

DECLARING A POLICY OF TRUTH: RECOGNIZING THE WRONGFUL ADOPTION CLAIM

Imagine for a moment wanting to adopt a child, either because you cannot have children of your own or for some other reason.¹ All you want is to have a child upon whom you can shower your love and affections. You go to a state agency where you realize, after attending a number of meetings, that healthy infants are in high demand and that your chances of adopting one within the next few years are slim. So you consider adopting a child with a correctable medical problem, thinking that it might be a little harder emotionally and financially but that the burden would be well worth the happiness of raising a child.

To your joy, the agency notifies you that a six-year-old girl named Amy is available for adoption. The social worker responsible for Amy's placement informs you that Amy's mother was blonde, blue-eyed and young, and that she liked to cook and wanted to become a nurse. The social worker also states that Amy had been hospitalized for malnutrition, that she was small for her age and that the agency removed Amy from foster care because of alleged abuse. Because the social worker provided you with no other information, you assume that Amy is otherwise healthy and ultimately adopt her.

Soon after the adoption, it becomes clear that Amy is behind her developmental level and that her behavior can be very disruptive. Concerned about Amy, you engage in a thorough search for any medical records held by the agency before you adopted her. In the process you come across a report that states that Amy's birth mother is actually a committed mental patient and has been diagnosed with schizophrenia. You also learn that doctors diagnosed Amy as being mentally retarded before she was five years old. Finally, you discover that the social worker who placed Amy with you knew these facts but never disclosed them. You have grown attached to Amy, and want to help her, but the medical bills and the constant care Amy needs are more than you can handle. What can you do?

Since 1986, a number of states have recognized that one remedy in this situation is to allow the adoptive parents to bring suit for the

¹ This hypothetical is based on the case of *Mohr v. Commonwealth*, 653 N.E.2d 1104, 1106-09 (Mass. 1995).

"wrongful adoption" of the child.² The circumstances in which the adoptive parents can recover under this theory, however, differ vastly among states.³ A number of courts, while recognizing such a claim, have limited its applicability to specific circumstances.⁴

This Note will trace the development of the wrongful adoption action from its inception in 1986 to its recognition by the Supreme Judicial Court of Massachusetts in 1995. In so doing, this Note will focus on the recent Massachusetts case, *Mohr v. Commonwealth*, and argue that the *Mohr* court correctly decided a number of related issues in favor of adoptive parents.⁵ Part I provides a brief history of adoption along with an explanation of background cases that have addressed the wrongful adoption claim.⁶ Part II argues that other jurisdictions should follow the *Mohr* decision because it appropriately bolsters adoptive parents' rights and supports adoption as an institution in society.⁷ Part III addresses the importance of allowing wrongful adoption claims based in negligence.⁸ Part IV discusses how imposing a duty to disclose upon adoption agencies is an essential part of making wrongful adoption claims an effective means of recovery for adoptive parents.⁹ Part V examines the *Mohr* court's determination of when a statute of limitations bars a wrongful adoption claim, and argues that courts in other jurisdictions should similarly decide this issue.¹⁰ Finally, Part VI considers the effects of recognizing the wrongful adoption claim upon intermediaries and children, concluding that allowing wrongful adoption claims ultimately serves all parties' best interests.¹¹

² E.g., *Mohr*, 653 N.E.2d at 1112; see *M.H. & J.L.H. v. Caritas Family Servs.*, 488 N.W.2d 282, 288 (Minn. 1992); *Burr v. Board of County Comm'rs*, 491 N.E.2d 1101, 1107 (Ohio 1986).

³ Compare *Mohr*, 653 N.E.2d at 1112 & n.10 (allowing recovery for intentional and negligent misrepresentations and requiring a duty to disclose) with *Mallette v. Children's Friend & Serv.*, 661 A.2d 67, 72-73 (R.I. 1995) (allowing recovery for negligent misrepresentation but not requiring a duty to disclose) and *Burr*, 491 N.E.2d at 1109 (allowing recovery for intentional misrepresentations only).

⁴ See, e.g., *Michael J. v. County of L.A. Dep't of Adoptions*, 247 Cal. Rptr. 504, 513 (Ct. App. 1988); *Burr*, 491 N.E.2d at 1109; *Meracle v. Children's Servs. Soc'y*, 437 N.W.2d 532, 537 (Wis. 1989).

⁵ See *infra* notes 258-320 and accompanying text.

⁶ See *infra* notes 12-257 and accompanying text.

⁷ See *infra* notes 258-88 and accompanying text.

⁸ See *infra* notes 289-307 and accompanying text.

⁹ See *infra* notes 308-20 and accompanying text.

¹⁰ See *infra* notes 321-29 and accompanying text.

¹¹ See *infra* notes 330-84 and accompanying text.

I. TRACING THE DEVELOPMENT OF THE WRONGFUL ADOPTION CLAIM

A. *The History of Adoption*

Although the first adoption statutes in the United States were not passed until the mid-nineteenth century,¹² there was little controversy over the passage of these laws because the idea of adoption had existed for centuries.¹³ The enactment of these laws was merely considered a natural step in the movement towards a more formal recognition and further development of the adoption process.¹⁴ Although the passage of these adoption laws was not one of the great issues of that time, these laws were, nonetheless, critical in bringing the force and structure of the judicial system into the private affairs of the family.¹⁵ The first American adoption statutes legalized relationships that would otherwise exist, as they had for years, solely in the form of simple informal agreements between persons.¹⁶

These early adoption statutes further provided, in varying degrees, for judicial supervision over adoptions.¹⁷ Courts became more involved in the adoption process, replacing the American tradition of informal transfer of parental rights.¹⁸ Since then, whenever there were any contests between the natural and custodial parents, for example, when the natural parents wanted their child back, the courts would have the authority to step in via a habeas corpus action.¹⁹ Because a habeas

¹² HELEN L. WITMER ET AL., *INDEPENDENT ADOPTIONS* 19 (1963). Texas and Vermont were the first states to enact adoption laws in 1850. *Id.* at 30. In 1851, Massachusetts enacted its first adoption statute. *Id.*

¹³ Mary E. Schwartz, Note, *Fraud in the Nursery: Is the Wrongful Adoption Remedy Enough?*, 26 VAL. U. L. REV. 807, 810 (1992). In fact, adoptions can be found in Greek mythology and in a number of Biblical stories. *See id.* at 810 n.19.

¹⁴ *See* WITMER, *supra* note 12, at 19.

¹⁵ *See id.*; Joan H. Hollinger, *Introduction to Adoption Law and Practice*, in 1 *ADOPTION LAW AND PRACTICE* § 1.02, at 22 (Joan H. Hollinger ed., 1988); Schwartz, *supra* note 13, at 811.

¹⁶ WITMER, *supra* note 12, at 24.

¹⁷ *Id.* at 30-31.

¹⁸ Schwartz, *supra* note 13, at 811 & n.30. This tradition of informal adoptions developed in part from the Puritan practice of "putting out," or sending children to live with families who could afford to raise them. *Id.* at 811 n.30. The informal transfer of parental rights was also prevalent in the South in the 1700s, where wealthy citizens often took large groups of orphans into their families. *Id.*

¹⁹ WITMER, *supra* note 12, at 25. Habeas corpus means, in Latin, "you have the body." BLACK'S LAW DICTIONARY 709 (6th ed. 1990). Although habeas corpus actions are usually brought by persons seeking release from unlawful imprisonment, in these custody battles between custodial and natural parents, habeas corpus was the usual form in which the dispute was presented to the courts. WITMER, *supra* note 12, at 25; *see* BLACK'S LAW DICTIONARY 709.

corpus proceeding was a flexible remedy akin to an action in equity, courts could mold their judgments to fit the needs of the parties before them.²⁰ Thus, courts played an increasingly vital role in formalizing adoptions and in mediating disputes that arose out of adoptions and other informal custodial arrangements.²¹

The first American adoption statutes fell into two broad categories: those that authenticated and made a public record of private agreements of adoption and those that provided for judicial supervision over the adoption process.²² These statutes also shared two distinct characteristics with Roman adoption law, the basis for American adoption statutes.²³ The first characteristic was the requirement of a complete severance of the adoptee from the biological family coupled with a complete acceptance into the adoptive family.²⁴ The second characteristic was the recognition of adoptive parents' rights as superior to those of either adoptees or biological parents.²⁵ Generally, both of these characteristics were intended to ensure that the adoptee became a full-fledged member of the new family and that the adoptive parents' family lines survived.²⁶

Initially, the adoption process matched children with parents based on superficial characteristics such as hair and eye color.²⁷ In the 1850s, Charles Loring Brace, a Protestant minister, spearheaded the "orphan train" movement to place selected children.²⁸ Brace believed that sending homeless children out to midwestern farms would reform these "little vagabonds."²⁹ Adoptive parents' qualifications and their plans for the children were never questioned.³⁰ As a result of this movement, from 1853 to as late as 1929, children were shipped from the East Coast to the Midwest for adoption where they were displayed on platforms and selected by families.³¹ The children were never formally adopted, and the families with whom they lived had no legal responsibility to

²⁰ WITMER, *supra* note 12, at 25.

²¹ *See id.* at 24-25, 28.

²² *Id.* at 30-31; Schwartz, *supra* note 13, at 811-12.

²³ Schwartz, *supra* note 13, at 811; *see* Leo H. Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 747 (1956).

²⁴ Huard, *supra* note 23, at 744; Schwartz, *supra* note 13, at 811.

²⁵ Schwartz, *supra* note 13, at 811; *see* Huard, *supra* note 23, at 745.

²⁶ Schwartz, *supra* note 13, at 811.

²⁷ *Id.* at 812.

²⁸ *See* Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 921, 923 (1991).

²⁹ *See id.* at 923-24.

³⁰ *Id.* at 924.

³¹ Schwartz, *supra* note 13, at 812 n.33; *see* Dickson, *supra* note 28, at 924.

care for them.³² Either an adoptive parent or a child could end their relationship at will.³³

Near the beginning of the twentieth century, however, ensuring the welfare of adoptees became an important consideration in the adoption process.³⁴ Although a number of state statutes already included provisions that permitted adoptions only if the adoption would promote the welfare of the child, a long-standing public concern in ensuring that homeless and destitute children were properly cared for gradually extended to the adoption process.³⁵ As a result, states began to recognize the adoptees' needs and pass legislation that took into account their welfare.³⁶

One of the most important developments in adoptees' rights was the statutory requirement of a social investigation, through which the suitability of the adoptive home would be determined, prior to formal adoption.³⁷ This requirement was essential to the adoption process because a court supervising the adoption needed full and complete facts about the child and his or her adopting parents in order to make proper decisions regarding the child's placement.³⁸ Furthermore, because the adoption process would affect the rest of the adoptee's life, an adoptee was entitled to the most thorough and careful work in the adoption process.³⁹ Not surprisingly, by 1954, the adoption laws of forty-four states contained provisions for social investigations.⁴⁰ Since then, states have continued their efforts to devise legal protection for the adoptee, effectively replacing the interests of the adoptive parents

³² Dickson, *supra* note 28, at 924.

³³ *Id.*

³⁴ See Charles Chejfec, Comment, *Disclosure of an Adoptee's HIV Status: A Return to Orphanages and Leper Colonies?*, 13 J. MARSHALL J. COMPUTER & INFO. L. 343, 351 & n.54 (1995). One commentator believes that this change developed after mental health theory began to impact juvenile law, resulting in a policy shift emphasizing that adoption was to serve the interests of the child. Schwarz, *supra* note 13, at 813.

³⁵ WITMER, *supra* note 12, at 31, 33. Several states required that the adoptive parents be able to sufficiently care for the adoptive child in their first adoption statutes, including Massachusetts, Illinois, Maine, New Hampshire, Ohio, Oregon, Rhode Island, Washington and Wisconsin. *Id.* at 31.

³⁶ *Id.* at 34. For example, in 1917, Minnesota amended its adoption statute to provide that an investigation of proposals for adoption be made by the State Welfare Department, a licensed children's agency, a social worker of the court or a similarly competent person. *Id.* at 35. Other protection still exists today which help prevent children from being adopted against their interest or casually removed from their natural homes. *Id.* at 34.

³⁷ *Id.* at 34.

³⁸ See *id.* at 35 (quoting Wisconsin Children's Code Commission report from early 1930s).

