<sup>26</sup> Although very little information about the children was maintained in the records,<sup>27</sup> in many instances the birth mother knew the adoptive parents, allowing health information to be informally transmitted. It was common practice for a birth mother to stay with the adoptive family during pregnancy.<sup>28</sup>

Beginning in the 1920s, adoption professionals fostered a movement to transform the adoption process to achieve complete anonymity between adoptive parents and birth parents.<sup>29</sup> A majority of states enacted statutes that sealed adoption records and prevented even the birth parents, adoptive parents, and adoptee from gaining access without a court order upon a showing of "good cause," a standard that was often difficult to meet.<sup>30</sup> Underlying this movement was the philosophy that adoption constitutes a rebirth, severing all ties with the biological family and creating the illusion that the child was born into the adoptive family.<sup>31</sup> Adoptive parents and children were matched by physical characteristics so that the child appeared to be the birth child of the adoptive parents.<sup>32</sup> In fact, new birth certificates were issued, listing the adoptive parents as the birth parents.<sup>33</sup>

In conformity with this philosophy of rebirth, for most of the 20th century adoption agencies and other intermediaries have

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§ 1.03[4], at 1-37.

25 HOLLINGER ET AL., *supra* note 7, § 1.03[4] at 1-37.

26 *Id.* § 13.01[1][b], at 13-5.

27 *Id.* § 13.01[1][b], at 13-4.

28 CAPLAN, *supra* note 24, at 85.

29 Adoption agencies used promises of confidentiality to entice adoptive parents to use their services rather than seek a direct placement. They also coerced birth mothers to relinquish their babies by threatening not to honor their desire for confidentiality unless they relinquished. HOLLINGER ET AL., *supra* note 7, § 1.03[4], at 1-36 to 1-37.

30 *See, e.g., Id.* § 13.01[1], at 13-6; Howe, *supra* note 20, at 190; Ann T. Lamport, Note, *The Genetics of Secrecy in Adoption, Artificial Insemination, and In Vitro Fertilization*, 14 AM. J.L. & MED. 109, 112 (1988); Barbara Prager & Stanley A. Rothstein, Note, *The Adoptee's Right to Know His Natural Heritage*, 19 N.Y.L.F. 137, 137-39 (1973).

31 HOLLINGER ET AL., *supra* note 7, § 1.04, at 1-49; ARTHUR P. SOROSKY ET AL., *THE ADOPTION TRIANGLE* 38 (1978).

32 Katz, *supra* note 21, at 9; Lamport, *supra* note 30, at 110.

33 SOROSKY ET AL., *supra* note 31, at 38.

given very limited information to adoptive parents about the child's medical and social background and biological family.<sup>34</sup> The conventional wisdom of adoption agencies was that adoptive parents and their children were better off not knowing background information,<sup>35</sup> and that any potential impact of a child's biological inheritance should be minimized.<sup>36</sup> Adoption experts advised that to foster the bond between adoptive parents and children, "the adoptive parents should be provided with as little information as possible on the 'shadowy figures' of the birth parents."<sup>37</sup>

Agencies withheld negative information in particular, such as mental illness, criminal behavior, alcoholism,<sup>38</sup> and other "sordid or irrelevant details" about a child's biological family.<sup>39</sup> As older children began to comprise an increasingly larger number of the children adopted during the last several decades,<sup>40</sup> critical information about the child's own health history was also often withheld.<sup>41</sup>

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34 SOROSKY ET AL., *supra* note 31, at 35-36; Golden, *supra* note 5. See also Elizabeth Neuffer, *State Liable for Hiding Key Records in Adoption*, BOSTON GLOBE, Oct. 29, 1991, at 21 (Massachusetts Department of Social Services did not require disclosure of medical history to adoptive parents until 1990.).

35 David Schneidman, spokesperson for the Illinois Dept. of Children and Family Services, made such a statement describing the policy of agencies in Illinois prior to the enactment of Illinois' disclosure law in 1985. Rob Karwath, *Teenager's Parents Sue in Wrongful Adoption*, CHI. TRIB., Dec. 29, 1989, § 1, at 12.

36 See Rita Beck Black, *Genetics and Adoption: A Challenge for Social Work*, in SOCIAL WORK IN A TROUBLED WORLD 193, 200 (Miriam Dinerman ed., 1981) (Seventh National Association of Social Workers Symposium).

37 SOROSKY ET AL., *supra* note 31, at 36, (quoting E.W. Goldey & R.M. Sands, *The Vicissitudes of the Adoption Process*, 128 AM. J. PSYCHIATRY 590, 590-95 (1971)).

38 SOROSKY ET AL., *supra* note 31, at 36.

39 HOLLINGER ET AL., *supra* note 7, § 13.01[1][b], n.21, at 13-7 (citing MICHAEL SHAPIRO, CHILD WELFARE LEAGUE OF AMERICA, A STUDY OF ADOPTION PRACTICE (1956)).

40 In 1986, infants comprised slightly less than half (48.1%) of all domestic unrelated adoptions. Special needs adoptions comprised slightly over one-fourth of domestic, unrelated adoptions. ADOPTION FACTBOOK, *supra* note 1, at 4. See also RICHARD P. BARTH & MARIANNE BERRY, ADOPTION AND DISRUPTION: RATES, RISKS, AND RESPONSES 8-11 (1988). The authors observe that "special-needs" often refers to children over age three, "minority children, handicapped children, emotionally or intellectually impaired children, or groups of siblings of three or more." *Id.* at 8. Other groups use a more restrictive definition of "special needs": "black children over 3, white children over 10, emotionally disturbed or mentally retarded children of all ages, physically handicapped children, or sibling groups of three or more." *Id.* at 10.

41 See BARTH & BERRY, *supra* note 40, at 107-113; Belkin, *supra* note 6, at B8; Golden, *supra* note 5; Klein, *supra* note 5, at 3; Neuffer, *supra* note 34, at 21.

In addition to the philosophical underpinnings of this policy, agencies were often motivated by several concerns. Caseworkers feared that negative information might hamper placement<sup>42</sup> or potentially stigmatize the child in the eyes of the adoptive family.<sup>43</sup> The concern was expressed that knowledge of information perceived as negative by the adoptee would harm the child's developing self-image,<sup>44</sup> or create tremendous anxiety about the possibility of later developing a genetic disorder.<sup>45</sup> Opponents of disclosure of health information further argued that extensive medical and social background information might facilitate tracing efforts by adoptees to find birth parents<sup>46</sup> and invade the birth family's privacy.<sup>47</sup>

In the last two decades, however, a complete turnaround has occurred in the attitude of experts in the adoption field toward the disclosure of nonidentifying information to adoptive parents. In 1971 the Child Welfare League of America, a national organization of adoption agencies and one of this country's foremost adoption authorities, recommended in its *Guidelines for Adoption Service* that adoptive parents be given all pertinent nonidentifying background information on the child.<sup>48</sup> Today, adoption experts are virtually unanimous in their agreement that complete and accurate medical and social history should be communicated to adoptive parents.<sup>49</sup> Most agencies currently adhere to these rec-

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42 See KATHERINE A. NELSON, *ON THE FRONTIER OF ADOPTION: A STUDY OF SPECIAL NEEDS ADOPTIVE FAMILIES* 87 (1985); see also Golden, *supra* note 5; Klein, *supra* note 6.

43 Black, *supra* note 36, at 199-202; Norman Fost, *Disclosing Genetic Information to Adoptive Parents: Ethical Considerations*, in *GENETIC FAMILY HISTORY: AN AID TO BETTER HEALTH IN ADOPTIVE CHILDREN* 51 (Wisconsin Clinical Genetics Center and Waisman Center on Mental Retardation and Human Development 1984) [hereinafter *GENETIC FAMILY HISTORY*]; Gilbert S. Omenn, et al., *Genetic Counseling for Adoptees at Risk for Specific Inherited Disorders*, 5 *AM. J. MED. GENETICS* 157, 162 (1980).

44 Black, *supra* note 36, at 199-200; Fost, *supra* note 43, at 51.

45 Deborah Franklin, *What a Child Is Given*, *N.Y. TIMES*, Sept. 3, 1989, § 6, at 36, 41; Omenn et al., *supra* note 43, at 162.

46 Timothy N. O'Connell, Note, *S.B. 340: Disclosure of Social and Medical History of the Biological Parents of an Adopted Child*, 4 *U. DAYTON L. REV.* 533, 537 (1979).

47 See SOROSKY ET AL., *supra* note 31, at 50; Lamport, *supra* note 30, at 123; O'Connell, *supra* note 46, at 535, 537; Dirk Johnson, *Debate on Adoption is Focusing on Rights to See Family Histories*, *N.Y. TIMES*, February 11, 1990, § 1, at 36; see generally, Omenn et al., *supra* note 43, at 162-63.

48 See SOROSKY ET AL., *supra* note 31, at 36.

49 HOLLINGER ET AL., *supra* note 7, § 13.01[1], at 13-10 to 13-11; SOROSKY ET AL., *supra* note 31, at 36. See also NELSON, *supra* note 42, at 92-93 (recommending complete disclosure based on study of special-needs adoptive families); CHILD WELFARE LEAGUE OF AMERICA, *STANDARDS FOR ADOPTION SERVICE* 25-28, 37-39 (1988) [hereinafter *CWLA STANDARDS*] (standards recommend thorough investigation of medical, developmental, psycho-

ommendations by declaring as their official policy that health-related information will be provided to adoptive parents,<sup>50</sup> although some have only recently revised their practices.<sup>51</sup>

Many considerations affected this recent reversal of opinion. First and foremost, nondisclosure of health information often impaired subsequent medical and psychological diagnosis and treatment of adopted children,<sup>52</sup> many times with devastating consequences.<sup>53</sup> Failure to alert prospective adoptive parents to known health problems and risks often resulted in placement of a child with a family that was totally unprepared to cope with the challenges the child's special needs presented.<sup>54</sup> This lack of forewarning has caused emotional trauma for both the child and other members of the adoptive family and sometimes has led to disruption of the adoption itself.<sup>55</sup> Moreover, access to accurate medical and genetic history will allow the adoptees to make informed childbearing decisions.<sup>56</sup>

Competent, professional practices on the part of the adoption intermediary can eliminate many of the concerns voiced by early opponents of disclosure. For example, through concentrated efforts by specially trained professionals and appropriate support services, adoptive families can be found and prepared to accept the physical or mental limitations of children with special needs.<sup>57</sup> Experts who specialize in placing children with special

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logical and family history and in general full disclosure to adoptive parents of this information); Summary of testimony of adoption experts in *Backes v. Catholic Family & Community Serv.*, 509 A.2d 283, 287, 289, 291 (N.J. Super. Ct. Ch. Div. 1985).

50 HOLLINGER ET AL. *supra* note 7, § 13.01[1], at 13-10 to 13-11; Golden, *supra* note 5.

51 Golden, *supra* note 5; Karwath, *supra* note 35, at 12; Neuffer, *supra* note 34, at 21.

52 See *infra* notes 136-49 and accompanying text.

53 See *Foster v. Bass*, 575 So. 2d 976 (Miss. 1990), discussed *infra* notes 466-86 and accompanying text; see also *infra* notes 140-49 and accompanying text.

54 See *infra* notes 150-51, 156 and accompanying text.

55 See *infra* notes 152-55 and accompanying text.

56 See *infra* note 163 and accompanying text.

57 In its introduction to the most recent edition of its standards, the Child Welfare League of America observes that the experience of child welfare agencies who aggressively seek families for waiting children has shown that "adoptive parents can be found for ethnic and racial minority, older, disabled, and emotionally disturbed children. Adoptive parents have successfully been found for these children among single applicants, those who initially applied for infants or problem-free children, and the children's own foster parents." CWLA STANDARDS, *supra* note 49, at 5-6.

See also Black, *supra* note 36, at 195 (Many adoptive parents may be willing to adopt a newborn in the face of uncertainties over higher risk of genetic disorders due to in-

needs state that good adoptive homes are available,<sup>58</sup> but that it is agency understaffing and bureaucratic red tape that often impedes the placement process.<sup>59</sup> Summarizing the prevalent approach, one specialist in special needs adoption observes: "It makes no sense to place a child with a family who won't be able to deal with that child . . . . This is not a poker game. These kids need families with the ability to nurture them."<sup>60</sup>

Although the concerns regarding stigmatization are not frivolous, the prevailing view today is that these can be addressed with appropriate counseling and education.<sup>61</sup> Nondisclosure, by inhibiting trust, has its own detrimental effects on the dynamics of relationships in an adoptive family.<sup>62</sup> Furthermore, professionals in

cest.); Lampert, *supra* note 30, at 115 (Author provided genetic counseling to prospective adoptive parents who chose to adopt child after being advised of significant risk of schizophrenia.); *San Francisco*, 5 AIDS POLICY AND LAW, July 11, 1990, at 7 (Program in Yonkers, N.Y. placed HIV positive children who have been abandoned by their parents in foster care rather than hospitals and discovered that 52% of the foster families were willing to adopt the HIV children placed with them.).

Katherine Nelson, who conducted a study of special needs adoptive families for the Child Welfare League of America, concluded that even if more healthy infants were available for adoptions, the pool of prospective adoptive parents for special needs children, while perhaps reduced, would have a stable core. She feels that interest in these children is partly independent of the supply and demand phenomenon. Foster parents will continue to form attachments to children for whom they care. Special needs children will also continue to be sought by parents motivated by altruism and by families whose own needs or lifestyles are particularly compatible with these children. NELSON, *supra* note 42, at 85.

58 Gloria Hochman commented that there is no child for whom she would say they could not find a family. Telephone Interview with Gloria Hochman, Communication Director of National Adoption Exchange (Sept. 18, 1990). Judy Gustafson reported that there are waiting lists of families willing to adopt spina bifida children. Telephone Interview with Judy Gustafson, Coordinator of the Spina Bifida Adoption Referral Program, (Sept. 18, 1990). This is also true for Down's Syndrome children at all functioning levels. Telephone Interview with Janet Marchese, Director and Founder, Down's Syndrome Adoption Exchange (Sept. 18, 1990). Diane Mahon also reported that they have no trouble finding homes for children with all types of special needs, whether the disabilities are physical, mental, or emotional. Telephone Interview with Diane Mahon, National Director of AASK American Adoption Exchange (Sept. 24 1990).

59 Mahon, National Director of AASK America Adoption Exchange, reported that her primary problem is "getting the kids out of the system." She observed that if the family willing to adopt a child lives in a different state than the child, the receiving state will often be reluctant to facilitate the adoption due to concern over public services and expenditures the child might require. Telephone Interview with Diane Mahon (Sept. 24, 1990). Janet Marchese also commented about problems with bureaucratic delays and interstate transfers. Telephone Interview with Janet Marchese, Down's Syndrome Adoption Exchange (Sept. 18, 1990).

60 Telephone Interview with Gloria Hochman, Communications Director of National Adoption Exchange (Sept. 18, 1990).

61 See BARTH & BERRY, *supra* note 40, at 169; Black, *supra* note 36, at 199, 202-03; Omenn et al., *supra* note 43, at 159.

62 Adoption experts who originally opposed revealing background information to

the mental health and social services fields now recognize that access to information regarding genetic heritage plays an important role in the adoptee's development of a personal sense of identity.<sup>63</sup> The term "genealogical bewilderment" has been used in psychological literature to describe symptoms associated with identity conflict that many adoptees experience in adolescence or adulthood. Often, this conflict results from the adoptee's lack of knowledge about the medical, social, and ethnic backgrounds of her biological parents and family.<sup>64</sup> Appropriate counseling and support services can counteract the impact of information perceived as negative by the adoptee.<sup>65</sup> In addition, this information may be less threatening than fears adoptees harbor when their background is unknown to them.<sup>66</sup>

Because identifying information is still kept confidential by agencies and other intermediaries when the birth parents choose a closed adoption, the concern that health information might facilitate tracing has not been viewed as significant, particularly in comparison to the compelling arguments favoring disclosure.<sup>67</sup>

adoptive parents changed their positions five years later, claiming "[f]amily therapy has clearly shown us that there cannot be a family secret, that under conditions where communication becomes blunted or corrupted the secret grows to be a conspiracy in which energies must be devoted to its maintenance . . . On-going communication leads to basic trust." R.M. Sands & G. Rothenberg, *Adoption in 1976: unresolved problems, unrealized goals, new perspectives* (paper presented at the annual meeting of the American Association of Psychiatric Services for Children, San Francisco, Calif.), (quoted in SOROSKY ET AL., *supra* note 31, at 37).

63 See SOROSKY ET AL., *supra* note 31, at 132-42; Black, *supra* note 36, at 203-05; Henig, *supra* note 1, at 72; see also *Backes v. Catholic Family & Community Servs.*, 509 A.2d 283, 286-87 (N.J. Super. Ct. Ch. Div. 1985) (summarizing testimony regarding effect on adoptees); *Mills v. Atlantic City Dep't. of Vital Statistics*, 372 A.2d 646, 650, 655 (N.J. Super. Ct. Ch. Div. 1977) (summarizing testimony of adoptees and psychologists emphasizing the importance of knowledge of one's background to an adoptee's identity, self-image, and perceptions of reality); Maureen A. Sweeney, *Between Sorrow and Happy Endings: A New Paradigm of Adoption*, 2 YALE J.L. & FEMINISM 329, 348 (1990).

64 The term "genealogical bewilderment" originated in an Article by H.J. Sants, *Genealogical Bewilderment in Children with Substitute Parents*, 37 BRIT. J. MED. PSYCHOL. 133 (1964). It has since been employed by many others. See *In re Assalone*, 512 A.2d 1383, 1388 & n.5 (R.I. 1986) (summarizing testimony of expert witness Dr. Brandon Qualls); CAPLAN, *supra* note 24, at 82; SOROSKY ET AL., *supra* note 31, at 113.

65 Black, *supra* note 36, at 205-06; SOROSKY ET AL., *supra* note 31, at 224.

66 FLORENCE FISHER, *THE SEARCH FOR ANNA FISHER* 52 (1973) ("The adoptee goes back only into himself. Beyond that there is a wall. And it is the fear of what is behind that wall—magnified a thousand rational and irrational times in one's imagination—that causes all the mischief."); SOROSKY ET AL., *supra* note 31, at 124; Black, *supra* note 36, at 205 (discussing fear of adoptees about passing on unknown genetic defects to their children).

67 See O'Connell, *supra* note 46, at 537; see also Blair, *supra* note 8, at 697-98, 743-



Moreover, the philosophical underpinnings of nondisclosure of background information have weakened as adoption experts during the last decade have recognized that adoption cannot "mirror biology."<sup>68</sup> Families created by adoption are different than those created by birth, and these differences must be acknowledged and appreciated.<sup>69</sup> Matching of physical characteristics has been deemphasized<sup>70</sup> and current standards emphasize placing children with families who are willing and prepared to meet the individual needs of the particular child.<sup>71</sup> In fact, experts now contend that disclosure of background information *strengthens* the bond between adoptive parents and the child because it facilitates more appropriate placement and a better understanding by the parents of the child and the child's needs.<sup>72</sup> It also enables adoptive parents to respond to the child's questions about her birth family.<sup>73</sup>

Responding to the recent awareness of the importance of transmittal of health-related information, the vast majority of state legislatures have enacted legislation during the past decade permitting greater disclosure of background information to adoptive parents. The contents of these statutes vary widely, however. While most mandate some disclosure,<sup>74</sup> others leave the decision of

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62, for a more detailed discussion of the privacy interests of birth parents that may be affected by disclosure.

68 See, e.g., Katz, *supra* note 21, at 9; Sants, *supra* note 64, at 140.

69 H. David Kirk, *Foreword* to WILLIAM FEIGELMAN & ARNOLD R. SILVERMAN, *CHOSEN CHILDREN: NEW PATTERNS OF ADOPTIVE RELATIONSHIPS* xiv (1983); see generally Marquis & Detweiler, *supra* note 1.

70 CWLA STANDARDS, *supra* note 49, at 34, 36 (Placement Standard 4.2, addressing suitability of adoptive families and children for each other, states that "similarities in background or characteristics should not be a major factor in selection of a family." Standard 4.9 states that physical resemblance "should not be the basis for selection of a family.").

71 *Id.* at 33-34 (Standard 4.2).

72 *Id.* at 37 (Standards 4.12, 4.13).

73 *Id.* at 38 (Standard 4.14).

74 See ALA. CODE § 26-10A-31 (Supp. 1991); ALASKA STAT. § 18.50.510 (1986); ARIZ. REV. STAT. ANN. § 8-129 (1992); ARK. CODE ANN. § 9-9-505 (Mitchie 1991); CAL. CIV. CODE § 224(70) (West Supp. 1992); COLO. REV. STAT. ANN. § 19-5-207(2) (West 1990); CONN. GEN. STAT. ANN. § 45-68e (West 1981 & Supp. 1991); FLA. STAT. ANN. § 63.162 (West Supp. 1992); GA. CODE ANN. § 19-8-23 (1991); HAW. REV. STAT. § 578.14.5 (Supp. 1990); ILL. ANN. STAT. ch. 40, para. 1522.4 (Smith-Hurd Supp. 1991); IND. CODE ANN. § 31-3-4-14 (West Supp. 1991); IOWA CODE ANN. § 600.8.C (West Supp. 1991); KAN. STAT. ANN. § 59-213 (Supp. 1991); KY. REV. STAT. ANN. § 199.520 (Baldwin 1991); LA. CH. CODE ANN. art. 1124-11279 (West Special Pamphlet 1992); MD. FAM. LAW CODE ANN. § 5-329.1 (1991); MASS. ANN. LAWS ch. 210, § 5A (Law-Co-op Supp. 1991); MICH. COMP. LAWS ANN. § 710.68 (West Supp. 1991); MO. ANN. STAT. § 453.121 (Vernon Supp. 1992);

what should be disclosed to the discretion of adoption agencies,<sup>75</sup> and a few require a court order for release of information.<sup>76</sup> Many of these statutes are not applicable to all types of adoption.<sup>77</sup> Significant differences exist among the states as to the content of the information to be disclosed. Some statutes focus only on the medical history of the parents,<sup>78</sup> others on the medical history of the child.<sup>79</sup> Few adequately specify that the medical

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MONT. CODE ANN. § 40-8-122 (1991); NEB. REV. STAT. § 43-107 (1988); N.H. REV. STAT. ANN. § 170-B:19 (1990 & Supp. 1991); N.J. STAT. ANN. § 9:3-41.1 (West Supp. 1991); N.Y. SOC. SERV. LAW § 373-a (McKinney Supp. 1992); N.C. GEN. STAT. § 48-25 (1991); N.D. CENT. CODE § 14-15-16 (1991); OHIO REV. CODE ANN. §§ 3107.12(D)(6), 3107.17(D) (Anderson 1989); OR. REV. STAT. § 109.342(4) (1990); 23 PA. CONS. STAT. ANN. § 2909 (1991); S.D. CODIFIED LAWS ANN. § 25-6-15.2 (Supp. 1991); TEX. FAM. CODE ANN. § 16.032 (West Supp. 1992); UTAH CODE ANN. § 78-30-17 (1992); VT. STAT. ANN. tit 15, § 461 (1989); VA. CODE ANN. § 63.1-223(D) (Michie 1991); WASH. REV. CODE ANN. § 26.33.350 (West Supp. 1992); WIS. STAT. ANN. § 48.432 (West Supp. 1991); WYO. STAT. § 1-22-116 (1988).

<sup>75</sup> See DEL. CODE ANN. tit. 13, § 924 (Supp. 1990); N.M. STAT. ANN. § 40-7-53 (1989); OKLA. STAT. ANN. tit. 10, § 57 (West Supp. 1992); S.C. CODE ANN. § 20-7-1780(D) (Law. Co-op. Supp. 1991).

<sup>76</sup> See D.C. CODE ANN. § 16-311 (1989); ME. REV. STAT. ANN. tit. 19 § 534 (West Supp. 1991); NEV. REV. STAT. ANN. § 127.140 (Michie 1986). See also DEL. CODE ANN. tit. 13, § 925 (Supp. 1990).

<sup>77</sup> Some states' nondisclosure statutes do not apply to independent adoptions. See OKLA. STAT. ANN. tit. 10, § 57 (West Supp. 1992) (allowing only state or private agencies to release medical history to prospective adoptive parents, despite the fact that a large percentage of nonrelative adoptions in Oklahoma are independent rather than agency adoptions); see also the following disclosure statutes that refer only to state and private agencies: GA. CODE ANN. § 19-8-23 (1991); ILL. ANN. STAT. ch. 40, para. 1522.4 (Smith-Hurd Supp. 1991); N.Y. SOC. SERV. LAW § 373-a (McKinney Supp. 1992); S.C. CODE ANN. § 20-7-1780 (Law. Co-op. Supp. 1991).

Several states exclude stepparent or relative adoptions from coverage of the disclosure statute. See, e.g., IOWA CODE ANN. § 600.867 (West Supp. 1991); TEX. FAM. CODE ANN. § 16-032 (West Supp. 1992).

Some disclosure statutes have been drafted so that they appear to apply only to adoptions following a voluntary relinquishment, and not to adoptions preceded by involuntary termination. See, e.g., LA. CH. CODE ANN. art. 1124-1127 (West Special Pamphlet 1992); N.J. STAT. ANN. § 9:3-41.1 (West Supp. 1991).

<sup>78</sup> The following states with statutes providing for disclosure of health-related information in adoption omit reference to the inclusion of the child's medical history in the information to be disclosed: Alaska, Arizona, Connecticut, Georgia, Illinois, Kentucky, Maine, Missouri, New Hampshire, North Carolina, North Dakota, South Dakota, Vermont, and West Virginia.

<sup>79</sup> ARK. CODE ANN. § 9-9-505 (Michie 1991) (requiring only "written health history and genetic and social history of the child"); COLO. REV. STAT. ANN. § 19-5-207 (West 1990) (requiring written report including "physical and mental condition of the child" and the "child's family background"); MISS. CODE ANN. § 93-17-3 (Supp. 1991) (requiring "doctor's certificate showing the physical and mental condition of the child"); TENN. CODE ANN. § 36-1-114 (1991) (requiring only "information concerning the child's social and medical history").

and genetic history of relatives should be included.<sup>80</sup> Only a handful describe the efforts that should be undertaken by an adoption agency or other intermediary to collect necessary information and transmit it accurately.<sup>81</sup>

Unfortunately, despite the endorsement of full and accurate disclosure of health-related information by professional guidelines and adoption experts, the revision of most agencies' official policies to reflect this position, and legislative reform, many adoptive parents still do not receive complete and accurate health-related information. Understaffing, bureaucratic and financial pressures to

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80 Currently, fewer than half the states' disclosure statutes actually specify that "genetic" history or information must be disclosed. They are: ARIZ. REV. STAT. ANN. § 8-129 (1992); ARK. CODE ANN. §§ 9-9-505-06 (Michie 1991); CAL. CIV. CODE § 224.70(b) (West Supp. 1992); GA. CODE ANN. § 19-8-23 (1991); HAW. REV. STAT. § 578.14.5(a) (Supp. 1990); IOWA CODE ANN. § 600.8 (West Supp. 1991); KAN. STAT. ANN. § 59-2130(a)(1) (Supp. 1991); LA. CH. CODE ANN. art. 1125 (West Special Pamphlet 1992); MINN. STAT. ANN. §§ 259.46-49 (West 1982 & Supp. 1992); N.J. STAT. ANN. § 9:3-41.1 (West Supp. 1991); N.Y. SOC. SERV. LAW § 373-a (McKinney Supp. 1992); OHIO REV. CODE ANN. § 3107.12 (Anderson 1989); OR. REV. STAT. § 109.342 (1991); S.C. CODE ANN. 20-7-1740 (Law. Co-op. Supp. 1991); TEX. FAM. CODE ANN. § 16.032 (West Supp. 1992); UTAH CODE ANN. §§ 78-30-16, -17 (1992); WIS. STAT. ANN. § 48.432 (West Supp. 1991); WYO. STAT. § 1-22-116 (1988).

Fewer than half the states provide for collection and disclosure of the medical history of biological relatives other than the birth parents. The statutes which do have such a provision are: ALASKA STAT. § 18.50.510 (1991); ARIZ. REV. STAT. ANN. § 8-129 (1992); CONN. GEN. STAT. ANN., § 45a-748 (West Supp. 1992); FLA. STAT. ANN. § 63.162 (West Supp. 1992); HAW. REV. STAT. § 578.14.5(a) (Supp. 1990); ILL. ANN. STAT. ch. 40, para 1522.4 (Smith-Hurd Supp. 1991); IOWA CODE ANN. § 600.8 (West Supp. 1991); KY. REV. STAT. ANN. § 199.520(4)(a) (1991); LA. CH. CODE ANN. art. 1125 (West Special Pamphlet 1992); MO. ANN. STAT. § 453.121.1(5), .3 (Vernon Supp. 1992); NEB. REV. STAT. § 43-107 (Supp. 1990); N.H. REV. STAT. ANN. § 170-B:19(II-a) (1990 & Supp. 1991); N.C. GEN. STAT. § 48-25 (1991); OHIO REV. CODE ANN. § 3107.12(D)(3) (Anderson 1989); OKLA. STAT. ANN. tit. 10, § 57(D) (West Supp. 1992); S.D. CODIFIED LAWS ANN. § 25-6-15.2 (Supp. 1991); TEX. FAM. CODE ANN. § 16.032 (West Supp. 1992); WIS. STAT. ANN. § 48.432(4)(a) (West Supp. 1991).

81 Ohio has a fairly detailed statute describing the manner in which an investigation to obtain medical and social history should be conducted. OHIO REV. CODE ANN. § 3107.12 (Anderson 1989).

Other states, if they address the issue at all, simply require reasonable efforts. *See, e.g.*, CONN. GEN. STAT. ANN. § 45-68g (West 1981 & Supp. 1991) ("Each agency or department shall be required to make a reasonable effort to obtain the information provided for in section 45-68e . . ."); HAWAII REV. STAT. § 578-14.5(b) (Supp. 1990). ("All affected public agencies and all child placing organizations . . . shall make reasonable efforts to complete this form with medical information on both natural parents, to obtain from the natural parents written consent to the release of this information to or for the benefit of the adopted child, and whenever possible, to obtain from the natural mother a signed release to receive a copy of all of her medical records, relating to the birth of the adopted child, which are within the possession of the hospital or other facility at which the child was born.") For further discussion of the need for greater regulation of the "reasonable efforts" that need to be taken, see Blair, *supra* note 8, at 713-42.

generate placement statistics,<sup>82</sup> and the antipathy of individual caseworkers, or sometimes whole agencies,<sup>83</sup> to full disclosure have resulted in widespread failure to transmit critical medical and psychological information to adoptive parents.<sup>84</sup> The problem has

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82 Frequently, adoption agencies do not have the staff to perform adequate investigations. The Los Angeles Times recently reported that "public adoption officials describe a system swamped with children who need to be placed, a situation that social workers say has created pressure to place more and more children at a faster rate." Klein, *supra* note 6. The shortage of staff necessary to conduct appropriate investigations could force children to wait years to be adopted. Because social workers know the delay may exacerbate a child's problems, the shortage of agency resources contributes to hasty placements. *Id.* Katherine Nelson, in her study of special needs adoption, found that the parents who were dissatisfied with the information they had been given about their child most often attributed this to organizational factors such as "worker turnover, heavy caseloads, and inadequate interviewing procedures." NELSON, *supra* note 42, at 35.

Bureaucratic and financial pressures have been cited by a number of experts as a leading cause of nondisclosure. Jeffrey Rosenberg, MSW and Director of Public Policy for the National Committee for Adoption, observed that "[t]here is a great deal of pressure to place these kids, 'move 'em, move 'em, move 'em,' [s]o what happens is this wrongful adoption stuff. We hope not too much, but we don't know." Klein, *supra* note 6. One social worker reported that the director of her adoption agency told her "[p]lace them as rapidly as you can. If we have to disrupt (a placement), fine. We can disrupt it. That makes for more placements and that means better statistics." *Id.*

For public agencies state funding is often related to the number of placements, and placement statistics become the measure of a worker's efficiency. *Id.* Private agencies, which are funded in large part through fees paid by adoptive parents, are also not immune from the financial pressure to generate placements. See Sharon Gustafson, *Regulating Adoption Intermediaries, Ensuring that the Solutions Are No Worse than the Problem*, 3 GEO. J. LEGAL ETHICS 837, 848 (1990).

83 Katherine Nelson found that one of the reasons that health information was not accurately communicated was that "[s]ome workers . . . apparently did not want to disclose all of the available information about the child. Perhaps some workers feared that full disclosure would discourage a seemingly good family. Other workers may have felt that the parents did not need to have certain information. Still other workers (or agency policies) might have tried to maintain the secrecy about the child's background that characterizes traditional adoption practice." NELSON, *supra* note 42, at 87.

84 Several recent studies and experts have documented this failure. Katherine Nelson found that half of the families interviewed, who had not previously been foster parents to their special needs child (she labels these families outright adopters) felt that the agency's information about the child had been insufficient or inaccurate. *Id.* at 86. She also found that "[t]he preferences of more than 1 in 10 outright adopters were stretched because the worker failed to provide, or ineffectively communicated, information about the child's problems in functioning." *Id.* at 84. She concluded that "[t]his practice exploited parents as resources for waiting children, particularly when the agency could have provided better information than it did." *Id.*

Similarly, a study of older child adoptions and adoption disruptions conducted in the early 80s revealed that over half of the families interviewed whose adopted child had been sexually abused had not been told prior to placement, and almost one-third of the adoptive families of physically abused children had not been told of the abuse. Twenty-eight percent of the families were not informed of a developmental disability and over one-third were not told of a learning disability or emotional or behavioral problems. In

received extensive media attention<sup>85</sup> and prompted the plethora of lawsuits examined in this Article, most of which stem from adoptions that occurred within the past twenty years.<sup>86</sup> Although additional statutory reform should ultimately help curtail nondisclosure,<sup>87</sup> the compensation of victims of this practice promises to be a topic demanding the attention of the courts for many years to come.

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only 23% of these cases did the social worker claim that the reason for nondisclosure was that the condition was not known to the social worker. BARTH & BERRY, *supra* note 40, at 105, 108-09.

The Los Angeles Times has reported that adoption experts "contend that vital information on adopted children, ranging from past abuse to important medical and psychological information about birth parents, is frequently withheld from adoptive parents, despite professional guidelines—and in some cases laws—calling for full disclosure." Klein, *supra* note 6. Reuben Pannor, former director of a private Los Angeles agency, declared his open criticism of public agency practices. "The goal is to get them off the rolls, find them permanent homes, adoptive homes, which means the state and county no longer have financial responsibility . . . But there has been an over-zealousness about placing these 'special needs' children . . . . Many have been placed without proper preparation, background testing, without information about what problem the child has, and about recessive problems that may show up later." *Id.* The extent of nondisclosure was dramatically illustrated during a recent trial of a wrongful adoption case, in which five or six people were struck from the jury during voir dire because "they had been involved in adoptions in which facts had been withheld." *State Is Liable for Failing to Disclose Child's History to Adoptive Parents*, 35 ATLA Law Rep. 34 (Feb. 1992) [hereinafter *State is Liable*].

85 See, e.g., *Adoptive Parents Sue Agency for Concealing Child's Background*, CHI. DAILY L. BULL., Aug. 16, 1990; Cameron Barr, *Due Process for Adoptive Parents*, AM. LAW., Oct. 1988, at 182; Belkin, *supra* note 6; Franklin, *supra* note 45; Jack Friedman, *He's Not Our Son*, PEOPLE, July 11, 1988, at 38; Golden, *supra* note 5; Henig, *supra* note 1; Bonnie Jacob, *Raising Cain*, NEW DOMINION, May/June 1989, at 32; Kevin Johnson, *Family Sues over Adoption*, U.S.A. TODAY, March 8, 1990, at 3A; Johnson, *supra* note 47; Karwath, *supra* note 35; Klein, *supra* note 6; Dianne Klein, *Adoption Gone Awry; Psychotic Child Disrupts a Household*, WASH. POST, Jan. 5, 1988, at 10; Klein, *supra* note 5; Marvelli & Marvelli, *supra* note 6; Neuffer, *supra* note 34; Andrea Sachs, *When the Lullaby Ends*, TIME, June 4, 1990, at 82; Randall Samborn, *Full Disclosure?*, NAT'L. L.J., Jan. 15, 1990, at 6; *State Reviews Policy on Special Needs Adoption*, Proprietary to the United Press International, Sept. 6, 1981; .

In addition, several lawyers representing plaintiffs in wrongful adoption actions have been asked to appear or be interviewed by television programs. Samuel Totaro and Enrico Mirabelli appeared on Philadelphia Today and have been asked to appear on Good Morning America. Telephone Interview with Samuel Totaro (Aug. 19, 1990). Neil Cogan was contacted by 60 Minutes about a segment. Telephone Interview with Neil Cogan (August 8, 1990).

86 See *supra* note 5.

87 See generally, Blair, *supra* note 8.

### III. LIABILITY OF ADOPTION INTERMEDIARIES: WHAT CONDUCT SHOULD BE ACTIONABLE?

#### A. *Intentional Misrepresentation and Nondisclosure*

The earliest decisions and the majority of lawsuits filed have focused on intentional behavior on the part of adoption intermediaries, consisting of purposeful misrepresentations regarding health-related matters or conscious nondisclosure of critical information that would indicate the presence or risk of severe physical or mental impairment.

#### 1. Treatment by the Courts

(a) *Intentional Misrepresentation.*—The seminal decision<sup>88</sup> in the area of wrongful adoption is *Burr v. Board of County Commissioners*, a 1986 opinion of the Ohio Supreme Court which affirmed a jury award of damages in the amount of \$125,000 to adoptive parents whom the court found had been fraudulently misled by the material misrepresentations of a public adoption agency.<sup>89</sup> In 1964, the Burrs applied to the Stark County Welfare Department to adopt a baby boy under six months of age.<sup>90</sup> To their surprise, they were contacted several weeks later by a county caseworker who advised them a seventeen-month-old boy was available for adoption and arranged for them to meet this child. At the meeting the Burrs were told that the child was born to an eighteen-year-old unwed mother in the city hospital and had been cared for since birth by his mother and her parents.<sup>91</sup> They were further advised that the mother was employed during the day, that she feared the grandparents mistreated the child while she was at

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88 *Allen v. Allen*, 330 P.2d 151 (Or. 1958) may actually have been the first 'wrongful adoption' case for intentional misrepresentation. In *Allen* adoptive parents sued an adoption agency who had placed a three-year-old girl with them several years before. The child had severe emotional problems requiring institutionalization. The suit sought both revocation of the adoption and monetary damages for medical bills they incurred for the child. The court dismissed the case, finding it had no jurisdiction, but appeared to focus on the request to set aside the adoption. The court in dicta also noted it found no evidence of fraud, but the decision did not discuss the facts of the case in detail so it offers little guidance.

89 491 N.E.2d 1101, 1108-09 (Ohio 1986).

90 *Id.* at 1103.

91 *Id.*

work, that she wanted to move to Texas to pursue an opportunity for better employment, and thus she had decided to surrender the child for adoption.<sup>92</sup> Mr. Burr also testified he was told the child "was a nice, big, healthy baby boy." The Burrs decided to adopt the child and named him Patrick.<sup>93</sup>

As Patrick grew older, it became apparent his physical and mental development were delayed. He experienced poor motor skills, a speech impediment, learning disabilities, and at age nine was placed in special education classes for the educable mentally retarded.<sup>94</sup> By age seventeen, he had begun to hallucinate and his behavior became violent and abnormal.<sup>95</sup> Over the years the Burrs took him to numerous hospitals and doctors for evaluation<sup>96</sup> and ultimately, when he was nineteen, he was diagnosed to have Huntington's Chorea, a genetically inherited progressive neurological disease characterized by movement disorders, delusions and hallucinations, and intellectual deterioration.<sup>97</sup> he condition is fatal, with an average life expectancy after onset during childhood of 8.5 years.<sup>98</sup> His care required his parents' constant attention.<sup>99</sup> Ultimately, Patrick required twenty-four-hour nursing care,<sup>100</sup> and had to be institutionalized for the remainder of his life.<sup>101</sup>

In 1982, the Burrs obtained the sealed adoption records by court order and learned for the first time the truth of Patrick's origins. The county department's own records revealed Patrick's mother was a thirty-one-year-old mental patient at Massillon State Hospital, where Patrick had been born. She was mildly mentally retarded with a speech impediment and psychotic reactions of

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92 *Id.*; Complaint at 3-4, *Burr v. Board of County Comm'rs*, (Stark County Ct. CP., Ohio) (No. 83-470).

93 491 N.E.2d at 1103.

94 *Id.*

95 *Id.*

96 *Id.*

97 *Id.* See also *STEDMAN'S MEDICAL DICTIONARY* 299 (25th Ed. 1990).

98 491 N.E.2d at 1103.

99 In August, 1990, counsel for plaintiffs, Wylan Witte, reported that Patrick's father had spent all of his time off and taken extra time off of his job to take care of Patrick. Patrick was in an institution as of August, 1990, in the final stages of the disease, and his father still visited him every day. Telephone Interview with Wylan Witte (Aug. 13, 1990).

100 At the time of the trial, Patrick made a courtroom appearance with two nurses who attended to him twenty-four hours a day. Letter from Wylan Witte to Marianne Blair (Aug. 23, 1990).

101 Telephone Interview with Wylan Witte (Aug. 14, 1990).

unknown origin. His father was unknown but presumed to be another mental patient. Prior to placement with the Burrs, Patrick had lived in two foster homes. The department was aware he was developing slowly and had performed psychological testing prior to his placement with the Burrs that indicated his intellectual functioning was below normal.<sup>102</sup> Moreover, the records revealed the agency had misrepresented facts to the court in a confidential report filed as part of the initial adoption proceedings, in which it was stated the child's intelligence was average and his family history regarding mental disease was unknown.<sup>103</sup>

Shortly after learning of the agency's massive fabrication, the Burrs filed suit against the Stark County Board of County Commissioners, the County Welfare Department, its director, and the then-retired caseworker who had made the misrepresentations to them, seeking damages for the medical expenses, and transportation and lodging costs they had incurred seeking treatment for Patrick, ultimate funeral expenses, other expenses incurred for his support, and mental pain and suffering.<sup>104</sup> At trial, the Burrs testified that had they known his true history, they would not have chosen to adopt this particular child, due to their limited financial circumstances and the fact that Mrs. Burr was already disabled herself due to the loss of a leg from polio.<sup>105</sup> Expert testimony revealed that Patrick's family background and history indicated a high risk of disease.<sup>106</sup> At the time of trial Patrick's medical bills had thus far exceeded \$81,000.<sup>107</sup> Counsel for plaintiff suggests that statements by jurors after the suit was over indicated the reason their verdict was not more than \$125,000 was that they assumed the child was covered by insurance.<sup>108</sup>

The Ohio Supreme Court had little trouble affirming the verdict, holding that the adoptive parents had sufficiently proven each element of the tort of fraud.<sup>109</sup> "It would be a travesty of justice," proclaimed the court, "and a distortion of the truth to conclude that deceitful placement of this infant, known by appel-

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102 491 N.E.2d at 1104.

103 *Id.*; Complaint at 4, *Burr* (No. 83-470).

104 Complaint at 10, *Burr* (No. 83-470).

105 491 N.E.2d at 1106.

106 *Id.* (states that this testimony came from the defendants' expert).

107 Plaintiffs-Appellees' Brief at 21, *Burr* (No. 85-786).

108 Telephone Interview with Wylan Witte (Aug. 13, 1990).

109 491 N.E.2d at 1105-07.



lants to be at risk, was not actionable when the tragic but hidden realities of the child's infirmities finally came to light."<sup>110</sup>

International misrepresentation that is far less blatant and elaborate than the statements made to the Burrs has also been held actionable in fraud. In *Roe v. Catholic Charities*,<sup>111</sup> three adoptive families alleged that defendant advised the parents that their children were normal in physical and mental condition and developments, that the children would require no extraordinary medical care, and that the agency had no information concerning the children's background. Plaintiffs further alleged their statements were false when made, because the agency knew two children had a history of psychiatric treatment, and because all three children had exhibited severely abnormal behavior while in foster care.<sup>112</sup> This disturbed behavior continued after the adoptions and required professional treatment, including institutionalization of one of the children. The Illinois appellate court determined that these allegations of intentional misrepresentation on the part of an adoption agency constituted grounds for a fraud claim and were sufficient to withstand a motion to dismiss.<sup>113</sup>

(b) *Intentional Nondisclosure.*—The *Burr* court was unwilling to be expansive in defining the conduct for which liability would be imposed by its holding. "It is not the mere failure to disclose the risks inherent in this child's background which we hold to be actionable . . . ,” the court declared, but rather, "it is the deliberate act of misinforming this couple . . . ."<sup>114</sup> In *Burr*, addressing nondisclosure was not critical, because the factual findings at the lower court level supported the imposition of liability for affirmative misrepresentation. Since *Burr*, however, several courts have been willing to impose liability for intentional nondisclosure.

In *Michael J. v. County of Los Angeles, Department of Adoptions*<sup>115</sup> a California appellate court addressed the issue of liability for intentional nondisclosure of health information head-on in their review of a summary judgment dismissing a wrongful adop-

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110 *Id.* at 1107.

111 No. 5-89-0411, 1992 WL 29911 at \*1-2 (Ill. App. Ct. Feb. 14, 1992).

112 *Id.* at \*2. Plaintiffs allege one child had a history of extensive mental health treatment prior to her adoptive placement for "violent and uncontrollable behavior as well as intellectual, social and emotional retardation." The other two had engaged in behavior such as smearing feces on walls and killing the family dog. *Id.*

113 *Id.* at \*5.

114 *Id.* at 1109.

115 247 Cal. Rptr. 504 (Cal. Ct. App. 1988).

tion case. The agency's conduct that was subject to scrutiny in *Michael J.* was the alleged intentional concealment of a material fact.<sup>116</sup> When Michael was adopted as an infant in 1970, the skin on his upper torso and face had the color of a "port wine stain." County records, reflecting a medical examination the County had procured prior to placement, described the birthmark and reported "doctor will not make a definite statement as to the prognosis for this child."<sup>117</sup> The adoptive parents were aware of the stain, of course, but were not advised of the doctor's statement regarding his prognosis, which would have highlighted the stain's significance. When Michael was eleven, he suffered an epileptic seizure and was diagnosed with Sturge-Weber Syndrome, a congenital degenerative neurological condition<sup>118</sup> involving loss of coordination and epilepsy, for which the port wine stain is diagnostically significant.<sup>119</sup>

In the suit brought by the adoptive mother on behalf of herself<sup>120</sup> and the child, the court found that if the evidence at trial establishes that the adoption agency intentionally failed "to disclose a material fact within the agency's possession that the examining physician would not render a prognosis for Michael . . .," liability could be imposed upon the agency for such conduct.<sup>121</sup> The court's pronouncement was forceful:

Public policy cannot extend to condone concealment or intentional misrepresentation which misleads prospective adoptive parents about the unusual calamity they are assuming. The adoption of a child is an act of compassion, love and humanitarian concern where the adoptive parent voluntarily assumes enormous legal, moral, social, and financial obligations. Accord-

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116 *Id.* at 513.

117 *Id.* at 505.

118 *Id.* at 506.

119 *Id.* at 513.

120 Suit was filed by the adoptive mother because at the time of filing, the adoptive parents were divorced, the mother had custody, and the father chose not to be a party. Telephone Interview with Sheldon Rosenfield (Sept. 25, 1990).

121 247 Cal. Rptr. at 513. The published opinion was issued following the second trip to the appellate court for this case. After the suit was originally filed, the county took a statute of limitations issue through appeal which took 5 years to resolve. It was ultimately resolved in plaintiffs' favor, the case was remanded for trial, discovery ensued, and the county then raised the sovereign immunity issue which went up through the appellate system for four years, culminating in the published opinion cited herein. The case was again remanded in May of 1988, set for trial in September, 1990, and ultimately settled just prior to trial. Telephone Interview with Sheldon Rosenfield (Sept. 25, 1990); and with his staff (Oct. 8, 1991).

ingly, a trustworthy process benefits society, as well as the parent and child. As keepers of the conscience of the community, we cannot countenance conduct which would allow persons who desire entrance into the emotional realm of parenting to be unprotected from schemes or tactics designed to discharge societal burdens onto the unsuspecting or unwary. As trustees of the child's destiny the agency was obligated to act with morals greater than those found in a purveyor's common marketplace.<sup>122</sup>

Two appellate courts have recently reached a similar conclusion. In *M.H. v. Caritas Family Services*,<sup>123</sup> a Minnesota appellate court upheld a cause of action for intentional nondisclosure on appeal of a summary judgment by the lower court. The adoption agency was alleged to have told the adoptive parents only that there was a possibility of incest in the child's family and did not reveal that the child was conceived by siblings and his father had a history of below average intelligence and mental problems. As the child grew, his behavior problems became more apparent, including violence and setting fires, and he was ultimately diagnosed as having attention deficit hyperactivity disorder.<sup>124</sup> The appellate court determined that intentional nondisclosure of material facts can subject an adoption agency to liability, because the parties are in a confidential or fiduciary relationship and one party has special knowledge that is not accessible to the other.<sup>125</sup> Similarly in *Roe v. Catholic Charities*,<sup>126</sup> an Illinois appellate court found that not only affirmative misrepresentations, but also the intentional failure to disclose necessary medical and psychological information to adoption parents, will subject the agency to liability.<sup>127</sup>

The most recent imposition of liability for intentional nondisclosure came in the form of a jury verdict for \$3.8 million against the state in *Mohr v. Massachusetts*.<sup>128</sup> The state agency that ar-

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122 247 Cal. Rptr. at 513.

123 475 N.W.2d 94 (Minn. Ct. App. 1991), *review granted*, (Minn. Nov. 13, 1991).

124 *M.H.*, 475 N.W.2d at 97.

125 *M.H.*, 475 N.W.2d at 99.

126 No. 5-89-0411, 1992 WL 29911 (Ill. App. Ct. Feb. 14, 1992). *See supra* notes 111-13 and accompanying text for an additional discussion of this case.

127 *Id.* at \*8, \*12.

128 No. 87-0152 (Bristol County Super. Ct. Nov. 4, 1991). There is no published opinion. The case is reported in the following sources: Neuffer, *supra* note 34; *State Is Liable*, *supra* note 84, at 34; "Wrongful Adoption" Verdict May Open New Class of Tort Plaintiffs, MASS. LAWS. WEEKLY, Nov. 4, 1991, at 1. The case is currently on appeal. The ver-

ranged for the adoption of six-year-old Elizabeth in 1973 intentionally withheld medical records indicating that Elizabeth had been diagnosed in infancy as mentally retarded with cerebral atrophy and that her birth mother was a schizophrenic who had been institutionalized in a state mental facility. The records were in fact provided to the child's pediatrician without authorization to release them to the adoptive parents. The jury apparently was unpersuaded by the state's contention that nondisclosure was the policy of the state agency and that disclosure was not required by statute at the time of the adoption.<sup>129</sup>

## 2. Policy Considerations Favoring Recognition of Liability

Before examining in detail the theories of liability available to adoptive parents and adoptees, it is important to address more generally the policy considerations favoring recognition of liability for intentional misrepresentation and nondisclosure by adoption agencies regarding health-related matters. Imposition of liability in cases of this nature may generate concern that adopted children will be viewed as commodities.<sup>130</sup> Such concern is unwarranted if the courts continue to recognize, as they have been doing, that it is the inappropriate conduct by the adoption agency that triggers liability, not merely detection of a subsequent problem with the health of an adopted child.

Significant benefits will be attained by the continued recognition of liability for both intentional misrepresentation *and* intentional nondisclosure of health-related matters. These include (1) deterring such conduct in the future by adoption intermediaries and thereby avoiding the tragic consequences which have resulted from these practices; (2) compensating adoptive parents who have been denied the ability to make an informed decision about the commitment they will undertake and adopted children who have failed to receive proper medical care or nurturing as a result of

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dict was reduced to \$200,000 in compliance with the limitations of the Massachusetts Tort Claims Act, which limits recovery to \$100,000 per plaintiff. Telephone Interview with Stephen Sheehan, counsel for plaintiffs (Feb. 11, 1992); *State Is Liable*, *supra* note 84.

129 Neuffer, *supra* note 34, at 21; *State Is Liable*, *supra* note 84, at 34.

130 The courts in both *Burr* and *Michael J.* felt it necessary to discuss and dispel such misgivings. See *Burr*, 491 N.E.2d at 1109; *Michael J.*, 247 Cal. Rptr. at 511, 513. For a recent expression of this concern in the media, see Sachs, *supra* note 85, at 82 ("In a risk-averse age when consumer standards have become more exacting and family commitments seem less binding, there is a danger that adopted children could be viewed as commodities that come with an implied warranty.").

the intermediary's conduct; and (3) promoting confidence in the adoption process.

(a) *Deterrence*—One of the most compelling arguments favoring the imposition of liability for *both* intentional misrepresentation and intentional nondisclosure is the deterrent effect of the threat of liability upon the future practices of adoption agencies and other intermediaries. Deterrence has long been recognized as a primary underlying rationale in the field of tort law. Traceable to the writings of English legal philosophers, Jeremy Bentham and John Austin, in the late eighteenth and nineteenth centuries,<sup>131</sup> the "prophylactic"<sup>132</sup> role of tort liability in preventing future harm remains a central concept in the current writings of tort scholars, particularly those in the school of law and economics.<sup>133</sup> "The action in tort," it has been said, "is a 'judicial parable,' designed to control the future conduct of the community in general."<sup>134</sup> The purpose of contract law, to ensure that promises are performed,<sup>135</sup> is also promoted by the deterrent effect of legal enforcement, that is, knowledge of potential liability for noncompliance surely motivates performance of contracts.

Why is it so important to deter both intentional misrepresentation and nondisclosure of health-related information? An examination of the tragic consequences of these practices provides the answer. Regardless of whether an adoption agency misrepresents factors affecting a child's mental or physical health, or simply chooses to say nothing at all, the net result is that the adoptive parents do not receive information that is critical to future diagnosis and health care for the child.

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131 Glanville Williams, *The Aims of the Law of Tort*, 4 CURR. LEGAL PROBS. 137, 144 (1951).

132 See W. PAGE KEETON, ET AL, PROSSER AND KEETON ON THE LAW OF TORTS-§ 4, at 25 (5th ed. 1984), which discusses prevention of future harm as one of the primary factors affecting the recognition of tort liability.

133 Stephen D. Sugarman, *Doing Away with Personal Injury Law*, in PERSPECTIVES ON TORT LAW 126 (Robert Rabin ed., 3d ed. 1990). See generally, e.g., Walter Blum & Harry Kalven, *The Empty Cabinet of Dr. Calabresi: Auto Accidents and General Deterrence*, 34 U. CHI. L. REV. 239 (1967); Guido Calabresi, *The Costs of Accidents*, in PERSPECTIVES IN TORT LAW, *supra*, at 169, 173-190; Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

134 Williams, *supra* note 131, at 144.

135 KEETON ET AL., *supra* note 132, § 1, at 5.

The damaging effects of nondisclosure of the presence or risk of psychological problems, in particular, has been the recent focus of much litigation and media attention. In many instances children have received ineffective or no treatment for years because their adoptive parents and medical caregivers lacked information that would signal a particular type of intervention was necessary. For example, prior physical or sexual abuse experienced by a child is an indicator that a child is at risk for serious behavior and mental problems, which can be dealt with most effectively if the psychiatrist is aware of this history.<sup>136</sup> This type of information has been particularly susceptible to being withheld by adoption intermediaries.<sup>137</sup> Tina Chandler's story illustrates the importance of this knowledge. Tina was institutionalized in adolescence after a long history of violent and destructive behavior, including threats to kill siblings and setting fires,<sup>138</sup> and after she had undergone years of therapy. Through litigation against the adoption agency, her parents ultimately learned the extent to which their daughter was severely physically and sexually abused prior to her adoption at age four. This knowledge, and the recovery of photographs taken when she was a child to document her injuries, enabled her psychiatrists to help her confront and resolve the effects of her abuse and resulted in a remarkable turnaround, enabling her to return home to her family.<sup>139</sup>

Other types of medical and social history are also integral factors in the diagnosis of psychological impairment. Knowledge regarding substance abuse during pregnancy can facilitate diagnosis of fetal alcohol syndrome or other drug-related neurological problems.<sup>140</sup> Awareness of a family history of schizophrenia, man-

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136 See John W. McInturf, *Preparing Special-Needs Children For Adoption Through Use of a Life Book*, 65 CHILD WELFARE 373, 376, 378, 381 (1986).

137 See BARTH & BERRY, *supra* note 40, at 105, whose study of older child adoptions found that fewer than half of the families whose children had been sexually abused had been told, and almost one-third of the families whose children had been physically abused had not been told; see also Belkin, *supra* note 6, § 1, at 1; Golden, *supra* note 5; Klein, *supra* note 6.

138 Belkin, *supra* note 6, § 1, at 1.

139 Telephone Interview with Neil Cogan, attorney for Tina's parents and other adoptive parents in *Griffith v. Johnston*, 899 F.2d 1427 (5th Cir. 1990), *cert. denied* 111 S. Ct. 712 (1991) (August 8, 1990).

140 See Jacob, *supra* note 85, at 48 (Adoption agency withheld information collected from foster mother that provided strong indications child suffered organic brain damage from fetal alcohol syndrome, a condition that ultimately caused his institutionalization); see also Don Hadley & Barbara Peterson, *Family History Workshop*, in GENETIC FAMILY HISTORY, *supra* note 43, at 108; Renata Laxova, *Minor Signs of Major Problems*, in GENETIC

ic-depression, and other mental disorders which are subject to genetic influence<sup>141</sup> can hasten diagnosis and appropriate drug therapy. Often adoptive parents of children who ultimately required institutionalization report that for years they sought medical help and were told that the child's problems were not serious, or improper diagnosis impeded effective treatment.<sup>142</sup> One adoptive mother did not obtain information revealing a family history of manic-depression until her daughter, after years of therapy, was ultimately diagnosed at seventeen with the same problem. The mother, who had tried for several years to obtain her daughter's medical history, lamented, "Laura had so much pain and went undiagnosed for so long. She didn't just need family therapy, she needed lithium."<sup>143</sup>

The consequences of delaying appropriate treatment can sometimes be irreversible. Psychiatrists who specialize in the treat-

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FAMILY HISTORY, *supra* note 43, at 72; Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1429-1430 (1991).

141 Black, *supra* note 36, at 200-03. See also *State Is Liable*, *supra* note 84, at 34 (Seymour Kety, senior research psychiatrist at National Institute of Health, testified at *Mohr* trial that "children of schizophrenic mothers are 15 times more likely to exhibit schizophrenic behavior").

142 See Golden, *supra* note 5 (Adoptive parents of *Lisa G.* were not told of psychiatric evaluation prior to adoption that recommended the child be institutionalized immediately for long term care. Five years after the adoption, she was ultimately institutionalized and the adoption revoked, but she was denied years of the care she needed.); Jacob, *supra* note 85, at 48 ("The cruel thing is that not knowing about John's condition has caused him so much time," said his father. "Time we spent on therapies that didn't work, time wasted when the doctors said 'he's just a hyperactive, normal kid. He'll grow out of it.' Now it may be too late to help John or it may take 10 times longer than it would have if we'd started right in the first place."); Karwath, *supra* note 35, at 12 (Carol Krueger, adoptive mother of an institutionalized mentally retarded son with attention span and conduct disorders, learned for the first time 12 years after the adoption that both of the child's parents had been institutionalized for mental problems. "If we had had this information earlier," she stated, "maybe we could have been more aware of things to look for and gotten more expert help sooner."); Klein, *supra* note 6, at 1 (Monica Shoemaker (pseudonym) endured years of inappropriate therapy before she was diagnosed as having multiple personality disorder and schizophrenia, information that social workers withheld from her adoptive family); Klein, *supra* note 85, at 3 (Adoptive mother of Tommy Colella, whose diagnosis of fetal alcohol syndrome with psychotic behavior was not shared with his adoptive parents, observed, "[a]s awful as it was, we know that Tommy suffered more than we did. He was denied the treatment he needed. The system failed him.").

See also *Roe v. Catholic Charities*, No. 5-89-0411, 1992 WL 29911 at \*7 (Ill. App. Ct. Feb. 14, 1992) in which the court observed that the children of three adoptive families could have received proper treatment at a much earlier time if the adoption agency had provided them with diagnostic evaluation that had already been performed prior to placement.

143 Franklin, *supra* note 45, at 41.

ment of psychopathic children report that the chances of therapy achieving a successful outcome are greatly increased if the child is diagnosed at a young age. They indicate that for children over seven, the chances of success are only about 50%. When treatment is delayed past age eleven, the chances for recovery are not good.<sup>144</sup> Thus, the price of nondisclosure is not only to be found in the turmoil experienced by the child and the adoptive family prior to accurate diagnosis, but may include permanent inability to function and institutionalization.<sup>145</sup>

The need for accurate health history to facilitate diagnosis and treatment of physical impairments is equally compelling. Some hereditary disorders can be life-threatening if not properly diagnosed and treated.<sup>146</sup> Adopted children often undergo painful and sometimes hazardous diagnostic testing that would have been unnecessary if adequate medical history had been provided.<sup>147</sup> Knowledge regarding a hereditary risk not only warns adoptive parents and physicians to watch for certain symptoms, but also alerts parents that certain activities or medical procedures may create a particular risk for their child.<sup>148</sup> Information that would assist with early identification of children with developmental delay is particularly important to maximize their potential, as developmental progress will be further retarded absent early intervention.<sup>149</sup>

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144 KEN MAGID & CAROLE A. MCKELVEY, *HIGH RISK* 149, 216 (1987).

145 See *supra* note 142, describing five children who were ultimately institutionalized; see also, Belkin, *supra* note 6 (describing Tina Chandler and other adopted children who were institutionalized following nondisclosure).

146 For example, familial polyposis causes polyps to form in late childhood, creating symptoms of chronic colitis. Carcinoma of the colon almost invariably develops if the disease is left untreated. *STEDMAN'S*, *supra* note 97, at 1238; Omenn *et al.*, *supra* note 43, at 162.

147 John R. Ball & Gilbert S. Omenn, *Genetics, Adoption, and the Law*, in *GENETICS AND THE LAW* II 277 (Aubrey Milunskey & George J. Annas eds., 1980); Franklin, *supra* note 45, at 40-41 (Adoptee Robert Morse underwent many painful tests to reach a diagnosis of juvenile chronic arthritis, a disease he later discovered was prevalent in his birth family.); Omenn *et al.*, *supra* note 43, at 162; Ginny Whitehouse, *Consumers Viewpoint: Panel Discussion in GENETIC FAMILY HISTORY*, *supra* note 43, at 19 (Discovery by adult adoptee of history of fibrous breast lumps avoided repetition of painful treatment that might otherwise have been avoided).

148 For example, a genetic clinic contacted the adoptive parents of a child after her birth mother was diagnosed with von Willebrand disease, a bleeding disorder which the child had a 50% risk of developing. The adoptive parents were warned to take preventive measures in situations in which bleeding might occur and to perform certain tests before any elective surgery on the child. Omenn *et al.*, *supra* note 43, at 161.

149 Susan Heighway, *Developmental Approach to Casefinding: Part 1*, in *GENETIC FAMILY HISTORY*, *supra* note 43, at 93.



Accurate and complete disclosure of nonidentifying health-related information is also essential to appropriate placement for a child. Professionals who specialize in placing children with special needs for adoption stress that providing prospective adoptive parents with the most complete information available is essential to ensuring that the family is both emotionally and financially able to cope with the challenges that a child who has or develops special needs may present.<sup>150</sup> Social scientists who have conducted studies of adoptions of older and special needs children confirm that providing incomplete or inaccurate information about a child's special needs or problems in functioning contributes to dissatisfaction with the adoption on the part of the adoptive parents<sup>151</sup> and is a significant factor contributing to adoption disruption.<sup>152</sup> These findings are supported by a study of California's own state records which indicated that between 1983 and 1987, sixty-nine adoption annulments were attributed to fraudulent misrepresentation regarding a child by a county agency.<sup>153</sup> When an adoptive placement is disrupted, the child experiences tremendous instability, emotional upheaval, and a sense of rejection that can be permanently damaging. The child's chances for successful adoption thereafter are diminished.<sup>154</sup> Less obvious may be the devastating effect that disruption has on the adoptive parent, who is beset by feelings of inadequacy and failure. Observed one researcher, "Dissolution was not the parents' easy way out; it was their tragedy."<sup>155</sup> Even if the adoption is not disrupted, lack of information

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150 Diane Mahon stressed the need for full disclosure and observed that the more a family is told about a child's needs and history, the more likely the family is to adopt and care for the child. Telephone Interview with Diane Mahon, National Director for AASK American Adoption Exchange (Sept. 24, 1990); Gloria Hochman, Communication Director of the National Adoption Exchange expressed a similar sentiment. Telephone Interview with Gloria Hochman (Sept. 18, 1990). See also CWLA STANDARDS, *supra* note 49, at 36-37 (Standard 4.12); NELSON, *supra* note 42, at 92.

151 BARTH & BERRY, *supra* note 40, at 108-09; NELSON, *supra* note 42, at 71, 73.

152 The term adoption disruption is used to describe any adoptive placement that has ended, whether before or after finalization of the adoption. BARTH & BERRY, *supra* note 40, at 20.

"Among families that reported no information gaps, the disruption rate was only 19%. Among families reporting one or more gaps, the disruption rate was 46%." *Id.* at 108-09; NELSON, *supra* note 42, at 74-75. See also *supra* note 6, for a list of revocation actions, many of which were preceded by inadequate disclosure.

153 Klein, *supra* note 6.

154 NELSON, *supra* note 42, at 71-72, 75 (History of previous disrupted adoption is a predictor for both parent dissatisfaction and adoption disruption); BARTH & BERRY, *supra* note 40, at 72, 156-7.

155 NELSON, *supra* note 42, at 77.

can seriously diminish the adoptive parents' ability to accept the challenges a child, particularly one with emotional or psychological problems, may present, and can create an atmosphere in the home that is dysfunctional and harmful to the child.<sup>156</sup>

Failure to transmit information regarding health problems adversely impacts an adoptive family's financial ability to meet a child's needs in two ways. Children are placed with families who do not have the financial resources to provide the medical care, special education, equipment, or other needs the child may have because the adoptive parents were not forewarned and could not make an assessment of their ability to meet these needs prior to making the commitment.<sup>157</sup> Second, adoptive families who are not aware of their child's special needs are not alerted to the possibility of federal and state adoption assistance, or may have insufficient information to qualify. Federal and state programs provide benefits to families who adopt special needs children and meet certain eligibility requirements.<sup>158</sup> The benefits include medical assistance under Medicaid and various state programs, as well as social services such as respite care, specialized day care, counseling, and in home supportive services such as housekeeping

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<sup>156</sup> *Id.* at 32-33, 68-69, 73.

<sup>157</sup> *See id.* at 39, 84; *see also* Belkin, *supra* note 6, at A1, B8 (Residential psychiatric care can cost as much as \$15,000 per month); Johnson, *supra* note 47, at 36. Some adoptive parents have sought revocation to obtain governmental assistance. Klein, *supra* note 6 (adoptive parents sold family business and sought revocation to pay child's medical bills); Marvelli, *supra* note 6.