³⁹ *Id.*

⁴⁰ WITMER, *supra* note 12, at 35. Twenty-six states required these investigations while 18 states left investigations to the discretion of the courts. *Id.* at 35-36.

with the welfare of the adoptee as the focal point in the adoption process.⁴¹

B. *Agency Adoptions v. Independent Adoptions*

There are two kinds of intermediaries who place children with adoptive families—agencies and independent facilitators.⁴² In an agency adoption, children are placed with the help of a licensed social service agency.⁴³ After the prospective parents contact an adoption agency, the agency conducts in-depth interviews with them.⁴⁴ These interviews both allow the agency to carefully observe the adoptive parents and also give adoptive parents a general idea of what the adoption process entails.⁴⁵ Once the agency approves the prospective parents, their names are placed on a waiting list of qualified adopters.⁴⁶ The final step in the procedure is a court appearance to finalize the adoption.⁴⁷ The court ensures that the biological parents have given their voluntary, informed consent to the adoption.⁴⁸ Upon such a finding, the court then issues an adoption decree and a new birth certificate, signifying a new start to the child's life.⁴⁹

In an independent adoption, an unlicensed third party arranges the adoption.⁵⁰ Although the facilitator is usually a lawyer or doctor, some states also permit direct placements by the biological parents.⁵¹ The main purpose of the facilitator is to interview the biological parent(s) to determine the level of commitment to the adoption.⁵² A certified social worker or adoption agency performs the study of the prospective parents.⁵³ The final step in this type of adoption involves

⁴¹ See *id.* at 36–37. Such efforts have included forbidding adoption placements not made by a natural parent, guardian, relative, or authorized agency, prohibiting all independent placements except when made with relatives, and requiring that “whenever a child is placed independently for adoptive purposes, either the person who places the child or the person who receives the child must notify the state welfare department.” *Id.* at 36.

⁴² Schwartz, *supra* note 13, at 813–14.

⁴³ WILLIAM MEEZAN ET AL., *ADOPTIONS WITHOUT AGENCIES: A STUDY OF INDEPENDENT ADOPTIONS* 1 (1978); Schwartz, *supra* note 13, at 814.

⁴⁴ Schwartz, *supra* note 13, at 814.

⁴⁵ *Id.*

⁴⁶ *Id.* at 814–15.

⁴⁷ *Id.* at 815.

⁴⁸ *Id.*

⁴⁹ Schwartz, *supra* note 13, at 815–16.

⁵⁰ *Id.* at 813–14. These unlicensed third parties are commonly referred to as facilitators. See generally MEEZAN, *supra* note 43 (thoroughly discussing various studies done on independent adoptions).

⁵¹ MEEZAN, *supra* note 43, at 1, 7.

⁵² See Schwartz, *supra* note 13, at 814.

⁵³ *Id.*

the biological mother or father signing the surrender papers and the adoptive parents petitioning the court for adoption.⁵⁴

Although agencies and facilitators of independent adoptions have the same goal in mind—placement of a child with a compatible family—they differ in how they achieve this goal.⁵⁵ Agencies often provide additional services to biological mothers such as medical care and counseling through public assistance,⁵⁶ whereas independent adoptions provide more substantial financial assistance by compensating biological mothers for many of their expenses.⁵⁷ Agencies also often follow formal procedures that are essential to the protection of the child, such as exploring the motivation of the adoptive parents and their capacity for the parental role.⁵⁸ Conversely, individuals who facilitate adoptions may not formally undertake such procedures.⁵⁹

Because agencies and independent facilitators differ in their methods of placing children, biological and prospective parents may have different attitudes toward each type of adoption.⁶⁰ Some biological parents may perceive agencies as bureaucratic and more impersonal than an individual doctor or lawyer.⁶¹ Hence, biological parents may view independent adoptions as more confidential and as providing them with a forum in which they can state their concerns and have some say in the placement of their child.⁶²

Agency and independent adoptions also differ when it comes to disclosing specific information about an adoptee's background.⁶³ Studies have shown that while agencies share a good deal of information about a child's background, including medical and psychiatric history of biological parents, facilitators may disclose less background information to prospective parents.⁶⁴ This disparity in information may

⁵⁴ *Id.*

⁵⁵ See MEEZAN, *supra* note 43, at 10–11.

⁵⁶ *Id.* at 10.

⁵⁷ Schwartz, *supra* note 13, at 814 n.42.

⁵⁸ MEEZAN, *supra* note 43, at 11.

⁵⁹ *Id.*

⁶⁰ See *id.* at 10–11.

⁶¹ *Id.*

⁶² See *id.* at 11; Schwartz, *supra* note 13, at 814 n.42.

⁶³ MEEZAN, *supra* note 43, at 6.

⁶⁴ *Id.* at 9 (citing MARY ANN JONES, THE SEALED ADOPTION RECORD CONTROVERSY: A REPORT OF AGENCY POLICY, PRACTICE AND OPINION (Child Welfare League of America, 1976)). One reason why agencies may be more likely to share relevant information is that, due to their association with social services departments, they are more likely to have access to it. See VICTOR E. FLANGO ET AL., THE FLOW OF ADOPTION INFORMATION FROM THE STATES 13 (1994). Social services departments are great sources of this information because they have a programmatic interest in adoption information and, thus, obtain the participation of other agencies, such as bureaus of vital statistics, who also have access to relevant information. *Id.*

occur because biological mothers are reluctant to divulge information that might harm their child's chances of being adopted or because facilitators do not recognize the importance of obtaining this information.⁶⁵ Thus, adoptive parents who use an independent facilitator may receive less information than they might from an agency.⁶⁶ In either case, this information is important so that the adoptive parents can make a fully informed decision about whether or not to adopt, and can help the child develop his or her identity.⁶⁷

C. Tort Liability for Agency Decisions Concerning Foster Care:
DeShaney v. Winnebago County Department of Social Services

Although the United States Supreme Court has not addressed the issue of whether agencies should be held liable for wrongful adoption, the Court has considered whether agencies should be held liable for their placement decisions concerning foster care.⁶⁸ In 1989, in *DeShaney v. Winnebago County Department of Social Services*, the United States Supreme Court held that the State had no constitutional duty to protect a child from injuries caused by his biological father while the child was in his father's custody, even though the State had once given a third party temporary custody of the child.⁶⁹ In *DeShaney*, the State Department of Social Services suspected that a child was being abused by his father but took no action to permanently remove the child from his father's custody.⁷⁰ The child and his mother sued the State pursuant to 42 U.S.C. § 1983.⁷¹ They alleged that the State had effectively deprived the child of his liberty without due process of law, in violation of the Fourteenth Amendment, by failing to intervene when they knew or should have known that his father was abusing him.⁷² The Supreme Court reasoned that because the harm occurred while the child was in the custody of his father, who was in no sense a state actor, the State itself did not deprive the child of his liberty.⁷³ Thus, the Court held that the State's failure to protect an individual against private violence does not constitute a violation of the Due Process Clause.⁷⁴

⁶⁵ MEEZAN, *supra* note 43, at 6.

⁶⁶ *See id.*

⁶⁷ *See id.*

⁶⁸ *See DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 201 (1989).

⁶⁹ *Id.* at 192, 201.

⁷⁰ *Id.* at 192-93.

⁷¹ *Id.* at 193.

⁷² *Id.*

⁷³ *DeShaney*, 489 U.S. at 201.

⁷⁴ *Id.* at 197.

In *DeShaney*, Joshua's biological father had physically abused him for a long period of time.⁷⁵ The Winnebago County Department of Social Services ("DSS") first learned that Joshua might be a victim of child abuse in January 1982, when he was approximately two years old.⁷⁶ At that time, his father's second wife complained to police that the father had hit Joshua, leaving marks.⁷⁷ In response, DSS interviewed the father, but did nothing more.⁷⁸ In January 1983, Joshua was admitted to a local hospital with multiple bruises and abrasions.⁷⁹ Upon being notified of Joshua's condition, DSS obtained a court order from a Wisconsin juvenile court to place Joshua in the temporary custody of the hospital.⁸⁰ Despite this change in custody and the creation of a "Child Protection Team"⁸¹ to consider Joshua's situation, the juvenile court ultimately dismissed the case and DSS returned Joshua to his father's custody.⁸² For the next seven months, the caseworker assigned to Joshua's case observed a number of suspicious injuries on Joshua's head.⁸³ She also learned that he had not been enrolled in school.⁸⁴ The caseworker dutifully recorded these incidents, along with her continuing suspicions that someone was physically abusing Joshua.⁸⁵ Finally, in March 1984, Joshua's father beat him so severely that he fell into a life-threatening coma.⁸⁶ Joshua survived as a result of emergency brain surgery but had suffered so much brain damage that he was required to spend the rest of his life in an institution for the profoundly retarded.⁸⁷

In deciding that the State could not be held liable for failing to protect Joshua from his father's abuse, the United States Supreme Court reasoned that a state simply cannot be held liable when private citizens act violently.⁸⁸ The Court reasoned that a constitutional duty to provide an individual with certain services arises only when a state

⁷⁵ See *id.* at 192-93.

⁷⁶ *Id.* at 192.

⁷⁷ *Id.* at 191-92.

⁷⁸ *DeShaney*, 489 U.S. at 192.

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *Id.* This "team" consisted of a pediatrician, a psychologist, a police detective, a lawyer for Winnebago County, several DSS caseworkers, and various hospital personnel. *Id.*

⁸² *Id.* At this time, DSS entered into an agreement with Joshua's father to take a few steps toward improving Joshua's situation, such as enrolling Joshua in a preschool program and having Joshua's father seek counselling. *Id.*

⁸³ *DeShaney*, 489 U.S. at 192-93.

⁸⁴ *Id.* at 193.

⁸⁵ *Id.*

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ See *DeShaney*, 489 U.S. at 197.

restrains that person's freedom to the point at which the person is wholly dependent upon the state.⁸⁹ Otherwise, the Court explained, a state is not a guarantor of an individual's safety, even if it has once offered that person shelter.⁹⁰

Although the United States Supreme Court did not hold that a state has a constitutional duty to protect a child in Joshua's situation, the Court did note that a state may still acquire a duty under state tort law to provide such a child with adequate protection.⁹¹ The Court stated that a state may, through its courts and legislature, impose such affirmative duties of care and protection upon its agents.⁹² Because not all common-law duties owed by government actors are constitutionalized by the Fourteenth Amendment, however, the Court held that the State's failure to act in this situation did not deprive Joshua of his liberty in violation of the Due Process Clause of the Fourteenth Amendment.⁹³

D. Case Law: Other States' Treatment of Wrongful Adoption

In 1986, in *Burr v. Board of County Commissioners*, the Supreme Court of Ohio became the first court to hold that an adoption agency can be held liable for wrongful adoption.⁹⁴ In *Burr*, the adoptive parents brought suit against a public adoption agency which represented to them that it had a "nice big, healthy, baby boy" for the couple to adopt, even though the agency knew that the child had physical and mental problems at the time of adoption.⁹⁵ The agency also repre-

⁸⁹ *Id.* at 200. An example of a person who is wholly dependent on the state is a prisoner or an involuntarily committed mental patient. *Id.*

⁹⁰ *Id.* at 201.

⁹¹ *Id.* at 201-02 (possible duties which may arise in these situations include the duty to render certain services in a non-negligent fashion and the affirmative duty to act which arises due to a "special relationship").

⁹² *Id.* at 202.

⁹³ *DeShaney*, 489 U.S. at 191, 202.

⁹⁴ 491 N.E.2d 1101, 1107 (Ohio 1986); Marci J. Blank, Note, *Adoption Nightmares Prompt Judicial Recognition of the Tort of Wrongful Adoption: Will New York Follow Suit?*, 15 CARDOZO L. REV. 1687, 1695 (1994) (recognizing *Burr* as the first successful wrongful adoption case). The first court to even consider the tort of wrongful adoption was the California Court of Appeals in 1980. See *Richard P. v. Vista Del Mar Child Care Serv.*, 165 Cal. Rptr. 370, 373 (Ct. App. 1980). In this case, the California Court of Appeals held that the adoptive parents' claims of negligent and intentional misrepresentations failed because the defendant adoption agency had fully disclosed all the facts it had on hand to the adoptive parents. *Id.* The court went on to bar the adoptive parents' claim as a matter of public policy, reasoning that to impose liability in such a case would effectively make the adoption agency a guarantor of an adoptee's future health. *Id.* at 374.

⁹⁵ *Burr*, 491 N.E.2d at 1105-06.

sented that the child's mother was eighteen, unmarried, and simply could not handle raising the child when, in fact, the mother was a thirty-one-year-old mental patient at a state mental institution.⁹⁶

In order to recoup some of the child's medical expenses, which amounted to over \$80,000, the parents brought suit alleging that but for their reliance on the agency's material misrepresentations, they would not have adopted the child.⁹⁷ The Supreme Court of Ohio allowed the wrongful adoption claim, based in fraud, reasoning that when an infant is deceitfully placed in an adoptive home it would be a travesty of justice and a distortion of the truth to conclude that the agency's fraud is not actionable.⁹⁸ Noting that couples are able to weigh the risks of becoming natural parents, taking into consideration a host of factors, the court concluded that adoptive parents should be allowed to make the same decision in an informed and intelligent manner.⁹⁹ Thus, the court held that as long as all the elements of the tort of fraud were met, the Burrs would be eligible to recover for wrongful adoption.¹⁰⁰

In recognizing a cause of action for wrongful adoption, however, the Supreme Court of Ohio was careful to expressly limit its holding to intentional misrepresentations.¹⁰¹ The court was concerned that its decision would be interpreted as either requiring adoption agencies to be guarantors of their placements, or evincing a desire to shift the burden of parenting from parents to society by holding agencies liable whenever adoptees developed serious emotional or physical problems.¹⁰² The court nonetheless held that the agency's deliberate act of misinforming the Burrs deprived them of their right to make a sound parenting decision, and that they therefore suffered compensable injuries.¹⁰³ Thus, the Supreme Court of Ohio held that the record amply supported the trial court's finding that the agency engaged in fraud and affirmed the judgment in favor of the adoptive parents in the amount of \$125,000.¹⁰⁴ Most importantly, however, the court recognized a claim of wrongful adoption against adoption agencies for their intentional misrepresentations to adoptive parents.¹⁰⁵

⁹⁶ *Id.* at 1105, 1106 n.3.