<sup>158</sup> Since passage of the Adoption Assistance and Child Welfare Act of 1980, the federal government has provided reimbursement to the states for adoption assistance benefits to families who adopt eligible children with special needs. In addition, each state has its own state-funded adoption assistance program. The intent of the federal program is to complement rather than replace the state programs, which often cover children who do not meet the requirements for federal assistance and provide benefits not available in the federal program. HOLLINGER ET AL., *supra* note 7, § 9.01[2].

To establish eligibility for federal benefits, a state must determine that the child is a child with special needs and that the child meets the financial and categorical criteria of either the Aid to Families with Dependent Children (AFDC) program or the Supplemental Security Income (SSI) program. To be classified as a child with special needs, the state must find that the child cannot or should not be returned to the child's parents, that there is a specific factor which makes it reasonable to conclude that the child cannot be placed for adoption without assistance, and that reasonable efforts have been made to place the child without assistance, unless such efforts would not be in the best interest of the child (i.e., the child has become attached to the prospective adoptive parents). *Id.* § 9.03 and 9.03[1]. Factors which may make a child eligible include physical, mental or emotional handicaps. *Id.* § 9.03[1][b].

State eligibility requirements vary, although they also tend to limit adoption assistance to children who, because of special needs, are more difficult to place. *Id.* § 9.03.

and personal care.<sup>159</sup> To qualify for assistance, adoptive parents must apply in most cases prior to finalization of the adoption<sup>160</sup> and show that the child's special needs existed at that time. The federal program recently amended its regulations to allow adoptive parents to apply after finalization if they can show they were not provided with all relevant information about the child's condition at the time they requested assistance.<sup>161</sup> Nevertheless, full disclosure at the outset is necessary to alert prospective adoptive parents of the need to apply for these benefits prior to finalization and to ensure eligible adoptive families will receive benefits for the full period in which they are entitled to them.<sup>162</sup>

In addition to their affects on future health care and suitability of the placement to meet the child's needs, misrepresentation and nondisclosure of health-related information have other long-term negative effects. When information regarding potential hereditary risks is withheld, adoptees as they reach adulthood are denied critical information that may affect their own choices regarding childbearing. Furthermore, this may have adverse consequences for the health of their own descendants.<sup>163</sup> Lack of knowledge

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159 Federal medicaid benefits include assistance with in-patient hospital services (except institutions for a mental disease or tuberculosis), outpatient hospital services, laboratory and X-ray services, early periodic screening and diagnosis for physical or mental disorders, and some types of medical treatment. States may choose to include in their medicaid programs home health care services, private duty nursing services, physical therapy, dental care, prescription drugs, in-patient psychiatric services, or other diagnostic, preventative, or rehabilitative services. *Id.* § 9.04[3], at 9-25 and § 9.04[4], at 9-27 to 9-28.

160 *Id.* § 9.04[6][a]. Some states allow adoptive parents to apply for state adoption assistance benefits based upon preexisting conditions if the adoptive parents did not have knowledge of these conditions at the time of the adoption. *Id.* See Jacob, *supra* note 85, at 48, indicating that Virginia, as of 1989, intended to adopt a policy allowing parents to apply for state aid even if a child were not diagnosed as a special needs child until several years after adoption.

161 HOLLINGER ET AL., *supra* note 7, § 9.04[6][a] (citing Human Development Servs., U.S. Dept. of Health and Human Servs. Policy Interpretation Question, ACYF-p1Q-88-06, Eligibility for Title IV-E Adoption Assistance (Dec. 2, 1988)).

162 Federal law permits states to negotiate an adoption assistance agreement with adoptive parents that will take effect upon placement, so that the family will be eligible for benefits without having to wait for issuance of an interlocutory or final decree of adoption. *Id.* § 9.04[6][a].

163 See Black, *supra* note 36, at 198; Omenn et al., *supra* note 43, at 162; Diane Plumridge et al., *ASHG Activities Relative to Education*, 46 AM. J. HUM. GENETICS 208, 209 (1990). Adoptees who are alerted to possible genetic disorders may consider prenatal genetic screening or amniocentesis.

about their background can also create identity conflict in some adopted children, particularly as they reach adolescence.<sup>164</sup>

Assuming then that disclosure of health-related information is essential, and taking note of professional guidelines that endorse disclosure<sup>165</sup> and statutory reform that now requires it,<sup>166</sup> why is the deterrent effect of liability for nondisclosure necessary? In the first place, several states still do not mandate the disclosure of health-related information to adoptive parents by statute,<sup>167</sup> and many other states provide statutes which are insufficiently comprehensive in coverage and scope.<sup>168</sup> Moreover, enforcement provisions and sanctions for noncompliance are almost totally absent.<sup>169</sup> Thus, while state statutes provide limited guidance, they do not motivate compliance. Additionally, professional guidelines recommending disclosure fall short. These guidelines have been in place since 1971,<sup>170</sup> and yet intentional nondisclosure of health-related information still occurs frequently.<sup>171</sup> Agencies experience financial pressures to place special needs children quickly to conserve public or agency resources.<sup>172</sup> Counsel for plaintiff in the *Burr* case expressed his opinion that the fraud in *Burr* was committed simply to avoid the expense and additional paperwork of placing the child through the special needs program.<sup>173</sup> Furthermore, funding for agencies is linked to placement; as a result social workers often experience bureaucratic pressure to place

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164 See *supra* note 63-64 and accompanying text.

165 CWLA STANDARDS, *supra* note 49, at 37-38.

166 See *supra* note 74.

167 See *supra* notes 75-76.

168 See *supra* notes 77-81 and accompanying text.

169 See Blair, *supra* note 8, at 775-76, for a more comprehensive coverage of this topic. Currently, only a few states impose sanctions for failure to comply with disclosure statutes. See IOWA CODE ANN. § 600.8(11) (West Supp. 1991) (making it a misdemeanor for any person to "assist[] in or impede[] the placement or adoption of a minor person in violation of this section" which requires placement investigation and disclosure of medical background information); LA. CH. CODE ANN. art. 1127 (West Special Pamphlet 1992) (Failure to make good faith effort to obtain and disclose health information is punishable by fine of \$150 to \$500.) The Uniform Conference of Commissioners is considering a revision to the Uniform Adoption Act that would make it a misdemeanor when someone with a duty to disclose knowingly fails to provide information that is reasonably available. See UNIF. ADOPTION ACT § art. § 10-e (Proposed Draft Aug. 9, 1991).

170 SOROSKY ET AL., *supra* note 31, at 36.

171 See BARTH & BERRY, *supra* note 40, at 108-11; NELSON, *supra* note 42, at 31-35; see also *supra* notes 5, 83-85.

172 See *supra* note 82 and accompanying text.

173 Maley, *supra* note 6, at 730 n.141.

children quickly to generate placement statistics.<sup>174</sup> In some instances individual workers fear disclosure may discourage a particular placement, or the worker or agency continues to adhere to the traditional policy that secrecy about a child's background should be maintained.<sup>175</sup> Thus, the incidence of misrepresentation and nondisclosure is still sufficiently frequent to necessitate the deterrent effect that liability for such practices would create.

Due to the organized and professional level of the activity being affected, it is quite reasonable to conclude that liability will indeed have a deterrent effect on intentional practices of adoption intermediaries. Unlike tortfeasors who become subject to liability through random, everyday misfortunes, adoption practice is highly regulated and conducted by licensed professionals with a great deal of training.<sup>176</sup> Social workers employed in both public and private agencies have specialized training, supervised direction, and the ability to implement specified internal procedures and regulations. Private attorneys who handle independent adoptions are also legally trained, licensed, subject to professional regulation and ethical codes, and have access to continuing legal education that can provide specialized training in appropriate adoption practices. Furthermore, both adoption agencies and private attorneys frequently carry malpractice insurance and are thus subject to the pressures of insurers to conform their procedures to limit liability exposure.<sup>177</sup>

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174 See *supra* notes 82, 84 and accompanying text.

175 See *supra* note 83; BARTH & BERRY, *supra* note 40, at 110.

176 See generally CWLA STANDARDS, *supra* note 49, at 67-68. Standard 6.20 directs that social work staff members, including at least the director of the adoption service, the caseworker directors, and the social work supervisors should have graduate degrees in social work. It further provides:

All aspects of adoption service require specific knowledge and skills that are acquired through a combination of professional education and experience in social work, and through ongoing inservice training and supervision.

Professionally trained social workers should be used for those adoption service tasks that involve casework and groupwork interviewing, assessing and preparing children and parents for the adoptive placement, and assisting birth and adoptive parents to arrive at their decisions.

*Id.* at 67.

177 See Jeffrey Rosenberg & William Pierce, *Adoption Practice Today: The Current Judicial Boundaries*, 13 FAM. L. REP. 3025, 3030 (1987), reprinted in ADOPTION FACTBOOK, *supra* note 1, at 137, 142. Stephen Juech, counsel for defendants in *Meracle v. Children's Servs. Soc'y.*, 437 N.W.2d 532 (Wis. 1989), advised that most private agencies have EEO coverage (error and omission coverage) that would apply to wrongful adoption actions. Telephone Interview with Stephen Juech, Esq., Frisch Dudek, Ltd. (Aug. 9, 1990).

Recent court decisions imposing liability have already had an impact. In the *Journal of Law and Social Work*, an Article appeared in 1989 advising child welfare agencies of the *Burr* decision and recommending precautions agencies should take in order to reduce legal liability for the placement of children for adoption.<sup>178</sup> The Article recommended that agencies systematically review their policies and procedures to ensure full disclosure of all known important medical and background information to potential adoptive parents prior to placement. It also proposed training and specific disclosure procedures to implement the policy.<sup>179</sup> Additional evidence of the effect of litigation may be found in the recently revised Texas disclosure statute,<sup>180</sup> enacted at least partially in response to the wrongful adoption litigation filed against the Texas Department of Human Services.<sup>181</sup>

(b) *Compensation.*—Liability for intentional misrepresentation and nondisclosure also functions to compensate those who have been harmed by such behavior—adopted children and their adoptive parents. Compensation of losses has long been recognized as one of the underlying functions of tort law,<sup>182</sup> despite criticism from scholars that it cannot serve as the sole rationale for all tort liability.<sup>183</sup> Contract law also seeks to compensate parties for losses sustained as the result of a breach.<sup>184</sup>

Adoptees deserve compensation when intentional failure by adoption intermediaries to accurately disclose health-related information delays or impairs appropriate medical treatment. They may experience physical, mental, or emotional suffering which could have been reduced or alleviated.<sup>185</sup> For some children, their physical or mental impairments may become permanent or more

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178 Carol Amadio, *Wrongful Adoption—A New Basis for Litigation, Another Challenge for Child Welfare*, J.L. & SOCIAL WORK, March 1989, at 23.

179 *Id.* at 29-30.

180 TEX. FAM. CODE ANN. § 16.032 (West Supp. 1991).

181 Telephone Interview with Neil Cogan, Associate Dean at S.M.U. College of Law, drafter of the recent amendments to the Texas disclosure statute, and plaintiff's attorney in *Griffith v. Johnston*, 899 F.2d 1427 (5th Cir. 1990), *cert. denied* 111 S. Ct. 712 (Oct. 2, 1991).

182 KEETON ET AL., *supra* note 132, § 4 at 20; Posner, *supra* note 133, at 30-31; Williams, *supra* note 131, at 151.

183 Posner, *supra* note 133, at 30-31.

184 See JOHN D. CALAMARI & JOSEPH PERILLO, CONTRACTS § 14-1 (3rd ed. 1987).

185 See *supra* notes 138-49 and accompanying text; see also discussion of *Foster v. Bass*, 575 So. 2d 967 (Miss. 1990), *infra* part III.(B).1.b.

severe because of delayed or ineffective treatment. They may face a lifetime with a reduced functioning capacity, in terms of physical, mental, or emotional limitations, or a reduced life expectancy, as a result of conditions that could have been less severe or improved if accurate information had prompted appropriate medical care.<sup>186</sup> These children are entitled to compensation for their impairments, physical and mental pain and suffering, medical expenses, and loss of earnings they will incur as adults, which resulted from the intentional failure to disclose.

Adopted children should also be entitled to compensation for emotional trauma or deprivation of needed medical care or other services when placement with a family incapable of meeting their needs is directly traceable to a failure to provide health-related information to adoptive parents. As discussed above,<sup>187</sup> nondisclosure of information about a child's impairments may result in placement in a family that is emotionally or financially unable to cope with the child's needs or limitations. Such placements can create a home atmosphere that is hostile, tense, psychologically damaging and possibly even physically abusive to the child, and may result in a disruption of the adoption, creating further instability and emotional pain. Due to their limited financial resources or lack of access to adoption subsidies, families who received inadequate information about a child's needs may discover they are unable to provide the medical or psychiatric care, special education, or special equipment that the child might require.<sup>188</sup> When an adoptive placement is inappropriate or the child is deprived of needed services because the adoptive parents were not adequately prepared and informed of the child's health background, the child is entitled to compensation for the resulting physical, mental, or emotional harm.

To discuss the compensation to which an adoptive parent is entitled, it is essential to first focus clearly on the nature of the harm that is caused by misrepresentation or nondisclosure. Failure to transmit accurate and complete health-related information to prospective adoptive parents denies them *the opportunity to make an informed choice* about the commitment they are about to undertake and their own capacity to meet a particular child's special needs and challenges. The harm to them is not simply that they endured

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186 *Id.*

187 *See supra* notes 150-62 and accompanying text.

188 *See supra* notes 157-62 and accompanying text.

the emotional and financial devastation that can accompany raising a child with severe mental, emotional, and/or physical impairments. The harm results from the fact that, by withholding essential information, they were denied the opportunity to choose whether they would voluntarily assume those burdens. The nature of the injury was clearly understood by the Ohio Supreme Court in *Burr*, when it proclaimed:

Adoptive parents are in the same position as, and confront risks comparable to those, of natural parents relative to their child's future. Our decision should not be viewed as altering traditional family relationships and responsibilities, nor should it be read as shifting part of the burden of parenting to society. However, just as couples must weigh the risks of becoming natural parents, taking into consideration a host of factors, so too should adoptive parents be allowed to make their decision in an intelligent manner.<sup>189</sup>

One might question why adoptive parents should be compensated for being denied the opportunity to choose, when birth parents often endure the same hardships without being given a choice. The response is on several levels. First, the nature of the wrong in the adoption context is that information was available that could have provided an opportunity to make an informed choice, and thus a duty should be imposed on the party in control of that information to release it to the prospective adoptive parents. Our society does in fact now widely recognize a cause of action for wrongful birth.<sup>190</sup> Natural parents are allowed to recover for pecuniary losses<sup>191</sup> and for emotional distress<sup>192</sup> against physicians for failing to provide parents with accurate medical information concerning a risk their child would be severely impaired, in time to prevent conception or permit termination of a pregnancy. Providing compensation for pecuniary losses and emotional distress awarded in the wrongful adoption context is clearly analogous.<sup>193</sup>

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189 491 N.E.2d 1101, 1109 (Ohio 1986).

190 See KEETON ET AL., *supra* note 132, § 55, at 371.

191 *Id.* at n.47.

192 *Id.* at n.47-48. See *infra* notes 386-415 and accompanying text for a discussion of some of the obstacles still encountered in some courts to the recovery of damages for emotional distress; see also Gregory G. Sarno, Annotation, *Recoverability of Compensatory Damages for Mental Anguish or Emotional Distress For Tortiously Causing Another's Birth*, 74 A.L.R. 4TH 798 (1989).

193 See LeMay, *supra* note 11, at 486-87 (comparison of wrongful adoption and



To simply argue that adoptive parents should be treated similarly to parents in wrongful birth actions is the easiest course. To do so, however, ignores the fact that creation of a relationship by birth and creation by adoption are different, and the differences should affect society's expectations. It is both a fundamental legal principle<sup>194</sup> and a sociological norm<sup>195</sup> in our society that natural parents are primarily responsible for the care of their children. When natural parents cannot or for some reason do not properly exercise that responsibility, the state, under the principle of *parens patriae*, assumes responsibility for the care of their children through its juvenile court system. By the 1950s, adoption in this country became recognized as a valuable child welfare service,<sup>196</sup> that is, a method of addressing the needs of children whose birth families were unable or unwilling to adequately care for them. By the 1970s child welfare experts reached agreement that adoption as a means of raising and nurturing a child was preferable to state institutions or foster care, not just for infants, but also for older children and children with physical, mental or emotional problems.<sup>197</sup> Through adoption, the adoptive parents assume responsibility for the care and support of their children, and we recognize that once the adoption is final, their duties are identical to those of natural parents.<sup>198</sup> Yet few would advocate that the state could discharge its burden to care for children by simply assigning them to selected families for adoption. Adoption is a *voluntary* assumption of the responsibilities of parenting. Prior to the adoptive placement, there exists no special bond between a potential adoptive parent and a particular child. When undertaking the adoption commitment involves *foreseeable* extraordinary challenges, adoptive parents should have the right to make an informed choice wheth-

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wrongful birth actions); Maley, *supra* note 6, at 727-29 (discussing analogy to wrongful birth damages).

194 See HOMER CLARK, *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 6.2 (2d ed. 1988). "Today both mother and father are responsible for the support of their children, to the extent of their respective resources and abilities." *Id.* The parent's responsibility for the education for the child arises out of our "traditional assumption that the basic social unit is the nuclear family and that that unit is the best instrument for transmission of social values to preceding generations." *Id.* § 9.2, at 332. The parent decides what medical care is to be provided. *Id.* § 9.3, at 335.

195 See generally JOSEPH K. FOLSOM, *THE FAMILY: ITS SOCIOLOGY AND SOCIAL PSYCHIATRY* 20 (1934); CARLE C. ZIMMERMAN, *FAMILY AND CIVILIZATION* 700-01 (1947).

196 Howe, *supra* note 20, at 177.

197 *Id.* at 188; HOLLINGER ET AL., *supra* note 7, § 1.04, at 1-51, § 9.01, at 9-3.

198 See CLARK, *supra* note 194, § 20.10, at 927-28.

er or not to assume this responsibility based upon *all* information reasonably available about a particular child.

What then, are the damages incurred when adoptive parents are denied the opportunity for informed choice? Just as natural parents who recover under a wrongful birth claim, adoptive parents experience emotional trauma and financial losses when an adopted child presents challenges with which they were not prepared to cope.

Much of the sociological literature<sup>199</sup> and media coverage<sup>200</sup> that present case studies have focused on the trauma of families that encountered unexpected, severe psychological problems in adopted children. Destructive behavior, theft, arson,<sup>201</sup> violent attacks, and threats or attempts to kill siblings, other children, or the adoptive parents<sup>202</sup> are commonly reported by parents who were not given accurate information regarding their child's mental problems prior to placement. It is also common for some of these seriously disturbed children to practice self-mutilation or attempt suicide.<sup>203</sup> Living with a seriously dis-

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199 See BARTH & BERRY, *supra* note 40, at 175-76; NELSON, *supra* note 42, at 31-35, 68-69, 76-77.

200 See *supra* note 85 and articles cited therein.

201 See *M.H. v. Caritas Family Servs.*, 475 N.W.2d 94, 97 (Minn. Ct. App. 1991), *review granted*, (Minn. Nov. 13, 1991); NELSON, *supra* note 42, at 33, 69; Belkin, *supra* note 6; Jacob, *supra* note 85, at 37; Marvelli & Marvelli, *supra* note 6.

202 See Belkin, *supra* note 6, at 1 (Mark Richards, whose adoptive parents were told only that he had a mild learning disability, attempted to burn down his home and threatened his younger brother with a butcher knife. His parents subsequently learned the state had a large file on Mark, describing horrible abuse by his father, who had bitten the child's left forefinger off. Attacks by other children are also described.); Golden, *supra* note 5 (Jacob Clemens, in an apparent suicide attempt, killed two of his younger brothers in a fire. "Debbie" attacked her adoptive mother with a knife. Lisa G. attempted to poison her adoptive father with Lysol.); Jacob, *supra* note 85, at 37; Klein, *supra* note 6 (Twice Monica Shoemaker tried to suffocate her baby sister and three times she threatened her mother with a butcher knife.); Sachs, *supra* note 85, at 82 (One child attempted to cut off his cousin's arm and, on another occasion, burn down the room while the cousin slept. After the adoption, the adoptive parents learned he had been horribly abused as a child.).

In Colorado an organization founded for parents of adoptive children who are violent and mentally ill gained 2,000 members in its first five months of operation. Golden, *supra* note 5.

203 BARTH & BERRY, *supra* note 40, at 176 (Eight-year-old child, who practiced Satanic worship and sliced his penis to draw blood for ceremonies, was placed with adoptive father who was unaware of this behavior at time of placement.); Friedman, *supra* note 85 at 38; Golden, *supra* note 5; Klein, *supra* note 6, at 3 (Tommy Colella, a child whose adoption revocation received national media coverage, attempted repeatedly to set fires, mutilate himself, and commit suicide by hanging prior to his institutionalization. Only later did his parents learn the state had extensive files on his psychiatric disorder.);

turbed child is disruptive for other children in the family<sup>204</sup> and extremely stressful for the parents, often causing marital discord between the parents and not infrequently contributing to their divorce.<sup>205</sup> Parents who were not prepared for this behavior feel manipulated, angry, frustrated, victimized, inadequate, and sometimes afraid of their children.<sup>206</sup>

It is not only psychological problems, however, that can cause emotional trauma. Parents of children with debilitating, progressive neurological impairments, such as Huntington Disease, grieve intensely. As courts have observed in other contexts, "[t]here is no joy in watching a child suffer and die . . . ."<sup>207</sup>

Many families have also been financially devastated by the unexpected medical costs that they incur. For example, at the time of trial, medical expenses for the care of Patrick Burr exceeded \$80,000.<sup>208</sup> Expenses for the care of Erin Meracle, another child afflicted with Huntington Disease whose case is discussed below,<sup>209</sup> were estimated at the time of settlement to be approximately \$30,000 per year. The Kruegers, who are currently suing an adoption agency in Chicago for failing to reveal an extensive history of mental illness in the birth parents, have expended up to

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Marvelli & Marvelli, *supra* note 6 (describing one adopted daughter's self-abuse and pre-occupation with fire and death); *State Is Liable*, *supra* note 84, at 34 (Elizabeth Mohr made several suicide attempts.).

204 See Golden, *supra* note 5 (account of Lisa G.); Klein, *supra* note 6 (Mother stated that her other children lived in constant turmoil and fear because of Monica's behavior.); see also Jacob, *supra* note 85, at 36 (indicating a previously well adjusted sister began staying in her room behind closed doors). The impact on siblings can be particularly harmful if biological siblings are adopted together and the adoption of one is later revoked, causing their separation. See generally Belkin, *supra* note 6, at B8; Sharman Stein, *Spurned Adoptee Just Wants to See Brother*, CHI. TRIB. April 5, 1990, at 1.

205 NELSON, *supra* note 42 (One adoptive mother was hospitalized for two months with a nervous breakdown). The adoptive parents of the child in *Collier v. Krane*, 736 F. Supp. 473 (D. Colo. 1991), were divorced prior to filing the action, in part related to stress of child's behavior. Telephone Interview with Paul Radosevich, counsel for plaintiffs (Oct. 18, 1991); Golden, *supra* note 5 (One adoptive mother, who now leads workshops for adoptive families, commented, "[a] lot of people stay in the [adoptive] commitment after it doesn't work out. And to me, that's really unhealthy because it affects the rest of the family. I've seen so many marriages break up over it."); Jacob, *supra* note 85, at 36 (The stress caused the adoptive couple to fight continuously.).

206 NELSON, *supra* note 42, at 32, 76-77.

207 *Schroeder v. Perkel*, 432 A.2d 834, 842 (N.J. 1981) (wrongful birth action against physicians who failed to warn of danger of cystic fibrosis).

208 *Burr v. Board of County Comm'rs*, 491 N.E.2d 1101, 1108 (Ohio 1986).

209 *Meracle v. Children's Serv. Soc'y*, 437 N.W.2d 532 (Wis. 1989). See *infra* notes 437-47 and accompanying text. The estimate was made by Charles Steirman, counsel for plaintiffs, in a telephone interview (Oct. 11, 1990).

\$70,000 for therapists, doctors, specialists and tutors for their son, who is currently institutionalized.<sup>210</sup> The cost of residential psychiatric care can be up to \$15,000 per month.<sup>211</sup> One adoptive family was forced to sell a family business and ultimately seek revocation because they could no longer pay their child's mounting medical bills.<sup>212</sup> Often parents who file wrongful adoption actions are motivated by the desire to obtain financial assistance to help provide necessary services for their child.<sup>213</sup> Adoptive parents who were denied the opportunity to make an informed choice about whether they could meet a particular child's needs with the resources available to them are entitled to reimbursement for the extraordinary medical and other expenses incurred as a result of the child's condition.

Certainly, adoptive parents who are fully informed also may encounter emotional trauma and financial strain. The distinction from uninformed adoptive parents is that the informed adoptive parents made a voluntary choice to assume that particular burden. Moreover, the fact that the choice was voluntary may lessen the burden. While a child with severe psychological or other impairments creates stress under the best of circumstances, parents who are informed and anticipate these problems are likely to have received more counseling and tend to be better prepared emotionally to deal with them. Informed adoptive parents will have determined that the problems a particular child experiences are ones with which they can cope.<sup>214</sup> Moreover, they do not have to

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210 Johnson, *supra* note 85, at 3A. Cost of medical care for Michael Gibbs, another adopted child who is the subject of litigation, has totalled over \$400,000 so far, over \$100,000 of which was not covered by insurance. Telephone Interview with Samuel Totaro, counsel for plaintiffs (Aug. 13, 1990).

211 Belkin, *supra* note 6, at A1.

212 Klein, *supra* note 6.

213 Johnson, *supra* note 85, at 3A (discussing *Krueger* case).

The plaintiff in *Allen v. Children's Servs.*, 567 N.E.2d 1346 (Ohio Ct. App. 1990), sought help with obtaining special schooling and medical appliances. Telephone Interview with Blaine Schwarz, attorney for plaintiff (Sept. 17, 1991). The plaintiffs in *Griffith v. Johnston*, 899 F.2d 1427 (5th Cir. 1990), similarly filed suit to seek services for their children. Telephone Interview with Neil Cogan, attorney for plaintiffs (Aug. 8, 1990). In another case, *Wristen v. Jansen*, No. 86CU-10-6421 (Franklin County Ohio Court of Common Pleas, filed Oct. 15, 1986), the adoptive mother sued in an attempt to obtain help with costs of medical care. Telephone Interview with Pete Milless, attorney for plaintiffs (October 16, 1990).

214 NELSON, *supra* note 42, at 18, 92. One specialist in special needs adoption observed that you must look for a good match between the child and the family. For example, some families can tolerate one kind of abnormal behavior, such as setting fires, but not another, such as a sullen child. Telephone Interview with Gloria Hochman, Com-

deal with the additional frustration of feeling manipulated or the anger that compounds an otherwise stressful situation. Furthermore, adoptive parents who have been fully advised of health risks are more likely to have assessed their financial resources and are alerted to the possibility of financial assistance through adoption subsidies. And most importantly, their situation is not the result of inappropriate conduct by an adoption intermediary, the critical factor that entitles parents from whom essential information is withheld to compensation for their emotional trauma and financial losses.

(c) *Foster the Institution of Adoption.*—Adoption as an institution serves important societal interests.<sup>215</sup> Through adoption, children who might not otherwise have a permanent family or be provided with appropriate care and stability can have the opportunity to receive the care and nurturing they need in a familial setting from parents who have made a long term commitment to them. To the extent that children have the opportunity to develop a positive self-identity in a supportive, stable environment, society is spared the social problems that often accompany societal failure to meet the physical and emotional needs of its youngest members. Birth parents who are not prepared emotionally or financially to raise a child are provided an option that allows them to plan for the care of their child and postpone parenting until they feel ready for it. Research indicates “that unwed teenage mothers who relinquish their infants for adoption are much less likely to remain socially, educationally and economically disadvantaged throughout their lives than those who keep their babies.”<sup>216</sup> Adoptive parents have the opportunity to experience the joys of parenthood. Two researchers studying the outcome of adoptive placements concluded: “No other form of substitute care offers children—or adults seeking children—the quality of legal, psychological and familial belonging that adoption creates.”<sup>217</sup> Of

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munications Director, National Adoption Exchange (Sept. 18, 1990).

215 See generally BARTH & BERRY, *supra* note 40, at 24-41; Gustafson, *supra* note 82, at 841; HOLLINGER ET AL., *supra* note 7, § 1.01(1), at 17; Heidi A. Schneider, *Adoption Contracts and the Adult Adoptee's Right to Identity*, 6 LAW & INEQ. 185, 194 (1988).

216 HOLLINGER ET AL., *supra* note 7, § 1.01(1), n.16 (citing 1 NATIONAL RESEARCH COUNCIL, RISKING THE FUTURE: ADOLESCENT SEXUALITY, PREGNANCY AND CHILDBEARING (C.D. Hayes ed. 1987)); ADOPTION FACTBOOK, *supra* note 1, at 148 (reporting that one study indicates that teenage mothers who choose adoptions are less likely to live in poverty, less likely to receive public assistance, and more likely to complete high school).

217 BENSON JAFFE & DAVID FANSHELL, HOW THEY FARED IN ADOPTION: A FOLLOW-UP

course, beyond the sociological and psychological benefits, the state realizes certain economic benefits by being spared the cost of fully supporting children who might otherwise be in state custody.

Recognition of liability for wrongful adoption practices fosters confidence in the adoption process by prospective adoptive parents.<sup>218</sup> Widespread media coverage<sup>219</sup> given to nondisclosure by adoption agencies in recent years and the tragic consequences of that nondisclosure could undermine the public's trust in adoption intermediaries and impede willingness to adopt. While it might be persuasively argued that infertile couples are so desperate for babies that they will continue to adopt,<sup>220</sup> negative publicity regarding deceptive practices or nondisclosure may steer families away from agency adoption. Families may particularly shy away from adoption of special needs children, fearing that the problems may be far worse than represented to them. Publicized decisions by trial and appellate courts that condemn misrepresentation and nondisclosure by adoption intermediaries and compensate victims should counteract this erosion of public confidence. Such decisions send an important message that these practices are not appropriate, will not be tolerated, and must be deterred.

Advocates for adoption agencies in wrongful adoption suits have argued that the institution of adoption may be weakened because the cost of increased liability exposure might force agencies out of business.<sup>221</sup> Such fears appear exaggerated. Most private agencies have insurance coverage that would include this type of liability.<sup>222</sup> Private attorneys have malpractice insurance. And public agencies clearly are not going to get out of the adoption business because of increased exposure to liability. They are charged with the care of children who must be placed for adoption or put in foster care. Foster care is an expensive option for a

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STUDY v. (1970).

218 See, e.g., *M.H. v. Caritas Family Servs.*, 475 N.W.2d 94, 98 (Minn. Ct. App. 1991), review granted, (Minn. Nov. 13, 1991).

219 See, e.g., *supra* note 85.

220 See ADOPTION FACTBOOK, *supra* note 1, at 6 (reporting that one million infertile American couples compete for the 50,000 adoptable children who become available each year, and that at least 20 prospective adoptive couples exist for each adoptable child).

221 See *Adoptive Parents Sue Agency for Concealing Child's Background*, CHI. DAILY L. BULL., Aug. 16, 1990, at 2 (quoting Dennis Minichello, defense counsel in *Krueger v. Leahy*, who stated, "I believe it's going to expose adoption agencies to a lot of liabilities. We are creating liability exposure that never was contemplated. We believe it could stop adoptions or bankrupt them.").

222 See *supra* note 177 and accompanying text.

state, and foster parents have brought similar suits when harmed by a foster child whose condition was not disclosed to the foster parents.<sup>223</sup> Moreover, future liability can be minimized by amending the intermediaries' procedures to provide complete disclosure of nonidentifying background information.

In sum, continued recognition of liability for intentional misrepresentation and nondisclosure of health-related information serves important policy goals. Future practices by adoption intermediaries will be modified to ensure accurate transmission of medical and social history to adoptive parents. Victims of intentional misrepresentation and nondisclosure, some of whom have suffered traumatic and devastating consequences, will be compensated. Finally, public confidence in the integrity of the adoption process will be strengthened, thereby promoting the continued availability of adoptive homes for children with special needs.

### 3. Theories of Liability

#### (a) *Fraud.*

(i) *Affirmative Misrepresentation.*—In *Burr v. Board of County Commissioners*,<sup>224</sup> the adoptive parents recovered damages from the defendants on a tort cause of action for fraud.<sup>225</sup> The Ohio Supreme Court in *Burr* found the elements of the tort of fraud to be:

- (a) a representation or, where there is a duty to disclose, concealment of a fact,
- (b) which is material to the transaction at hand,
- (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,
- (d) with the intent of misleading another into relying upon it,
- (e) justifiable reliance upon the representation or concealment, and
- (f) a resulting injury proximately caused by the reliance.<sup>226</sup>

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223 See, e.g., *Johnson v. State*, 447 P.2d 352 (Cal. 1968) (en banc) (foster mother attacked by foster child whose emotional problems were not revealed was allowed to bring a claim against state); *Snyder v. Mouser*, 272 N.E.2d 627 (Ind. Ct. App. 1971) (cause of action stated by foster mother whose husband was killed by foster child about whom county did not warn).

224 491 N.E.2d 1101 (Ohio 1986).

225 *Id.* at 1105-07. See *Roe v. Catholic Charities*, No. 5-89-0411, 1992 WL 29911 at \*2-7 (Ill. App. Ct. Feb. 14, 1992). See also *KEETON ET AL.*, *supra* note 132, § 105, at 726-27.

226 491 N.E.2d at 1105 (citing *Cohen v. Lamko, Inc.*, 462 N.E.2d 407 (Ohio 1984)).