⁹⁷ *Id.* at 1106 & n.3, 1108.

⁹⁸ *Id.* at 1107.

⁹⁹ *Id.* at 1109.

¹⁰⁰ *Burr*, 491 N.E.2d at 1105.

¹⁰¹ *Id.* at 1109.

¹⁰² *See id.*

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1105, 1108.

¹⁰⁵ *Burr*, 491 N.E.2d at 1105.

Similarly, two years later, in *Michael J. v. County of Los Angeles Department of Adoptions*, the California Court of Appeals held that adoptive parents could sue for wrongful adoption for an agency's intentional, but not negligent, misrepresentations regarding their adopted child's health.¹⁰⁶ In *Michael J.*, a woman adopted a child in 1970 who, according to the County adoption agency, was "suitable for adoption, being in good health, except for the port wine stain" on his upper torso and face that was the color of a deep sunburn.¹⁰⁷ Based on medical knowledge and information available in 1970, the County knew or should have known that the port wine stain was a manifestation of Sturge-Weber Syndrome.¹⁰⁸ In fact, when the adoptive mother asked about the stain, the County concealed its significance from her despite its knowledge that she was strongly considering adopting the child.¹⁰⁹

The adoptive mother did not learn that the child had Sturge-Weber Syndrome until he suffered an epileptic seizure on July 28, 1981.¹¹⁰ She then sued the County for her emotional distress and for the child's medical expenses.¹¹¹ The trial court granted the County's motion for summary judgment finding that public policy did not warrant a departure from general sovereign immunity in this area of law.¹¹² On appeal, the California Court of Appeals looked to the Supreme Court of Ohio's decision in *Burr* for guidance.¹¹³ In determining that public policy does in fact recognize a cause of action for wrongful adoption against adoption agencies, the California Court of Appeals also reasoned that it would be a "travesty of justice and distortion of the truth" if such deceit by adoption agencies were not actionable "when the tragic but hidden realities of the child's infirmities finally came to light."¹¹⁴ Like the *Burr* court, the California Court of Appeals limited the applicability of its decision by explicitly refusing to hold agencies liable for "mere negligence."¹¹⁵ It stated that it did not want to make agencies the guarantors of an adoptee's future good health.¹¹⁶ Despite this concern, the California Court of Appeals reversed the trial court's judgment and

¹⁰⁶ 247 Cal. Rptr. 504, 513 (Ct. App. 1988).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *See id.*

¹¹⁰ *Id.*

¹¹¹ *Michael J.*, 247 Cal. Rptr. at 505.

¹¹² *See id.* at 505 n.1, 506.

¹¹³ *Id.*

¹¹⁴ *Id.* (quoting *Burr*, 491 N.E.2d at 1109).

¹¹⁵ *Id.*; *see Burr*, 491 N.E.2d at 1109.

¹¹⁶ *Michael J.*, 247 Cal. Rptr. at 513; *see Burr*, 491 N.E.2d at 1109.

held that public policy would not condone concealment or intentional misrepresentation which misleads prospective parents.¹¹⁷

In 1989, in *Meracle v. Children's Service Society*, the Supreme Court of Wisconsin became the first court to hold that adoption agencies could also be held liable for their negligent misrepresentations about a child's health.¹¹⁸ In *Meracle*, the adoptive parents told the Children's Service Society in 1977 that they wanted a "normal, healthy child."¹¹⁹ By this, they meant that they wanted a child who did not have a disabling or terminal disease, who was not deformed and who was of average or above average intelligence.¹²⁰ In 1979, the adoptive parents learned about a child who was available but whose grandmother had died of Huntington's Disease.¹²¹ The agency representative explained to the parents that the child's chances of developing the disease were no greater than any other child's because the disease is transmitted between successive generations.¹²² According to the agency representative, then, the fact that the child's father had tested negative indicated that the child was not at particular risk of developing the disease.¹²³ In 1984, a neurologist diagnosed the child as having Huntington's Disease and the adoptive parents brought suit against the agency, alleging that the child was negligently placed and that the agency negligently misrepresented that the child was free of Huntington's Disease.¹²⁴ The adoptive parents sought a \$10,000,000 judgment for loss of society and companionship of the child, pain and suffering, lost wages and medical expenses.¹²⁵

In its defense, the agency argued that both a three-year statute of limitations and public policy barred the parents' claim.¹²⁶ In holding that the statute of limitations did not bar the parents' claim, the Supreme Court of Wisconsin reasoned that the statute had not begun to run until 1984, when the child's diagnosis formed the basis for a

¹¹⁷ *Michael J.*, 247 Cal. Rptr. at 513. In its holding, the court failed to address the question of whether the adoptive mother had a viable claim for emotional distress. See *id.*

¹¹⁸ 437 N.W.2d 532, 537 (Wis. 1989).

¹¹⁹ *Id.* at 533.

¹²⁰ *Id.*

¹²¹ *Id.* Huntington's Disease is a progressive or degenerative disorder characterized by irregular, spasmodic, involuntary movements of the limbs or facial muscles, accompanied by a gradual loss of mental capacity, ending in dementia. STEDMAN'S MEDICAL DICTIONARY 299 (25th ed. 1990).

¹²² *Meracle*, 437 N.W.2d at 533.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.* at 533-34.

¹²⁶ *Id.* at 534.

cause of action.¹²⁷ Until that time, the court concluded, the parents were not deprived of any liberty, nor had they suffered any injury, pecuniary or emotional, which would support a claim against the agency.¹²⁸

The court also held that the parents' claim for wrongful adoption did not violate public policy, reasoning that the adoptive parents could be provided a remedy without imposing too onerous a burden on adoption agencies in the state.¹²⁹ In fact, the court stated that permitting such a cause of action would not inhibit adoptions but would actually give potential parents more confidence in the adoption process and in the accuracy of the information they received.¹³⁰ The Supreme Court of Wisconsin also concluded that the parents' claim was not barred by public policy because allowing such claims would not expose adoption agencies to potentially limitless liability, nor would it make them the guarantors of the health of adopted children.¹³¹ The court stated that because it would not impose upon adoption agencies a duty to discover or disclose information, these agencies could be held liable only where they made incorrect, affirmative representations about a child's health.¹³²

This decision, however, was very narrow in that it allowed agencies to avoid liability by "simply refrain[ing] from making affirmative representations about a child's health."¹³³ The court further narrowed its holding by emphasizing that adoptive parents could only recover for *extraordinary* medical expenses incurred as a result of the negligent misrepresentation.¹³⁴ In so doing, the court did not, however, preclude the possibility of adoptive parents recovering for emotional distress where they fulfilled the elements of that cause of action.¹³⁵ Most importantly, the Supreme Court of Wisconsin broke new ground by

¹²⁷ *Meracle*, 437 N.W.2d at 536.

¹²⁸ *See id.*

¹²⁹ *See id.* at 537.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *Meracle*, 437 N.W.2d at 537. In other words, adoption agencies have no duty to disclose relevant information, but once the agency voluntarily assumed this duty and released some information, it could not then negligently breach that duty. *Id.*

¹³³ *See id.*

¹³⁴ *See id.* The court did not explicitly state what "extraordinary" medical expenses were, but this presumably means anything relating to the child's treatment for Huntington's disease. *See id.*

¹³⁵ *See id.* at 536. In this case, the court held that the adoptive parents did not have a claim for emotional distress because they could not demonstrate the existence of any physical injury, an essential element of that cause of action. *Id.*

holding that adoptive parents may bring a claim against agencies for their negligent misrepresentations regarding an adoptee's health.¹³⁶

Similarly, in 1992, in *M.H. & J.L.H. v. Caritas Family Services*, the Supreme Court of Minnesota held that public policy did not preclude adoptive parents from bringing a negligent misrepresentation action against an adoption agency.¹³⁷ In *Caritas*, a couple contacted a Catholic social service agency in 1980 and completed an application for adoption during a home interview in May of that year.¹³⁸ In November 1981, the couple was interviewed again for the purpose of exploring the parents' feelings toward a child with incest in his or her background.¹³⁹ According to the adoption summary, the prospective parents appeared open to any child except one with a serious mental deficiency.¹⁴⁰ Two days later, the agency informed the couple that the agency had a child they might wish to adopt but that there was a possibility of incest in the child's family.¹⁴¹ The agency also mentioned that there was a slight chance of abnormalities related to the possible incest.¹⁴² The couple ultimately adopted the child, relying on their belief that incest in the child's family background would not affect the child's health.¹⁴³

Throughout his childhood, the child experienced serious behavioral and emotional problems, causing the adoptive parents to investigate the child's genetic background in 1987.¹⁴⁴ At that time, at the adoptive parents' request, Caritas Family Services provided a document stating that the child was the son of a 17-year-old boy and his 13-year-old sister.¹⁴⁵ Upon learning these facts, the adoptive parents filed an action against the adoption agency, alleging that the agency failed to disclose the relationship of the child's genetic parents and all relevant history known to the agency about the birth parents.¹⁴⁶ The complaint also alleged that the adoptive parents had suffered mental pain and anguish and had incurred considerable expenses as a result of the agency's misrepresentations.¹⁴⁷

¹³⁶ See *id.*

¹³⁷ 488 N.W.2d 282, 288 (Minn. 1992).

¹³⁸ *Id.* at 284.

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Caritas*, 488 N.W.2d at 285.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 286.

¹⁴⁷ *Caritas*, 488 N.W.2d at 286.

The Supreme Court of Minnesota held that public policy did not preclude the wrongful adoption claim based in negligence, reasoning that the adoptive parents' compelling need for full disclosure of medical background information outweighed the burden placed on adoption agencies to provide this information in a non-negligent manner.¹⁴⁸ Such information, the court reasoned, is critical to adoptive parents in securing timely and appropriate medical care for a child and allows the adoptive parents to make important personal, health and family decisions.¹⁴⁹ The court further reasoned that non-negligent disclosure is particularly important because adoption agencies are the adoptive parents' only source of information about a child's medical and genetic background.¹⁵⁰

The *Caritas* court also held that the adoptive parents could not recover for negligent or intentional infliction of emotional distress, or for punitive damages, because they failed to allege sufficient facts to support these claims.¹⁵¹ As in *Meracle*, however, the Supreme Court of Minnesota failed to impose an affirmative common law duty upon adoption agencies to disclose facts about a child's parentage.¹⁵² The court did conclude, however, that once an agency undertakes disclosure of such information, it must do so completely and adequately.¹⁵³ Thus, the Supreme Court of Minnesota held that an adoption agency may be held liable for its negligent misrepresentations about an adoptee only where the agency volunteered the relevant information.¹⁵⁴

In 1992, in *Roe v. Catholic Charities*, the Appellate Court of Illinois for the Fifth District finally did what earlier courts had failed to do: it concluded not only that adoption agencies can be sued for negligent and intentional misrepresentations, but also that these agencies have a duty to disclose all available information about an adoptee in response to adoptive parents' inquiries.¹⁵⁵ In *Catholic Charities*, three

¹⁴⁸ See *id.* at 287, 288.

¹⁴⁹ *Id.* at 287.

¹⁵⁰ *Id.* at 288.

¹⁵¹ *Id.* at 290.

¹⁵² *Caritas*, 488 N.W.2d at 287-88; *Meracle*, 437 N.W.2d at 537.

¹⁵³ *Caritas*, 488 N.W.2d at 288. The court based this holding on the longstanding notion that even if one has no duty to disclose a particular fact, if one chooses to speak he or she must say enough to prevent the words from misleading the other party. *Id.* (citing *Newell v. Randall*, 19 N.W. 972, 973 (Minn. 1884)).

¹⁵⁴ *Id.*

¹⁵⁵ 588 N.E.2d 354, 365 (Ill. App. Ct. 1992). Although this decision came closer to imposing a duty on adoption agencies to disclose information about a child's background than any previous decision, it still failed to impose an affirmative duty to disclose this information and thus fell short of fully protecting the adoptee and her adoptive parents. See *id.*

families went to the same adoption agency in hopes of finding physically and mentally healthy children to adopt.¹⁵⁶ The parents stipulated to the adoption agency that they would only adopt a child if the agency would tell them all they knew about their prospective child's background and if they would incur no unusual or extraordinary expense by adopting the child.¹⁵⁷ In response, the agency, through its agents and employees, made statements to the three sets of adoptive parents that their particular child was healthy and only needed lots of love.¹⁵⁸ The agency further indicated to each set of parents that each child was normal in his or her physical and mental condition as well as level of development, and that the adoptive parents would thus incur no unusual or extraordinary medical expenses for the child's care and treatment.¹⁵⁹

Although the agency represented that the children were healthy, it knew that each of these children had serious behavioral problems, ranging from one child smearing feces on the interior walls of past foster homes to another child stomping to death a family dog at a foster home.¹⁶⁰ Two of these children had received extensive counseling and were diagnosed as suffering from emotional and social retardation.¹⁶¹ After adoption, all of these children continued their destructive and violent behavior.¹⁶² Consequently, the adoptive parents brought suit against the agency for fraud, breach of contract and malpractice.¹⁶³

Although the Illinois Appeals Court would not allow the breach of contract claim, the court did hold that the parents' claims of fraud and malpractice were viable.¹⁶⁴ The court looked to the Ohio Supreme Court's decision in *Burr* for its reasoning that it would be a "travesty of justice" if adoptive parents could not recover when agencies intentionally misrepresented the health of a child.¹⁶⁵ The court also countered the argument that fraud-based wrongful adoption claims would hinder efforts to place handicapped children with families by concluding that a policy of truth and straightforward dealing would in fact

¹⁵⁶ *Id.* at 356.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Catholic Charities*, 588 N.E.2d at 356.