The elements set forth by the *Burr* court summarize the elements generally recognized as necessary to recover in tort for affirmative misrepresentation, also known as the tort of deceit.<sup>227</sup>

(1) *Existence of Material Misrepresentation.*—The application of some of these elements in the context of wrongful adoption deserves particular attention. The existence of an affirmative misrepresentation is a factual issue. Although advocates for adoption agencies have argued that recognizing liability for misrepresentations will open the door to false claims that a misrepresentation occurred, as the Wisconsin Supreme Court observed in *Meracle v. Children's Service Society*,<sup>228</sup> “[t]here is no greater chance of fraud [on the part of the claimant] in a case like this than in any case in which the dispute centers over what words were spoken during a particular conversation.”<sup>229</sup> Moreover, agencies can protect themselves by adopting procedures to disclose health-related information in writing and to place a copy of the report, signed by both prospective adoptive parents, in their own files and in the court file.<sup>230</sup> Typically, the mental element of the tort, intent or recklessness, has been shown by the existence of information in the files of the adoption agency that was not revealed or is contrary to what was revealed to the parents.<sup>231</sup> However, in some cases, proof may be found in other sources.

To sustain recovery, the misrepresentation must be material, as opposed to trivial. Generally the test for this element is an objective one: would a reasonable person attach importance to

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227 See KEETON ET AL., *supra* note 132, § 105. See also RESTATEMENT (SECOND) OF TORTS § 525 (1977), which provides:

One who fraudulently makes a misrepresentation of fact, opinion, intention or law for the purpose of inducing another to act or to refrain from action in reliance upon it, is subject to liability to the other in deceit for pecuniary loss caused to him by his justifiable reliance upon the misrepresentation.

228 437 N.W.2d 532 (Wis. 1989); see *infra* notes 437-47 and accompanying text for a discussion of the case.

229 *Meracle*, 437 N.W.2d at 537.

230 See TEX. FAM. CODE ANN. § 16.032 (West Supp. 1992) (requiring a copy of health history report to be signed by adoptive parents and filed with court prior to granting adoption); Amadio, *supra* note 178, at 30 (recommending disclosure forms signed and dated by social worker and adoptive parents).

231 Telephone Interview with Wylon Witte, counsel for plaintiffs in *Burr* (Aug. 13, 1990); see also Johnson, *supra* note 85 (discovery of nondisclosure came about in *Krueger* when caseworker read to adoptive mother information from the file); Complaint at 13-15, *Gibbs v. Ernst* (No. 90003066) (Ct. Common Pleas, Bucks County, Pa.).



these facts in making a decision.<sup>232</sup> A corollary to this rule adds a subjective element. A misrepresentation will be regarded as material if the maker is aware that the recipient considers this particular factor important, even though the objective reasonable person would not do so.<sup>233</sup> Thus, it is a question for the fact-finder to determine whether particular factors in a child's health history would cause a reasonable person to choose not to adopt that child. Obviously, this concept must be modified in the context of adoption. Factors enter into adoption that do not affect commercial transactions. Although we presume people enter into commercial transactions largely out of self interest, many reasonable people adopt severely impaired children based upon altruistic motives. Thus, the nature of the inquiry in this context should be whether the misrepresented or nondisclosed facts constitute information a reasonable person would want in order *to make an informed choice*, and which *could* persuade a reasonable person not to adopt a particular child. However, the subjective corollary must also be applied. If prospective adoptive parents have indicated that a particular health factor is important to their willingness to adopt a particular child, an intentional misrepresentation of that factor should be regarded as material even though it might not alter the decision of the objective "reasonable person."

(2) *Justifiable reliance*.—In the context of adoption, adoptive parents' justifiable reliance upon the adoption agency or other intermediary should not be a difficult hurdle in most cases. Prior to placement, the adoption intermediary is normally the sole source of information for the prospective adoptive parents, and it is entirely reasonable for them to put their trust in the intermediary's representations. In *M.H. v. Caritas Family Services*,<sup>234</sup> an adoption agency argued that because their social worker had told the adoptive parents that there was incest in the family background, without revealing that the child's birth parents were siblings, the adoptive parents' reliance was unreasonable because they made no inquiries about the incest. The appellate court appropriately found that no burden of inquiry should be placed upon adoptive parents as a matter of law, and the reasonableness of their behavior in a given situation is a question of fact

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232 KEETON ET AL., *supra* note 132, § 108, at 753-54.

233 *Id.* at 754.

234 475 N.W.2d 94, 96 (Minn. Ct. App. 1991), *review granted*, (Minn. Nov. 13, 1991).

for the jury.<sup>235</sup> It would be unfair to place upon adoptive parents a duty to, in effect, cross-examine social workers in order to prove justifiable reliance. While each case must be judged by its circumstances, the nature of the relationship should also be kept in mind when determining what is reasonable. Often placement occurs with very little notice.<sup>236</sup> The adoption intermediary is not a commercial vendor, but rather a governmental agency or private agency charged with fostering the welfare of the child,<sup>237</sup> or an attorney in a fiduciary relationship with the parents.<sup>238</sup> Therefore, the intermediary is likely to be trusted by the adoptive parents. The period prior to placement is often very emotional for adoptive parents.<sup>239</sup> Moreover, adoptive parents are in a vulnerable position<sup>240</sup> and may fear offending a caseworker or other intermediary with questions.<sup>241</sup> Thus, in most instances, it would be reasonable for adoptive parents to rely upon the representations of an intermediary. Requiring extensive probing to meet this element would be unfair.

A more difficult question is presented when adoptive parents learn of the misrepresentation after placement but prior to finalization. For example, if adoptive parents discover the true nature of a child's impairment or risk of impairment from medical caregivers within days of placement, then, depending upon the circumstances, it normally would be fair to find no justifiable reliance. However, strong public policy reasons dictate against reaching a similar result in every case in which the discovery is prior to

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235 *Id.* at 99.

236 Often infants are placed, both through an agency or privately, with just a few days notice to the adoptive family. Even when older children are placed for adoption, adoptive parents have sometimes reported pressure to accept placement very quickly. For example, Tom and Janice Colella, who recently settled a wrongful adoption case with the Orange County Department of Social Services, were called by a social worker who told them a seven-year-old boy was available for adoption and asked them to take the child that day, sight unseen. Friedman, *supra* note 85, at 40. Another family, who adopted two boys with severe psychological and social problems, was asked at the end of the first visit to decide if they wanted to adopt, without being provided any information on the boys' history of abuse and neurological impairment. Klein, *supra* note 6.

237 CWLA STANDARDS, *supra* note 49, at 9 ("The placement of children for adoption should have as its main objective the well-being of children.").

238 See Ronald E. Mallen, *Recognizing and Defining Legal Malpractice*, 30 S.C. L. REV. 203, 205 (1979).

239 See NELSON, *supra* note 42, at 32.

240 See *supra* note 220 (regarding the large number of families looking for a child to adopt); NELSON, *supra* note 42, at 87.

241 See NELSON, *supra* note 42, at 87.

finalization. Adoptions normally are not finalized for six months to a year after placement, and it can be much longer.<sup>242</sup> It would be unfair to deny recovery to the parents who discover the truth after months of caring for the child, if during that time the child and parents have emotionally bonded. By that time, the parents may be too attached to the child to give the child up,<sup>243</sup> or they may decide to proceed with the adoption because they feel the child would be harmed by further transfers. Taking the child away from a family to which he or she has bonded promotes instability and risks psychological harm to the child. Courts should not interpret the reliance requirement in a way that promotes such practices.

(3) *Causation*.—Finally, to recover for fraud, a claimant must show that reliance upon the representation caused injury. Causation can be shown in two ways. If the misrepresentation directly concerns the impairment the child has developed, then proof of the other elements—justifiable reliance upon an intentional or reckless material misrepresentation—should constitute proof that the parents' harm—the denial of an informed choice and the resulting expense and emotional stress they endured—was caused by the misrepresentation. If we conceive of the nature of the harm as the denial of the opportunity to make an informed choice, and if the test for materiality is an objective one—a misrepresentation of information that a reasonable person would want in order to make an informed choice—then proof of materiality and causation could be accomplished without testimony by the adoptive parents that “I would not have adopted [this particular child] if I had known the true facts.” When this type of testimony can be avoided, it should be. One commentator has observed that a conceivable disadvantage of recognizing liability in a wrongful adoption context is the potential adverse psychological effect upon a child who is aware or later learns of the lawsuit.<sup>244</sup> As this commentator argues, this concern should not outweigh the bene-

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242 The current Uniform Adoption Act § 13(c), 9 U.L.A. 35 (1988), provides a waiting period of six months after the interlocutory decree of adoption is issued before a final decree of adoption is entered.

243 For example, see *Allen v. Children's Servs.*, 567 N.E.2d 1346, 1348 (Ohio Ct. App. 1990), wherein an adoptive mother had formed a strong emotional bond with a child in the two- to three-month placement before discovering the child's profound deafness.

244 See Maley, *supra* note 6, at 730.

fits of imposing liability upon adoption intermediaries.<sup>245</sup> Many children, due to their impairments, will not reach a level of awareness that would subject them to adverse psychological effects. In other instances, receiving guidance from professionals may help parents to communicate with their children about the suit in a way that would avoid any harmful effects. Nevertheless, it would be beneficial to avoid the need for such testimony. Furthermore, in a theoretical sense, such testimony misrepresents the true nature of the injury. The adoptive parents who bring these suits are often totally devoted to their children at the time the suit is initiated.<sup>246</sup> The injury is that the adoptive parents were denied the opportunity to make an informed choice about whether to risk the extraordinary expenses and emotional distress that accompany the child's particular impairment.<sup>247</sup>

However, courts have been willing to recognize another avenue of causation. A direct link between the matter about which the misrepresentation was made and the impairment later suffered by the child has not been required, as long as it was established that the adoptive parents would not have adopted this particular child if they had known the true facts. For example, in *Krueger v. Leahy*,<sup>248</sup> an adoptive couple in Illinois sued an adoption agency for failing to disclose that both birth parents had been hospitalized for mental illness, that the birth mother was described as "low-functioning" and depressed, that she had been treated during the pregnancy with various medications, and that the pregnancy was considered "high-risk."<sup>249</sup> Their son required years of special education, tutors, testing, and therapy. He was eventually diagnosed as "mildly retarded," with "Attention Span Disorder," "Conduct Disorder," and "Oppositional Disorder." He ultimately required institutionalization.<sup>250</sup> The agency argued that to show causation, the Kruegers needed to allege and prove that the

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245 See generally *supra* part III.A.2.

246 Cf. *supra* note 99.

247 Having made this argument, I must concede that in every intentional misrepresentation or nondisclosure case of which I am aware, the parents have, in fact, pled that they would not have adopted this particular child had they known of the information prior to placement.

248 No. 89 L 18751 (Cir. Ct. of Cook County, Ill. filed Dec. 5, 1990).

249 Complaint at 7, *Krueger v. Leahy*, No. 89 L 18751 (Circuit Court of Cook County, Ill., filed Dec. 5, 1990). This case is currently awaiting hearing on defendant's motion to dismiss an amended complaint, set for late April 1992. Telephone Interview with Office of Enrico Mirabelli, attorney for plaintiff, April 23, 1992.

250 *Id.* at 8.

child's present condition was the result of a hereditary defect.<sup>251</sup> Ruling on the motion to dismiss, the court advised defense counsel that if plaintiffs could establish that the condition of the birth parents was relevant to their decision to adopt and that they never would have adopted the child had they known of the psychological difficulties of the birth parents, this would be sufficient to establish causation for all damages the plaintiffs incurred, regardless of whether the child's condition was hereditary.<sup>252</sup>

A similar attack by defense counsel in *Burr v. Board of County Commissioners*<sup>253</sup> was unsuccessful. Defense counsel argued that there was no proof that defendants knew that either of the birth parents had Huntington's Disease. The information concealed was that the birth parents were in a mental institution, and the birth mother was mildly retarded and psychotic.<sup>254</sup> At trial, the defense counsel went to great lengths to elicit testimony from the father that he could accept the fact that his son was mentally retarded, but it was the symptoms of Huntington's Disease that caused him the most distress and financial burden.<sup>255</sup> Defense counsel then argued that no causal connection existed between the "lie" and the expenses incurred by plaintiffs in the care and treatment of the child's Huntington's Disease.<sup>256</sup> The Ohio Supreme Court was not convinced. Noting the testimony that the Burrs never would have adopted Patrick had it not been for the lie, the court found that "had they not relied on the representations, their subsequent damages would never have resulted. In short, appellants knew the history was false, intended reliance, and in fact misled the Burrs to their detriment."<sup>257</sup> Thus, when the misrepresentation is not directly related to the child's impairment, but is still material, it appears that testimony that the parents would not have adopted this particular child had they known the true facts is both essential and sufficient to establish causation.

(4) *Damages*.—None of the published decisions involving intentional misrepresentation or nondisclosure have ad-

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251 Transcript of proceedings on Defendant's Motion to Dismiss at 15, *Krueger v. Leahy* (No. 89 L 18751) (Cir. Ct. of Cook County Ill. Aug. 15, 1990) [hereinafter *Krueger* transcript].

252 *Id.* at 21, 25, 27, 31-32.

253 491 N.E.2d 1101 (Ohio 1986).

254 *Id.* at 1104.

255 Appellant's Brief at 7-10, *Burr* (No. 85-786).

256 *Id.* at 25-26.

257 *Burr*, 491 N.E.2d at 1106.

dressed in much detail the nature of the damages that are recoverable for fraud. In *Burr* the court recited the general principle that a person who is damaged as the result of fraud may recover consequential damages that naturally and proximately result from the fraud.<sup>258</sup> The court found the jury award of \$125,000 appropriate in light of the medical bills, other expenses, and alleged emotional damage.<sup>259</sup>

Clearly, adoptive parents should be compensated for any extraordinary expenses they incur as a result of their child's impairments. Because the nature of this tort is intentional, punitive damages may also be appropriate in many circumstances.<sup>260</sup> A more difficult issue is whether they should be compensated for the ordinary costs of rearing the child—food, clothing, ordinary medical costs, etc. In *Burr*, plaintiffs sought damages for these expenses as well,<sup>261</sup> but it was not clear from the opinion whether they were calculated as part of the jury award. In *Krueger v. Leahy*,<sup>262</sup> the trial court, ruling on defendants' motion to dismiss, orally advised counsel that if plaintiffs could establish that they would not have adopted this child had they known of the parents' psychological difficulties, damages would include "every penny they spent rearing the child."<sup>263</sup> A comparable trend is emerging in wrongful birth cases. In such cases, courts compensate parents for the ordinary costs of raising a child, reduced by the amount of the benefit—the joy of raising a child.<sup>264</sup> Compensation for the normal costs of raising a child in the wrongful adoption context is more troubling, however, because most parents who adopt wanted to adopt a child and fully anticipated incurring the "normal" expenses of child rearing.<sup>265</sup> Consistent with the position that the injury in a wrongful adoption case consists of being denied the opportunity to make an informed choice about a particular child, the pecuniary losses truly caused by the misrepresentation are the extraordinary expenses related to the child's impairment. In cases

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258 *Id.* at 1106-1107; see KEETON ET AL., *supra* note 132, § 110, at 767.

259 *Burr*, 491 N.E.2d at 1108.

260 KEETON ET AL., *supra* note 132, § 2, at 9.

261 Complaint at 10, *Burr* (No. 85-786).

262 No. 89 L 18751 (Cir. Ct. of Cook County, Ill. filed Dec. 5, 1990).

263 *Krueger* transcript, *supra* note 251, at 32.

264 See Maley, *supra* note 6, at 728; see also KEETON ET AL., *supra* note 132, § 55, at 372. Some cases have offset damages for mental distress by the benefit rule. See Sarno, *supra* note 192, at 828-30.

265 Admittedly, this could also be said of many parents who file wrongful birth actions.

brought by adoptive parents who truly did not contemplate adoption prior to active recruitment by an agency to adopt a particular child, an award of child rearing costs might be appropriate. However, if the evidence indicates that the couple was actively seeking to adopt a child, the normal child rearing costs may be a wind-fall.<sup>266</sup>

Emotional distress will often constitute a major element of the injury suffered by adoptive parents who were denied the opportunity to make an informed choice to adopt a child with severe mental or physical impairments. Grief, stress resulting from unanticipated and overwhelming nursing and caretaking responsibilities, interfamily tension, and sometimes fear generated by a child's abnormal or violent behavior are all possible components of the mental anguish that may be experienced in this situation. Unfortunately, parents seeking to recover damages for emotional distress under a theory of fraud may encounter a major obstacle. At present, the state courts are divided on the issue of whether damages for emotional distress are recoverable in an action for fraud.<sup>267</sup>

Professor Merritt, in a recent article advocating the award of damages for emotional distress in fraud actions,<sup>268</sup> evaluated the two diverging approaches the courts have taken. He concluded that the decisions awarding damages for mental anguish were by far the better reasoned. Courts that denied recovery tended to

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266 Cf. Maley, *supra* note 6, at 728-29 (arguing that because adoptive parents would have adopted and enjoyed the benefits of parenthood anyway, the benefits offset should not be applied).

267 In 1989, Professor Andrew Merritt published a study of the availability of damages for emotional distress in fraud litigation. Andrew L. Merritt, *Damages for Emotional Distress in Fraud Litigation: Dignitary Torts in a Commercial Society*, 42 VAND. L. REV. 1 (1989). At that time, he concluded that jurisdictions that had directly addressed the problem were almost evenly split, with no basis to declare a clear majority or an emerging trend. *Id.* at 4-5 & n.11. Since publication of his Article, several other decisions have been issued that continue to indicate a split. In addition to the cases cited by Professor Merritt, see the following cases, which allow recovery for emotional distress in fraud claims: *Malandris v. Merrill Lynch*, 703 F.2d 1152 (10th Cir. 1983) (based on Colorado law), *cert. denied*, 464 U.S. 824 (1983); *Allen v. Jones*, 163 Cal. Rptr. 445 (Cal. Ct. App. 1980); *Kilduff v. Adams, Inc.*, 593 A.2d 478 (Conn. 1991); *Laubach v. Franklin Square Hosp.*, 556 A.2d 682 (Md. Ct. Spec. App. 1989); *Coble v. Bowers*, 809 P.2d 69 (Okla. Ct. App. 1990), *cert. denied*; *Nord v. Shoreline Sav. Ass'n.*, 805 P.2d 800 (Wash. 1991). Other courts continue to refuse to award damages for emotional distress for fraud. See e.g., *Adriana Int'l. Corp. v. Thorem*, 913 F.2d 1406 (9th Cir. 1990) (holding California statute governing action for fraud did not provide for award of damages for emotional distress), *cert. denied*, 111 S. Ct. 1019 (1991); *Olssen v. A.O. Smith Harvestore Prod., Inc.*, 656 F. Supp. 644 (S.D. Ind. 1987) (damages for mental anguish in fraud case recoverable only if *malice* of defendant is shown); *Sparrow v. Toyota of Florence*, 396 S.E.2d 645 (S.C. Ct. App. 1990).

268 Merritt, *supra* note 267.

articulate three rationales: (1) fraud is an "economic" tort and emotional distress damages are not awarded for fraud—an argument that overlooks the now substantial body of precedent that *does* allow recovery of emotional distress in fraud cases; (2) such damages are not within the contemplation of the parties—a contract principle that should not be imposed upon tort law; and (3) fraud damages should return plaintiffs to the position they occupied before the fraud—a rationale that actually would support compensation for emotional distress rather than undercut it.<sup>269</sup> These justifications are even less persuasive in the wrongful adoption context because existing precedent, i.e. *Burr*, recognizes a right to recover for emotional distress. Moreover, emotional distress, while not intended, is easily foreseeable by adoption intermediaries (unlike many commercial transactions in which the emotional impact may be far less apparent). Finally, although returning plaintiffs to the position they occupied previously is impossible, recompensing emotional distress comes closer to achieving this than failure to compensate for it. Cases that allow damages, Professor Merritt argues, recognize that allowing such awards best serves the "twin goals" of tort law: compensation and deterrence. Such awards will not impair efficient judicial administration by creating a new class of lawsuits because these plaintiffs are already before the courts bringing fraud suits for pecuniary losses.<sup>270</sup> Moreover, forcing plaintiffs to rely upon other causes of action, such as negligent or intentional infliction of emotional distress, is inadequate in many cases due to the additional limitations that have been imposed upon recovery under these theories.<sup>271</sup>

A third approach used by some states has been to allow recovery for emotional distress in fraud cases only if specific factors are present.<sup>272</sup> The allowance of damages for mental anguish in personal frauds, as opposed to business frauds, is relevant to wrongful adoption cases.<sup>273</sup> Presumably an adoption transaction would be considered a personal, rather than a strictly commercial, matter.

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269 *Id.* at 28-29.

270 *Id.* at 23-28.

271 *Id.* at 15-23. For a discussion of the requirements of intentional infliction of emotional distress, see *infra* notes 305-32 and accompanying text. For a discussion of the limitations on recovery for negligent infliction of emotional distress, see *infra* notes 384-415 and accompanying text.

272 Merritt, *supra* note 267, at 7.

273 *Id.* at 10-12.



Thus, adoptive parents in the many states now willing to award damages for emotional distress in fraud actions, or at least in "personal" fraud actions, will have an opportunity to seek full compensation under a fraud theory. Yet, in some states, adoptive parents will be required to pursue damages for emotional distress under the theories of intentional or negligent infliction of emotional distress.

(ii) *Nondisclosure*.—When the adoption intermediary fails to disclose material health-related information, as opposed to making an affirmative misrepresentation, adoptive parents should still be entitled to seek damages under a tort theory of fraud or deceit (sometimes referred to in this context as constructive fraud).<sup>274</sup> Liability for nondisclosure may be considered more problematic by some courts because traditionally, at common law, nondisclosure was not actionable.<sup>275</sup> The gradual erosion of this rule, however, and in particular, several well-recognized exceptions to it,<sup>276</sup> render its application in the wrongful adoption context particularly inappropriate. When a duty to disclose is created under these

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274 See Schiffer, *supra* note 11, at 713; see also RESTATEMENT (SECOND) OF TORTS § 551(1) (1977).

275 KEETON ET AL., *supra* note 132, § 106, at 737 & nn.21-22.

276 These exceptions are summarized in RESTATEMENT (SECOND) OF TORTS § 551 (1977), which provides:

- (1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.
- (2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,
  - (a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and
  - (b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and
  - (c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and
  - (d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and
  - (e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

circumstances,<sup>277</sup> the speaker is subject to the same liability as if he or she had made an affirmative misrepresentation.<sup>278</sup>

One longstanding exception recognizes that if any representation is made, the speaker must disclose enough to prevent his or her words from being misleading.<sup>279</sup> Allowing the impression that half of the truth amounts to the whole, or presenting facts in an ambiguous manner, can subject the speaker to liability just as if the matter had been affirmatively misrepresented.<sup>280</sup> When an adoption intermediary makes any representations regarding the health of a child, it is reasonable for prospective adoptive parents to assume they are being given all material information. The adoptive parents' awareness of an agency's duty to provide for the welfare of the child and the fact that the adoptive parents will be the future caregivers, responsible for securing future medical treatment, make it reasonable for them to assume that the information given to them includes all relevant information. This assumption is even more reasonable when the intermediary is a private attorney representing the adoptive parents in the adoption.

One trial judge orally lectured the attorneys on the application of this principle in the wrongful adoption context. At a motion hearing in *Krueger v. Leahy*,<sup>281</sup> the court told the parties that "a half truth can be as equally fraudulent as an entire falsehood because it does not speak the entire picture . . . . It is false because they asked for the history and they didn't get the history, they only got part of it."<sup>282</sup> While the adoptive parents' request for health information may be important evidence that providing only part of the history would be misleading, the request should not be viewed as a prerequisite to proof of fraud, as the *Krueger* court may have viewed it.<sup>283</sup> Health and social history information is central to any adoption. Adoption intermediaries often volunteer a great deal of information to adoptive parents in the course of a conversation about a particular child even though the

277 *Id.* § 551(2).

278 *Id.* § 551(1).

279 KEETON ET AL., *supra* note 132, § 106, at 738; RESTATEMENT (SECOND) OF TORTS § 551(2)(b) (1977).

280 KEETON ET AL., *supra* note 132, § 106, at 738.

281 No. 89 L 18751 (Cir. Ct. of Cook Cty. Ill. filed Dec. 28, 1989).

282 *Krueger* transcript, *supra* note 251, at 29-30.

283 *Id.* at 29 ("[T]he duty to speak arises from the relationship of the parties and the specific request for the information by the plaintiff."). "And had there been no request for information, one can hardly say that they have to volunteer all of this issue." *Id.* at 30.

adoptive parents had not actually made a request. Therefore, the adoptive parents may not articulate a specific request precisely because the information already offered misled them into believing they had been given all relevant information.

The second exception, which is perhaps the one best suited to imposing liability in a wrongful adoption context, is that a duty to disclose exists because of a fiduciary or similar relationship of trust and confidence between the parties.<sup>284</sup> An adoption is not an arms-length sale of widgets. Although the primary purpose of adoption is to promote the well-being of children, adoptive parents are also in a special relationship with an adoption intermediary. Professional guidelines for adoption agencies recognize that "child welfare agencies have a responsibility to provide preparation, counseling and support on an ongoing basis for all the parties involved in an adoption,"<sup>285</sup> and that the services provided by an adoption agency should include protection of the interests of adoptive parents, including their interest in making "a free and informed decision to adopt."<sup>286</sup> The counseling services an adoption agency provides to adoptive parents further illustrate the fiduciary nature of the relationship.<sup>287</sup> As an outcome of this counseling relationship, it is natural that adoptive parents would place special trust in agency social workers with whom they have worked closely and discussed intimate details of their lives.<sup>288</sup> Of course, when the adoption intermediary is a private attorney representing the couple in an independent adoption, the existence of a fiduciary relationship is well recognized.<sup>289</sup> Because adoption intermediaries are in a confidential or fiduciary relationship with adoptive parents, they have a duty to proceed in "utmost good faith" and make "full and fair disclosure of all material facts."<sup>290</sup>

Beyond these well recognized circumstances in which the duty of disclosure is imposed, Keeton recognizes what he refers to as

284 KEETON ET AL., *supra* note 132, § 106, at 738-39; RESTATEMENT (SECOND) OF TORTS § 551(2)(a) (1977).

285 CWLA STANDARDS, *supra* note 49, at 9.

286 *Id.* at 45-46, Reg. 5.2.

287 *Id.*, at 40-41, Reg. 4.18-19, at 43, Reg. 4.24, at 45-46, Reg. 5.1.

288 Schiffer, *supra* note 11, at 713-14.

289 See Mallen, *supra* note 238, at 205-06; KEETON ET AL., *supra* note 132, § 106, at 738 n.38.

290 KEETON ET AL., *supra* note 132, § 106, at 739. In *M.H. v. Caritas Family Services*, 475 N.W.2d 94, 99 (Minn. App. 1991), *review granted*, (Minn. Nov. 13, 1991), the court applied this exception to hold that an adoption agency could be held liable for nondisclosure of material facts, because of its fiduciary relationship with adoptive parents.

an "amorphous tendency" of courts in recent years to require disclosure under circumstances in which an ordinary ethical person would deem disclosure should be made.<sup>291</sup> This trend is summarized in section 551(2)(e) of the Restatement (Second) of Torts, which recognizes a duty to disclose

facts basic to the transaction, if [the speaker] knows that the other is about to enter [the transaction] under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.<sup>292</sup>

Thus, if a court were to have difficulty finding that the agency was in a fiduciary relationship, then the reasons asserted above in defense of its fiduciary nature,<sup>293</sup> the professional guidelines,<sup>294</sup> and the importance of material health-related information<sup>295</sup> would surely dictate that a duty to disclose exists on this basis.

In addition to the above bases for recognition of a common law duty to disclose, a statutory duty to disclose may exist if one of the many state statutes requiring disclosure of health-related information in adoption proceedings was in effect at the time of the adoption and applicable to adoption intermediaries under its terms.<sup>296</sup> The use of the statutory duty to disclose as an element of fraud or deceit is analogous to the use of a statutory duty to prove an element of negligence.<sup>297</sup> However, the absence of specific applicability of a disclosure statute should not limit recognition of a common law duty to disclose. Many of the disclosure statutes currently in force are woefully incomplete in their coverage,<sup>298</sup> often due to legislative oversight.<sup>299</sup> To interpret them as a limitation on liability, unless such language is clearly included in the statute, would in fact thwart legislative intent to promote disclosure of health-related information to adoptive parents.<sup>300</sup>

291 *Id.*; see also FOWLER HARPER ET AL., THE LAW OF TORTS § 714, at 475 (describes this as a "trend toward a rule of broader liability").

292 RESTATEMENT (SECOND) OF TORTS § 551(2)(e) (1977).

293 See *supra* notes 284-89 and accompanying text.

294 CWLA STANDARDS, *supra* note 49, at 9, 45, 46.

295 See *supra* notes 136-64.

296 See *supra* note 74.

297 KEETON ET AL., *supra* note 132, § 36, at 221 nn.11-14 and accompanying text.

298 See *supra* notes 74-81 and accompanying text. For a more complete discussion of the defects in statutory regulation, see Blair, *supra* note 8, at 713-75.

299 For example, Oklahoma omitted independent adoptions from its disclosure statute without discussing or paying much attention to the omission. Telephone Interview with Representative Linda Larason (Aug. 14, 1990) (co-sponsor of the recent amendment).

300 See O'Connell, *supra* note 46, at 534, 535; Gloria L. Kelly, Comment, *Getting to*

(iii) *Liability to Child*.—Although fraud may be a useful theory for recovery by adoptive parents, its use as a basis for recovery by the child is more problematic.<sup>301</sup> In general, recovery under a theory of fraud is available only to those whom the speaker intended to induce to act in reliance upon the misrepresentation,<sup>302</sup> which in the context of wrongful adoption would normally not include the child. Although Keeton describes the class of potential plaintiffs broadly to include “person[s] for whose use the representation was intended,”<sup>303</sup> in context, this refers to persons who were intended to rely upon the statement. Recovery for physical harm resulting from misrepresentation and for emotional distress have historically been categorized under the heading of negligence,<sup>304</sup> and thus the child’s recovery will more likely be pursued under that theory.

(b) *Intentional Infliction of Emotional Distress*.—The circumstances surrounding an intentional affirmative misrepresentation or nondisclosure may be so outrageous that the adoptive parents or a child could recover under a theory of intentional infliction of emotional distress. Recognized as a separate tort since the 1930s,<sup>305</sup> the elements are set out in the Restatement (Second) of Torts, section 46:

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.<sup>306</sup>

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*Know You: Disclosure of Information Contained in Sealed Adoption Records Under Connecticut Public Act 87-555*, 5 CONN. PROB. L.J. 81, 82, 102-105 (1989).

301 The adopted child was not a party to the suit in *Burr v. Board of County Comm’rs*, 491 N.E.2d 1101 (Ohio 1986). In *Krueger*, the trial court instructed counsel for plaintiffs to drop the child from the count for fraudulent transmission. *Krueger* Transcript, *supra* note 251, at 28. In *Roe v. Catholic Charities*, No. 5-89-0411, 1992 WL 29911 at \*13 (Ill. App. Ct. Feb. 14, 1992), the court dismissed both the fraud and the negligence claims made by the adopted children against the agency for failure to state a cause of action, with no discussion as to its rationale.

302 KEETON ET AL., *supra* note 132, § 105, at 728, § 107, at 747.

303 *Id.* § 107, at 747.

304 See RESTATEMENT (SECOND) OF TORTS § 310 (1965).

305 KEETON ET AL., *supra* note 132, § 12, at 60.

306 RESTATEMENT (SECOND) OF TORTS § 46(1) (1965).

(i) *Liability to Adoptive Parents.*—Claims under this theory have been asserted in several wrongful adoption cases that are currently pending before the courts.<sup>307</sup> Intentionally withholding from prospective adoptive parents information suggesting the existence or high risk of severe impairment of a child who is placed for adoption may in many instances be considered sufficiently outrageous to support liability under this cause of action. As previously discussed,<sup>308</sup> the emotional stress associated with the challenges presented by a severely disturbed or chronically ill child is often overwhelming if the parents were unprepared to cope with them. In some instances, it has caused adoptive parents physical harm as well. In *Krueger*, for example, the plaintiffs' son's psychological problems allegedly placed a severe strain on the marriage and caused Mr. Krueger cardiac problems.<sup>309</sup> One research study described an adoptive mother who was so overwhelmed by the serious behavior problems of her children that she was hospitalized for two months for a "nervous breakdown" and was "on the verge of another one" at the time of the interview.<sup>310</sup> Although in *M.H. v. Caritas Family Services*,<sup>311</sup> the appellate court affirmed that the conduct in that case was not sufficiently egregious for recovery under this theory, the trial court in *Krueger* acknowledged on the record that under the right circumstances<sup>312</sup> a refusal to disclose

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307 *M.H. v. Caritas Family Servs.*, 475 N.W.2d 94, 99-100 (Minn. Ct. App. 1991), *review granted*, (Minn. Nov. 13, 1991); *Krueger* transcript, *supra* note 251, at 55-61; Complaint at 17, *Gibbs v. Ernst* (No. 90003066) (Ct. Common Pleas of Bucks County, Pa.) (case dismissed on Motion to Dismiss at trial court and currently on appeal).

308 See *supra* notes 199-207 and accompanying text.

309 *Krueger* transcript, *supra* note 251, at 58.

310 NELSON, *supra* note 42, at 69.

311 475 N.W.2d 94, 99-100 (Minn. Ct. App. 1991), *review granted*, (Minn. Nov. 13, 1991).