¹⁶¹ *Id.*

¹⁶² *Id.* One child cut the whiskers off the family cat and flattened his mother's tires. *Id.* Another child painted a neighbor's house and exposed himself to neighbors. *Id.* The third child had severe episodes of violent behavior requiring the aid of professional counseling. *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 360, 362, 366.

¹⁶⁵ *Catholic Charities*, 588 N.E.2d at 357 (quoting *Burr*, 491 N.E.2d at 1107).

greatly aid these placements.¹⁶⁶ Because not all persons have the special strength and values required to adopt a handicapped child, the court reasoned, a policy of truth would ensure that only those who were willing and able to care for such children would be entrusted with this duty.¹⁶⁷ In addition, the court reasoned that if the adoptive parents knew of any potential problems with their child, they could ensure that the child received appropriate treatment as soon as possible.¹⁶⁸

Finally, in imposing a duty upon adoption agencies to disclose background information, the court stated that any increased burden on adoption agencies was slight relative to the need to preserve, encourage and strengthen the family unit.¹⁶⁹ The court reasoned that by requiring an adoption agency to disclose all available information regarding an adoptee to the adoptive parents, they could assume the awesome responsibility of raising a child with full knowledge of what it would entail for that particular child.¹⁷⁰ As a result, the court explained, the family unit would strengthen.¹⁷¹ The burden on agencies was considered by the court to be reasonable, if not inevitable, because the agency is the only party to the adoption with any information concerning the child's health and, thus, has no choice but to bear the burden of disclosure.¹⁷² Accordingly, the Illinois Appeals Court held that an agency had a duty to respond to adoptive parents' inquiries about a prospective child by disclosing all available information it possessed regarding the adoptee, that the agency had breached that duty, and that as a direct and proximate result of that breach, the adoptive families sustained damages.¹⁷³

In the early 1990s, the *Catholic Charities* decision had a strong impact on the decisions of other courts that were also considering the implications of allowing recovery for wrongful adoption.¹⁷⁴ For example, the Supreme Court of Pennsylvania, in the 1994 case of *Gibbs v. Ernst*, held that long-standing common law actions of fraud and neg-

¹⁶⁶ *Id.* at 360.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 365.

¹⁷⁰ *Catholic Charities*, 588 N.E.2d at 365.

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ *Id.* In addition, the Illinois Court of Appeals refused to impose a duty upon agencies to investigate the child's paternity. *Id.* at 361 (citing *Petrowsky v. Family Serv. of Decatur, Inc.*, 518 N.E.2d 664, 668 (Ill. App. Ct. 1987)). On the issue of damages, the court implied that punitive damages, though only allowed in rare circumstances, were a possibility in a wrongful adoption action provided that the wrongful act was accompanied by aggravated circumstances, including fraud, willfulness, wantonness, or malice. *Id.*

¹⁷⁴ See, e.g., *Mohr v. Commonwealth*, 653 N.E.2d 1104, 1110-11 (Mass. 1995); *Gibbs v. Ernst*, 647 A.2d 882, 888 (Pa. 1994); *Mallette v. Children's Friend & Serv.*, 661 A.2d 67, 69 (R.I. 1995).

ligence could be extended to the adoption setting.¹⁷⁵ The court also held that adoption agencies are under an obligation to reveal fully and accurately all available non-identifying information about an adoptee.¹⁷⁶

In *Gibbs*, a couple who were already foster parents and were interested in adopting a healthy Caucasian infant approached an agency about their prospects for adoption.¹⁷⁷ After telling the couple that there was a two-year waiting list for such an infant, the agency informed them that it would be easier if they adopted a child who was older and therefore harder to place with an adoptive family.¹⁷⁸ The couple agreed in 1983 that they would be willing to adopt such a child, as long as the child had no history of sexual or physical abuse or any mental or emotional problems.¹⁷⁹

In 1984, the agency informed the couple that they had been chosen to adopt a child who, although hyperactive, behind in his school work and the victim of verbal abuse by his mother, was otherwise normal.¹⁸⁰ The agency specifically denied any history of physical or sexual abuse.¹⁸¹ Immediately after the child was adopted in 1985, however, he began experiencing severe emotional problems, characterized by violence and extreme cruelty.¹⁸² Soon his conduct had deteriorated to the point where he had to be placed in the custody of the Department of Human Services ("DHS").¹⁸³ In September 1989, a caseworker from DHS informed the adoptive parents for the first time that the child had been severely abused, both physically and sexually, as a young child.¹⁸⁴ Records indicated that before the child was placed in numerous foster homes, he had been abused physically and sexually by his biological parents.¹⁸⁵ In response to these revelations, the parents brought suit against the agency under the theories of wrongful adoption and negligent placement of an adoptive child.¹⁸⁶

¹⁷⁵ 647 A.2d at 887.

¹⁷⁶ *Id.* at 892.

¹⁷⁷ *Id.* at 884.

¹⁷⁸ *Id.*

¹⁷⁹ *Id.*

¹⁸⁰ *Gibbs*, 647 A.2d at 884-85.

¹⁸¹ *Id.* at 885.

¹⁸² *Id.* (attempting to amputate the arm of a five-year-old, attempting to kill his cousin by hitting him over the head with a lead pipe, and placing Clorox in a cleaning solution causing his adoptive mother to severely burn her hands).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Gibbs*, 647 A.2d at 885-86. One incident of abuse involved the child's biological mother trying to cut off the child's penis. *Id.* at 886.

¹⁸⁶ *Id.*

In holding that adoption agencies can be sued for both negligence and fraud, the Supreme Court of Pennsylvania noted that many authorities, such as the Illinois Appeals Court in *Catholic Charities*, had recognized that an action for wrongful adoption is no more than an extension of common law principles to the adoption setting.¹⁸⁷ Furthermore, in considering the competing interests of adoptive parents and agencies, the court reasoned that the need of adoptive parents for accurate medical and social information about their prospective child outweighs any burden placed on adoption agencies.¹⁸⁸ Full and accurate disclosure, according to the court, would ensure that adoptive parents would be emotionally and financially equipped to raise a child with special needs and would assist, rather than diminish, an agency's effectiveness in placing children.¹⁸⁹

Even more significant than this determination, however, was the Supreme Court of Pennsylvania's holding that agencies have a duty to reveal, fully and accurately, all available non-identifying information—information which does not reveal the biological parents' identities—about an adoptee.¹⁹⁰ In so holding, the court explained that even if this duty had not been created by statute, the unique relationship between the adoption agency and the adoptive parents gives rise to such a responsibility.¹⁹¹ Recognizing such a duty, the court further reasoned, is important as a method of providing parents critical background information about their prospective children.¹⁹² The court also explained that this duty is not unreasonable because it only requires agencies to make reasonable efforts to disclose the medical history they have already obtained.¹⁹³ Agencies do not have an additional duty, based either in common law or under statute, to investigate a child's background.¹⁹⁴ For these reasons, the Supreme Court of Pennsylvania became one of the first courts to hold not only that an adoption agency is liable for its negligent and intentional misrepresentations, but also that agencies have a duty to disclose all available information about a prospective adoptee.¹⁹⁵

¹⁸⁷ *Id.* at 886, 887 (citing *Catholic Charities*, 588 N.E.2d at 357).

¹⁸⁸ *See id.* at 887.

¹⁸⁹ *Id.*

¹⁹⁰ *Gibbs*, 647 A.2d at 892.

¹⁹¹ *Id.* The court noted that such a relationship requires trust and confidence; after all, "[a]n adoption is not an arms-length sale of widgets." *Id.* at 893 (quoting D. Marianne Brower Blair, *Getting the Whole Truth and Nothing But the Truth: The Limits of Liability for Wrongful Adoption*, 67 NOTRE DAME L. REV. 851, 908 (1992)).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* at 893–94.

¹⁹⁵ *Gibbs*, 647 A.2d at 892.

Despite the influence of *Catholic Charities* and *Gibbs* on other jurisdictions' acceptance of a wrongful adoption action based in negligence, the Supreme Court of Rhode Island in *Mallette v. Children's Friend & Service* was still hesitant to impose a duty to disclose upon adoption agencies.¹⁹⁶ In 1995, the *Mallette* court held that although public policy does not preclude adoptive parents from maintaining a claim for negligent misrepresentation against an adoption agency, agencies have no concomitant duty to disclose relevant information to adoptive parents.¹⁹⁷ In *Mallette*, the adoptive parents approached an agency in 1981 about the possibility of adopting a child.¹⁹⁸ In 1982, the agency notified the couple that a child was available whom they might be interested in adopting.¹⁹⁹ According to the adoptive parents' complaint, the agency negligently misrepresented and omitted certain information regarding the child's medical and family history.²⁰⁰ In 1991, the adoptive parents first learned that the child's biological mother suffered from a number of medical conditions, including macrocephaly, tachycardia, tremors of the hands, and poor coordination.²⁰¹ Soon after these revelations, the adoptive parents brought suit against the agency.²⁰² The adoptive parents alleged that the agency negligently failed to provide information and records about the child's background, negligently misrepresented that information and failed to inform them of the child's probable need for future medical care.²⁰³

The Supreme Court of Rhode Island held that public policy did not preclude the adoptive parents from maintaining a claim for negligent misrepresentation against the defendant agency.²⁰⁴ Specifically, the court agreed with the Appeals Court of Illinois's reasoning in *Catholic Charities* that allowing suits in wrongful adoption did not require the creation of a new tort.²⁰⁵ Rather, the court recognized that such a cause of action merely required a straightforward application

¹⁹⁶ *Mallette*, 661 A.2d at 67, 71, 72, 73.

¹⁹⁷ *Id.* at 72, 73.

¹⁹⁸ *Id.* at 68.

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ *Mallette*, 661 A.2d at 68. Macrocephaly, also known as megacephaly, is a condition, either congenital or acquired, in which a person's head is abnormally large. *STEDMAN'S MEDICAL DICTIONARY* 910, 934 (25th ed. 1990). Tachycardia is rapid beating of the heart, usually applied to rates of over 100 beats per minute. *See id.* at 1550.

²⁰² *Mallette*, 661 A.2d at 68.

²⁰³ *Id.* The parents sought recovery for their emotional distress, the child's medical and psychiatric treatment expenses, and lost opportunities for proper medical and psychiatric treatment of the child. *Id.*

²⁰⁴ *Id.* at 72.

²⁰⁵ *See id.* at 69, 72 (citing *Catholic Charities*, 588 N.E.2d at 357).

and extension of well-recognized common law actions, such as negligence and fraud, to the adoption context.²⁰⁶ The Supreme Court of Rhode Island also agreed with the Minnesota Supreme Court's reasoning in *Caritas* that allowing this cause of action would actually give prospective parents more confidence in the adoption process and in the accuracy of the information they receive during that process.²⁰⁷

The Supreme Court of Rhode Island did, however, refuse to impose a duty on adoption agencies to disclose a child's background information unless the agency first volunteered the information.²⁰⁸ The court implicitly reasoned that no duty of care previously existed under statute or in common law requiring adoption agencies to disclose relevant information about a child's background.²⁰⁹ To avoid liability, an adoption agency could simply not disclose any information about a child's medical background.²¹⁰ If the agency did share the information, it would only have to do so in a non-negligent manner.²¹¹ Thus, the Supreme Court of Rhode Island determined that an adoption agency can be held liable for negligent misrepresentations of a child's health, but only if the agency first volunteers the information.²¹²

E. *The Most Recent Case: Mohr v. Commonwealth*

The most recent wrongful adoption case resolved a number of related issues in favor of the adoptive parents.²¹³ On August 14, 1995, the Supreme Judicial Court of Massachusetts in *Mohr v. Commonwealth* explicitly held that adoption agencies, public and private, are liable for their negligent and intentional misrepresentations of an adoptee's background, and that they have an affirmative duty to disclose relevant information to adoptive parents.²¹⁴ The court added that adoptive parents have no duty to investigate a child's background.²¹⁵ The *Mohr* case involved a couple who sued an adoption agency after learning

²⁰⁶ See *id.* (citing *Catholic Charities*, 588 N.E.2d at 357).

²⁰⁷ *Mallette*, 661 A.2d at 72 (quoting *Caritas*, 488 N.W.2d at 288).

²⁰⁸ See *id.* at 73.

²⁰⁹ See *id.* at 70.

²¹⁰ *Id.* at 73.

²¹¹ *Id.*

²¹² *Mallette*, 661 A.2d at 73.