312 Contrary to his position on causation for fraud, the trial judge in *Krueger* stated that to prove causation for intentional infliction of emotional distress, plaintiffs must show that the child's condition was hereditary and, thus, directly related to the subject of the nondisclosure and the parents' psychological problems. *Krueger* transcript, *supra* note 251, at 59-60. Plaintiffs' counsel had argued that if the accurate and complete information had been disclosed, they never would have adopted the child and thereby would have been spared the emotional distress caused by the child's condition. It is not completely clear why the court was willing to accept this causation argument for fraud and not for intentional infliction of emotional distress. The difference appears not to be the causation element itself, but rather, the requirement for intentional infliction of emotional distress that the conduct be extreme and outrageous. The language of the Court suggests this may be the case:

certain health information to adoptive parents of a "mentally diminished" child could rise to the level of intentional infliction of emotional distress.<sup>313</sup>

Appellate courts in Iowa and Illinois have considered claims against adoption agencies for intentional infliction of emotional distress under other circumstances. In *Engstrom v. State*<sup>314</sup> and *Petrowsky v. Family Service of Decatur, Inc.*,<sup>315</sup> the adoptive parents alleged that the adoption agencies failed to appropriately investigate paternity, causing extensive litigation in the *Petrowsky* adoption and resulting in the *Engstrom's* loss of custody to the father after a two year preadoptive placement of the child in their home. In both cases, the conduct of the adoption agency was alleged to be reckless rather than intentional. Both courts conceded that the agencies may not have exercised reasonable care in their efforts to ascertain the birth father's status,<sup>316</sup> but held that the agencies' actions did not "go beyond all possible bounds of human decency"<sup>317</sup> and, thus, were not sufficiently outrageous. When an agency's nondisclosure or misrepresentation is intentional, a stronger case for "outrageousness" exists.<sup>318</sup>

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First, in order for you to even arguably . . . allege intentional infliction of emotional distress now you must allege a biological relationship between what that child suffers from today and the condition of the parents. Because absent that, there is absolutely no proximate causal relationship between the anxiety that they suffered by reason of the child's present emotional circumstances and the failure to give the information as to the parents. Short of that, you do not have extreme outrageous conduct.

*Id.*

313 *Id.* at 60.

314 461 N.W.2d 309 (Iowa 1990).

315 518 N.E.2d 664 (Ill. App. Ct. 1987), *appeal denied*, 522 N.E.2d 1256 (Ill. 1988).

316 In *Engstrom*, the court found that the defendant's failure to ascertain that the father was indeed alive, despite the birth mother's insistence that he was dead, was negligent because several years earlier another branch of the Iowa Department of Human Services had located the birth father in an attempt to collect child support. *Engstrom*, 461 N.W.2d at 320. The *Petrowsky* court found, on another count, that the question of whether the defendants conduct failed to conform to reasonable care was a question for the jury. In *Petrowsky*, the agency initially relied upon the allegations of the birth mother and birth father that someone other than the actual birth father was the child's father, and failed to obtain their initial statements in an affidavit. *Petrowsky*, 518 N.E.2d at 665-66.

317 *Engstrom*, 461 N.W.2d at 320; *Petrowsky*, 518 N.E.2d at 669.

318 *Cf. Kunz v. Deitch*, 660 F. Supp. 679 (N.D. Ill. 1987) (upholding claim of natural father for intentional infliction of emotional distress where maternal grandparents intentionally placed child for adoption without his knowledge or consent and blocked father's access to child for seven months).

Beyond this distinction, however, it would seem appropriate for outrageousness to be judged at least in part by the potential impact upon the victim. The court in *Petrowsky* compared the facts of its case to those in which outrageous behavior had been found not to exist, such as *Morrison v. Sandell*,<sup>319</sup> in which defendant placed human waste material in plaintiff's file drawer, and *Harris v. First Federal Savings & Loan Association*,<sup>320</sup> which concerned an employer who continuously and unconscionably criticized plaintiff on the job. While waste is disgusting, its impact is rarely as long term as the lifelong, daily stress that can be associated with the challenges of raising a severely impaired child, if one is unprepared for those challenges. Neither are the challenges of a particular job as long-reaching. The true impact of an intermediary's actions should be considered in determining the outrageousness of the conduct.

(ii) *Liability to Child*.—The restrictions of the Restatement (Second) of Torts, section 46,<sup>321</sup> if followed literally, pose an obstacle to use of the theory of intentional infliction of emotional distress to recover on behalf of the adopted children who suffer severe emotional harm as the result of nondisclosure of health-related information to their parents. Subsection (2) of section 46 provides:

Where such conduct is directed at a third person, the actor is subject to liability if he intentionally or recklessly causes severe emotional distress

(a) to a member of such person's immediate family who is present at the time, whether or not such distress results in bodily harm, or

(b) to any other person who is present at the time, if such distress results in bodily harm.

This section appears to be directed at emotional distress resulting from witnessing a horrifying event causing tortious injury. The comment suggests that the purpose of the restriction is to guarantee the genuineness of claims to emotional distress and to limit the number of potential plaintiffs,<sup>322</sup> but states that it "is

319 446 N.E.2d 290 (Ill. App. Ct. 1983).

320 473 N.E.2d 457 (Ill. App. Ct. 1984).

321 RESTATEMENT (SECOND) OF TORTS § 46(2)(a) (1965).

322 *Boyd v. Bulala*, 647 F. Supp. 781, 791 (W.D. Va. 1986). To illustrate the principle, the comments note that numerous people may suffer distress at news of the assassination



intended to leave open the possibility of situations in which presence at the time may not be required.<sup>323</sup> Although some courts appear to follow this or an even stricter test, requiring plaintiffs to be in the "zone of danger,"<sup>324</sup> many modern cases seem to reject the presence requirement. This is particularly true when the circumstances do not involve a horrifying event causing injury, and when the circumstances leave no doubt as to the genuineness of the plaintiff's claim.<sup>325</sup>

Precedent exists supporting the assertion of a claim for intentional infliction of emotional distress brought on behalf of children against a social service agency and its employee for improperly withholding information in a nonadoption context. In *M.H. ex rel. Callahan v. State*,<sup>326</sup> conservators appointed for three minor children sued the State of Iowa, its Department of Human Services, and one of its employees for intentional infliction of emotional distress, among other claims.<sup>327</sup> The claim alleges that the employee delayed disclosing to "lawful authorities, doctors and professionals conducting evaluations of the mother, and the juvenile court"<sup>328</sup> information that the mother had admitted actively engaging in sexual abuse of the children.<sup>329</sup> Plaintiffs allege that the delay caused the children to suffer anxiety about the possibility of being returned to an abusive environment. On an appeal from a ruling on a motion to dismiss, the Iowa Supreme Court affirmed the finding of the trial court that it could not conclude as a matter of law that the misconduct was not outrageous or that plaintiffs could not present sufficient proof to recover under the theory of intentional infliction of emotional distress.<sup>330</sup>

Certainly, children adopted by families not properly advised of their health history can suffer severe emotional distress associated with physical or mental impairments that have developed or wors-

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of a president.

323 RESTATEMENT (SECOND) OF TORTS § 46 cmt. 1 (1965).

324 See *Schlacter v. Moss Rehab. Hosp.*, 695 F. Supp. 186, 189 (E.D. Pa. 1988) (mother denied recovery for severe emotional distress caused by injuries suffered by her son as a result of the defendants' care because plaintiff not in "zone of danger").

325 See *Boyd v. Bulala*, 647 F. Supp. 781 (W.D. Va. 1986) (allowed father recovery for emotional distress caused by outrageous conduct of delivery room doctor that resulted in severe brain damage to daughter, where father, although not a witness in delivery room, was present in hospital and aware of difficulty with delivery).

326 385 N.W.2d 533 (Iowa 1986).

327 *Id.* at 535.

328 *Id.* at 538.

329 *Id.*

330 *Id.* at 540.

ened due to lack of timely diagnosis.<sup>331</sup> Placement with a family emotionally unprepared to deal with a child's special needs can also result in severe emotional distress due to rejection, lack of nurturing, or disruption of the placement.<sup>332</sup> *M.H. ex rel. Callahan v. State*, which recognized the possibility of recovery by children for harm resulting from nondisclosure of essential information to third parties, suggests that if the court finds defendant's conduct sufficiently outrageous, adopted children may also use this theory to recover for severe emotional distress and any resulting bodily harm.

(c) *Negligence*.—Negligence has also been employed by litigants seeking recovery against adoption intermediaries for intentional misrepresentation or nondisclosure of medical information.<sup>333</sup> Negligence, of course, is an appropriate theory to advance to seek recovery for intentional acts.<sup>334</sup> "Negligence is conduct, and not a state of mind."<sup>335</sup> In a wide variety of factual contexts, courts have found intentional misrepresentation or nondisclosure to form the basis for recovery on a negligence claim.<sup>336</sup>

The elements of negligence, as every first year law student knows, are duty, breach of that duty, causation, and damages.<sup>337</sup> The most critical issue in the context of "wrongful adoption" cases will be whether intentional failure to accurately and fully disclose

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331 See *supra* notes 136-49.

332 See *supra* notes 150-56.

333 In *Roe v. Catholic Charities*, No. 5-89-0411, 1992 WL 29911 at \*7-13 (Ill App. Ct. Feb. 14, 1992), the court held plaintiffs had properly stated a claim for negligence against an adoption agency that intentionally misrepresented and withheld important information about the medical and psychological history of their adopted children. *Id.* at \*7, \*12-13. *Gibbs v. Ernst* (No. 90003066) (Ct. Common Pleas of Bucks County, Pa.) (dismissed at trial court level and currently on appeal); *Martin v. Methodist Home* (No. 90-07815) (Dist. Ct. of Dallas County, Tex.); *Phillips v. Texas Dept. of Human Servs.* (Dist. Ct. of Travis County, Tex.); *Richards v. Texas Dept. of Human Servs.*, (No. 476799) (Dist. Ct. of Travis County, Tex.).

334 KEETON ET AL., *supra* note 132, § 31.

335 *Id.* § 31, at 169 (quoting Terry, *Negligence*, 29 HARV. L. REV. 46 (1915)).

336 See KEETON ET AL., *supra* note 132, § 33, at 205-08 and cases cited therein; see also *Mixon v. Dobbs Houses, Inc.*, 254 S.E.2d 864 (Ga. 1979) (employer did not tell employee his wife was in labor until after employee finished his work shift); *Brown v. MacPherson's, Inc.*, 545 P.2d 13 (Wash. 1975) (states failed to communicate warnings from avalanche expert).

337 See RESTATEMENT (SECOND) OF TORTS §§ 281, 282 (1965); KEETON ET AL., *supra* note 132, § 30.

health-related information violates a duty on the part of the adoption intermediary.

(i) *Recognition of a Duty.*—Generally, the duty required under negligence law is to avoid an unreasonable risk of harm to others.<sup>338</sup> The standard of conduct to which one must conform to avoid negligence is commonly described as the conduct of a reasonable person under like circumstances.<sup>339</sup> Nevertheless, when an actor has special knowledge or skill, this enhanced ability will be considered when determining whether conduct is reasonable.<sup>340</sup> Thus, the special training and expertise of adoption agencies, their employees, and other professionals, such as attorneys, who serve as adoption intermediaries, must be taken into account in considering the reasonableness of their actions.

The recognition of a duty—the determination that certain conduct in a particular context is unreasonable—is simply the outcome of a careful deliberation regarding the individual and societal interests affected. It is said that “‘duty’ is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection.”<sup>341</sup> Factors typically considered include the gravity, probability, and foreseeability of risk,<sup>342</sup> the policy of preventing future harm,<sup>343</sup> and the burden to the defendant and consequences to society of imposing the duty.<sup>344</sup> Those factors have been discussed in great detail above in the section addressing the policy implications favoring recognition of liability in general for intentional nondisclosure and misrepresentation.<sup>345</sup> To summarize, the gravity of the harm caused by failure to disclose

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338 See RESTATEMENT (SECOND) OF TORTS § 282 (1965); KEETON ET AL., *supra* note 132, §§ 31, 53.

339 See RESTATEMENT (SECOND) OF TORTS § 283 (1965); KEETON ET AL., *supra* note 132, § 32.

340 KEETON ET AL., *supra* note 132, § 32, at 185.

341 *Id.* § 53, at 358.

342 See, e.g., *Richard P. v. Vista Del Mar Child Care Serv.*, 165 Cal. Rptr. 370, 373 (Cal. Ct. App. 1980); *Corgan v. Muehling*, 574 N.E.2d 602, 606 (Ill. 1991); KEETON ET AL., *supra* note 132, § 31, at 169-71.

343 *Richard P.*, 165 Cal. Rptr. at 373.

344 *Id.*; *Corgan*, 574 N.E.2d at 606; KEETON ET AL., *supra* note 132, § 31, at 171-73.

345 See *supra* notes 136-220 and accompanying text. For a discussion of the specific application of those factors in the context of a negligence claim against an adoption agency for intentional misrepresentation and nondisclosure of background information, see *Roe v. Catholic Charities*, No. 5-89-0411, 1992 WL 29911 at \*12-13 (Ill. App. Ct. Feb. 14, 1992).

health-related information has in many cases been extreme—permanent disability or the deterioration of the physical or mental condition of the child due to inappropriate treatment; financial devastation to the parents; and severe emotional trauma to the child and the other family members.<sup>346</sup> The risk is not remote, as evidenced by the large number of wrongful adoption suits filed and the extensive media coverage given to families traumatized as the result of nondisclosure.<sup>347</sup> Hence, to trained professionals who work in the adoption field, the risk of this harm certainly is, or should be, apparent. The policy of preventing future harm is well served by the deterrent effects of imposing liability for such intentional behavior.<sup>348</sup> Furthermore, the consequence to society of imposing the duty is positive; disclosure will facilitate appropriate medical care for adopted children and placement with an adoptive family prepared to deal with a child's special needs.<sup>349</sup> Nor is the burden on adoption intermediaries great. By adopting appropriate protocols, they can avoid future liability.<sup>350</sup>

The impact of custom upon recognition of a duty merits special attention. The customary conduct of others in similar circumstances is often considered in determining the reasonableness of certain actions.<sup>351</sup> For plaintiffs whose suits against adoption intermediaries arise out of adoptions that occurred within the recent past, custom in the industry will be a significant benefit.

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346 See *supra* notes 136-59, 185-89, 201-213 and accompanying text.

347 See *supra* notes 5, 85.

348 See *supra* notes 176-81.

349 See *supra* notes 136-62 and accompanying text. In *Roe v. Catholic Charities*, No. 5-89-0411, 1992 WL 29911 at \*12 (Ill. App. Ct. Feb. 14, 1992), the court considered the consequences of imposing a duty to disclose information in the agency's possession:

The consequence of placing that burden on defendant is [that] defendant discloses what information it has in response to an adopting parent's inquiry, so that adoptive parents assume the awesome responsibility of raising a child with their eyes wide open. We further view the consequences of placing the burden of disclosure upon defendant when, as in this situation, the adoptive parents ask for this information, to include a party's being answerable for the consequences of their own acts or omissions, a principle basic to our system of justice. Since informed adults would be assuming the responsibility of raising an adopted child, a favorable consequence of imposing this burden would be the encouragement, preservation and strengthening of basic family units in our society . . . .

*Id.* at \*12.

350 See *supra* notes 176-79 and accompanying text; see also Amadio, *supra* note 173, at 29-30.

351 KEETON ET AL., *supra* note 132, § 33, at 193.

Most adoption agencies have in recent years developed policies requiring full disclosure of health-related information.<sup>352</sup>

It is not completely clear, however, at what point it is fair to say full disclosure became customary. Some advocates for adoption agencies defending suits involving adoptions that took place in the early 1970s may argue that disclosure was not customary at that time.<sup>353</sup> Often, even custom within a particular agency is difficult to determine.<sup>354</sup> One measure of custom, however, might be professional guidelines. The Child Welfare League of America, the nation's foremost affiliation of adoption agencies, published guidelines as early as 1971 recommending that adoptive parents be given all pertinent background information.<sup>355</sup>

Even when a custom is established, however, it is not always controlling in the determination of whether conduct is reasonable. For example, customs that are normally reasonable can be found unreasonable if the situation in a particular case creates higher risk.<sup>356</sup> When an adoption agency or intermediary has information that indicates a particular risk of mental or physical impairment, a normal custom of not disclosing background information in general becomes unreasonable. Moreover, customs that evolve from efforts to save time or money, even if adopted by an entire industry, will not provide significant protection.<sup>357</sup> Nondisclosure policies often served multiple goals. While some may have been

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352 See *supra* notes 48-51 and accompanying text.

353 For example, Dennis Minichello, attorney for Lutheran Social Services in *Krueger v. Leahy*, commented to the author that it is unfair to judge by today's standards agencies that had restrictive information policies years ago. Telephone Interview with Dennis Minichello (Oct. 2, 1990).

One adoption expert claims that, by the 1960s, the majority of agencies began recording background and revealing nonidentifying information, although there was a great deal of controversy about revealing negative information. SOROSKY ET AL., *supra* note 31, at 36.

354 In *Burr*, the defense counsel for the adoption agency maintained that it was their policy in the early 1960s, at the time of the adoption, to not disclose family history to adoptive parents. On the other hand, an agency employee or official apparently testified that the agency had no written policy and that the only information withheld on policy grounds was the natural parents' names. She indicates that other information was disclosed. Plaintiffs-Appellees' Brief at 9, *Burr* (No. 85-786); see also NELSON, *supra* note 42, at 87.

355 SOROSKY ET AL., *supra* note 31, at 36.

356 KEETON ET AL., *supra* note 132, § 33, at 194.

357 If the entire industry adopts a custom for efficiency or cost reasons, the behavior could in effect be customary negligence. An industry should not be permitted to set its own standard in this way. *Id.*

benevolent,<sup>358</sup> clearly in many circumstances bureaucratic pressures, cost-cutting, and short-cutting the typically longer placement process for a special needs child played a role.<sup>359</sup>

Moreover, if custom were the only measure of reasonableness, incentive for change would be curbed.<sup>360</sup> The courts have occasionally been willing to impose liability for conduct previously considered customary.<sup>361</sup> Keeton observes that "where common knowledge and ordinary judgment will recognize unreasonable danger, what everyone does may be found to be negligent."<sup>362</sup> Particularly after 1971, when nondisclosure flaunted "industry" standards, evidence that a majority of agencies still followed a non-disclosure policy, if such evidence exists, should not render their conduct reasonable.<sup>363</sup>

If state statutes or administrative regulations requiring disclosure of the health-related information at issue were in effect at the time of the adoption that is the subject of a particular suit, such statutes and regulations should be considered as evidence that the intermediary's conduct was unreasonable. A statute need not expressly or impliedly create a claim for civil liability in tort for it to be considered by the courts in defining the standard of conduct of a reasonable person in the context of a common law negligence claim.<sup>364</sup> Although courts will more commonly utilize a

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358 See *supra* notes 32-47 and accompanying text.

359 See *supra* notes 82-83 and accompanying text.

360 KEETON ET AL., *supra* note 132, § 33, at 195.

361 *Id.* at n.13 and accompanying text.

362 *Id.* § 33, at 195.

363 Compare *Mohr v. Massachusetts* (No. 87-0152) (Bristol County Superior Ct., Nov. 4, 1991), in which jury was allowed to return a verdict in favor of adoptive parents against a state agency that had intentionally withheld evidence of a child's mental retardation and a family history of schizophrenia in a 1973 adoption, despite the agency's defense that nondisclosure was the established policy and procedure at that time. The claims against the state agency were negligence claims, including negligent placement and failure to obtain the plaintiff's informed consent to the adoption. However, claims of misrepresentation and deceit brought against the individual social worker who handled the adoption were rejected by the jury, following an instruction by the judge that the social worker could not be held liable on those claims if they found there was a "secret policy of nondisclosure." During the trial, the social worker had testified that she was instructed by her superiors not to reveal details of the child's medical history. Plaintiffs are currently appealing that jury instruction. *State Is Liable*, *supra* note 84, at 34; Neuffer, *supra* note 34.

364 RESTATEMENT (SECOND) OF TORTS § 285(a),(b) (1965) provides as follows:

The standard of conduct of a reasonable man may be

(a) established by a legislative enactment or administrative regulation which so provides, or

criminal statute or ordinance to establish a duty, courts may also consider statutes and regulations that prohibit certain conduct, even if the statute or regulation itself creates no provision for liability.<sup>365</sup> Factors relevant to the court's decision to rely upon a statute or regulation to establish a duty include whether the purpose of the statute is to protect persons such as the plaintiff against harm from the type of behavior the statute or regulation prohibits.<sup>366</sup>

Over the past twelve years the majority of states have enacted statutes which mandate that certain health-related information be disclosed to adoptive parents.<sup>367</sup> Some states have similar or more detailed requirements in their state regulations or licensing requirements.<sup>368</sup> A major purpose of these statutes is clearly to protect adopted children and their adoptive parents from the harm that results from nondisclosure—improper health care and inappropriate placement. To the extent an adoption intermediary violates state statutes or regulations mandating disclosure, such a violation, if not negligence per se, should at least constitute prima facie evidence of breach of duty.

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(b) adopted by the court from a legislative enactment or an administrative regulation which does not so provide.

365 *Id.* § 286, cmt. d.

366 KEETON ET AL., *supra* note 132, § 36, at 222-27. See also the RESTATEMENT (SECOND) OF TORTS § 286, which provides:

The court may adopt as the standard of conduct of a reasonable man the requirements of a legislative enactment or an administrative regulation whose purpose is found to be exclusively or in part

(a) to protect a class of persons which includes the one whose interest is invaded, and

(b) to protect the particular interest which is invaded, and

(c) to protect that interest against the kind of harm which has resulted, and

(d) to protect that interest against the particular hazard from which the harm results.

367 See *supra* note 74.

368 For example, in Texas the state accreditation rules for adoption agencies require that an agency provide the pediatrician of the adoptive parents with all medical information it has concerning a child placed for adoption. This regulation has been in place for many years. In several current wrongful adoption suits in Texas, breach of this rule is being alleged as grounds for establishing the breach of duty in a negligence claim. Telephone Interview with Neil Cogan, attorney for plaintiffs in several wrongful adoption suits (Oct. 2, 1991).

It would be inappropriate, however, to use current state statutes or administrative regulations as the sole measure of duty and deny liability whenever a statute did not require disclosure. Currently, very few disclosure statutes are sufficiently comprehensive. Some cover only certain types of adoptions,<sup>369</sup> some address only certain types of information,<sup>370</sup> and some do not address the role of adoption intermediaries in the disclosure process. In many cases, these gaps are due to inadvertence. With few exceptions,<sup>371</sup> disclosure statutes, where they exist, are not intended to *limit* liability. To hold that no duty exists because a disclosure statute was not violated would thwart the intent of state legislatures, which enacted these statutes to protect adopted children and adoptive parents and to promote disclosure, not deter it.<sup>372</sup>

In *Roe v. Catholic Charities*,<sup>373</sup> an adoption agency was sued by an adoptive parent for both fraud and negligence arising from

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369 See *supra* note 77 and accompanying text.

370 See *supra* notes 78-79 and accompanying text.

371 Some of the recently enacted disclosure statutes include a limitation or preclusion of liability for disclosure made under the statutes. The intent of at least some of these provisions may be simply to clarify that disclosure of what would otherwise be confidential information creates no liability for breach of confidentiality or the right of privacy if it is within the scope of disclosure authorized by statute. Unfortunately, the language of some provisions appears broad enough to exclude liability for disclosure that is incomplete or inaccurate. See The Adoption Information Act of 1983, 1983 Cal. Stat. 1162, §§ 13-14 (establishing a maximum liability for the state or any licensed adoption agency of \$250 for damages caused by acts or omissions of their employees with regard to programs authorized by the acts); ILL. ANN. STAT. ch. 40, para. 1522.5 (Smith-Hurd 1991) (No liability for "acts or efforts made within the scope of . . . [the act]."). Others, while arguably allowing liability for intentional nondisclosure or misrepresentation, would appear to preclude liability for incomplete, inaccurate, or unauthorized disclosure due to recklessness or negligence. See GA. CODE ANN. § 19-8-23(9) (1991) ("Any department employee or employee of any placement agency who releases information or makes authorized contacts in good faith and in compliance with this subsection shall be immune from civil or criminal liability for such release of information or authorized contacts."); N.D. CENT. CODE § 14-15-16(14) (1991) ("Any child-placing agency discharging in good faith its responsibilities under this section is immune from any liability, civil or criminal, that otherwise might result."); WIS. STAT. ANN. § 48.432(8) (West 1987) (civil and criminal immunity for persons who participate in good faith in the requirements of the disclosure statute).

A better approach is reflected in the proposed 1991 discussion draft of the Uniform Adoption Act, art. 10, § 10-e(d), at 155, providing, "The [criminal] penalties [for nondisclosure] provided in subsections (a) and (b) do not preclude an adoptive parent or adoptee from bringing a common law action in tort against a person . . . who negligently or intentionally fails to perform the duties required under [the section regulating disclosure of background information]." Unif. Adoption Act, art. 10, § 10-e(d) (Proposed Draft Aug. 9, 1991).

372 See *supra* note 300 and accompanying text.

373 No. 5-89-0411, 1992 WL 29911 at \*5 (Ill App. Ct. Feb. 14, 1992).



alleged intentional misrepresentation and nondisclosure. The agency defended itself with the assertion that because adoption was a creature of statute, any duty imposed upon the agency could be found only in legislation. Moreover, the agency argued, at the time of the adoption, not only did no disclosure statute exist, but an existing statute that required confidentiality of adoption records would have rendered such a disclosure illegal. The court rejected both arguments. It stated that adoption agencies, like corporations and other "creatures of statute," are subject to all of the laws of the state, including both statutory law and common law, and could thus be held liable for both fraud and negligent conduct.<sup>374</sup> The court also observed that the confidentiality law remained in effect after the Illinois legislature enacted a statute mandating disclosure of health-related information by adoption intermediaries, indicating disclosure of this nature was not in conflict with the confidentiality provisions.

Similarly, courts have recognized the duty of a state agency to warn foster parents of psychiatric problems involving violent propensities.<sup>375</sup> Moreover, in *Snyder v. Mouser*,<sup>376</sup> the court rejected the argument of a county welfare department that because no statute imposed a duty to disclose the child's known dangerous propensities, no duty to disclose existed.<sup>377</sup> The court found that a duty to disclose could arise under common law and that the complaint, alleging negligent failure to warn the foster parents of a foster child's "homicidal propensities," stated a claim upon which relief could be granted.<sup>378</sup>

(ii) *Liability To Child*.—Negligence may be one of the most appropriate theories to assert on behalf of an adopted child who suffers mental or physical harm or emotional distress as the result of an intentional misrepresentation or nondisclosure to his or her parents. It is well established that liability for misrepresenta-

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<sup>374</sup> *Id.*

<sup>375</sup> *Johnson v. State*, 447 P.2d 352, 355 (Cal. 1968) (holding the state has a duty to warn foster parents of latent, dangerous qualities suggested by the foster child's criminal history or character, and of any matter state employees knew or should have known might endanger the foster family); *Snyder v. Mouser*, 272 N.E.2d 627, 634 (Ind. App. 1971) (claim for negligent failure to warn foster parents of known vicious propensities of a foster child is a valid cause of action).

<sup>376</sup> 272 N.E.2d 627 (Ind. App. 1971).

<sup>377</sup> *Id.* at 634.

<sup>378</sup> *Id.* at 633-34. The Court further found that whether a duty to disclose existed under the particular circumstances of this case was a question for the jury. *Id.*

tion or nondisclosure under a negligence theory is not confined to the person to whom information is falsely stated or from whom it is concealed.<sup>379</sup> Liability is extended to those "who may be reasonably expected to be endangered" as a result of the misrepresentation or nondisclosure.<sup>380</sup> The rationale supporting liability in this situation is that truthful disclosure would have influenced the person receiving the information to exercise precautions to protect the plaintiff; the misrepresentation or nondisclosure, then, prevents these precautions.<sup>381</sup> This is precisely the impact of failure to disclose health-related information to adoptive parents—precautions in the nature of health care are not taken because the parents are not forewarned of or are unable to meet these needs.

(d) *Negligent Infliction of Emotional Distress.*—As previously discussed, emotional distress resulting from the consequences of the misrepresentation or nondisclosure may be a significant element of the damages of the adoptive parents, and in some cases, of an adopted child.<sup>382</sup> In addition to utilizing other theories of recovery,<sup>383</sup> emotional distress may be included as an item of damages in a negligence claim or pled as a separate claim of negligent infliction of emotional distress.<sup>384</sup> If the defendant's conduct is determined to be extreme and outrageous, of course, damages for emotional distress are recoverable under the theory of intentional infliction of emotional distress, discussed above.<sup>385</sup> If the court finds that the defendant's conduct, though intentional, is not extreme or outrageous, plaintiffs may encounter some restrictions on their ability to pursue this type of damages under a negligence theory, even for "intentional" conduct.

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379 KEETON ET AL., *supra* note 132, § 33, at 206.

380 *Id.*

381 *Id.* § 33, at 207. However, in the only published "wrongful adoption" case to examine a negligence claim for intentional misrepresentation and nondisclosure, *Roe v. Catholic Charities*, No. 5-89-0-411, 1992 WL 29911 at \*13 (Ill. App. Ct. Feb. 14, 1992), the court rejected without discussion the children's claims.

382 See *supra* notes 150-56, 187, 199-207 and accompanying text.

383 See *supra* notes 224-332 and accompanying text (discussing fraud and intentional infliction of emotional distress).

384 The choice to include it in one cause of action, or to separate the claim, is influenced predominantly by the pleading style of the attorney in states that follow a federal notice pleading system.

385 See *supra* notes 305-32 and accompanying text.

Under the traditional view, recovery for emotional distress caused by a defendant's negligence is not recoverable unless accompanied by physical injury, illness, or other physical consequences.<sup>386</sup> Several states have now completely rejected the requirement of physical symptoms and permit a negligence cause of action for infliction of serious emotional distress alone.<sup>387</sup> In 1987, the Texas Supreme Court declared that elimination of the requirement of physical manifestation for recovery under the tort of negligent infliction of emotional distress had become the "established trend in American jurisprudence."<sup>388</sup> Nevertheless, most states still retain the requirement of bodily harm.<sup>389</sup> In *Meracle v. Children's Service Society*,<sup>390</sup> a negligent misrepresentation action discussed in detail below, the Wisconsin Supreme Court denied adoptive parents recovery for emotional distress because neither parent had put forth sufficient proof of physical injury accompanying the emotional distress.<sup>391</sup>

The bodily harm requirement will not preclude recovery of damages for emotional distress under a negligence theory in all

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386 KEETON ET AL., *supra* note 132, § 54, at 361. According to the RESTATEMENT (SECOND) OF TORTS §§ 312-13 (1965), regardless of whether the actor intends to cause emotional distress, which would be highly unlikely in an adoption context, or unintentionally causes emotional distress, the actor's negligence will not create liability for emotional distress alone. RESTATEMENT (SECOND) OF TORTS § 436A (1965) provides:

If the actor's conduct is negligent as creating an unreasonable risk of causing either bodily harm or emotional disturbance to another, and it results in such emotional disturbance alone, without bodily harm or other compensable damage, the actor is not liable for such emotional disturbance.

387 See KEETON ET AL., *supra* note 132, § 54, at 364-65 & nn.57-60; Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fright: A History*, 88 MICH. L. REV. 814, 820-21 (1990) (requirement of physical injury has been eliminated in a minority of states where a showing of serious mental distress is made, but the majority still retain requirement); Merritt, *supra* note 267, at 21; see also, e.g., *Corgan v. Muehling*, 574 N.E. 2d 602, 609 (Ill. 1991); *St. Elizabeth Hosp. v. Garrard*, 730 S.W.2d 649, 652 n.3, 654 (Tex. 1987) (note cases cited therein).

388 *St. Elizabeth Hosp. v. Garrard*, 730 S.W.2d 649, 654 (Tex. 1987).

389 See, e.g., *Nancy P. v. D'Amato*, 517 N.E.2d 824 (Mass. 1988) (mother of sexually abused child could not recover for negligent infliction of emotional distress without physical consequences); *Reilly v. United States*, 547 A.2d 894 (R.I. 1988) (parents of severely brain damaged child could not recover against negligent obstetricians for negligent infliction of emotional distress without physical symptoms); *Garrett v. City of New Berlin*, 362 N.W.2d 137 (Wis. 1985) (question of whether sister, who witnessed brother's accident, had physical manifestations of her emotional distress was one for the jury, where she had experienced hysteria and insomnia).

390 437 N.W.2d 532 (Wis. 1989).

391 *Id.* at 536.

contexts. Under the traditional approach, when plaintiffs suffer bodily harm as the result of a defendant's negligence, courts have been willing to allow recovery for emotional distress that is contemporaneous with the injury, often referred to in this context as "parasitic" damages.<sup>392</sup> If an action is brought on behalf of an adopted child seeking recovery for nondisclosure or inaccurate disclosure of health-related information to the adoptive parents, in most cases the nature of the child's injury will be deterioration of a physical or psychiatric condition due to improper medical treatment. Assuming adequate proof of this injury, the child would easily satisfy the requirement of bodily harm and be entitled to seek recovery for emotional distress as well. Physical harm resulting from the emotional distress itself is also sufficient. Thus, adopted children who suffer serious emotional distress as a result of inappropriate placement, but who experience no deterioration of their condition as a result of the misrepresentation or nondisclosure, may still recover damages for emotional distress if they can demonstrate physical symptoms resulting from their mental anguish. This would also be true for the adoptive parents. In states that retain the bodily harm requirement, symptoms such as recurrent headaches, nausea, or insomnia have often been deemed sufficient to satisfy the requirement.<sup>393</sup>

The primary purpose of the bodily harm requirement is to separate trivial or false claims from substantial, genuine injuries.<sup>394</sup> Many states, while not completely abandoning the bodily harm requirement, have recognized that for certain types of negligent conduct, the very nature of the circumstances create a "special likelihood of causing real and severe emotional distress,"<sup>395</sup> and render the bodily harm requirement unnecessary.<sup>396</sup> For example, the Wisconsin Supreme Court in *La Fleur v. Mosher*<sup>397</sup> allowed recovery to a fourteen-year-old girl who had been accidentally locked up in an unused wing of a police station

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392 *Payton v. Abbott Labs.*, 437 N.E.2d 171, 176 (Mass. 1982); see KEETON ET AL., *supra* note 132, § 54, at 362-63.

393 *St. Elizabeth Hosp. v. Garrard*, 730 S.W.2d 649, 652-53 (Tex. 1987); RESTATEMENT (SECOND) TORTS § 436A cmt. c (1965).

394 See RESTATEMENT (SECOND) OF TORTS § 436A cmt. b (1965); see also, e.g., *Payton v. Abbott Labs.*, 437 N.E.2d 171, 180 (Mass. 1982); *La Fleur ex rel. Blackey v. Mosher*, 325 N.W.2d 314, 317 (Wis. 1982); KEETON ET AL., *supra* note 132, § 54, at 360-61.

395 *La Fleur*, 325 N.W.2d at 317.

396 *Id.*

397 *Id.*, 325 N.W.2d 314.

overnight and subsequently experienced traumatic neurosis. The court found that deprivation of her liberty was a "wrong sufficiently worthy of redress that the physical injury requirement should not be necessary."<sup>398</sup> Unfortunately, the Wisconsin Supreme Court in *Meracle* was unwilling to apply this principle in the wrongful adoption context, holding that the adoptive parents were not deprived of a constitutional right nor did "the nature of their claim present a similar guarantee of the genuineness and severity of the injury."<sup>399</sup> Possibly, the court employed a strict interpretation to refute a defense argument that plaintiff's claim for emotional distress had occurred several years earlier, at a time when the child had not yet developed the disease, and was therefore barred by the statute of limitations.<sup>400</sup> Outside of that unique context, such a comparison, quite frankly, defies reason. It is incomprehensible to conclude that the distress of a fourteen-year old who was uncomfortable and afraid for a fourteen-hour overnight period would be more genuine and severe than the grief suffered by parents who watch their child, from the age of seven, slowly deteriorate over several years and eventually die of Huntington's Disease. The "constitutional" nature of the right was not emphasized in *La Fleur*, nor has it been present in cases in other contexts in which courts have found that the circumstances guarantee the genuine and substantial character of the assertion of emotional distress.<sup>401</sup> Moreover, a court evaluating a mental distress claim should not focus on whether a defendant's actions rise to the level of a constitutional violation. When the issue before the court is measurement and validation of mental anguish, courts should consider the psychological "deprivation of liberty" and emotional stress that is exacted by the type of twenty-four-hour-a-day nursing and caretaking demands that necessarily become part of parenting a child with a severe impairment such as Huntington's Disease.

Courts adjudicating claims for emotional distress in the wrongful adoption context should consider the application of a similar exception to the bodily harm requirement applied by the Virginia

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398 *Id.* at 317-18.

399 *Meracle v. Children's Serv. Soc'y*, 437 N.W.2d 532, 536 (Wis. 1989).

400 *Id.*

401 See KEETON ET AL., *supra* note 132, § 54, at 362 (citing cases in which courts have allowed recovery without bodily harm for mental anguish caused by negligent transmission of a message, particularly one involving death, and for negligent mishandling of corpses).

Supreme Court in *Naccash v. Burger*,<sup>402</sup> a wrongful birth case. The parents of a child born with Tay-Sachs disease sued a physician and other medical care providers who were responsible for mislabeling a blood test that would have alerted the parents to the risk of Tay-Sachs early in the pregnancy.<sup>403</sup> Tay-Sachs is a genetic disorder affecting the central nervous system. It causes affected infants to begin deteriorating at four to six months, suffer blindness, deafness, paralysis, seizures, and mental retardation, and eventually die within two to four years.<sup>404</sup> The court determined that the rationale of discouraging spurious claims was inapplicable in this context, as no one would seriously contend that the emotional distress of parents under such circumstances was feigned or fraudulent.<sup>405</sup> The evidence showed an "unbroken chain of causal connection" between the erroneous information, "the deprivation of the parents' opportunity to accept or reject the continuance" of the pregnancy, and "the emotional distress the parents suffered following the birth of their fatally defective child."<sup>406</sup> To require proof of physical injury accompanying the emotional distress in such circumstances, the court reasoned, "would constitute a perversion of fundamental principles of justice."<sup>407</sup>

In states that continue to adhere to the bodily harm requirement, a similar exception should apply to adoptive parents who have experienced emotional distress resulting from deprivation of the opportunity to make an informed choice about the adoption of a child with a severe mental or physical impairment. Common sense in these circumstances dictates that emotional distress is not

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402 290 S.E.2d 825 (Va. 1982).

403 *Id.* at 826-27. Had the correct results been forwarded to the parents, they could have conducted further testing upon themselves and through amniocentesis to confirm the baby actually was afflicted with Tay-Sachs, and chosen to abort the pregnancy.

404 *Id.* at 827.

405 *Id.* at 831.

406 *Id.*

407 *Id.* (citing *Berman v. Allan*, 404 A.2d 8, 15 (N.J. 1979)). Several other courts have allowed damages for emotional distress in wrongful birth actions without discussing a requirement for physical injury. *E.g.*, *Eisbrenner v. Stanley*, 308 N.W.2d 209, 214 (Mich. Ct. App. 1981); *Berman v. Allan*, 404 A.2d 8, 14 (N.J. 1979); *Karlsons v. Guerinot*, 394 N.Y.S.2d 933, 936 (N.Y. App. Div. 1977); *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 493 (Wash. 1983) (statute allowed recovery). *But see, e.g.*, *Gallagher v. Duke Univ.*, 852 F.2d 773 (4th Cir. 1988); *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691 (Ill. 1987) (no claim for emotional distress damages if plaintiffs suffered no physical injury or illness); *Goldburg ex rel. Goldburg v. Ruskin*, 471 N.E.2d 530 (Ill. App. Ct. 1984); *Smith v. Cote*, 513 A.2d 341, 351 (N.H. 1986) ("[D]amages for emotional distress are not recoverable in wrongful birth actions."); *Howard v. Lecher*, 366 N.E.2d 64 (N.Y. 1977).

trivial or feigned. The same exception should apply to children who offer sufficient proof of serious emotional distress experienced as the result of placement in an adoptive family that was not adequately informed or prepared to meet their special needs. Disruption of the placement or expert psychological testimony of the deleterious emotional impact on the child should be sufficient to demonstrate that the emotional harm endured by a child in these circumstances is no more trivial or feigned than the harm experienced by the fourteen-year old in *Le Fleur*.

Another obstacle adoptive parents may encounter in seeking damages for emotional distress under a negligence theory is a related restriction which requires that plaintiffs who are not directly injured must witness the occurrence that caused injury in order to recover for their grief and anxiety resulting from the injuries to a third party. This requirement, sometimes referred to as the bystander proximity doctrine, is often applied in the context of parents who seek damages for emotional distress suffered as the result of a tortious injury to their child.<sup>408</sup> Some courts have retained a zone of danger test that requires the plaintiff be in the zone of danger in order to recover for emotional distress resulting from the tortious injury to a third person.<sup>409</sup> The purpose of these restrictions is to limit the liability of a defendant, who might otherwise owe damages to numerous people who experienced sorrow over the injury defendant caused to plaintiff, and to ensure that recovery is limited to those to whom harm was reasonably foreseeable.<sup>410</sup> Unfortunately, the "bystander rule" was mechanically applied in a recent Kansas wrongful birth case to preclude recovery for negligent infliction of emotional distress. The court held that "visibility of results as opposed to visibility of a tortious act does not give rise to a claim of emotional damages."<sup>411</sup>

Application of the "bystander rule" in both wrongful birth and wrongful adoption cases is totally inappropriate. As has been recognized in other recent wrongful birth cases, *Karlsons v. Guerinot*<sup>412</sup> and *Naccash v. Burger*,<sup>413</sup> the parents in a wrongful

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408 KEETON ET AL., *supra* note 132, § 54, at 366.

409 *Id.* This requirement is eroding for family members who observe their loved ones harmed, beginning with the case of *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968).

410 KEETON ET AL., *supra* note 132, § 54, at 365-66.

411 *Arche v. United States Dept. of Army*, 798 P.2d 477, 482 (Kan. 1990).

412 57 A.2d 73 (N.Y. 1977).

413 290 S.E.2d 825, 831 (Va. 1982).

birth case are not mere witnesses or bystanders observing a tortious injury. Rather, in a wrongful birth action, the parents are the ones to whom a duty to provide accurate prenatal diagnostic testing is owed. When the duty to them is breached, they are entitled to recover for all the damages, including mental anguish, they incur as a result of the breach.<sup>414</sup> Similarly, in a wrongful adoption action, the adoption intermediary owes a duty to the adoptive parents to provide accurate and complete health-related information, and the parents should be entitled to recover for all damages they suffer when that duty is breached. Moreover, the rationale of the bystander rule is inapplicable. Adoptive parents are not among a potentially unlimited group who could suffer distress, as a group of bystanders might be.<sup>415</sup> They are the persons to whom the misrepresentation or nondisclosure was made. Their emotional distress is clearly foreseeable to a trained adoption intermediary. Thus, application of the "bystander" or "zone of danger" rules to limit recovery of adoptive parents for emotional distress damages in a wrongful adoption suit would be totally inappropriate.

(e) *Breach of Contract.*—In addition to the pursuit of damages under one or more tort theories, adoptive parents who were the victims of affirmative misrepresentation or nondisclosure may choose to pursue relief for breach of contract.<sup>416</sup> Unfortunately, in a few cases rejecting contract liability (under circumstances in which rejection may well have been appropriate),<sup>417</sup> the court used overly broad language, seemingly rejecting the appropriateness of contract theory under any circumstances in the wrongful adoption context. One Ohio appellate court pronounced that the "better reasoned view" regarding contract actions is that "a bar-

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414 *Karlsons*, 57 A.2d at 73; see also *Naccash*, 290 S.E.2d at 831.

415 See MERRITT, *supra* note 267, at 22-23 (applies this argument as a rationale for resisting application of this restriction to fraud plaintiffs in general).

416 Several plaintiffs in wrongful adoption suits have alleged breach of contract under some theory. The theory alleged as the nature of the breach, however, is not necessarily the one proposed herein, but rather a breach of a promise to place a healthy child, or a breach of warranty theory, which are discussed below. See *Richard P. v. Vista Del Mar Child Care Serv.*, 165 Cal. Rptr. 370 (Cal. Ct. App. 1980) (alleging breach of contract and breach of warranties based on failure to place a healthy child); *Allen v. Children's Servs.*, 567 N.E.2d 1346 (Ohio Ct. App. 1990) (breach of contract alleged based on failure to place healthy child); see also *Complaint, Richards v. Texas Dept. of Human Servs.* (No. 476799) (Travis County, Dist. Ct., Tex.), (filed Apr. 18, 1990) (alleging breach of oral agreement to place children with certain health histories).

417 See *infra* notes 537-56 and accompanying text.



gained-for exchange . . . with respect to the life of a child is repugnant.<sup>418</sup> Such language misconstrues the nature of the breach. If an adoption agency or other professional intermediary, through intentional misrepresentation or nondisclosure, has failed to provide services reasonably and in good faith, the breach lies in the failure to provide the *services* the intermediary contracted to provide. There is nothing repugnant in the notion that an adoption agency should be held to its agreement to provide services in a professional manner, as must other professionals who contract to provide a service.

A written contract between adoptive parents and some adoption agencies may specifically provide that all material nonidentifying health-related information will be released to adoptive parents, in which case, proof of intentional misrepresentation or nondisclosure may constitute breach of an express duty. An express duty would also be created by an oral promise to provide this information,<sup>419</sup> which might occur more frequently than a written promise.

Even when the duty to provide complete and accurate health-related information has not been expressly undertaken, the court should be willing to imply this duty. In *Petrowsky v. Family Services of Decatur*,<sup>420</sup> an action brought by an adoptive couple against an adoption agency for failure to properly investigate the paternity of their child, the Illinois appellate court observed, "Every contract contains an implied duty of good faith. Good faith between contracting parties requires the party vested with contractual discretion to exercise it reasonably," and not "arbitrarily, capriciously, or in a manner inconsistent with the reasonable expectation of the parties . . . . Society especially expects service contracts to be executed with a reasonable degree of care and skill."<sup>421</sup> The court determined that the adoption agency had an implied duty to perform the terms of the adoption agreement "reasonably and in

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418 *Allen*, 567 N.E.2d at 1349. The court in *Allen* was quoting a New Jersey opinion, *A.L. v. P.A.*, 517 A.2d 494, 497 (N.J. Super. Ct. App. Div. 1986), a case in which a court denied recovery to an adoptive couple who sued natural parents for revoking their consent in a private adoption. The *Allen* court deleted from the original quote the words "through an improper intermediary," which were critical to the message in *A.L.* The court in *A.L.* was condemning "black market" adoptions in the original quote.

419 Depending upon the circumstances and the formulation adopted by the particular jurisdiction, the parol evidence rule may create an obstacle here. See generally, CALAMARI & PERILLO, *supra* note 184, §§ 3-2 to 3-8.

420 518 N.E.2d 664 (Ill. App. Ct. 1987).

421 *Petrowsky*, 518 N.E.2d at 667.

good faith," and it was a question for the jury to determine if this duty had been breached under the circumstances of the case.<sup>422</sup> Their determination is, of course, consistent with the general principles reflected in the Restatement (Second) of Contracts, section 205,<sup>423</sup> which recognizes a duty of good faith performance that emphasizes "faithfulness to an agreed common purpose and consistency with the justified expectations of the other party."<sup>424</sup>

In *Petrowsky*, the court noted that evidence of adoption agency custom was relevant to a determination of the reasonableness and good faith of the agency's actions in performance of the contract, but that custom would not be a "conclusive measure of the standard of care."<sup>425</sup> As noted in the discussion of custom's impact on negligence liability,<sup>426</sup> in recent years the custom of disclosure has been established.<sup>427</sup> Before a majority of agencies adopted a policy of full disclosure, however, professional guidelines and experts called for it.<sup>428</sup> Thus, if the practices of a majority of adoption agencies were unreasonable, the absence of "custom" should not preclude recovery under a contract theory.

A couple anticipating adopting a child who contracts with an adoption agency reasonably expects that representatives of the agency will not intentionally misrepresent the background of the child or withhold vital information concerning the mental or physical health of the child. Such behavior should be found to be a breach of the good faith to which the adoptive parents are entitled.

The ability to assert a contract claim may have some very practical advantages. The statute of limitations for contract claims are often longer than for tort claims.<sup>429</sup> Contract actions against

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422 *Id.* But see *Engstrom v. Iowa*, 461 N.W.2d 309, 313-14 (Iowa 1990) (Court dismisses claim for breach of implied duty of good faith against adoption agency for failure to properly investigate paternity, in part because claim was not properly pleaded. Additionally, the court attempted to distinguish between the duty of good faith in performing a contract, which they said was alleged in *Petrowsky*, and the absence of a duty of good faith in entering a contract, which the court contends was alleged in *Engstrom* and should be addressed by tort law).

423 RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981) provides: "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement."

424 RESTATEMENT (SECOND) OF CONTRACTS § 205 cmt. a (1981).

425 *Petrowsky*, 518 N.E.2d at 667.

426 See *supra* notes 351-63 and accompanying text.

427 See *supra* notes 48-51, 352, 355 and accompanying text.

428 See *supra* notes 48-49 and accompanying text.

429 The statute of limitations has been a contested issue in several of the wrongful

public adoption agencies may be more viable in jurisdictions that retain governmental immunity over tort claims.<sup>430</sup>

Moreover, damages for emotional distress may be available under a contract theory. Although as a general rule, damages for emotional distress are not available for breach of contract,<sup>431</sup> many courts have recognized, as an exception to this rule, the availability of such damages when emotional distress is reasonably foreseeable as a consequence of the breach at the time the contract is entered.<sup>432</sup> Other exceptions allow damages for mental anguish in contracts of a personal nature<sup>433</sup> or when the conduct accompanying a breach is willful or reckless.<sup>434</sup> Certainly contracts for adoption are of a personal nature. Intentional misrepresentation or nondisclosure is by definition willful. Moreover, emotional distress on the part of adoptive parents is foreseeable. The court in *Petrowsky* recognized this element of foreseeability in the context of adoption, declaring: "Due to the delicate nature of adoption proceedings the parties are especially susceptible to emotional trauma of some kind. Adoption agencies must be aware of the human element behind the contract, anticipate, and be responsible for any mental suffering a breach might trigger."<sup>435</sup>

Despite its potential usefulness to parents, breach of contract is unlikely to be an effective basis for an adopted child to seek recovery for injuries caused by nondisclosure, as the child is normally not a party to the adoption contract. An adopted child who has been harmed might explore the possibility of recovery as a

adoption tort cases. In *Burr*, the statute of limitations for fraud was four years from the time the claim accrued. *Burr*, 491 N.E.2d at 1108. The court held that the claim did not accrue until the fraud and wrongdoer were actually discovered. *Id.* In *Meracle v. Children's Serv. Soc'y*, 437 N.W.2d 532, 534 (Wis. 1989), the court held a three year statute of limitations for negligence began to run from the time a plaintiff discovered, or with reasonable diligence should have discovered the injury, and that it was caused by defendant's conduct. In *Meracle* their time began to run when their daughter was actually diagnosed with Huntington Disease. *Id.* at 536.

430 Sonja A. Soehnel, Annotation, *Governmental Tort Liability for Social Service Agency's Negligence in Placement, or Supervision After Placement, of Children*, 90 A.L.R.3d 1214, at 1218 (1979).

431 Gregory C. Sarno, Annotation, *Recoverability of Compensatory Damages for Mental Anguish or Emotional Distress for Breach of Service Contract*, 54 A.L.R.4th 901, 911 (1987).

432 *Id.* at 911.

433 *Id.* at 921-22. Among the cases annotated is *Chrum v. Charles Heating and Cooling, Inc.*, 327 N.W.2d 568 (Mich. Ct. App. 1982), wherein the court noted that "where deep, personal human relations are involved, damages for emotional suffering for breach of contract are allowed." See also 54 A.L.R.4th at 922.

434 *Petrowsky*, 518 N.E.2d at 668.

435 *Id.*

third party beneficiary, alleging he or she was an intended beneficiary of performance of the duty to disclose health-related information.<sup>436</sup>

### B. *Negligent Conduct*

Several types of negligent conduct on the part of an adoption intermediary can lead to the failure to accurately disclose critical health-related information to adoptive parents. The intermediary may negligently misrepresent a material fact related to the health of the child that the intermediary should have known was not true. The intermediary may be negligent in the actual transmission of the information, so that, unintentionally, information it possesses that should have been revealed was not. Finally, an intermediary may be negligent by failing to properly investigate the health history of a child, and thereby not disclose information it should have been able to disclose. These categories are not completely distinct. Often, an intermediary will make a general remark that a child is in good health when, in fact, proper investigation would have revealed the falsity of such a statement. Thus, negligent misrepresentation and negligent failure to investigate may in many instances be two sides of the same coin. Nevertheless, it is useful to analyze each duty separately when exploring the limit to which liability should extend.

#### 1. Treatment by the Courts

(a) *Negligent Misrepresentation.*—The first published appellate decision to impose liability upon an adoption agency for conduct that was admittedly unintentional was *Meracle v. Children's Service Society*.<sup>437</sup> When the Meracles adopted twenty-three month old Erin from a private adoption agency, they were told that her paternal grandmother had died of Huntington's Disease.<sup>438</sup> They al-

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<sup>436</sup> See generally, CALAMARI & PERILLO, *supra* note 184, at § 17-1 to 17-4, 17-14. I am unaware of any published or unpublished decisions that have explored this theory in the wrongful adoption context. This was alleged as the basis of a claim by an adopted child against an adoption agency in *Wristen v. Jansen*. Complaint at 13, *Wristen v. Jansen* (No. 86CV-10-64(21) (Franklin County Ct. C.P., Ohio, filed Oct. 12, 1986). The case was settled without a published opinion having been entered. Telephone Interview with Pete Milless, Plaintiff's attorney (Sept. 18, 1991).

<sup>437</sup> 437 N.W.2d 532 (Wis. 1989). Plaintiff's attorney never argued the social worker's conduct was intentional in this case. Telephone Interview with Charles Stierman, attorney for plaintiffs, (Oct. 11, 1990).

<sup>438</sup> This disease is referred to as Huntington's Chorea, Huntington's Disease, or Hun-

lege that the social worker handling the placement told them that Erin's natural father had tested negative for the disease, and that therefore Erin had no greater chance of developing the disease than any other child.<sup>439</sup> Several months after the adoption was finalized, the Meracles learned of the inaccuracy of the statement regarding Erin's father when they heard on television that no reliable test had yet been developed<sup>440</sup> to determine if someone at risk had inherited the disease.<sup>441</sup> Just prior to her seventh birthday, Erin Meracle was diagnosed with Huntington's Disease, the same disease that afflicted Patrick Burr.<sup>442</sup>

Erin's parents sued the adoption agency and its two insurers<sup>443</sup> for negligent placement and negligent misrepresentation.<sup>444</sup> Reversing the trial court's grant of summary judgment for the defendants, the Wisconsin Supreme Court held that public policy should not bar a claim for negligent misrepresentation in the adoption context.<sup>445</sup> The agency had voluntarily assumed a duty to inform the Meracles about Huntington's Disease and Erin's risk of developing it, and thus could be held liable for making an affirmative misrepresentation about the child's health.<sup>446</sup> Damages, the court emphasized, would be limited to extraordinary medical expenses.<sup>447</sup>

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ington Disease. STEDMAN'S *supra* note 97, at 299.

439 437 N.W.2d at 533. At her deposition, the social worker did not recall making such a statement. At the time of Erin's birth, her natural father was only 15 years old. Telephone Interview with Stephen Juech, attorney for defendants, (Aug. 9, 1990).

440 Since 1979 when the statement was made, the development of predictive testing for Huntington's Disease has become far more accurate: in 1983 the DNA marker was identified for Huntington's Disease and in some cases the degree of risk now can be predicted with greater certainty. See generally, Marguerite Chapman, *Invited Editorial: Predictive Testing for Adult-Onset Genetic Disease*, 47 AM. J. HUM. GENETICS. 1 (1990).

441 437 N.W.2d at 533. Apparently, the birth father had undergone a test indicating that he did not have any symptoms of Huntington's Disease. These tests would not indicate whether he was at risk, and thus could not confirm whether he was capable of transmitting the disease to Erin. Telephone Interview with Charles Stierman, attorney for plaintiffs (Oct. 11, 1990).

442 437 N.W.2d at 533. It is highly unusual for someone to develop Huntington's Disease at this age. *Id.* at 535. Normally onset of symptoms occurs between ages 30 to 50. See STEDMAN'S, *supra* note 97, at 299.

443 Wisconsin allows direct actions against insurance companies, and thus insurers are routinely named as parties. One defendant carrier provided error and omission coverage to the agency at the time of the adoption, and the other defendant insurance company had issued the policy in effect at the time the diagnosis was made. Telephone Interview with Stephen P. Juech, Counsel for two defendants (Aug. 9, 1990).

444 437 N.W.2d at 533.

445 437 N.W.2d at 537.

446 *Id.*

447 *Id.* The court denied damages for emotional distress because the plaintiffs had

Recently, in *Wallerstein v. Hospital Corp. of America*,<sup>448</sup> a Florida appellate court also recognized a claim for negligent misrepresentation, this time in the context of an adoption arranged by a private attorney rather than an agency.<sup>449</sup> Suit was filed by the adoptive parents on behalf of themselves and their child against physicians whom the parents had employed to examine the child prior to release from his post-birth hospitalization and report to them on his health. They alleged in their complaint that the doctors assured them Shawn was healthy and suitable for adoption. The parents proceeded with the adoption and subsequently discovered, when Shawn was approximately eleven months old, that he had chronic, non-progressive brain dysfunction with spastic quadriparesis (paralysis) that has been tentatively diagnosed as cerebral palsy.<sup>450</sup> His condition will result in permanent and severe motor impairment.<sup>451</sup> Plaintiffs alleged that information contained in the medical records at the time of defendants' examination indicates that the neurological impairment should have been evident to defendants at that time.<sup>452</sup> The appellate court held the adoptive parents' alleged reliance upon a representation "made under circumstances in which its falsity should have been known" was sufficient to state a claim against the defendant doctors and the hospital that employed them.<sup>453</sup>

A Minnesota appellate court in *M.H. v. Caritas Family Services*,<sup>454</sup> provided the most recent opinion to endorse recognition of a claim for negligent misrepresentation.<sup>455</sup> Expressing concern over the need for deterrence and maintaining public confidence in adoption, the court held that "public policy does not preclude

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not demonstrated any physical injury. *Id.* at 536. See *supra* notes 386-407 and accompanying text.

Press reports indicate that the case was settled prior to going to trial for \$250,000. Patrick Jasperse, *False Information Suit from Adoption Settled*, MILWAUKEE J., July 10, 1989. At the time of settlement, it was anticipated that Erin would live approximately four-to-six more years with annual medical expenses of \$30,000 per year. Telephone Interview with Charles Stierman, attorney for plaintiffs (Oct. 11, 1990).

448 573 So. 2d 9 (Fla. App. 4 Dist. 1990).

449 Telephone Interview with Bill Thompson, attorney for plaintiffs (Oct. 8, 1991).

450 573 So. 2d at 9.

451 Telephone Interview with Bill Thompson, attorney for plaintiffs (Oct. 8, 1991).

452 *Id.*

453 573 So. 2d at 10. The case is currently back in the trial court awaiting trial. Telephone Interview with Bill Thompson, attorney for plaintiffs, (Oct. 8, 1991).

454 475 N.W.2d 94 (Minn. Ct. App. 1991), *review granted*, (Minn. Nov. 13, 1991).

455 See *supra* notes 123-25, and accompanying text.

a negligent misrepresentation action against an adoption agency.<sup>456</sup>

Courts have not unanimously embraced the claim of negligent misrepresentation in the adoption context, however. In one of the earliest wrongful adoption cases, *Richard P. v. Vista del Mar Child Care Serv.*,<sup>457</sup> a California appellate court denied recovery to adoptive parents who sued an adoption agency for negligent misrepresentation, among other theories. Plaintiffs alleged that at the time they adopted their infant son, they had been told he was premature and had large earlobes, but at that time had no neurological damage, was in good health, and was, as the complaint phrased it, "a proper subject for adoption."<sup>458</sup> They also alleged that their pediatrician, whom they also named as a defendant, had recently told them the child's medical problems were predictable at his birth, although he himself had found no health problems when he examined the child the day after placement.<sup>459</sup> The appellate court sustained the lower court demurrer to the pleadings.<sup>460</sup>

Several factors make an analysis of the court's reasoning problematic. The sketchy facts included in the appellate court opinion make it difficult to assess whether a sufficient allegation in the complaint of an essential element existed, i.e., that the misrepresenter, the agency, should have known of the falsity of its statement.<sup>461</sup> Somehow, the court concluded that the agency had made a full disclosure of the child's medical history to the adoptive parents.<sup>462</sup> Moreover, plaintiffs' position was not enhanced by characterization of the misrepresentation as one of failure to correctly represent the child's future health, which the court deemed an expression of opinion and not actionable.<sup>463</sup> The general nature of the representation distinguishes this case from *Meracle* (although not from *Wallerstein*) in that the representation made was one of "present good health" rather than a misrepresen-

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456 *M.H.*, 475 N.W.2d at 97.

457 165 Cal. Rptr. 370 (Cal. App. 1980).

458 165 Cal. Rptr. at 373. The offensive nature of this characterization probably did not advance the plaintiff's cause.

459 165 Cal. Rptr. at 372-73.

460 165 Cal. Rptr. at 372, 374. Although the pediatrician was a named defendant, he was not a party to the appeal.

461 See *infra* notes 508-10 and accompanying text for a discussion of this element of the tort of negligent misrepresentation.

462 165 Cal. Rptr. at 374.

463 165 Cal. Rptr. at 373.

tation of a specific matter, such as the import of specific test results and resultant risk of Huntington's Disease. Nevertheless, it would appear that the allegation that subsequent problems "were predictable at birth," combined with the allegation of a representation that the child had no neurological damage, should have been sufficient to constitute an allegation that the agency should have known of the falsity of its statement and therefore withstood a demurrer. The case illustrates the link between a negligent misrepresentation claim and the breach of a duty to reasonably investigate. Had the case been allowed to proceed to summary judgment or trial, the evidence may or may not have established that based upon what the agency did know, it should have known of the falsity of its statement or at least undertaken further investigation to find out.

Unfortunately, in granting the demurrer, rather than focusing on specific pleading defects, the court made the sweeping pronouncement that "no cause of action for negligence should be recognized based on considerations of public policy."<sup>464</sup> The court concluded that an agency which had made full disclosure was not morally blameworthy, that subsequent impairment was not foreseeable merely from the fact of prematurity, and that imposition of liability would impede the functioning of adoption agencies and make them the "guarantor of the infant's future good health."<sup>465</sup>

(b) *Negligent Transmission and Negligent Failure to Investigate.*—In *Foster by Foster v. Bass*,<sup>466</sup> the duty of an adoption agency to investigate the health of a child and to accurately transmit the information to adoptive parents was addressed for the first time by an appellate court. Of all the cases examined herein, this one is perhaps the most tragic, because, had appropriate measures been taken, the child's severe impairment would have been completely prevented.

In 1972 Jean and Kevin Foster adopted Geoffrey, a newborn, through a private adoption agency, Catholic Charities, Inc. In their brochure, Catholic Charities advertised that as part of its placement process, it would "conduct a painstakingly thorough and time consuming investigative procedure" into, inter alia, "the

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464 *Id.*

465 *Id.* at 373-74.

466 575 So. 2d 967 (Miss. 1990).



child's physical and mental health potential."<sup>467</sup> As part of this process, a Catholic Charities worker reviews the hospital records and copies information onto a form which it presents to the adoptive parents to provide them with some medical history on the child. The parents are then instructed to give this form to their own pediatrician and provide medical care for the child. The form reports a variety of test results and significant factors regarding the birth and post-natal course, and includes a space next to the word "PKU" to report the results of a routine screening test for PKU. The hospital records themselves are not forwarded to the adoptive parents or their pediatrician, nor do the parents or pediatrician have access to them because they are not given the birth name of the child nor the name of the physician who cared for the infant in the hospital.<sup>468</sup>

Geoffrey was placed directly with the Fosters six days after his birth, at which time they were given the medical form. Geoffrey's form, however, contained several blank lines, including a blank space on the line for reporting PKU test results.<sup>469</sup> "PKU" is an abbreviation for phenylketonuria, an inherited, recessive metabolic disease that inhibits a person's ability to process certain amino acids. When the disorder is discovered at or near birth, a change in the infant's diet can prevent "all the clinical manifestations of the disease."<sup>470</sup> If left untreated, however, the disease causes severe and irreversible brain damage, resulting in severe retardation (I.Q.'s between 25-50), and often in seizures, cerebral palsy, microcephaly, and behavior disorders.<sup>471</sup> Although a simple screening test was available and in use in Mississippi for PKU, the physician supervising his care prior to placement had not ordered the test.<sup>472</sup>

Geoffrey's pediatrician, Dr. Nichols, interpreted the blank to mean that Geoffrey's test results had not yet been received, as it could take up to two months to receive the report. Because he

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467 *Id.* at 977.

468 *Id.* at 970-71. The agency also provides the parents with a Placement Health Examination Report, which they are instructed to give to their pediatrician and to return when completed to the agency.

469 *Id.* at 970.

470 *Id.* at 969-70.

471 *Id.* at 969.

472 Although at least one of the hospitals in Jackson at the time of Geoffrey's birth routinely administered PKU tests to newborns, the hospital at which Geoffrey was born had no policy for performing the PKU test as a routine screening procedure. State law did not mandate the test until 1985. 575 So. 2d at 969-70.

did not have Geoffrey's birth name, he had to rely upon the agency to serve as conduit to report the results. He testified later that he assumed that the adoption agency would contact him if the results were positive, based on his past experience with adoption agencies. Dr. Nichols was extremely knowledgeable about PKU, having actively worked to institute a mandatory newborn PKU screening procedure at one of the local hospitals. He insisted that if he had known the PKU test has not been administered to Geoffrey, he would have immediately ordered the test.<sup>473</sup>

When Geoffrey was four years old, he was diagnosed as having severe and irreversible brain damage caused by phenylketonuria. He will never be able to function independently.<sup>474</sup> His father ultimately filed suit on his behalf, as next friend, against the doctor who supervised his care in the hospital, the pediatrician,<sup>475</sup> and Catholic Charities. The father alleged the agency was negligent in failing to have the child tested for PKU in the hospital prior to his release, failing to order the PKU test prior to adoption when their own form failed to record the results of the test, and failing to provide necessary medical information. Plaintiff never asserted or argued fraud or misrepresentation,<sup>476</sup> nor was there an allegation of intentional nondisclosure. Rather, the essence of the complaint was that the agency was negligent in its transmission of the information and in failing to investigate the child's health history and ensuring that appropriate screening tests were performed.

The Mississippi Supreme Court, however, affirming a summary judgment in favor of the agency, appears to have concluded that there was no breach by the agency of a duty to exercise reasonable care in investigating the child's health or of the duty to transmit health information. In a 5-1-2 decision that was poorly reasoned and somewhat vague,<sup>477</sup> the majority emphasized that the duty to determine whether Geoffrey had PKU was with his doctors; the agency had no doctors on staff; and the injury was not foreseeable because the disease was rare. The majority further found that the agency's actions were not the proximate cause of

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<sup>473</sup> 575 So. 2d at 970-71.