²¹³ See *Mohr v. Commonwealth*, 653 N.E.2d 1104, 1109 (Mass. 1995) (determining when statute of limitations begins to run); *id.* at 1112 (allowing claims for negligent and intentional misrepresentations and requiring duty to disclose); *id.* at 1112 n.10 (holding affirmative duty to disclose applies to both state and private adoption agencies); *id.* at 1112 n.12 (holding no duty of adoptive parents to investigate).

²¹⁴ *Id.* at 1112 & n.10.

²¹⁵ *Id.* at 1112 n.12.

that their adopted child was mentally retarded instead of just small for her age, as the agency had represented.²¹⁶ In considering whether adoptive parents could bring a suit for wrongful adoption, the court reasoned that this was not a new action but, rather, an extension of well-recognized common law actions such as negligence and fraud.²¹⁷ The court further reasoned that the adoptive parents' need for an adoptee's background information outweighed any increased burden on adoption agencies.²¹⁸ Therefore, the court held that public policy called for recognition of a claim of negligent or intentional wrongful adoption and created a concomitant duty to disclose all available information about an adoptee's background.²¹⁹

In the early 1970s, the Mohrs approached the Department of Public Welfare ("Department") seeking to adopt a child.²²⁰ They attended a number of the Department's educational meetings in which they learned that certain special needs children were available for adoption and that a subsidy was available to encourage their placement.²²¹ In their adoption application, the Mohrs indicated that they would accept a child with a correctable medical problem, and that they would consider a child with an emotional problem.²²²

In March 1974, the Mohrs were notified by a social worker in the Department that a six-year-old girl named Elizabeth was available for adoption.²²³ The social worker described the biological mother as having blonde hair, blue eyes, fair coloring and as being about five-feet-one-inch tall and 130 pounds.²²⁴ The social worker also stated that Elizabeth had been removed from foster care because of alleged abuse, had been hospitalized for malnutrition and had been examined for dwarfism because of her small size.²²⁵ After living with Elizabeth for two years, the Mohrs finally adopted her in August 1976.²²⁶

Just prior to her adoption, Elizabeth underwent neurological testing and the Mohrs were told that she had a considerable behavioral disruption and was a child of below average intelligence.²²⁷ At this time,

²¹⁶ *Id.* at 1105-06, 1107-08.

²¹⁷ *Id.* at 1109 n.8.

²¹⁸ *See Mohr*, 653 N.E.2d at 1113.

²¹⁹ *Id.* at 1112.

²²⁰ *Id.* at 1107.

²²¹ *Id.*

²²² *Id.*

²²³ *Mohr*, 653 N.E.2d at 1107.

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ *Id.*

the doctor recommended therapy with the whole family and an inpatient evaluation to determine whether Elizabeth's problems were organic or related to early emotional deprivations.²²⁸ The Mohrs did not follow the doctor's recommendations until 1984, when they decided to have the suggested inpatient evaluation performed.²²⁹ It was only then, in the course of obtaining previously unseen medical records from the Department, that the Mohrs discovered that Elizabeth's mother had been diagnosed as schizophrenic and that Elizabeth herself had been previously diagnosed with mental retardation and cerebral atrophy.²³⁰ The Mohrs also discovered that Elizabeth's biological mother was a committed mental patient with a dull normal level I.Q.²³¹ Although the social worker who placed Elizabeth apparently knew at least some of this information, she failed to disclose it either to the Mohrs or in the petition she prepared for submission to the probate court in connection with Elizabeth's adoption.²³²

The Mohrs brought suit to recover sufficient damages to enable them to provide Elizabeth with the structured residential placement she would need throughout her lifetime to obtain proper treatment and supervision.²³³ They alleged that the Department negligently failed to provide accurate and complete information about Elizabeth's background and that the Department negligently and fraudulently misrepresented Elizabeth's medical and family history.²³⁴ The trial court entered a judgment in favor of the Mohrs in the amount of two hundred dollars, from which the Commonwealth (representing the state agency) appealed directly to the Supreme Judicial Court of Massachusetts.²³⁵

One major consideration of the Supreme Judicial Court was whether it should even recognize a cause of action for wrongful adoption.²³⁶ Holding that adoption agencies are liable for their intentional and negligent misrepresentations made to adoptive parents about a child's history prior to adoption, the court looked to other jurisdictions that had addressed the issue to support its reasoning.²³⁷ In so doing, the

²²⁸ *Mohr*, 653 N.E.2d at 1107.

²²⁹ *Id.*

²³⁰ *Id.* at 1106, 1107-08. The cerebrum is the part of the brain which includes the cerebral cortex and basal ganglia. *STEDMAN'S MEDICAL DICTIONARY* 280 (25th ed. 1990). Cerebral atrophy is a wasting of the cerebrum. *See id.* at 151, 280.

²³¹ *Mohr*, 653 N.E.2d at 1108.

²³² *Id.* at 1107, 1108.

²³³ *Id.* at 1109.

²³⁴ *Id.* at 1105-06.

²³⁵ *Id.*

²³⁶ *Mohr*, 653 N.E.2d at 1109.

²³⁷ *Id.* at 1109-11, 1112.

court agreed with the Rhode Island Supreme Court and the Appeals Court of Illinois that recognizing the tort of wrongful adoption requires only the straightforward application of well-recognized common law actions, rather than the creation of a new tort.²³⁸ Furthermore, the *Mohr* court reasoned that the compelling need for full disclosure of a child's medical and familial background outweighs any increased burden on adoption agencies.²³⁹ Prospective parents, the court concluded, need this information not only to obtain timely and appropriate medical care for the child, but also to make an informed decision regarding whether to adopt the child.²⁴⁰ Because the adoption agency is the only party with access to information about a child's background, the court noted, full disclosure is especially needed in the adoption context.²⁴¹ As did the *Caritas* court, the *Mohr* court concluded that allowing liability for negligent as well as intentional wrongful adoption does not impose an onerous burden on adoption agencies.²⁴² To avoid liability for negligent wrongful adoption, an agency need only use due care to ensure that it fully and adequately discloses information about a child's background so as not to mislead potential parents.²⁴³ Therefore, the Supreme Judicial Court held that public policy did not bar adoptive parents from bringing a suit for wrongful adoption.²⁴⁴

Another major consideration of the *Mohr* court was whether or not adoption agencies have a duty to disclose all known information about prospective adoptees.²⁴⁵ The court held that such a duty does exist under statute.²⁴⁶ The court reasoned that the notion of good faith and fair dealing dictates an affirmative duty to disclose, a duty that applies to both public and private adoption agencies.²⁴⁷ In so holding, the court analogized adoption to business transactions where there is a duty to disclose material facts known to one party at the time of the transaction.²⁴⁸ Finally, the court reasoned that the adoptive parents'

²³⁸ *Id.* at 1109 n.8, 1110.

²³⁹ *See id.* at 1112, 1113.

²⁴⁰ *Id.* at 1112.

²⁴¹ *Mohr*, 653 N.E.2d at 1112.

²⁴² *Id.* at 1113 (citing *Caritas*, 488 N.W.2d at 287).

²⁴³ *Id.*

²⁴⁴ *Id.* (citing *Mallette*, 661 A.2d at 72, which finds "recognition of such a tort would [actually] promote public policy").

²⁴⁵ *See id.* at 1112.

²⁴⁶ *Mohr*, 653 N.E.2d at 1112 (citing MASS. REGS. CODE tit. 110, § 7.213(3) (1994), which states in relevant part that "Department [of Social Services] shall provide the adoptive parents with all relevant information about a child to enable the adoptive parent to knowledgeably determine whether to accept the child for adoption.").

²⁴⁷ *Id.* at 1112 n.10.

²⁴⁸ *See id.*

need for full disclosure of a child's medical and familial background severely outweighs any increased burden upon adoption agencies.²⁴⁹ Thus, the court held that an adoption agency has an affirmative duty to disclose to adoptive parents information about a child that will enable them to make an informed decision about whether to adopt a child.²⁵⁰

A third major consideration of the Supreme Judicial Court was determining at what point the applicable statute of limitations begins to run in wrongful adoption claims, some of which are brought many years after the actual adoption.²⁵¹ In *Mohr*, the court specifically had to decide whether the Mohrs' claim was barred by a three-year statute of limitations.²⁵² The court held that the Mohrs had appropriately commenced this action within the three-year statutory period, reasoning that, in the absence of a governing statute, the statute of limitations would not begin to run until the date when the plaintiffs knew or should have known that they had been harmed by the defendant's conduct.²⁵³ The court applied this discovery rule, reasoning that it would be unfair to hold that a claim had expired even before a plaintiff knew or should have known of the harm.²⁵⁴ According to special questions presented to the jury, the Mohrs did not know the agency had harmed them until February 1984, less than three years before they filed their claim.²⁵⁵ Thus, the court held that the applicable statute of limitations had not expired and the Mohrs' claim of wrongful adoption, therefore, was timely.²⁵⁶ Because the Mohrs' claim had not been time-barred, and because the court was willing to recognize claims for negligent and intentional wrongful adoption against public and private adoption agencies, the court therefore held that the Mohrs had a viable claim and affirmed the lower court's judgment in their favor.²⁵⁷

II. IMPLICATIONS OF THE *MOHR* DECISION: BOLSTERING ADOPTIVE PARENTS' RIGHTS

By resolving a number of important issues in favor of adoptive parents, the Supreme Judicial Court in *Mohr* took a much needed step

²⁴⁹ See *id.* at 1112, 1113.

²⁵⁰ *Id.* at 1112.

²⁵¹ *Mohr*, 653 N.E.2d at 1109.

²⁵² *Id.* at 1109 n.7.

²⁵³ *Id.* at 1109.

²⁵⁴ *Id.*

²⁵⁵ *Id.*

²⁵⁶ *Mohr*, 653 N.E.2d at 1109.

²⁵⁷ See *id.* at 1109, 1112, 1112 n.10, 1112 n.12, 1115.

toward giving adoptive parents more rights in the adoption process.²⁵⁸ The *Mohr* court not only held that agencies could be held liable for their negligent and intentional misrepresentations, but it also clearly determined when adoption agencies may be held liable (at what point the statute of limitations begins to run), and exactly which actions (misrepresentations) or inactions (nondisclosure) could result in liability.²⁵⁹ The court further bolstered adoptive parents' rights by holding that the duty to disclose to adoptive parents information about a child's background applies to both public and private adoption agencies.²⁶⁰ Although both public and private agencies have been the subject of wrongful adoption suits in different states, the *Mohr* court was the only court to explicitly state that both have a duty to disclose background information to adoptive parents.²⁶¹ In so doing, the *Mohr* court emphasized the need for agency disclosure of background information in the adoption process, something which few courts in other jurisdictions have done.²⁶² Finally, the *Mohr* court held that adoptive parents do not have a duty to investigate a child's background for themselves.²⁶³ This is also essential to bolstering adoptive parents' rights because it protects adoptive parents, who do not have the expertise or ability to conduct investigations of prospective children as thoroughly as adoption agencies, from comparative negligence claims. Through its clear, unprecedented decision, the *Mohr* court appropriately strengthened adoptive parents' rights and set an example that courts in other jurisdictions should follow.

The reasoning behind the *Mohr* decision should be adopted by other courts because it takes into careful consideration the unique features of an adoption.²⁶⁴ These features make disclosure imperative and justify holding agencies liable for their misrepresentations.²⁶⁵ First, the purpose of an adoption is to place a child with a family who will

²⁵⁸ See *id.* 1104, 1109, 1112, 1112 n.10, 1112 n.12).

²⁵⁹ *Id.* at 1109, 1112.

²⁶⁰ *Id.* at 1112 n.10.

²⁶¹ Compare *Mohr*, 653 N.E.2d at 1112 n.10 (explicitly requiring both state and private agencies to disclose) with *Michael J. v. County of Los Angeles Dep't of Adoptions*, 247 Cal. Rptr. 504, 513 (Ct. App. 1988) (no explicit requirement for state agency to disclose) and *M.H. & J.L.H. v. Caritas Family Servs.*, 488 N.W.2d 282, 288 (Minn. 1992) (no explicit requirement for private agency to disclose).

²⁶² See *Mohr*, 653 N.E.2d at 1112. In fact, the Supreme Court of Pennsylvania in *Gibbs* was the only other court to hold that adoption agencies have a duty to reveal fully and accurately all available information about an adoptee. *Gibbs v. Ernst*, 647 A.2d 882, 892 (Pa. 1994).

²⁶³ See *Mohr*, 653 N.E.2d at 1112-13 n.12.

²⁶⁴ See *id.* at 1112.

²⁶⁵ See *id.*

give the child the love, support and care that every child needs.²⁶⁶ Adoptive parents cannot provide the child with appropriate support and care unless they have accurate medical and other relevant information about the adoptee. When the child has special needs, this information is particularly critical if adoptive parents are to obtain timely and appropriate treatment for the adoptee.²⁶⁷ If adoptive parents are not fully aware of a child's background, energy that could otherwise be spent showering affection upon the child will inevitably be spent feeling sad, frustrated and angry upon discovering that their child has serious physical or emotional problems that the adoption agency knew of but never disclosed.²⁶⁸ Because the adoption agency is the only party with access to such information, and because adoptive parents need this information if an adoption is to be successful, the adoption agency carries the burden of accurately passing on that information to those who can use it best—the adoptive parents.²⁶⁹

Second, the decision whether or not to adopt a child is significantly different from the decision whether or not to have a child of one's own. Although there are always certain risks associated with having a child, either biologically or through adoption, biological parents have the advantage of knowing what diseases occur in the family and thus may be passed down to their child.²⁷⁰ Just as natural parents weigh these risks, adoptive parents should be able to consider all the factors that might affect their decision to become parents of a particular child.²⁷¹ Adoptive parents can only do so if they are given all available information about an adoptee from the source who knows the child's history best—the adoption agency placing the child.²⁷² Even more significantly, many of the disorders suffered by adoptees are caused by third parties, such as a birth mother who used alcohol or drugs during pregnancy or biological or foster parents who sexually or physically abused the child.²⁷³ The likelihood that a child will have to cope with fetal alcohol

²⁶⁶ See Blair, *supra* note 191, at 894; Sanford N. Katz, *Rewriting the Adoption Story*, FAM. L. ADVOC. Summer, 1982, at 9, 10.

²⁶⁷ See Mohr, 653 N.E.2d at 1112.

²⁶⁸ See Dickson, *supra* note 28, at 945.

²⁶⁹ See Mohr, 653 N.E.2d at 1112.

²⁷⁰ See *id.*

²⁷¹ *Id.*

²⁷² In considering whether wrongful adoption claims threatened the biological parents' interests in concealing their identities, the court noted that wrongful adoption claims did not undermine those interests. See *id.* at 1113. Adoption agencies could simply provide information about a child's medical and familial background without disclosing the biological parents' identities. *Id.*

²⁷³ See Dickson, *supra* note 28, at 944.

syndrome, prenatal drug addiction or the scars of abuse is primarily within the control of the biological or foster parents.²⁷⁴ Adopters should have the same ability to control whether they will accept responsibility for children who have such problems.²⁷⁵ Thus, requiring disclosure would give prospective parents more confidence in the adoption process and ensure that intermediaries place adoptees with a family that is receptive and understanding of their special needs.²⁷⁶

Finally, those agencies and individuals who facilitate adoptions function very differently from the doctor who assists in the birth of a child. Like a doctor, the facilitator guides the parents through the required procedures and is concerned about the parents' happiness from the beginning until the child is "delivered." An adoption intermediary has other concerns, however, that a doctor does not have. An intermediary must also consider whether the biological parents are committed to the adoption proceeding and whether the adoption is in the best interests of the child.²⁷⁷ Before imposing a duty upon adoption agencies to disclose an adoptee's background information, a court must carefully consider the practical effects of wrongful adoption claims upon those agencies and individuals who facilitate adoptions.²⁷⁸

After weighing these considerations, however, a court would undoubtedly conclude, as did the *Mohr* court, that requiring adoption agencies to accurately disclose an adoptee's background information in a non-negligent manner does not impose any extraordinary or onerous burdens upon adoption agencies.²⁷⁹ To avoid liability, an agency need only use due care to ensure that it fully and correctly discloses all available information about an adoptee's background.²⁸⁰ Practically speaking, this would only require looking through the adoptee's file and conveying any medical or other background information to prospective parents. Intermediaries would also not be guarantors of an adoptee's future health because the notion of foreseeability, as found in the concepts of duty and proximate cause, places significant limits on an intermediary's liability.²⁸¹ The alternative, denying adoptive parents any recourse against adoption agencies for their nondisclosure or

²⁷⁴ *Id.*

²⁷⁵ *Id.*

²⁷⁶ See *Mohr*, 653 N.E.2d at 1112-13; Blair, *supra* note 191 at 882-83; Dickson, *supra* note 28, at 949.

²⁷⁷ See Schwartz, *supra* note 13, at 813-14.

²⁷⁸ See *Mohr*, 653 N.E.2d at 1113.

²⁷⁹ See *id.*

²⁸⁰ *Id.*

²⁸¹ *Id.*; Gibbs, 647 A.2d at 891; see *Roe v. Catholic Charities*, 588 N.E.2d 354, 364 (Ill. App. Ct. 1992).

misrepresentations regarding a child's background, is simply not a result that a court should sanction.²⁸²

The *Mohr* decision is exemplary in many respects, particularly in that it gives much needed support to adoptive parents' rights by clearly resolving a number of issues in their favor.²⁸³ Admittedly, however, without knowing the court's reasoning behind the decision, it may not be clear why courts in other jurisdictions should follow this decision. The *Mohr* court concluded that recognition of the wrongful adoption claim merely requires the application of common-law principles to the adoption context.²⁸⁴ The law does not, however, seem to allow recovery for persons in other related situations. For example, if a husband discovers that his wife made misrepresentations before their marriage regarding her physical or emotional well-being, he cannot recover the kinds of damages otherwise available in a divorce proceeding.²⁸⁵ At most, the husband may be able to annul the marriage.²⁸⁶ It appears, thus, that looking to related situations may not help one determine whether adoptive parents should recover when an agency makes misrepresentations about their adopted child.

As stated above, however, the adoption process and the relationship between the adoptive parents and the adoptee are unique. Furthermore, the adoptive relationship is too distinctive to compare it to other kinds of relationships. Primarily, the adoptee-adoptive parents' relationship is unique in that the stability of this relationship depends almost entirely on a third party—the intermediary placing the child.²⁸⁷ The adoptive parents rely upon the adoption intermediary to provide them not only with a child but also with any information that will help them to care for the child. The adoptee also depends upon the intermediary to place him or her with a family that will provide adequate

²⁸² See *Mohr*, 653 N.E.2d at 1113.

²⁸³ See *id.* at 1109, 1112, 1112 n.10, 1112–13 n.12.

²⁸⁴ *Id.*

²⁸⁵ The reason for this bar is that divorce conceptually requires grounds that have occurred only after the marriage. WALTER O. WEYRAUCH ET AL., *CASES AND MATERIALS ON FAMILY LAW: LEGAL CONCEPTS AND CHANGING HUMAN RELATIONSHIPS* 511 (1994). Thus, the remedies available in a divorce proceeding, such as rehabilitative alimony, are not available where the grounds for the action arose prior to the marriage. See *id.* at 625–27 (discussing the development of the “rehabilitative alimony” remedy and how it signals the evolution of marriage toward a contractual relationship).

²⁸⁶ Annulment is the appropriate remedy where the grounds for a suit between spouses arise before the marriage. *Id.* at 511. Obtaining an annulment is a difficult task, however, as one must prove: 1) the grounds for the annulment existed prior to the marriage; 2) as a result, marital consent has been impaired; and 3) the fraud itself was of an extreme nature going to the essential aspects of the marriage. *Id.*

²⁸⁷ See *Mohr*, 653 N.E.2d at 1112.

care and that is willing to cater to any of the adoptee's special needs. Thus, the foundation of the adoptee-adoptive parents' relationship completely depends on the agency or facilitator placing the child. Hence, requiring that an adoption intermediary perform its job thoroughly is the most effective way of ensuring that the adoption process is minimally disruptive to all parties involved.²⁸⁸

III. THE IMPORTANCE OF ALLOWING RECOVERY FOR WRONGFUL ADOPTION CLAIMS BASED IN NEGLIGENCE

As a number of jurisdictions have recognized a claim against adoption agencies for their negligent misrepresentations, the *Mohr* court was not revolutionary in similarly recognizing such a claim.²⁸⁹ The *Mohr* court's decision to allow negligent misrepresentation claims is nonetheless important to the development of the wrongful adoption suit for a number of reasons. First, an adoption agency's affirmative representations about an adoptee will not always rise to the level of being intentional or fraudulent. In *Meracle*, the agency accurately revealed to the prospective parents that Huntington's Disease existed in the adoptee's background.²⁹⁰ The misrepresentation occurred when the agency negligently stated that the child would not run any increased risk of contracting the disease despite her background.²⁹¹ Similarly, in *Caritas*, the adoption agency affirmatively and correctly stated to the prospective parents that there was a possibility of incest in the adoptee's family.²⁹² The agency in *Caritas* failed to mention, however, that the adoptee's parents were a seventeen-year-old boy and his thirteen-year-old sister.²⁹³ In both *Meracle* and *Caritas*, the agencies' representations were not so diametrically opposed to the truth that one could consider them fraudulent or intentional. Yet if those courts had not allowed the adoptive parents' wrongful adoption claims based in negligence, the adoptive parents would not have been able to recover for the real damages caused by the agencies' negligence.²⁹⁴ These damages are no less immense than those sought in a fraudulent wrongful adoption suit, and could run as high as ten million dollars for the

²⁸⁸ See Dickson, *supra* note 28, at 945.

²⁸⁹ *Mohr v. Commonwealth*, 653 N.E.2d 1104, 1112 (Mass. 1995); *Gibbs v. Ernst*, 647 A.2d 882, 887 (Pa. 1994); *Mallette v. Children's Friend & Serv.*, 661 A.2d 67, 72 (R.I. 1995).

²⁹⁰ *Meracle v. Children's Serv. Soc'y*, 437 N.W.2d at 532, 533 (Wis. 1989).

²⁹¹ *Id.* at 533, 537.

²⁹² *M.H. & J.L.H. v. Caritas Family Servs.*, 488 N.W.2d 282, 284 (Minn. 1992).

²⁹³ *Id.* at 285.

²⁹⁴ See *id.*; *Meracle*, 437 N.W.2d at 537.

child's medical expenses and for the adoptive parents' pain and suffering, lost wages and loss of the child's companionship.²⁹⁵

Courts in earlier cases that failed to recognize wrongful adoption claims based in negligence were concerned that allowing these claims would in effect make adoption agencies guarantors of an adoptee's future good health.²⁹⁶ In particular, the *Burr* court was concerned that negligent misrepresentation claims would in effect create untenable contracts of insurance, in which an adoption agency had a duty to ensure that each child adopted would mature to be healthy and happy.²⁹⁷ As mentioned above, however, the notion of foreseeability, as found in the concepts of duty and proximate cause, places significant limits on an intermediary's liability.²⁹⁸ Furthermore, to avoid liability for wrongful adoption based on negligence, an adoption intermediary need only use due care to ensure that it fully and adequately discloses information about a child's background so as not to mislead prospective parents.²⁹⁹ Thus, intermediaries, subject to wrongful adoption claims based in negligence, will not become guarantors of the health and happiness of the children they place. Rather, they will be given the appropriate responsibility of passing on, in a non-negligent manner, information that is essential to the health and happiness of the children they place.³⁰⁰

Another reason why adoption intermediaries should be liable for their negligent misrepresentations is that adoptive parents may not otherwise be able to bring a claim against state adoption agencies.³⁰¹ In holding that adoption agencies are liable for their negligent misrepresentations, the *Mohr* court recognized the difficulty of suing state adoption agencies when they are statutorily immune from liability for certain actions.³⁰² In *Mohr*, the Massachusetts Torts Claims Act provided that an agency could not be liable for any claim arising out of an intentional tort, including misrepresentation.³⁰³ In other words, adoptive parents could not sue state adoption agencies for their intentional misrepresentations about an adoptee.³⁰⁴ Absent a wrongful adoption

²⁹⁵ *Meracle*, 437 N.W.2d at 533-34.

²⁹⁶ *Michael J. v. County of Los Angeles Dep't of Adoptions*, 247 Cal. Rptr. 504, 512 (Ct. App. 1988); *Burr v. Board of County Comm'rs*, 491 N.E.2d 1101, 1109 (Ohio 1986).

²⁹⁷ *Burr*, 491 N.E.2d at 1109.

²⁹⁸ See *Mohr*, 653 N.E.2d at 1113; *Roe v. Catholic Charities*, 588 N.E.2d 354, 364 (Ill. App. Ct. 1992); *Gibbs*, 647 A.2d at 891.

²⁹⁹ *Mohr*, 653 N.E.2d at 1113.

³⁰⁰ See *id.* at 1112.

³⁰¹ *Id.* at 1113.

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Mohr*, 653 N.E.2d at 1113.

claim based in negligence, then, adoptive parents would have absolutely no recourse against state adoption agencies for their misrepresentations.³⁰⁵ The *Mohr* court, stating that it could not sanction such a result, thus recognized wrongful adoption claims based in negligence.³⁰⁶ Other jurisdictions that similarly provide immunity for state agencies may likewise run into this dilemma. After the *Mohr* decision, however, these states have a model solution to the problem—recognition of negligent, not just intentional, misrepresentation claims in the adoption context.³⁰⁷

IV. GIVING SUBSTANCE TO THE WRONGFUL ADOPTION CLAIM BY IMPOSING A DUTY TO DISCLOSE

Another important requirement established by the *Mohr* court is the affirmative duty of adoption agencies to disclose relevant background information to adoptive parents.³⁰⁸ The only other court to even approach imposing such a duty was the Illinois Appeals Court in *Catholic Charities*.³⁰⁹ Both of these courts recognized that imposing a duty to disclose served the important societal goal of allowing prospective parents to assume the responsibility of parenthood only after they are fully informed as to what parenthood entails.³¹⁰ In an adoption, this goal can be served only if prospective parents are aware of any special responsibilities they must assume for a particular child.³¹¹ Prospective parents cannot know the scope of those special responsibilities unless the intermediary discloses background information.³¹² Because adoption intermediaries are the only party with this information, the burden rightly falls upon them to provide it to the adoptive parents.³¹³

Without a duty to disclose, adoption agencies could avoid liability by simply not making any affirmative representations about an adoptee's health.³¹⁴ In *Mallette*, *Meracle* and *Gibbs*, the courts reasoned that by not having an affirmative duty to disclose, adoption agencies were prevented from becoming guarantors of an adoptee's future health.³¹⁵ The problem with this rationale, however, is that it creates a perverse

³⁰⁵ *Id.*

³⁰⁶ *See id.*

³⁰⁷ *See id.* at 1112.