<sup>474</sup> *Id.* at 971.

<sup>475</sup> Both doctors reached a settlement with the plaintiff. 575 So. 2d at 968.

<sup>476</sup> *Id.* at 981.

<sup>477</sup> As the dissent points out, the majority never stated whether there was no genuine issue about whether the agency owed the adoptive parents a duty, or whether the agency breached a duty owed. 575 So. 2d at 986.

Geoffrey's injuries, and that the physician's negligence superseded the agency's actions.<sup>478</sup> These rulings were made in spite of testimony by the agency's own director that the many blanks on Geoffrey's form were evidence of poor record keeping; that the agency could have contacted the hospital or the doctor who treated Geoffrey while he was in the hospital to obtain accurate information about whether the test had been performed; that current practice is to check back with the hospital so that all information required by the form can be provided; and that the agency has a duty to investigate a child's health and report that information to the adoptive parents.<sup>479</sup>

On the issue of negligent transmission, the majority opinion was not sufficiently precise about its rationale. It is not clear whether the court concluded that an adoption agency has no duty to accurately transmit health information, or whether the court found as a matter of law that the duty simply was not breached. The majority observed that the creation of the medical form did not obligate the agency to make sure it was completed,<sup>480</sup> which might indicate that the majority's conclusion was that there was simply no duty to transmit health information. On the other hand, the majority contended that Catholic Charities informed the Fosters of all information it had, which might indicate it simply felt that the duty to accurately transmit had not been breached.<sup>481</sup> The majority's discussion of duty did not really separate the question of negligent transmission from the issue of the failure to investigate, which further complicates the effort to properly characterize the court's analysis. The two duties, although often involved in the same factual setting, should be analyzed separately. One focuses on the duty to exercise reasonable care to accurately transmit the information the agency has. The duty to investigate goes one step further, and requires reasonable efforts to obtain information regarding health matters that is not otherwise in the agency's possession.

For the reasons elaborated upon below,<sup>482</sup> adoption intermediaries should be charged with a duty to exercise reasonable care to accurately transmit the health information they possess. The majority concluded that the agency did not know whether or not

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478 *Id.* at 982.

479 575 So. 2d at 989-91.

480 *Id.* at 978.

481 *Id.* at 981.

482 *See infra* notes 492-93, 496-99, 516-17 and accompanying text.

a PKU test was conducted.<sup>483</sup> An equally plausible conclusion from the facts would be that the worker who filled out the form knew that the test had not been administered and intended to communicate that fact by leaving the line next to "PKU" blank. In any event, the court should have held that the agency had a duty to accurately and clearly communicate what it knew; either that (a) it did not know if a test had been performed, or (b) that it knew a test had not been performed. Whether the agency then breached that duty by leaving the line blank should have been a jury question. Reasonable people could differ over whether the blank would in fact communicate a lack of knowledge or no test, or whether it was ambiguous and misleading and would create an unreasonable risk of misinterpretation by the pediatrician.

Regarding the duty to investigate, it would be fair to distill from the majority's discussion that they rejected imposing such a duty upon adoption intermediaries in general. While some of their rationale clearly focused upon the rarity of PKU, at other points the majority was more general, arguing that the doctors had a duty to determine whether Geoffrey had PKU, that the agency had no doctors on staff,<sup>484</sup> and that the agency should not have been "cloaked with the same kind of duty" to investigate the blank beside "PKU."<sup>485</sup> After summarizing many of the wrongful adoption cases discussed above, the majority warned of the need to "approach slowly any attempt to make an adoption agency liable for the health of the children that they place."<sup>486</sup> Such a statement overlooks the fact that liability is imposed for the agency's unreasonable conduct in not pursuing health information that would allow it to present a complete and accurate health history, rather than for placing a child with a latent health risk. Nevertheless, such a statement is consistent with the *Meracle* case,

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483 575 So. 2d at 981. The majority states, "[N]o one informed Catholic Charities that a test had not been conducted." The most plausible interpretation of this was that the "information" the worker possessed when filling out the form was that the agency did not know whether the test had been conducted. Had this been communicated clearly, it should have alerted Dr. Nichols, the pediatrician, to check further and administer the test. If the "information" the worker thought the agency had was that a test had been conducted and the results were not in, then the error was not really one of negligent transmission, because the worker communicated through the form exactly what he or she intended to communicate. Rather, it would be another example of negligent misrepresentation, a theory the majority did not consider.

484 *Id.*

485 *Id.* at 978.

486 *Id.* at 981.

which was quick to make clear that it was *not* addressing whether agencies have a duty to discover health information.<sup>487</sup>

## 2. Policy Considerations Favoring Recognition of Liability

The policy arguments favoring liability for negligent conduct of adoption intermediaries parallel the arguments for imposing liability for intentional conduct.<sup>488</sup> Deterrence and compensation have long been viewed as sufficient rationales for imposing liability for negligent conduct in general,<sup>489</sup> and they are equally compelling in the context of wrongful adoption. Recognizing liability for negligence will also aid the institution of adoption. Although defendants who negligently cause injury are generally not perceived to be as morally blameworthy as those who intentionally cause harm, moral blameworthiness has never been a prerequisite to attaching liability for tortious conduct,<sup>490</sup> outside of the punitive damages context.<sup>491</sup>

(a) *Deterrence.*—The law must also deter negligent conduct of adoption intermediaries that inhibits transmission of full and accurate health-related information. The tragic consequences of failing to receive this information<sup>492</sup> occur regardless of whether the cause of the failure is intentional or negligent conduct. Moreover, liability can have a deterrent effect upon even negligent behavior, particularly when it is an organized activity such as adoptive placement. Intermediaries must implement adequate training for employees on how to disclose information and the steps that must be taken to investigate health history. Imposing liability for negligent conduct will thus motivate careful assessment of training practices and internal procedures.<sup>493</sup> Increased

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487 *Meracle v. Children's Serv. Soc'y*, 437 N.W.2d 532, 537 (Wis. 1989). See also *M.H. v. Caritas Family Servs.*, 475 N.W.2d 94, 98 (Minn. Ct. App. 1991) (making an identical disclaimer), *review granted*, (Minn. Nov. 13, 1991).

488 See *supra* notes 131-223 and accompanying text.

489 See KEETON ET AL., *supra* note 132, § 4 at 20, 25-26. See generally, Posner, *supra* note 133, at 12-19; Sugarman, *supra* note 133, at 126; Calabresi, *supra* note 133, at 175-82.

490 See Posner, *supra* note 133, at 17 (pointing out that we impose negligence under the reasonable person standard against people who are "clumsier than most" and insane people incapable of reasonable conduct).

491 Generally, negligent conduct is not sufficient to support an award of punitive damages. KEETON et al., *supra* note 132, § 2 at 9-10.

492 See *supra* notes 136-64 and accompanying text.

493 Even advocates for adoption agencies concede that negligent conduct may be avoidable with good risk management. See Rosenberg & Pierce, *supra* note 177, at 3030.

pressure from insurers to limit exposure will have the same effect. It will also close an escape hatch for many intermediaries who might otherwise argue that their failure to disclose critical information was merely negligent, rather than intentional.

There is a risk, however, that if liability is imposed only for negligent misrepresentation or negligent transmission, and not for negligent failure to investigate or, worse yet, intentional nondisclosure, then the goal of deterrence will be thwarted. The ultimate purpose of deterring certain conduct is to increase the accuracy and content of health information disclosed. If intermediaries are liable only for misrepresentations, but not for failure to disclose, they may be motivated to decrease the amount of background information revealed—or perhaps say nothing at all.<sup>494</sup> Even if intentional nondisclosure and negligent misrepresentation and transmission are actionable, if there is no duty to make reasonable efforts to investigate, adoption intermediaries could choose to record only information volunteered to them on the supposition that the less information they possess the less they are obligated to disclose, and their potential liability for negligent misrepresentation would be minimized.<sup>495</sup> Obviously, such a result would be counterproductive, and thus reinforces the need to include within

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Mr. Rosenberg and Mr. Pierce were, respectively, the Director for Adoption Services and the President of National Committee for Adoption, an advocacy and lobbying organization for adoption agencies.

494 This concern was expressed by Charles Stierman, attorney for plaintiffs in *Meracle*, who indicated that although the decision was favorable to his clients, he feared that the narrow approach taken by the Wisconsin Supreme Court would in fact cause agencies to simply not volunteer anything. Telephone Interview with Charles Stierman, attorney for plaintiffs (Oct. 11, 1990). See also Dickson, *supra* note 11, at 962.

495 Stephen Juech, counsel for defense in *Meracle*, predicted that the decision may result in social workers making less effort to seek out information. Discovery in *Meracle* apparently revealed that this social worker stated she had in fact called a medical specialist in Milwaukee who had worked with the paternal birth family. The social worker also said that she had transmitted the information that she had been given by the doctor. There was a factual dispute about what was actually said to the *Meracle* family, which was never resolved because the case was settled. Telephone Interview with Stephen Juech (August 9, 1990).

If the statements the *Meracles* allege were in fact made, however, it is quite likely that they were made because the social worker misunderstood the information she had been given by the doctor. No one in that case ever alleged that her misrepresentation was intentional. Mr. Juech expressed the opinion that based on conversations he has had with social workers, he feels the decision may influence them to seek less outside information. *Id.* This result could be avoided, of course, if a duty to investigate is also imposed.

the scope of actionable negligent conduct the failure to make reasonable efforts to investigate.

(b) *Compensation.*—The emotional trauma that can result for both adoptive parents and adopted children,<sup>496</sup> as well as the financial pressures created by extraordinary expenses,<sup>497</sup> can occur regardless of the nature of the fault that deprived the adoptive parents of the critical information. Victims of negligent behavior in the adoption context, just as victims of other types of negligent behavior, deserve to be compensated.

(c) *Foster the Institution of Adoption.*—In both *Meracle* and *M.H. v. Caritas Family Services*, the courts explicitly responded to the concern raised by the California Appellate Court in *Richard P.* that to expose adoption agencies to liability for negligence would “impede the proper functioning of adoption agencies.”<sup>498</sup> Both courts concluded that, on the contrary, to renounce such liability might actually inhibit adoptions because prospective adoptive parents’ confidence in the adoption process would be eroded if agencies were immunized from liability.<sup>499</sup> Imposing liability, observed the court in *M.H.*, would promote accurate communication of health information, rather than inhibit an agency’s performance of its role.<sup>500</sup>

Recognizing a duty not only to carefully communicate the information the agency possesses, but in addition to make reasonable efforts to investigate potential health problems, also aids the institution of adoption. The importance to the adoption process of making a full and complete investigation is recognized in the professional guidelines developed by the Child Welfare League of America, which emphasize the significance of assessing the child’s medical and psychological characteristics and needs for appropri-

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496 See *supra* notes 136-56, 186-89, 199-207 and accompanying text.

497 See *supra* notes 208-13 and accompanying text.

498 165 Cal. Rptr. 370, 374 (Cal. Ct. App. 1980) (citation omitted).

499 *Meracle v. Childrens Serv. Soc’y*, 437 N.W.2d 532, 537 (Wis. 1989) (“Further, our decision will not inhibit adoption. Indeed, it will give potential parents more confidence in the adoption process and in the accuracy of the information they receive. Such confidence would be eroded if we were to immunize agencies from liability for false statements made during the adoption process.”); *M.H. v. Caritas Family Servs.*, 475 N.W.2d 94, 98 (Minn. Ct. App. 1991) (“To renounce such liability may actually inhibit adoptions because prospective parents would be warier of the process if the agency had no disincentive to make false statements.”), *review granted*, (Minn. Nov. 13, 1991).

500 *M.H.*, 475 N.W.2d at 98.

ate placement.<sup>501</sup> Imposing liability for breaching this duty motivates compliance and prevents intermediaries from taking the approach of "see no evil, hear no evil, say no evil." The ultimate goal of adoption, to place children in families that will best meet their needs, is better served.<sup>502</sup> Enforcing this duty will not "expose agencies to potentially unlimited liability."<sup>503</sup> The duty negligence law imposes is generally one of reasonable conduct.<sup>504</sup> If the efforts taken by the intermediary to investigate health history were reasonable under the circumstances, liability would not be imposed.

### 3. Theories of Liability

#### (a) *Negligence and Negligent Infliction of Emotional Distress*

(i) *Negligent Misrepresentation.*—Negligent misrepresentation, although essentially just negligence in a specific context, has been treated to some extent as a separate theory or theories depending upon whether the setting was commercial or not, with its elements separately identified.<sup>505</sup> These elements are well summarized in *Wallerstein v. Hospital Corp. of Am.*:<sup>506</sup>

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501 CWLA, *Standards for Adoption Service*, *supra* note 49, at 25-28. Standards 3.1 to 3.6 describe in some detail the steps needed to make a developmental history, medical examination, psychological history, and family history. These standards also describe how to confer with specialists and coordinate findings in order to determine the kinds of families into which children should be placed.

502 *See id.* at 9, 25. ("The primary purpose of an adoption service should be to help children who would not otherwise have a home of their own, and who can benefit from family life, to become members of a family that can give them the love, care, protection, and opportunities essential for their healthy personal growth and development." *Id.* at 9.)

503 The concern of expanding liability too far was expressed by the court in *Meracle*, although the statement was not specifically directed to the duty to investigate.

504 *See supra* notes 338-63 and accompanying text.

505 KEETON et al., *supra* note 132, § 107 at 745-48, discusses the development of the tort of negligent misrepresentation creating pecuniary losses, which is often recognized in a commercial context. *See* RESTATEMENT (SECOND) OF TORTS, § 552 (1965) (Information Negligently Supplied for the Guidance of Others).

Liability has also been recognized for negligent misrepresentation in a more general context, particularly when the misrepresentation caused physical harm. *see Id.* 304 ("A misrepresentation of fact or law may be negligent conduct.") *See* § 311 (Negligent Misrepresentation Involving Risk of Physical Harm; *see supra* notes 387-88, 392-407 for a discussion of the erosion of the physical harm requirement to recover for emotional distress in negligence actions.

506 573 So. 2d 9, 10 (Fla. Dist. Ct. App. 1996) (citation omitted).



In order to be actionable, a suit for negligent misrepresentation must contain the following elements: (1) misrepresentation of a material fact; (2) the representor must either know of the misrepresentation, must make the representation without knowledge as to its truth or falsity, or must make the representation under circumstances in which he ought to have known of its falsity; (3) the representor must intend that the representation induce another to act on it; (4) injury must result to the party acting in justifiable reliance on the misrepresentation.

All of these elements, as applied in the context of a wrongful adoption proceeding, have been discussed in detail above,<sup>507</sup> except, of course, the one element that distinguishes this tort from intentional misrepresentation. Liability for negligent misrepresentation can be imposed even if the false statement was not intentional or reckless, but simply "was made under circumstances in which its falsity should have been known."<sup>508</sup> If an adoption intermediary does not make reasonable efforts to determine if its statements are true, liability should be imposed for any resulting harm to the adoptive parents or the child.<sup>509</sup> Thus, when an affirmative representation is made, it is clear that a duty to reasonably investigate exists to ensure the statement's accuracy. When negligence in the manner of communication creates a misrepresentation, that also has been deemed a sufficient basis for liability.<sup>510</sup>

Although the court in *Wallerstein* recited the standard language that the injury must result to the party acting in reliance upon the statement, the court did not specify that Shawn's claim under that theory should be dismissed. The more restrictive language is probably derived from a recitation of the elements made in a commercial setting.<sup>511</sup> In the context of an adoption, recog-

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507 See *supra* notes 225-73 and accompanying text.

508 573 So. 2d at 10.

509 None of the cases in which a claim for negligent misrepresentation has been recognized in the adoption context has yet been tried. *Meracle* settled; *M.H.* and *Wallerstein* are awaiting trial. Thus, the cases give us little guidance on the application of this standard.

510 See RESTATEMENT (SECOND) OF TORTS, § 311(2)(b) (1965) *reprinted infra* at note 512.

511 See *Id.* § 552, which relates to Misrepresentation Causing Pecuniary Loss, and provides:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in ob-

nizing the child's claim is appropriate and consistent with both the specific recognition of a right of recovery for one physically harmed by another whose actions resulted from a negligent misrepresentation,<sup>512</sup> as well as the general rule that liability for negligent misrepresentation extends to anyone who "may reasonably be expected to be endangered."<sup>513</sup>

(ii) *Negligent Transmission and Failure to Investigate.*—When accurate and complete health information is not conveyed due to lack of reasonable care in the transmission or investigation of the information, liability should be imposed under a general negligence claim.<sup>514</sup> The elements of negligence—duty, breach, causation and injury—have been discussed above.<sup>515</sup> The element of duty deserves special attention in this context, however.

To the extent that there is a duty to disclose health information, there logically must follow a duty to make reasonable efforts

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taining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

512 *Id.* § 311 provides:

(1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results

(a) to the other, or

(b) to such third persons as the actor should expect to be put in peril by the action taken.

(2) Such negligence may consist of failure to exercise reasonable care

(a) in ascertaining the accuracy of the information, or

(b) in the manner in which it is communicated.

513 See *supra* notes 379-81 and accompanying text.

514 Damages for emotional distress can be sought in this claim or in a separate claim for negligent infliction of emotional distress. See *supra* notes 382-415 and accompanying text.

515 See *supra* notes 337-78 and accompanying text.

to communicate it in such a manner that the information is actually received in an understandable form. The arguments for recognizing a duty to disclose health information, i.e. the gravity, probability, and foreseeability of harm if such information is not conveyed, the benefits to society, and the comparatively light burden to an adoption intermediary, have been reviewed above in detail.<sup>516</sup> These arguments equally support recognition of a duty to exercise reasonable care in the transmission of the information, for the consequences are no less grave simply because the failure to receive the information resulted from faulty communication rather than the absence of an effort to communicate.<sup>517</sup>

Recognition of a duty to make reasonable efforts to investigate health information, when no misrepresentation has been made, is by far the most problematic basis for liability. To date no court has recognized this duty and several have explicitly<sup>518</sup> or implicitly rejected it.<sup>519</sup> Several commentators, however, have forcefully argued such a duty should be imposed.<sup>520</sup> The policy factors that courts must consider to determine whether a duty exists—the gravity, probability, and foreseeability of risks, the policy of preventing future harm, and the burden to the defendant and consequences to society of imposing the duty<sup>521</sup>—favor recognition of a duty to investigate. Where reasonable efforts could have uncovered critical health information, failure to take those steps can result in harm to adoptive families that is no less tragic, probable, or foreseeable than if the harm were caused by intentional failure to disclose. The policy of preventing future harm is well

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516 See *supra* notes 136-64, 341-50 and accompanying text.

517 A wrongful adoption case that recently settled illustrates an error of this nature. The adoptive mother of a one-year-old, who later developed a serious behavioral disorder and required special schooling, sued the agency for failure to reveal that a birth parent or parents were diagnosed as schizophrenic and low functioning. There was a factual dispute about whether that information was ever included in any oral conversation, but in addition, the department claimed they sent a background letter to the adoptive mother that got lost in the mail. Telephone Interviews with Peter Milless, attorney for Ellen Wristen, regarding *Wristen v. Jansen*, No. 86CU-10-641 (Franklin County, Ohio, October 15, 1986) (Oct. 16, 1990 and Sept. 18, 1991). If in fact the evidence at trial would have shown that the letter was the *only* method the department actually used to communicate this information, and it was not sent by certified mail, such a circumstance might be a good example of negligence in the transmission of information.

518 *Foster v. Bass*, 575 So. 2d 967, 981 (Miss. 1990).

519 *Meracle v. Children's Serv. Soc'y*, 437 N.W.2d 532, 537 (Wis. 1989); *M.H. v. Caritas Family Servs.*, 475 N.W.2d 94, 98 (Minn. Ct. App. 1991), *review granted*, (Minn. Nov. 13, 1991); *Burr v. Board of County Comm'rs*, 491 N.E.2d 1109 (Ohio 1986).

520 Dickson, *supra* note 11, at 965; Schiffer, *supra* note 11, at 718.

521 See *supra* notes 341-50 and accompanying text.

served by the motivating effect that imposing liability for failure to investigate should generate. The consequences to society of imposing the burden are favorable—i.e. the chances for appropriate placement and adequate post-adoption health care are enhanced.

The real stumbling block has been the perceived burden on the intermediary. Courts fear exposing intermediaries to “potentially unlimited liability.” Such a fear is unwarranted. In a myriad of settings, courts have asked juries to determine whether conduct was reasonable under the circumstances. There is no reason why such a determination cannot be made in the context of adoption practice. The Child Welfare League’s standards provide a starting point in summarizing what steps should be required.<sup>522</sup> These standards recommend obtaining a family history from birth parents, a developmental history from birth parents and others, if any, who have temporarily cared for a child, and a medical examination and evaluation from a qualified physician which includes assessment of the child’s medical records. Psychological testing may be warranted if there are indications of risk in that area. Specialists should be consulted about any indication of risk for specific health problems.<sup>523</sup> Again, custom in the industry is relevant, but not controlling.<sup>524</sup>

*Foster v. Bass* is the perfect example of why recognition of this duty is so vital. The adoption intermediary normally has sole access to the birth family, prior caregivers, and medical and genetic history.<sup>525</sup> It is not enough to say, “take this child to your pediatrician and let us know if there are problems.” The pediatrician chosen by the adoptive parents simply does not have access to the medical history that can provide diagnostic clues.<sup>526</sup> The pediatrician’s lack of access to this information led to tragic consequences for Geoffrey Foster.

Obviously the requirement of reasonable efforts to obtain missing information must be assessed on a case by case basis. Tracking down a paternal grandmother in the deserts of Outer Mongolia may be excessively burdensome. On the other hand,

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522 See CWLA Standards, *supra* note 49, at 26-28 (Standards 3.1 to 3.6).

523 *Id.*

524 See *supra* notes 351-63 and accompanying text.

525 See Schiffer, *supra* note 11, at 718.

526 Dr. Stella B. Kontras, M.D., Professor at Ohio State University, in testimony before the Ohio Senate, stated that “approximately three-fourths of the information a physician seeks in evaluating the health of a baby involves medical history.” O’Connell, *supra* note 46, at 533 & n.6.

calling up the hospital to check on the results of a PKU test is not.

The court in *Foster* emphasized that foreseeability of risk must be a factor in determining duty. This is certainly accurate, but the court's application of that factor was faulty. The court emphasized that phenylketonuria occurs only once in every 10,000 births among those of European ancestry.<sup>527</sup> Nevertheless, the grave consequences of the disease and the consequent importance of the test were obviously known to the agency, since the agency routinely included PKU test results on the brief standard form sent to adoptive parents. In such a circumstance, it seems evident they foresaw the potential impact of this information in the prevention of this disease. Obviously, the extent to which it is reasonable to expect intermediaries to detect risk factors and seek additional information expands as medical science expands. The general availability of knowledge about particular conditions affects the determination of what risks are foreseeable. It should be remembered, however, that adoption intermediaries have special skills and access to training that would warrant a court holding them to a higher standard.<sup>528</sup> For several years geneticists in particular have undertaken training conferences<sup>529</sup> and provided expertise to adoption intermediaries to develop forms to aid in their investigation.<sup>530</sup> Thus, the reasonableness of the intermediaries' efforts and the foreseeability of risk must be assessed in the context of the medical information available to them at the time and their access to specialized training and ability to consult with medical experts.

The dissent in *Foster* forcefully argued that the agency did have a duty to investigate, but based that duty in large part upon the fact that Catholic Charities advertised that it would undertake a thorough investigation of health matters.<sup>531</sup> Recognition of the duty to investigate under tort law, however, should not be dependent upon the nature of an intermediary's advertising. Such a

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527 *Foster*, 575 So. 2d at 969.

528 See *supra* note 340 and accompanying text.

529 For example, in 1984 the Wisconsin Clinical Genetics Center sponsored a continuing education project, entitled "Continuing Education in Genetics for Adoption Workers." GENETIC FAMILY HISTORY, *supra* note 43, at iv.

530 A committee of geneticists, pediatricians, and adoption workers are working to develop a form to take medical history of adopted children. Diane Plumridge, Joan Burns & Nancy L. Fisher, *ASHG Activities Relative to Education: Heredity and Adoption: A Survey of State Adoption Agencies*, 46 Am. J. Hum. Genetics 208, 214 (1990).

531 *Foster*, 575 So. 2d at 986-989 (Sullivan, J., dissenting).

duty should be recognized as inherent in the undertaking to place a child for adoption, because in most adoptions, no one else can supply the missing link to information the adoptive parents cannot access by themselves.

(b) *Breach of Contract.*—Breach of contract, express or implied, should also be a theory available to adoptive parents who failed to receive complete and accurate health-related information as the result of the negligent conduct of an adoption intermediary. In some instances, a commitment to investigate and disclose health background might have been made expressly through written materials, as in *Foster*,<sup>532</sup> or orally. In the absence of an express commitment, the court could still determine, as in *Petrowsky*,<sup>533</sup> that the contract with the adoption intermediary implied a duty to perform reasonably and in good faith, a duty which could be violated by negligent conduct alone. In *Petrowsky* it was the implied duty to make reasonable efforts to investigate paternity that was held to be actionable.<sup>534</sup> Similarly, failure to make reasonable efforts to investigate and communicate accurately the health history of a child to adoptive parents, a function that is also central to the adoption process, should also be viewed as a breach of the implied contractual duty of good faith.<sup>535</sup>

### C. *The Existence of Impairment and Absence of Fault*

In several wrongful adoption cases, plaintiffs have asserted, among other theories, claims for breach of warranty, strict liability, and breach of contract.<sup>536</sup> Such claims were based on the allegation that the intermediary promised and failed to provide a healthy child. To date the courts have uniformly and appropriately

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532 *Id.* at 988.

533 *Petrowsky*, 518 N.E.2d at 667; *See supra* notes 420-28.

534 *Id.* at 667-68.

535 A breach of contract claim was never asserted in *Foster*, presumably because the only plaintiff in that action was the adopted child, who was not a party to the contract. In *Richard P. v. Vista Del Mar Child Care Serv.*, 165 Cal. Rptr. 370, 374 (Cal. App. 1980), a breach of contract was alleged, but the court's brief discussion of it made no reference to a breach based on the conduct of the agency. The breach that was alleged is discussed below, *infra* notes 542-47.

536 This must be distinguished from a breach of contract action that identifies the breach as inappropriate conduct, either intentional or negligent, on the part of the agency.

rejected these attempts to recover under theories that impose liability without fault.

### 1. Treatment by the Courts

In *Allen v. Children's Services*,<sup>537</sup> an Ohio appellate court reversed the judgment of a trial court that had awarded \$17,000 to an adoptive mother for breach of contract. The mother, Geraldine Allen, entered into an "Agreement for Adoptive Placement" with defendant in September 1977 when nine-month-old Erika was placed in her home. Based upon several examinations that Erika had received by a physician prior to placement, the social worker assigned to the case had told Ms. Allen at the time of placement that Erika was healthy. Approximately two months later, the adoptive mother became concerned about the child's unresponsiveness to sound. She sought further examinations, which confirmed that Erika was severely to profoundly deaf. It was undisputed that this fact was unknown by either party at the time of placement. The agency offered to take Erika back, but Ms. Allen chose to proceed with the adoption because of the strong emotional bond that she had already formed with the child during the three months Erika had been in her care.<sup>538</sup>

After several years of negotiations, Ms. Allen filed suit against the private agency for negligence, fraud, and breach of contract, in an attempt to get assistance with the special schooling, equipment and extraordinary medical expenses Erika required.<sup>539</sup> The case proceeded to trial on the contract claim alone. Erika's mother claimed that the agency breached both a written and oral contract to place a healthy child.<sup>540</sup> In reversing the jury award of \$17,000, the appellate court held that Ohio does "not recognize a breach of contract action by adoptive parents against an adoption agency."<sup>541</sup>

In *Richard P.*,<sup>542</sup> discussed in detail above,<sup>543</sup> plaintiffs

537 567 N.E.2d 1346 (Ohio App. 1990).

538 *Id.* at 1347-48. The private agency also advised her that she could try to adopt the child through the county to become eligible for adoption assistance. Unfortunately, there was no guarantee that the county would agree to place Erika with Ms. Allen, a single mother, and Ms. Allen did not want to risk losing Erika, with whom she was already very emotionally attached. Telephone Interview with Blaine Schwarz, attorney for plaintiff (Sept. 17, 1991).

539 *Id.* at 1348 and telephone interview with Blaine Schwarz (Sept. 17, 1991).

540 *Id.* at 1348 and Telephone Interview with Blaine Schwarz, attorney for plaintiff (Sept. 17, 1991).

541 *Id.* at 1349.

542 165 Cal. Rptr. 370 (Cal. App. 1980).

sought, in addition to their negligence and fraud claims, recovery for strict liability in tort, breach of express and implied warranties, and breach of contract for "failure to procure for plaintiffs a child that was physically and mentally healthy."<sup>544</sup> The trial court sustained a demurrer to the complaint and plaintiffs appealed all but the strict liability claim.<sup>545</sup> Claiming Gregory was a healthy child at the time of placement, the California appellate court denied a breach occurred.<sup>546</sup> The court also rejected the warranty claims, and posited a rationale that the *Allen* court echoed ten years later:

[T]o accept a warranty theory under circumstances as involved in this case, is to give legal recognition to the impossible, for no human being, no matter how healthy at birth, can ever be guaranteed to be unaffected by physical or mental impairment in later years.<sup>547</sup>

## 2. Policy Considerations Disfavoring Recognition of Liability

Imposing liability upon adoption intermediaries who have undertaken reasonable efforts to investigate an adoptee's health and who have fully and accurately disclosed health-related information serves none of the goals of deterrence, compensation, or fostering the institution of adoption. Deterrence is not served because there is no inappropriate conduct to deter. Strict liability, breach of a contract to place a healthy child, and breach of warranty are not premised upon wrongful conduct by the intermediary, but rather upon the existence of some present or future health impairment in the child. If the agency has made reasonable efforts to investigate, was unaware of this condition at placement, and accurately revealed all that it knew to the prospective adoptive

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543 See *supra* notes 457-65 and accompanying text.

544 *Richard P.*, 165 CAL. RPTR. at 374.

545 The appellate court's recitation of the issues on appeal omits strict liability, nor is it discussed in the opinion, suggesting the plaintiffs chose not to pursue this issue.

546 It is difficult to see how the court reached this conclusion on a demurrer. Plaintiffs alleged Gregory had the neurological problems at birth and that they were detectable at that time. *Id.* at 371-72.

547 *Id.* at 374; see also, *Allen v. Children's Services*, 567 N.E.2d 1346, 1349 (quoting *Burr v. Board of County Comm'rs*, 491 N.E.2d 1101, 1109 (Ohio 1986)). In *Roe v. Catholic Charities*, No. 5-89-0411, 1992 WL 29911 (Ill. App. Ct. Feb. 14, 1992), at \*13, the court also upheld dismissal of the adoptive parents' claim for breach of contract, simply stating, that the defendants had failed to plead a cause of action for breach of contract and explicitly refusing to rule on whether a breach of contract action would be appropriate in an adoption setting.



parents, imposing liability under these circumstances can have no deterrent effect.

A judgment for damages under one of these theories will place funds in the hands of adoptive parents, or an adopted child, who have suffered a loss as a result of the child's impairment, so to that extent compensation will occur. However, with limited exceptions, both tort law and contract law compensate losses only when the losses are created by some behavior of the defendant that justifies the liability. In the field of tort law, compensation is awarded for losses caused by conduct which is "socially unreasonable."<sup>548</sup> In contract law, the doctrines of impossibility and impracticability of performance were created to fairly allocate risk when a contract cannot be performed.<sup>549</sup> When an adoption intermediary takes reasonable steps to discover and inform adoptive parents of health-related risks, there is no analogously unreasonable behavior. The intermediary should not bear the burden of compensation for losses related to impairments in the child that could not have been discovered at the time of placement with the exercise of reasonable care, and which were in fact unknown to both parties.

Moreover, imposition of liability under such circumstances would not foster the institution of adoption. To award monetary damages in situations where the loss is totally beyond the control of the intermediary would subject intermediaries to the risk of unlimited liability. To the extent that inappropriate conduct is not the basis of liability, no adjustment in their procedures can avoid future liability. Recognizing liability under these circumstances would in fact make adoption intermediaries "the guarantors of their placements" and impose "an untenable contract of insurance that each child adopted would mature to be healthy and happy."<sup>550</sup> Such a guarantee is impossible to fulfill.

### 3. The "Product" Theories of Liability.

Although strict liability was mentioned in the pleadings of *Richard P.*,<sup>551</sup> it has not been addressed in a published opinion. The doctrine of strict liability has evolved to impose liability with-

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548 KEETON ET AL., *supra* note 132, § 1 at 6.

549 *See generally* CALAMARI & PERILLO, *supra* note 184, §§ 13-1 to 13-14.

550 *Burr*, 491 N.E.2d at 1109.

551 *See* *Richard P. v. Vista del Mar Child Care Serv.*, 165 Cal. Rptr. 370, 372 (Cal. Ct. App. 1980).

out fault (i.e. without violation of an intentional tort or negligence) upon defendants who engage in unusual, abnormal, and highly dangerous activities,<sup>552</sup> a group which could hardly be said to include adoption intermediaries; and upon manufacturers and merchant sellers who produce or sell unreasonably dangerous defective products.<sup>553</sup> This theory is neither applicable nor appropriate to adoption intermediaries. Adoption agencies and attorneys who serve as intermediaries do not "manufacture" or sell children—they offer a service. Nor are the children "products" whose condition can be controlled by the intermediaries.