³⁰⁸ *Mohr v. Commonwealth*, 653 N.E.2d 1104, 1112 (Mass. 1995).

³⁰⁹ *See Roe v. Catholic Charities*, 588 N.E.2d 354, 365 (Ill. App. Ct. 1992).

³¹⁰ *Mohr*, 653 N.E.2d at 1112; *Catholic Charities*, 588 N.E.2d at 365.

³¹¹ *See Mohr*, 653 N.E.2d at 1112; *Catholic Charities*, 588 N.E.2d at 365.

³¹² *See Mohr*, 653 N.E.2d at 1112; *Catholic Charities*, 588 N.E.2d at 365.

³¹³ *Catholic Charities*, 588 N.E.2d at 365.

³¹⁴ *See Gibbs v. Ernst*, 647 A.2d 882, 891 (Pa. 1994); *Mallette v. Children's Friend & Serv.*, 661 A.2d 67, 73 (R.I. 1995); *Meracle v. Children's Serv. Soc'y*, 437 N.W.2d at 532, 537 (Wis. 1989).

³¹⁵ *See Mallette*, 661 A.2d at 73; *Gibbs*, 647 A.2d at 891, *Meracle*, 437 N.W.2d at 537.

incentive for adoption agencies to remain silent.³¹⁶ Some adoptive parents may be particularly keen or familiar with the adoption process and ask questions that force an agency to break their "code of silence." Those who are not as knowledgeable, however, may soon find themselves consumed by unexpected medical or other expenses with no way to alleviate that burden.³¹⁷

In the long run, imposing a duty upon adoption agencies to disclose relevant information will not only deter agencies from making misrepresentations but also will allow adoptive parents to be compensated for the unexpected expenses incurred for the adoptee's treatment.³¹⁸ Another favorable consequence would be the encouragement, preservation and strengthening of the family unit.³¹⁹ Finally, as the *Mohr* court pointed out, requiring agencies to disclose background information will actually give potential parents more confidence in the adoption process and in the accuracy of the information they receive.³²⁰ Imposing an affirmative duty to disclose upon adoption agencies is therefore essential to making a wrongful adoption claim an effective means of recovery for adoptive parents.

V. GIVING ADOPTIVE PARENTS TIME TO DISCOVER THE HARM: DETERMINING WHEN THE STATUTE OF LIMITATIONS BEGINS TO RUN

Because adoptive parents may not bring wrongful adoption claims until years after an adoption, one of the most important decisions a court must make in the face of such a claim is whether the action is barred by the applicable statute of limitations.³²¹ The *Mohr* court held that, in a wrongful adoption case, the statute of limitations does not begin to run until the adoptive parents discover, or reasonably should have discovered, that they have been harmed by the agency's misrepresentations.³²² Courts in other jurisdictions should follow the *Mohr* court's determination of this issue because allowing parents to bring a claim only after they have discovered the harm and who caused it is

³¹⁶ See *Mallette*, 661 A.2d at 73.

³¹⁷ It is important to note that the *Mohr* court would not hold that parents themselves had a duty to investigate a child's background. *Mohr*, 653 N.E.2d at 1112-13 n.12. As a result, agencies cannot use comparative negligence theory as a defense. See *id.* This not only recognizes that adoptive parents have needs which society recognizes as important but it also implies that the burden is truly on intermediaries, and not prospective parents, to make sure those needs have been fulfilled. See *id.*

³¹⁸ See *id.* at 1105, 1109.

³¹⁹ *Catholic Charities*, 588 N.E.2d at 365.

³²⁰ *Mohr*, 653 N.E.2d at 1112-13.

³²¹ See *Mohr v. Commonwealth*, 653 N.E.2d 1104, 1109 (Mass. 1995).

³²² *Id.*

essential to making a wrongful adoption claim an effective means of recovery for adoptive parents.³²³ Adoptive parents cannot bring a wrongful adoption claim unless they know who to sue and what to sue for, and they cannot make these determinations until they first discover that there is something wrong with their child.³²⁴ Without relevant background information about the adoptee, adoptive parents do not have a context in which to place their child's behavior and determine whether it is abnormal at all. Thus, it could easily take years for adoptive parents to discover that their child even has a physical or emotional disorder, let alone that the adoption agency that placed the child knew that the child had the disorder at the time of adoption.³²⁵ Furthermore, as the *Mohr* court pointed out, courts should not require adoptive parents to investigate a child's background on their own.³²⁶ Without disclosure of background information, adoptive parents will never fully understand their child's problems or know how to best treat their child.

Limiting the amount of time adoptive parents have to discover that their child has problems to a set number of years also would be extremely unfair. Because each case involves a distinct set of facts, the amount of time in which adoptive parents could reasonably determine that their child has a problem, and that the adoption agency knew of this problem at the time of the adoption, would vastly differ in each case. Under the *Mohr* court's rule, adoptive parents at least have an appropriate amount of time to discover that their child has special needs.³²⁷ Adoptive parents have until they discover or reasonably should have discovered that their child has special needs and that the adoption agency placing the child knew, but failed to inform them, of those needs.³²⁸

Not only is it fundamentally fair for a statute of limitations to run only after plaintiffs know they have been harmed and by whom, but it also gives prospective parents more confidence in the adoption proc-

³²³ See *id.*

³²⁴ See *id.*

³²⁵ See *id.* at 1107-08, 1109. In *Mohr*, the court affirmed the jury's finding that the adoptive parents knew or should have known as of February 1984, almost eight years after they had adopted the child, the material facts forming the basis of their action. *Id.* at 1109. Although the adoptive parents were aware even before the adoption that the adoptee had a low average intelligence and engaged in disruptive behavior, until they conducted further tests in 1984, they never knew that the adoptee actually had been diagnosed with cerebral atrophy and mental retardation. See *id.* at 1107-08.

³²⁶ *Mohr*, 653 N.E.2d at 1112-13 n.12.

³²⁷ See *id.* at 1109.

³²⁸ *Id.*

ess.³²⁹ Adoptive parents are less apt to feel like they are taking a risk if they know that in the future, should they discover that the agency made misrepresentations about their child, they will not be barred from suit simply because a set number of years has passed since the child's adoption. Consequently, knowing that a wrongful adoption action may be brought against them at any point, even years after they have completed the adoption, adoption agencies should have incentive to disclose information accurately throughout the adoption process.

VI. EXAMINING THE EFFECTS OF A WRONGFUL ADOPTION CLAIM UPON INTERMEDIARIES AND ADOPTEES

A. *Wrongful Adoption Claims and the Duty to Disclose: How Heavy is the Burden on Agencies and Facilitators?*

As wrongful adoption suits arise in jurisdictions that have not yet addressed these claims, courts in those jurisdictions will need to evaluate the effects of these claims on all parties to the adoption, including the adoption agencies and facilitators. Because these intermediaries are usually the only source of information regarding adoptees, the burden necessarily falls on them to make sure that that information is passed on to the adoptive parents.³³⁰ Intermediaries not only have a moral duty to disclose this information, to do so in a non-negligent, non-fraudulent manner is neither unduly difficult nor time consuming.³³¹ Practically speaking, it does not seem that intermediaries need to do much more than disclose fully and accurately all available information they possess about an adoptee.³³² This may require them to spend more time with prospective parents discussing an adoptee's background, but at least, courts are not requiring intermediaries to undertake costly family history verifications or testing to discover hidden genetic-related conditions.³³³ Thus, the extra time agencies and facilitators must spend to disclose background information is minimal. To avoid liability and still carry on a successful practice, an intermediary need only use due care to ensure that it fully and adequately

³²⁹ See *id.*

³³⁰ See *Mohr v. Commonwealth*, 653 N.E.2d 1104, 1112 (Mass. 1995); *Roe v. Catholic Charities*, 588 N.E.2d 354, 365 (Ill. App. Ct. 1992).

³³¹ See, e.g., *Mohr*, 653 N.E.2d at 1112; *Catholic Charities*, 588 N.E.2d at 365; *M.H. & J.L.H. v. Caritas Family Servs.*, 488 N.W.2d 282, 288 (Minn. 1992).

³³² See *Mohr*, 653 N.E.2d at 1112; *Catholic Charities*, 588 N.E.2d at 365.

³³³ See *Mohr*, 653 N.E.2d at 1113.

discloses the information about an adoptee that it has in its possession.³³⁴

Adoption agencies that usually provide background information and follow formal procedures would not be as affected by the imposition of a duty to disclose as a facilitator of an independent adoption could be. Agencies could simply include a "disclosure session" in the list of procedures that its employees must follow in the adoption process. The only potential problem for agencies, but not facilitators, is that a public agency may lose money if its funding is related to the number of placements it makes and the number of placements decreases because more time is spent with each set of potential parents.³³⁵

Facilitators, while not at risk of losing funds, instead face greater problems. These problems stem from the fact that, as a whole, facilitators are less likely to collect background information and to recognize the need to pass it on to prospective parents.³³⁶ As a result, they may actually run a higher risk of being sued than adoption agencies.

The consequences of a wrongful adoption suit are also more drastic for independent facilitators. Facilitators of independent adoptions are individuals representing themselves and will always be sued personally, rather than as an employee of a larger, bureaucratic adoption agency. One lawsuit against a facilitator may be enough to ruin that person for life, as that person may never be able to repair the damage done to his or her reputation. Agencies, on the other hand, are less personal and are in the business of placing children with adoptive families.³³⁷ Consequently, they are more likely to attract prospective parents despite a tarnished reputation because of the high demand for adoptable children, while also having greater financial resources than many individuals. Thus, people who facilitate independent adoptions must consider the serious consequences of being sued for wrongful adoption if they do not take care to disclose fully and accurately any information they obtain about an adoptee.³³⁸

³³⁴ See *id.*

³³⁵ Blair, *supra* note 191, at 869 n.82 (noting that both private and public adoption agencies are under financial pressure to place children hastily).

³³⁶ See MEEZAN, *supra* note 43, at 6.

³³⁷ See *id.* at 10-11.

³³⁸ Another potential legal ethics problem involving independent adoptions is that facilitators who represent both the biological parents and the adoptive parents represent conflicting interests. See MEEZAN, *supra* note 43, at 10-11. Some may view adoptions as a non-adversarial proceeding, where a child, for whom the biological parents cannot care, is given to a family that is able to care for the child. See Schwartz, *supra* note 13, at 814. In actuality, however, the biological and adoptive parents have competing interests which can only be advocated by different attorneys. See *id.* This is especially true for independent adoptions, where biological parents sometimes have

B. *Constitutional Claims Against State Adoption Agencies: Comparing Liability for Foster Care Decisions*

As of yet, no set of adoptive parents has brought a constitutional claim against a state adoption agency. One can easily imagine, however, a scenario in which adoptive parents bring suit under 42 U.S.C. § 1983 against a state adoption agency, claiming that the agency's decision not to disclose background information about the adoptee deprived the adoptee of his liberty without due process of law.³³⁹ In this situation, because there are no existing cases involving constitutional claims by adoptive parents, a court would have to consider the analogous scenario of a state's liability for its foster care decisions.

In *DeShaney v. Winnebago County Department of Social Services*, the United States Supreme Court held that a state agency cannot be constitutionally liable for its placement decisions concerning foster care.³⁴⁰ The Court reasoned that once the state returned Joshua to his father's custody, the state agency could not be liable for the private violence of his abusive father, who was not in any way a state actor.³⁴¹ Although an agency may be liable for its decisions regarding individuals who are in the state's custody and wholly dependent upon the state, e.g., prisoners, the Court held that agencies could not be constitutionally liable for harms that occurred while the victim was not in state custody.³⁴²

At first glance, the *DeShaney* decision may appear to impede a constitutional claim in the adoption context, but closer examination quickly diminishes this possibility. *DeShaney's* focus on foster care placement decisions distinguish it from the decision whether or not to disclose background information about an adoptee.³⁴³ The policy concerns that might have led to the Court's decision in *DeShaney* simply do not exist in the adoption context.³⁴⁴

In the context of foster care, there are a number of valid reasons why state agencies should not be constitutionally liable for their decisions concerning placement. First, employees in state agencies—social

a say in the placement of their child. See *id.* Just as a party cannot be in privity of contract with two opposing parties, an independent facilitator should not be serving two masters—the biological and adoptive parents. See MEEZAN, *supra* note 43, at 10–11.