The other two theories contain the same flaw. Breach of warranty encompasses several theories of recovery which compensate purchasers or users for defects in products,<sup>554</sup> without regard to the "fault" of the one who warranted the goods.<sup>555</sup> To a large extent today breach of warranties are governed by Article 2 of the Uniform Commercial Code, which applies to transactions in goods and does not govern contracts which are strictly for services.<sup>556</sup> Breach of contract for failure to place a healthy child also treats the child like a product and imposes liability without fault. In both *Richard P.* and *Allen*, the plaintiffs sought relief under contract theory, because they had contracted to adopt healthy children, but after placement it became apparent their children had significant health impairments. In neither case were the facts with regard to fault on the part of the intermediary developed in the record, because *Richard P.* was dismissed at the demurrer stage and *Allen*, although alleging negligence, proceeded to trial on the contract theory alone. In both cases the courts were justified in rejecting liability on the contract and warranty theories. To treat a child as a product is, as the court stated in *Allen*, repugnant and demeaning to the child. To impose liability without fault is unfair to the intermediary who, unlike a manufacturer or seller of goods, has absolutely no ability to control the physical or mental development of the child it is placing for adoption. If the intermediary has made reasonable efforts to investigate and fully and accurately

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552 KEETON ET AL., *supra* note 132 § 75, at 537.

553 *Id.* § 98, at 692-93.

554 *Id.* at § 95.

555 JAMES WHITE & ROBERT SUMMERS, UNIFORM COMMERCIAL CODE § 9-1 (3d ed. 1988).

556 *Id.* at § 9-2.

disclose health information, its obligation should be fulfilled and the risk of latent impairment must be borne by adoptive parents.

#### IV. SPECIAL CONSIDERATIONS BASED ON THE NATURE OF THE INTERMEDIARY

When intermediaries are private attorneys or governmental agencies, additional theories of liability may be available to plaintiffs considering wrongful adoption litigation.

##### A. *Private Attorneys*

Private attorneys play a significant role in the adoption of children in this country. The National Committee for Adoption reports that 31.4% of the domestic unrelated adoptions in the U.S. in 1986 were independent adoptions handled by private individuals, usually attorneys.<sup>557</sup> The nature of the attorney's role in an adoption may vary significantly, depending upon the preferences of the parties and the law of the state. In many states, an attorney may serve as an intermediary, to put a birth mother in contact with a couple who wishes to adopt.<sup>558</sup> In some of these states the adoption may occur through indirect placement, in which the birth parent(s) agrees to allow an attorney to choose the adoptive parents.<sup>559</sup> In California, an attorney may serve as facilitator,<sup>560</sup> but an attorney may not actually "place the child," (i.e., select the adoptive parents); rather, the birth parent(s) must place the child, and must personally know the prospective adop-

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557 NATIONAL COMMITTEE FOR ADOPTION, *supra* note 1, at 4, 60. Just over half of all domestic adoptions in the U.S. in 1986 were related adoptions, meaning that at least one of the adoptive parents or guardians is related to the child by blood or by marriage to the child's biological parent (i.e., a stepparent adoption). *Id.* at 59. In all likelihood the majority of these adoptions are handled by private attorneys rather than agencies.

558 For example, California allows attorneys to serve in this capacity. *See* D. LEAVITT, *supra* note 7, at 5-6. Often when attorneys serve in this capacity they are referred to as facilitators. *Id.* at 8.

559 This is the typical manner in which independent adoptions are handled in Oklahoma, for example.

560 *See supra* note 558.

In California, only 12% of all independent adoptions are originated with private attorneys . . . . In the greatest percentage the birth mother is first presented with names of couples wishing to adopt through her obstetrician. The attorney enters the process after the birth mother has selected a couple she would like to investigate further, often to arrange for a meeting.

HOLLINGER ET AL., *supra* note 7, § 5.03[1], at 5-14.

tive parent(s).<sup>561</sup> In other states, attorneys are not allowed to place children for adoption or to serve as intermediary in helping birth parents and prospective adoptive parents locate each other.<sup>562</sup>

In virtually all adoptions, however, agency or nonagency, an attorney will represent the adoptive parent(s), preparing the necessary court documents and representing the adoptive parent(s) at the hearings. If no agency is involved in the adoption, then the attorney's obligation as counsel for the adoptive parents should include performing an appropriate health investigation, or having a social worker do it, either as part of the home study or separately.<sup>563</sup> Moreover, as part of the attorney's duty to advise his or her client, the attorney should fully disclose all health-related information to the prospective adoptive parents or verify that such disclosure has been made. If an agency made the placement, it remains the duty of the attorney for the adoptive parents to make reasonable efforts to ascertain whether the health history of the child was investigated and the results disclosed to his or her client, to the extent the attorney can reasonably verify this.<sup>564</sup>

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561 See CAL. CIVIL CODE § 224.20 (West Supp. 1991) which provides:

The selection of prospective adoptive parent or parents shall be personally made by the birth parent or parents of the child and may not be delegated to an agent. The act of selection by the birth parent or parents shall be based upon his, her, or their personal knowledge of the prospective adoptive parent or parents.

See also CAL. CIVIL CODE § 224q (West Supp. 1991) (repealed July 1, 1992):

§ 224q. Place for adoption, defined

As used in this chapter, "place for adoption," in the case of an adoption to which neither the State Department of Social Services nor a licensed adoption agency is a party, means the selection of a prospective adoptive parent or parents for a minor child by the parent or parents. The selection shall be personally made by the parent or parents of the child and may not be delegated to an agent. The act of selection by the parent or parents shall be based upon his, her, or their personal knowledge of the prospective adoptive parent or parents. "Personal knowledge" includes, but is not limited to, their full legal name; age; religion; race or ethnicity; employment; whether other persons, whether children and adults, reside in their home, any health conditions curtailing their normal daily activities or reducing their normal life expectancy; and their general area of residence, or upon request, their address. "Prospective adoptive parent" means a person who has filed or intends to file a petition to adopt a minor who has been or who is to be placed in his or her physical care.

562 See HOLLINGER, *supra* note 7, § 6.04[1][a], at 6-94 (describing New York's restrictions on the role an attorney may play in placement and the initial contact).

563 See LEAVITT, *supra* note 7, at 25-26 (describing the role of counsel in an independent nonagency adoption and emphasizing the importance of obtaining a complete health history from both birth parents to be given to the prospective adoptive parents).

564 Raymond W. Godwin & Kenneth Biedzynski, *Liability for Wrongful Adoption Looms*

If an attorney has failed to fulfill this obligation, adoptive parents may wish to pursue a claim for legal malpractice against the attorney who represented them in an adoption.<sup>565</sup> The elements of legal malpractice are derived from the elements of an ordinary negligence claim.<sup>566</sup> To prevail, a plaintiff must prove (1) a duty to exercise ordinary skill and knowledge<sup>567</sup> arising out of the contract for professional services; (2) a breach of that duty by "failure to exercise professional skill,"<sup>568</sup> and (3) damages caused by the breach.<sup>569</sup> In determining the standard of care, the trend is to compare the degree of care and skill exercised by the attorney with a statewide or national standard, rather than a local or community standard.<sup>570</sup>

To date, no published opinions have considered a wrongful adoption claim against a private attorney.<sup>571</sup> The most difficult obstacle may be establishing the duty to investigate and disclose as part of the contract for professional services. In nonagency adoptions in which the attorney plays a role as facilitator or intermediary, the attorney representing the adoptive parents should be bound by the same professional guidelines<sup>572</sup> that govern an adoption agency. Even in cases in which the attorney is hired after the birth parent(s) and adoptive parent(s) have found each other through some other process, competent adoption representation

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*Large*, N.J.L.J., Sept. 12, 1991, at 7. The authors, an attorney who concentrates in adoption matters and his law clerk, advise fellow members of the New Jersey bar that attorneys representing adoptive parents in agency adoptions must be aware of the statutory disclosure requirements and "ensure that the agency fully complies with such guidelines by inspecting and analyzing the agency's medical report for its comprehensiveness and conformity. Overlooking this precaution will be inviting claims of legal malpractice." *Id.*

565 *Id.*

566 Keith J. Pflaum, Comment, *The Heart of Attorney Malpractice: A Discussion of the Standard of Care Required of Attorneys*, 13 J. LEGAL PROF. 311, 313 (1988).

567 Mallen, *supra* note 238, at 205.

568 Richard Bridgman, *Legal Malpractice — A Consideration of the Elements of a Strong Plaintiff's Case*, 30 S.C. L. REV. 213, 221 (1979).

569 *Id.*

570 Pflaum, *supra* note 566, at 317; Ronald Mallen, *Legal Malpractice: The Legacy of the 1970s*, 16 FORUM 119, 126 (1980).

571 Nor is the author aware of any such claims that have actually been filed. *Wallerstein* involved a claim against physicians who gave reports to an attorney handling a private adoption on the health of a child. Plaintiffs asserted a claim for breach of fiduciary duty against the doctors, among other claims. (Brief for Appellants, *Wallerstein v. Hospital Corp. of Am.*, 573 So. 2d 9 (Fla. Dist. Ct. App. 1990) (No. 89-1260). See *supra* notes 448-53 and accompanying text. This claim was dismissed by the trial court and, apparently, summarily rejected by the appellate court, which refused to discuss it in the opinion. 573 So. 2d at 10.

572 See *supra* notes 48, 71-74, 165, 285-86, 522-23 and accompanying text.

requires that the attorney undertake this vital function.<sup>573</sup> In addition, in many cases state statutes impose the duty to investigate and disclose health information upon an attorney who serves as intermediary or who files a petition for adoption.<sup>574</sup>

When an attorney represents adoptive parents in an agency adoption, the attorney's client is the adoptive parents, not the agency, and the attorney should still have an obligation to make reasonable efforts to ascertain whether the agency fulfilled its duty to investigate and disclose background information to his or her clients. In other contexts, attorneys have been found guilty of malpractice for failure to adequately advise their clients about matters intrinsic to the transaction for which the attorney was hired. For example, attorneys have been held to commit malpractice for failure to properly advise a divorce client about the community property interests in a military pension and for giving erroneous advice as to the meaning of a contract.<sup>575</sup> A similar obligation should be recognized in adoption practice for attorneys to advise clients of the agency's duty to investigate and disclose health information and to make reasonable efforts to verify that this has been done.<sup>576</sup>

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573 See *supra* note 563.

574 See, e.g., ARK. CODE ANN. § 9-9-505 (Michie 1991) ("Prior to placement for adoption, the licensed adoption agency, or where an agency is not involved, the person, entity or organization handling the adoption shall compile and provide to the prospective adoptive parents a detailed, written health history and genetic and social history of the child . . . ."); ALASKA STAT. § 25.23.185 (1991) ("At the time a petition for adoption is filed with the court, the agency or individual placing the person for adoption, or the petitioner, shall file with the court . . . ." background information which includes medical and social history).

On the other hand, in a few states, the confidentiality statutes may restrict an attorney's ability to disclose. In Oklahoma, this potential exists, although it has never been fully explored. See OKLA. STAT. ANN. tit. 10, §§ 57, 60.5A, 60.17 (West Supp. 1991).

575 See Mallen, *supra* note 570, at 126-27.

576 An attorney hired by the adoption agency to represent adoptive parents may encounter a conflict of interest in this regard. If the attorney is representing the adoptive couple in court, the attorney's client is the adoptive couple, and the duty to advise and ensure disclosure extends to them. Despite the fact that normally the agency and the couple are not in an adversarial relationship, the potential for such a relationship could develop if health information has not been adequately disclosed. Such potential suggests it is not advisable for an attorney representing the agency to also represent adoptive parents in agency adoptions.

A potential for conflict, although to a lesser degree, exists in a state such as California in which an attorney is permitted, with written consent, to represent both the adoptive parents and the birth parent(s). See CAL. CIV. CODE § 224.10 (West Supp. 1992). If a birth parent should request that vital health information not be disclosed (such as a potential AIDS infection), the attorney would have a conflict of interest requiring with-

The ability of an adopted child to rely upon a legal malpractice theory to recover for damages that nondisclosure may have caused is far more tenuous. Courts have been willing to recognize liability for malpractice in favor of third parties, i.e., nonclients, only in very limited circumstances.<sup>577</sup> The one relevant circumstance in which an attorney has been held liable to a third party is when the attorney's services to the client were intended by the client to directly benefit the nonclient.<sup>578</sup> For example, some courts have been willing to allow beneficiaries who were intended to inherit under a will drafted by the attorney to recover under this theory.<sup>579</sup> The Illinois Supreme Court, however, which concededly applies the exception more narrowly,<sup>580</sup> refused recovery in *Pelham v. Griesheimer* to children whose mother's divorce attorney had failed to ensure their father had named them as beneficiary of his life insurance policy, a requirement of the decree.<sup>581</sup> The court felt recovery should be limited to cases in which the nonclients were intended third-party beneficiaries of the attorney-client contract.<sup>582</sup> However, the *Pelham* court also pointed out that a divorce is an adversarial proceeding, and courts are more reluctant to recognize third party rights in this context.<sup>583</sup> Even though adoptions are not normally adversarial proceedings, adopted children may have difficulty convincing courts that the services rendered by the attorney were intended to directly benefit them, as opposed to providing them incidental benefits, and thus they may be precluded from utilizing malpractice as a theory of recovery.

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drawal from the case.

577 *Pelham v. Griesheimer*, 440 N.E.2d 96, 99 (Ill. 1982) (citations omitted) ("The traditional, general rule has been that the attorney is liable only to his client, not to third persons.")

See generally, Donald B. Hilliker, *Attorney Liability to Third Parties: A Look to the Future*, 36 DEPAUL L. REV. 41 (1986); Patrick E. Braun, Comment, *The Pelham Decision, Attorney Malpractice and Third-Party Nonclient Recovery: The Rise and Fall of Privity*, 1983 N. ILL. L. REV. 357.

578 *Pelham*, 440 N.E.2d at 99 (The nonclient must prove the clients intend to benefit the nonclient.). See Hilliker, *supra* note 577, at 60-61; Braun, *supra* note 577, at 376.

579 Hilliker, *supra* note 577, at 55, 59 (citing, inter alia *Lucas v. Hamm*, 364 P.2d 685 (Cal. 1961); *Guy v. Liederbach*, 459 A.2d 744 (Pa. 1983)).

580 *Pelham*, 440 N.E.2d at 100; Hilliker, *supra* note 577, at 58; Braun, *supra* note 577, at 376.

581 *Pelham*, 440 N.E.2d at 101.

582 *Pelham*, 440 N.E.2d at 99.

583 Braun *supra* note 577, at 375; *Pelham*, 440 N.E.2d at 101.

### B. Governmental Agencies

When the adoption intermediary is a public agency, plaintiffs in wrongful adoption actions may wish to consider seeking damages under 42 U.S.C. § 1983,<sup>584</sup> which creates a civil cause of action for those who are deprived of a constitutional right by a person exercising authority under the power of state law.<sup>585</sup> One such case, *Collier v. Krane*,<sup>586</sup> was brought by an adoptive mother seeking damages under Section 1983 against a state adoption agency that allegedly failed to disclose health history to her about her son, asserting that this failure violated her rights to substantive due process under the 14th Amendment. A similar suit, *Griffith v. Johnston*, was filed by a group of adoptive parents and children in Texas who sought only specific relief, but no monetary damages.<sup>587</sup>

Seeking damages under Section 1983 has certain advantages. It may allow a plaintiff to bring a claim that would be time-barred under other theories.<sup>588</sup> A state law restriction on governmental tort liability might be avoided.<sup>589</sup> Unfortunately, plaintiffs will en-

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584 42 U.S.C. § 1983 (1988) provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

585 RONALD D. ROTUNDA, ET AL., 2 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE §§ 19.13, 19.16, 19.17 (1986).

586 763 F. Supp. 473 (D. Colo. 1991).

587 899 F.2d 1427 (5th Cir. 1990), *cert. denied* 111 S. Ct. 712 (1991). Plaintiffs sought only injunctive relief, requesting the court order that the State disclose the full content of their files on the plaintiffs' children, with identifying information redacted, and that the state provide medical care and services to plaintiffs' children. In addition to this relief, plaintiffs also brought a § 1983 claim alleging violation of the Federal Adoption Assistance Act, and requested that the court order the state to inform prospective adoptive parents of the availability of federal adoption assistance, determine eligibility for these benefits with due care, and negotiate in good faith a federal adoption assistance agreement with prospective adoptive parents. *Complaint, Griffith v. Johnston*, 899 F.2d 1427 (5th Cir. 1990).

588 Counsel for plaintiff in *Collier v. Krane*, 763 F. Supp. 473 (D. Colo. 1991), suggested the reason a § 1983 theory, rather than a state law tort or contract claim, was pursued was that the statute of limitations had probably expired for claims under other theories. Telephone Interview with Paul Radosevich (Oct. 18, 1991).

589 For example in *Deshaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189 (1989), a suit against a social worker for failure to intervene prior to the death of a child at the hands of an abusive father, the court might have denied a tort claim by



counter so many restrictions and obstacles that recovery of damages under this theory is not likely to be successful.

In the first place, the scope of permissible defendants is very limited. Section 1983 actions may be brought only against persons acting under color of state law, which includes governmental agencies and officials and persons participating in a joint activity with them.<sup>590</sup> In a recent decision, the U.S. Supreme Court declared that a state is not a person subject to liability for damages under Section 1983.<sup>591</sup> In addition, the court held state governmental entities and state officials acting in their official capacities cannot be sued for damages under Section 1983.<sup>592</sup> Thus, damages for "wrongful adoption" cannot be recovered under Section 1983 against public adoption agencies which are subdivisions of a state department or agency, or state employees acting in their official capacities. Employees of state agencies may be sued in their individual capacity,<sup>593</sup> although respondeat superior is inadequate to establish their liability.<sup>594</sup> It must be shown an individual acted personally in the deprivation of the civil rights of the plaintiff.<sup>595</sup> In addition, individuals are subject to qualified immunity. To be found liable, it must be shown that their conduct violated "clearly established statutory or constitutional rights of which a reasonable person would have known."<sup>596</sup> In *Collier*, the judge held the social worker who had been sued individually violated no clearly established right even if she had failed to disclose health background, and that to be held liable she would have had to be "plainly incompetent" or to "knowingly violate the law."<sup>597</sup>

Counties and cities can be sued for damages under Section 1983<sup>598</sup> and qualified immunity does not apply to their employ-

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characterizing the social workers acts as discretionary or applying a \$50,000 ceiling on tort recovery against governmental subdivisions. Thomas Eaton & Michael Wells, *Governmental Inaction As a Constitutional Tort: Deshaney and its Aftermath*, 66 WASH. L. REV. 107, 134 (1991).

590 ROTUNDA, *supra* note 585, § 19.17.

591 *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 64, 71 (1989).

592 *Id.* at 71. See ROTUNDA, *supra* note 585, at § 19.16 (1991 Supp.); JACK RUZICHIO & LOU JACOBS, *EMPLOYMENT LAW CHECKLIST & FORMS 2-3.3* (1991).

593 *Hafer v. Melo*, 112 S. Ct. 358, 365 (1991) ("State officials, sued in their individual capacities, are 'persons' within the meaning of § 1983" and may be held personally liable for damages based upon actions taken in their official capacities.)

594 RUZICHIO & JACOBS, *supra* note 592, at 2-3.4.

595 *Id.*

596 ROTUNDA, *supra* note 585, § 19.29, quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 810 (1982).

597 *Collier v. Krane*, 763 F. Supp. 473 (D. Colo. 1991).

598 *Monell v. Dept. of Social Services*, 436 U.S. 658, 694 (1978); RUZICHIO & JACOBS,

ees.<sup>599</sup> However, liability cannot be imposed against them for wrongful acts of employees not authorized to make or in execution of the governmental entity's policy.<sup>600</sup> Liability will be imposed only where the conduct is authorized by the law or official custom of the governmental body.<sup>601</sup> Custom can be adopted formally or informally, through widespread or persistent practice, actual or constructive knowledge by the policymaking official, or ratification of a series of decisions.<sup>602</sup> However, cities or counties will not be liable under Section 1983 solely on the basis of respondeat superior.<sup>603</sup> Since public agency adoptions in most states are handled through state subdivisions rather than city or county subdivisions, and since one must prove an official policy or at least knowledge or ratification of the nondisclosure by city and county agencies, the opportunity to recover damages under Section 1983 will be limited for wrongful adoption plaintiffs.

The other major obstacle is the difficulty of establishing violation of a constitutional right. Section 1983 does not itself create rights; rather it provides a remedy for rights guaranteed by the constitution or federal laws.<sup>604</sup> In both *Collier* and *Griffith*, plaintiffs alleged their right to substantive due process under the 14th amendment was violated. Both courts refused to find such a violation.<sup>605</sup>

In both *Collier* and *Griffith*, plaintiffs asserted that failure to disclose health information to prospective adoptive parents' violated the parents "fundamental interest" to make an informed decision about whether to adopt.<sup>606</sup> In *Griffith* the adoptive parents further elaborated that their liberty and property interests were violated by the state's practice of intentionally or recklessly

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*supra* note 592, at 2-3.5.

599 ROTUNDA, *supra* note 585, §§ 19.28.

600 ROTUNDA, *supra* note 585, §§ 19.19, 19.32. RUZICHIO & JACOBS, *supra* note 592, 2-3.5.

601 ROTUNDA, *supra* note 585 §§ 19.17, 19.18; *See, e.g.,* LaShawn v. Dixon, 762 F. Supp. 959, 991 (D.D.C. 1991) (Foster children suing D.C. Dept. of Human Services must show "alleged unconstitutional action amounts to an official policy or custom and that a causal link exists between the policy or custom and the alleged harm.")

602 RUZICHIO & JACOBS, *supra* note 592, § 2-3.5.

603 *Id.*

604 *See, e.g.,* Collier v. Krane, 763 F. Supp. 473, 475 (D. Colo. 1991).

605 Griffith v. Johnston, 899 F.2d 1427, 1437-41; Collier, 763 F. Supp. at 475-79.

606 Griffith, 899 F.2d at 1437-38. The opinion in *Collier* refers to the asserted right more generally as a right of familial association and a right of privacy to receive important information. Collier, 763 F. Supp. at 475-78.

placing children in their homes who "physically attacked them or other children in the home, destroyed property, and committed crimes for which the family was responsible."<sup>607</sup> They contended that if they had been properly informed, they either would not have chosen to adopt these particular children, or they would have been able to provide early care and treatment that would have avoided this violent behavior. They argued that the actions of the state agency, by failing to provide information that could protect them, was analogous to "quartering soldiers in their home," or invading the privacy of their homes by searching for contraceptives.<sup>608</sup> Adoptive parents might further argue that because due process guarantees freedom of choice in the decision to create a family through biological means,<sup>609</sup> when the mechanism to create a family is in the hands of the state, the state must disclose all information to provide prospective adoptive parents the opportunity to make an informed choice about the creation of their family.

Both the *Collier* and *Griffith* courts took a broad approach to rejecting the existence of a fundamental right of this nature. They held that there is no fundamental right to adopt, and therefore the manner of handling an adoption cannot violate the prospective parents' fundamental rights.<sup>610</sup> Because adoption is created by statute rather than biology, it is not the type of family traditionally protected by due process. Such an argument, of course, is too broad. The plaintiffs were not arguing they had a fundamental right to adopt, a contention that would, as the courts pointed out, create conflicts with the fundamental rights of natural parents.<sup>611</sup> Instead they argued that if the state selected them as prospective adoptive parents and agreed to place a particular child with them, they had a fundamental right to health information that could enable them to make an informed decision. The *Griffith* court acknowledged this distinction and argued that even if the fundamental right was conceived more narrowly, it fails because due process prohibits governmental interference; it does not require

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607 Brief for Appellants at 17, *Griffith*, 899 F.2d 1427.

608 *Id.*

609 *See, e.g.*, *Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (The right to privacy protects "the interest in independence in making certain kinds of important decisions."); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (Right to procreate is a fundamental right); *Griswold v. Connecticut*, 381 U.S. 479 (1965) and *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (right to use contraceptives); *Roe v. Wade*, 410 U.S. 113 (1973) (right of women to terminate pregnancy). *See also* ROTUNDA, *supra* note 585, § 18.26.

610 *Griffith*, 899 F.2d at 1437; *Collier*, 763 F. Supp. at 476.

611 *Griffith*, 899 F.2d at 1427; *Collier*, 763 F. Supp. at 476.

governmental assistance.<sup>612</sup> When the government is the only source of critical information, the *Griffith* court's distinction between interference and assistance appears arbitrary. Nevertheless, given the current reluctance of the U.S. Supreme Court to expand the coverage of substantive due process and their adherence to its application only in "traditional" familial contexts,<sup>613</sup> successful assertion of substantive due process rights on behalf of adoptive parents does not appear promising in the near future.

Similarly, the argument presented in *Collier* that adoptive parents have a privacy right to receive important information is unlikely to be successful soon. Adult adoptees have on occasion unsuccessfully asserted a privacy and first amendment right to receive important information in an attempt to gain access to their confidential adoption records.<sup>614</sup> The courts' refusal to recognize this right has been based in part upon the need to protect the privacy interests of birth parents,<sup>615</sup> a factor that would rarely be significant in the adoptive parent's desire for nonidentifying health information.<sup>616</sup> The right to information gathered in the adoption process also has been distinguished from other types of information to which parties have been found to be entitled, such as information on contraceptives,<sup>617</sup> because this information is the product of a judicial process of adoption—whereas the privacy and first amendment cases establishing a right to information focused on state statutes forbidding the flow of information from one person to another.<sup>618</sup>

In *Griffith*, plaintiffs also asserted that the failure to disclose health information to their adoptive parents violated the due process rights of the adopted children. These plaintiffs claimed that the children's psychological problems were greatly exacerbated, to the point of requiring institutionalization, because they did not receive appropriate treatment that would have been provided if

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612 *Griffith*, 899 F.2d at 1438.

613 See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (Plurality held biological father had no fundamental liberty interest in relationship with child born during mother's marriage to another man.)

614 See, e.g., *In re Maples*, 563 S.W.2d 760, 762 (Mo. 1978); *Mills v. Atlantic City Dept. of Vital Statistics*, 372 A.2d 646, 651-652 (N.J. Super. Ct. Ch. Div. 1977).

615 *In re Maples*, 563 S.W.2d at 762; *Mills* 372 A.2d at 651-52.

616 See Blair, *supra* note 8, at 745-65 for a discussion of potential conflicts with the privacy rights of birth parents when an intermediary makes "reasonable efforts" to investigate health-related information.

617 See *Griswold v. Connecticut*, 381 U.S. 479 (1965).

618 *In re Maples*, 563 S.W.2d at 762.

their parents were given accurate health information.<sup>619</sup> The Court rejected this argument, relying upon the U.S. Supreme Court's ruling in *De Shaney v. Winnebago Soc. Servs.* that in general the due process clause confers no affirmative right to governmental aid.<sup>620</sup> In *De Shaney*, the Court conceded that a person in a special relationship, i.e., in state custody and restrained from acting on his own behalf, is entitled to affirmative duties of care and protection.<sup>621</sup> The *Griffith* Court, however, held that the special relationship created by foster care<sup>622</sup> lapsed upon placement or upon adoption.<sup>623</sup> Given the recognition of both *Griffith* and other courts that foster care does establish a special relationship creating a liberty interest in reasonably safe placements, free from physical, psychological, and emotional harm,<sup>624</sup> the decision in *Griffith* is inconsistent with the fact that the conduct of state officials for which relief is sought occurred while the adopted children were in the custody of the state. The selection of adoptive homes and the decision not to disclose vital health information occurs prior to placement. Moreover, even after placement and during the several months prior to adoption, the children are not wholly outside the authority of the public agency, which has the obligation to ensure that their needs are being met during this period. Due to the custodial responsibility the state has towards children placed for adoption through a public agency, the Section 1983 claims of children who suffer physical or psychological deterioration resulting from nondisclosure should be far more viable than the *Griffith* court was willing to recognize. Nevertheless, when the agency is a state as opposed to a county or municipal

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619 Brief for Appellants at 10, *Griffith v. Johnston*, 849 F.2d 142 (5th Cir. 1990).

620 489 U.S. 189, 195 (1989).

621 *Id.* at 200.

622 *Griffith*, 899 F.2d at 1439. Although the Court in *DeShaney* recognized that foster care could create a special relationship, it refused to rule on this issue. *De Shaney*, 489 U.S. at 200, n. 8. Other federal courts have recognized that foster care creates a special relationship entitling a child to protection and creating potential liability under § 1983. See, e.g., *K.H. v. Morgan*, 914 F.2d 846, 848-850 (7th Cir. 1990); *Taylor v. Ledbetter*, 818 F.2d 791 (11th Cir. 1987); *LaShawn A. v. Dixon*, 762 F. Supp. 959, 991-994 (D.D.C. 1991); *B.H. v. Johnson*, 715 F. Supp. 1387, 1396 (N.D. Ill. 1989); Cf. *Milburn v. Anne Arundel DSS*, 871 F.2d 474, 476 (4th Cir. 1989) (No affirmative duty to protect child from foster parents whenever child voluntarily placed in foster home by natural parents.).

623 899 F.2d at 1439.

624 *LaShawn A.*, 762 F. Supp. at 992-993.

entity, the other obstacles<sup>625</sup> discussed above may prevent recovery.

A final impediment to recovery in some cases will be the U.S. Supreme Court's determination that ordinary negligence cannot form the basis of a Section 1983 action.<sup>626</sup>

In sum, while under the right circumstances adopted children may have a more viable claim to recovery under Section 1983 than adoptive parents, current precedent and the numerous restrictions on liability under Section 1983 will make recovery of damages under this theory difficult for both adoptive parents and adopted children.<sup>627</sup>

## V. CONCLUSION

Adoptive parents and their children need and deserve the protection of the courts from all forms of intentional or negligent conduct by adoption intermediaries which prevent adoptive parents from receiving complete and accurate health-related information about their children prior to placement. For too many years, adoptive parents have frequently been denied the opportunity to make an informed choice about whether to adopt a particular child and about their ability meet that child's needs. In far too many instances, adopted children have failed to receive critically needed medical or psychological treatment because vital information was not disclosed to their parents. And on far too many occasions, children have been placed with adoptive families who were unprepared or unable to meet the challenges, both emotional and financial, that a child's impairment created, resulting in trauma for all members of the adoptive family and occasionally in disruption of the adoption.

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625 See *supra* notes 591-97 and accompanying text.

626 *Daniels v. Williams*, 474 U.S. 327, 332-33 (1986); cf. *Pagano v. Massapequa Public Schools*, 714 F. Supp. 641 (E.D.N.Y. 1989) (Seventeen separate incidents of negligence may be considered to rise to the level of deliberate indifference to an affirmative duty and be actionable.).

627 An additional consideration in all actions against public agencies is the extent to which sovereign immunity has been waived. Sovereign immunity was a major issue raised in the cases against public agencies. See *Burr v. Board of County Comm'rs*, 491 N.E.2d 1101, 1108-09 (Ohio 1986); *Michael J. v. County of Los Angeles, Dep't of Adoptions*, 247 Cal. Rptr. 504, 507-511. Discussion of the extent to which various states have waived sovereign immunity is beyond the scope of this Article.

Holding adoption intermediaries liable for intentional and negligent nondisclosure is necessary to deter future nondisclosure, to compensate the victims of the intentional or negligent conduct, and to foster continued confidence of potential adoptive parents in the adoption process, particularly in regard to the adoption of children with special needs. In order for those goals to be effectively achieved, it is imperative for courts to recognize as actionable not only intentional misrepresentations, but also intentional nondisclosure, negligent misrepresentation, negligent transmission, and negligent failure to investigate health history, when any of these types of conduct by an adoption intermediary prevents adoptive parents from receiving full and accurate health history prior to placement. Anything less might actually inhibit full and accurate disclosure by prompting intermediaries to discover and/or disclose as little as possible, in order to limit potential liability, or to excuse their actions as merely negligent rather than intentional.

Several legal theories, both in tort and contract, are available for plaintiffs to recover for the physical, emotional and pecuniary injuries inflicted by the intentional or negligent failure to accurately disclose health history. These theories include, under the appropriate circumstances, fraud, intentional infliction of emotional distress, negligence, negligent misrepresentation, negligent infliction of emotional distress, breach of contract, and legal malpractice. When an adoption was handled by a public agency, recovery under Section 1983 may also be considered, although its viability is in doubt.

In some instances courts have restricted or denied recovery by applying tort or contract doctrine in a manner that is inappropriate in the wrongful adoption context. Traditional impediments to recovery of damages for emotional distress, in jurisdictions where they have not already been jettisoned, should not inhibit such awards in wrongful adoption cases. The mental anguish inflicted upon adoptive parents by severe impairments with which they were unprepared to cope and upon adopted children who were thereby denied critical medical care are neither trivial nor feigned and should fit within the doctrines and exceptions that allow recovery even under traditional approaches. Another obstacle wrongful adoption litigants have encountered is the hesitance of courts to apply contract law in wrongful adoption actions. Such misgivings are misplaced when the breach asserted is the failure to provide reasonable and professional service.

Recognition of liability for the intentional or negligent failure to investigate and fully and accurately disclose health information enforces a reasonable standard of conduct upon adoption intermediaries. Liability should extend no further. In some cases, despite reasonable and good faith efforts of an adoption intermediary to investigate and disclose health history, a severe impairment will develop or be discovered that was unknown to the intermediary or the adoptive parents at the time of placement. Imposing liability for damages in these circumstances, under theories such as strict liability, breach of warranty, or breach of a contract to place a healthy child, is unfair to the intermediary and fails to achieve the benefits that liability for intentional or negligent misconduct would accomplish. Adoption intermediaries should not be required to guarantee the health of children whom they place, as if they were products manufactured or sold. What they should be required to do is make reasonable efforts to investigate and disclose health history so that adoptive parents will be prepared for and willingly accept the challenges presented by adoption, and adopted children will have the best opportunity possible for a satisfying relationship that meets their needs.