³³⁹ For example, this scenario could occur where the adoption agency decides not to disclose to the adoptive parents that an adoptee has a disease curable in its early stages, and as a result, the parents do not provide the child with proper treatment and the child dies.

³⁴⁰ *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 197 (1989).

³⁴¹ *Id.* at 197, 201.

³⁴² See *id.* at 200, 201.

³⁴³ See *id.* at 197, 201.

³⁴⁴ See *id.* at 200, 201.

workers, supervisors and administrators—make numerous foster care decisions every day.³⁴⁵ It would not be practical to hold state agencies liable for every single one of those decisions. Doing so would create an incredible potential for liability and would slow down the decision-making process immensely, perhaps creating a bureaucratic nightmare.³⁴⁶ Second, holding state agencies liable for their employees' decisions concerning foster care is difficult because these decisions are highly discretionary.³⁴⁷ It would be extremely hard to second-guess a social worker's placement decisions when they are based primarily on the social worker's subjective observations and personal beliefs as to what is in the best interests of the foster child.³⁴⁸ Finally, damages would be difficult to determine in this context, unless the plaintiffs could clearly allocate dollar amounts to definite harms.³⁴⁹ Otherwise, the more intangible harms that may result from an improper placement would be difficult to quantify.³⁵⁰ For these policy reasons, it is understandable why state agencies should not be liable for their decisions concerning foster care.

In the adoption context, however, these policy reasons do not apply. Unlike the numerous decisions made regarding each foster child, only one decision needs to be made with every adoption regarding whether or not to disclose an adoptee's background information. Holding adoption agencies liable for these decisions therefore would not constantly expose them to liability as it would state agencies making decisions regarding foster care.³⁵¹ Nor would the potential for liability significantly slow the adoption process, because not every decision regarding adoption would need a supervisor's approval. In fact, the "decision" to disclose background information really does not involve

³⁴⁵ See *Smith v. Organization of Foster Families for Equal. & Reform*, 431 U.S. 816, 835 n.36 (1977) (noting that social workers' heavy caseloads may make judicial review of their decisions concerning foster care merely perfunctory).

³⁴⁶ For example, every decision might need at least one supervisor's approval before being acted upon. See *id.* at 834–35.

³⁴⁷ *Id.* at 835, n.36 (noting that despite statutory limitations, state agencies have considerable discretion in deciding whether or not to return child to the natural parent).

³⁴⁸ See *id.* at 834 (citing studies that suggest that social workers of middle-class backgrounds, albeit unconsciously, are inclined to favor continuing placement of child in foster care with higher-status family over returning the child to his natural parents, thus reflecting bias that treats natural parents' poverty and lifestyle as prejudicial to best interests of child).

³⁴⁹ See *id.* at 840. It would be difficult to place a dollar value on the "grievous loss" resulting from the disruption of the stable relationships needed by a child, caused by a social worker's decision to remove a child from a foster family. See *id.*

³⁵⁰ See *Smith*, 431 U.S. at 840.

³⁵¹ See *id.* at 835 n.36 (recognizing heavy caseload of social workers who make foster care decisions).

discretion or consideration of the particular situation. All it involves is full disclosure of an adoptee's background information to every set of prospective parents.³⁵² Holding state adoption agencies liable for not disclosing this information would not require any second-guessing or re-evaluation of that decision. Courts need only determine *whether* a social worker disclosed information, and not *why* he or she failed to do so. Lastly, damages could be more easily determined in the adoption context. Recovery could easily be tailored to an adoptee's specific needs, because all that is required is a medical doctor's diagnosis. For all of these reasons, courts should not hesitate to hold state agencies constitutionally liable when they fail to disclose background information to adoptive parents. There may be good reasons not to hold state agencies liable for their decisions concerning foster care, but these reasons do not apply to the adoption context. In fact, the ease with which a state agency can avoid liability, combined with the potentially devastating consequences to the adoptee, mandates holding state agencies constitutionally liable for their misrepresentations or non-disclosure of an adoptee's background.

On the issue of whether state agencies could be liable in other contexts, the United States Supreme Court in *DeShaney* did leave open the possibility of holding state agencies liable under state law for tort-like claims.³⁵³ The Court implicitly reasoned that an agency may be held liable either because of the special relationship between the agency and the foster child or because, under tort law, one who renders services to another must do so in a non-negligent fashion.³⁵⁴ Applying this reasoning to the adoption context, holding state agencies liable under state tort law for their misrepresentations during the adoption process is completely reasonable.³⁵⁵ An adoption agency arguably has a special relationship with the adoptive parents, and an adoption agency clearly provides services to adoptive parents.³⁵⁶ Thus, as the *Mohr* court noted, it would not require the creation of a whole new tort to recognize a claim for wrongful adoption.³⁵⁷ Rather, a court need

³⁵² See *Mohr*, 653 N.E.2d at 1113.

³⁵³ *DeShaney*, 489 U.S. at 201-02.

³⁵⁴ See *id.* at 202 (citing RESTATEMENT (SECOND) OF TORTS § 323 (1965) and W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 56 (5th ed. 1984)).

³⁵⁵ See *id.* at 201-02.

³⁵⁶ Cf. *Catholic Charities*, 588 N.E.2d at 363 (holding that because social worker's license places him or her in position of trust, violation of that trust would constitute breach of fiduciary relationship).

³⁵⁷ See *Mohr*, 653 N.E.2d at 1111.

only apply well-established common law principles to the adoption context in recognizing a wrongful adoption claim.³⁵⁸

C. *Wrongful Adoption Claims and the Best Interests of the Children*

Recognizing a claim for wrongful adoption is in the adoptee's best interest because, ultimately, recovery allows an adoptee to obtain proper treatment for his or her special needs. Wrongful adoption claims ideally should also deter agencies from making misrepresentations, resulting in appropriate placements where adoptive parents are fully aware of their child's needs and can provide proper treatment right away.³⁵⁹ Adoptees undoubtedly benefit from the recognition of wrongful adoption claims, but courts imposing liability have questioned whether wrongful adoption claims treat the children like products that come with an implied warranty.³⁶⁰ Rejecting this approach is essential to protecting the interests of adoptees because it dehumanizes them and belittles their needs and concerns. As one commentator put it, "a child is not a used car, nor can a health impairment be equated with a faulty carburetor."³⁶¹ As long as the focus of wrongful adoption claims is the inappropriate conduct by the adoption agency, and not merely detection of an adoptee's illness, however, there is little risk that courts will need to undertake such an analysis.³⁶²

Another concern in recognizing the wrongful adoption claim is whether imposing a duty to disclose upon adoption intermediaries will negatively affect the placement of children with serious physical or emotional problems.³⁶³ Although placement of special needs children may be slightly more complicated and difficult than healthy children, creating a duty to disclose would probably not create a class of unwanted adoptees who either are not as vigorously marketed or whose problems are overstated for fear of liability.³⁶⁴ Generally speaking, imposing a duty to disclose would result in the placement of children with families who are aware of the adoptees' special needs and are

³⁵⁸ *Id.*

³⁵⁹ See Blair, *supra* note 191, at 879-80 (giving examples that show that sooner adoptive parents know all relevant information surrounding child's medical condition, sooner treatment can begin and child can progress toward better health).

³⁶⁰ See *id.* at 877.

³⁶¹ *Id.* at 859.

³⁶² See *id.* at 877.

³⁶³ See Chejfec, *supra* note 34, at 352-53; Dickson, *supra* note 28, at 944.

³⁶⁴ See Note, *When Love Is Not Enough: Toward a Unified Wrongful Adoption Tort*, 105 HARV. L. REV. 1761, 1779 (1992). But see Chejfec, *supra* note 34, at 353 (stating that "mere possibility that an infant has the slightest chance of manifesting an illness is enough to cause an otherwise satisfactory adoption match to fail").

capable of giving the children treatment and emotional support they need.³⁶⁵ This actually ensures that these children are properly placed with a family that is receptive to and understanding of their special needs.³⁶⁶ Rather than denying special needs children adoptive homes, imposing a duty to disclose will actually encourage agencies to place them with the many prospective parents who are willing to adopt a special needs child.³⁶⁷

Whether disclosing an adoptee's medical history may result in stigmatization and render that child unadoptable is a valid concern for proponents of adoptees' interests.³⁶⁸ The high demand for healthy infants indicates that most people who enter the adoption process do not wish to adopt a child with a physical or emotional disorder.³⁶⁹ Studies have shown that of the children in foster care awaiting adoption, sixty percent are special needs children.³⁷⁰ Disclosing a special needs child's background to prospective parents may be necessary, but it does run the risk of stigmatizing that child as unadoptable both by the agency and by the parents who reject the child.³⁷¹

Moreover, as one commentator argues, the risk of stigmatization extends to children who may not have disorders themselves but who have a history of disease or other illnesses in their backgrounds.³⁷² For example, if prospective parents learn that the biological mother of a child is HIV positive, they may erroneously conclude that the child is HIV positive.³⁷³ Similarly, a child could have tested positive for HIV falsely.³⁷⁴ Finally, disclosure of some information may cause prospective parents to make unfair inferences about an adoptee.³⁷⁵ For example, prospective parents may infer that because a child's biological parent tested positive for HIV, the child has a predisposition towards drug usage, promiscuity or homosexuality.³⁷⁶ Thus, adoption agencies engaging in a policy of truth may ironically help foster untruths about an adoptee's true physical or emotional state.

³⁶⁵ See *Mohr*, 653 N.E.2d at 1112; *Catholic Charities*, 588 N.E.2d at 365.

³⁶⁶ See *Mohr*, 653 N.E.2d at 1112; *Catholic Charities*, 588 N.E.2d at 365.

³⁶⁷ See *Dickson*, *supra* note 28, at 944, 949; Note, *supra* note 364, at 1779.

³⁶⁸ See *Chejfec*, *supra* note 34, at 353.

³⁶⁹ See *Dickson*, *supra* note 28, at 937 n.108.

³⁷⁰ *Id.* at 944.

³⁷¹ See *Chejfec*, *supra* note 34, at 353.

³⁷² See *id.* at 359-60.

³⁷³ *Id.* at 360.

³⁷⁴ *Id.*

³⁷⁵ *Id.* at 359.

³⁷⁶ *Chejfec*, *supra* note 34, at 359.

Although the concern over stigmatization of special needs children exists, requiring that agencies disclose all relevant information about an adoptee ultimately results in more successful adoptions of special needs children.³⁷⁷ The adoptive parents' fear that a child has undisclosed problems is likely to be a much stronger deterrent to special needs adoptions than an accurate appraisal of a child's actual problems.³⁷⁸ Furthermore, many people who seek to adopt are willing to consider a child with a handicap.³⁷⁹ In fact, experts who specialize in placing special needs children state that good adoptive homes are available, but agency under-staffing and bureaucratic red tape often hinder the placement process.³⁸⁰ Finally, prospective parents may receive state and federal subsidies for adopting special needs children to ease any increased financial burden.³⁸¹ In reality, then, there are a number of factors which help ameliorate any negative effects resulting from disclosure of an adoptee's background.³⁸² These factors, combined with competent, professional and efficient practices on the part of the adoption intermediary, may be enough to eliminate many of the problems which lead to wrongful adoption suits.³⁸³ Specifically, disclosure by intermediaries will likely strengthen the bond between adoptive parents and a special needs child by ensuring that the parents understand the child's needs and are willing to cater to them.³⁸⁴

CONCLUSION

In sum, the wrongful adoption claim is not only important to correct the mistakes (intentional or negligent) made by adoption intermediaries during the adoption process, but it is also essential to the success of the adoption process as a whole. Without the possibility of being held liable for their misrepresentations, agencies will not be deterred from making placements that jeopardize the well-being of adoptees and cause incredible distress to adoptive parents.³⁸⁵ Imposing upon adoption agencies a duty to disclose is also an essential part of

³⁷⁷ See Dickson, *supra* note 28, at 944-45.

³⁷⁸ *Id.* at 945.

³⁷⁹ *Id.* at 944 (citing study which showed that over 50% of adopters surveyed expressed willingness to adopt child with major physical handicap). For example, there are couples who exclusively request to adopt HIV/AIDS children. Chejfec, *supra* note 34, at 359 n.114. Some of those couples return to adopt again even after their previous child has passed away. *Id.*

³⁸⁰ Blair, *supra* note 191, at 863-64.

³⁸¹ *Id.* at 883, 883 n.158; Note, *supra* note 364, at 1778.

³⁸² See Blair, *supra* note 191, at 883; Dickson, *supra* note 28, at 944.

³⁸³ See Blair, *supra* note 191, at 863.

³⁸⁴ *Id.* at 866.

³⁸⁵ See *id.* at 879, 882.

the adoption process because it forces agencies to disclose information when they otherwise might avoid liability by simply withholding information about an adoptee's background.³⁸⁶ Without the recognition of wrongful adoption claims, adoption is therefore an incomplete process, with the potential for immense confusion and unexpected heartache. These two emotions simply should not be a part of the joyful experience of adopting a child.

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³⁸⁶ See *Mallette v. Children's Friend & Serv.*, 661 A.2d 67, 73 (R.I. 1995); *Meracle v. Children's Servs. Soc'y*, 437 N.W.2d 532, 537 (Wis. 1989).