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IN THE BEST INTEREST OF THE CHILD: LITIGATION IN THE POST-PLACEMENT ADOPTION SETTING

Introduction

*"There is urgent need for a quickened national conscience and a new national policy with this as a goal: to nurture well all of our children, in body, mind and spirit, that we as a people may grow in wisdom, strength, and humane concerns"*¹

Having been derived from the civil law, adoption² is the statutory process by which existing parental rights and responsibilities are extinguished and a new parent-child relationship between persons not related by nature is established.³ The general effect of an adoption decree is to vest all parental rights and duties in the adoptive

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¹ Gary B. Melton, *Is There a Place for Children in the New World Order?*, 7 NOTRE DAME J.L. ETHICS & PUB. POL'Y 491, 529 n.155 (1993) (quoting NICHOLAS HOBBS, *THE FUTURE OF CHILDREN: CATEGORIES, LABELS, AND THEIR CONSEQUENCES* 261 (1975)).

² Adoption is the act of lawfully assuming the parental rights and responsibilities of another person, usually a child under the age of 18. CHRISTINE ADAMEC & WILLIAM L. PIERCE, PHD., *THE ENCYCLOPEDIA OF ADOPTION* 17 (1991). "An old and inappropriate definition is 'to raise someone else's child,' and in some minds, this definition may still prevail. Yet it mistakenly implies the concept of ownership, and people cannot own other people, including children." *Id.* American adoption law reaches back to Roman law which was governed by the principle *adoptio naturam imitatur* ("adoption imitates nature"). Susan L. Brooks, *Rethinking Adoption: A Federal Solution to the Problem of Permanency Planning for Children With Special Needs*, 66 N.Y.U. L. REV. 1130, 1135 (1991).

³ See ADAMEC & PIERCE, *supra* note 2, at 17 (stating that "[a] legal adoption imposes the same rights and responsibilities on an adoptive parent as are imposed on and assumed by a parent when the child is born to the family"); see also Kelly Bennison, Note, *No Deposit No Return: The Adoption Dilemma*, 16 NOVA L. REV. 909 (1992) (describing adoption as a statutorily created "legal fiction"). The "parent-child relationship" includes all rights, privileges, duties and obligations existing between parent and child, including inheritance rights. MORTON L. LEAVY, *LAW OF ADOPTION* 93 (1968).

parents,⁴ whereby they achieve the equivalent status of biological parents.⁵

With respect to emotional wellness, every child has a need for the unbroken continuity of an affectionate and stimulating relationship with an adult.⁶ Toward this end, adoption affords a child the opportunity to live in a stable and loving environment.⁷ The ultimate goal of adoption is to provide every child with a situation that is permanent and safe.⁸ Its success is often discussed in terms of parental satisfaction, child development and the creation of integrated families.⁹ The majority of adopting families present a consistent and happy picture of parents and children defining each other in a mutually warm, supportive, caring and positive way.¹⁰ Unfortunately, however, such an encouraging picture cannot be painted in every instance.¹¹ In fact, the most troubling picture, and all too often

⁴ LEAVY, *supra* note 3, at 1, 6, 71; see ADAMEC & PIERCE, *supra* note 2, at 17 (stating that adoption grants social, emotional and legal family membership to the person who is adopted).

⁵ To avoid any stigma that may be carried by adoptive parents, the term "biological" parents versus "natural" parents is used throughout this Note because although "many birth mothers [prefer] the term 'natural mother,' most adoptive parents loathe it, resenting the implication that their parenting is unnatural." Tamar Lewin, *Which Ties Should Bind? The Strain on the Bonds of Adoption*, N.Y. TIMES, Aug. 8, 1993, § 4, at 1. The terms "natural family" and "natural parent" are no longer used by adoption professionals as they are viewed as derogatory toward adoptive parents. See Nancy Gibbs, *The Baby Chase*, TIME, Oct. 9, 1989, at 86-87; see also Brenda Hoggett, *Adoption Law: An Overview*, in ADOPTION: ESSAYS IN SOCIAL POLICY, LAW, AND SOCIOLOGY 133 (Philip Bean ed., 1984).

⁶ Gillian Pascall, *Adoption: Perspectives in Social Policy*, in ADOPTION: ESSAYS IN SOCIAL POLICY, LAW, AND SOCIOLOGY 13 (Philip Bean ed., 1984).

⁷ Note, *When Love is Not Enough: Toward a Unified Wrongful Adoption Tort*, 105 HARV. L. REV. 1761, 1761 (1992) [hereinafter *When Love is Not Enough*].

⁸ *Id.* at 1762; see Brigitte M. Bodenheimer, *New Trends and Requirements in Adoption Law and Proposals for Legislative Change*, 49 S. CAL. L. REV. 10, 16 (1975) (stating that, although there are competing interests in the institution of adoption as we know it, the principle objective is to provide a secure family environment for children).

⁹ Pascall, *supra* note 6, at 10.

¹⁰ *Id.* at 11.

¹¹ See Dirk Johnson, *Case of Boy Abandoned by New Parents Prompts Look at Adoption*, N.Y. TIMES, Apr. 22, 1990, § 1, at 22. "[M]ost adoptions result in healthy, loving families. But . . . some adoptive parents [harbor] unrealistic expectations about children and [do] not expect problems, which are inevitable." *Id.* (emphasis added).

the real one, is when adoptive parents, having had no knowledge that the child had or would develop physical or emotional disabilities, seek recourse when those problems do finally manifest themselves.¹²

This Note takes the position, for policy and practical reasons, that avoiding litigation which involves the adopted child¹³ is legally sound and superior to the remedies of annulment¹⁴ and wrongful adoption.¹⁵ Part I discusses the inadequacies of the existing system, which necessarily results in adoptive parents seeking recourse for damages sustained. Part II discusses the annulment and wrongful adoption remedies, which should be avoided as alternative remedies for adoptive parents in light of the "adverse effect theory,"¹⁶ as they do not effectively promote the best interests of the child. Part III summarizes the concept of the adverse effect theory in relation to the "best interests of the child" standard. Part IV suggests recommendations for reform that may prove to be more viable alternatives to annulment and wrongful adoption in achieving society's paramount goal—protection of the child.

¹² Stephen W. Hayes, *Sending Children Back: Efforts to Reverse Adoptions Face Strong Legal Obstacles*, A.B.A. J., Apr. 1992, at 88.

¹³ See ADAMEC & PIERCE, *supra* note 2, at 16-17. The terms "adopted child" or "adoptive child" are the more acceptable labels and shall be used throughout this Note. "Adoptee" will not be used because it:

[I]s considered negative by many adoption professionals because it defines a person's entire existence around the issue of adoption, which is only one among many factors affecting an individual. It may also create the impression of a great degree of differentiation between "adoptees" and "nonadoptees," even though an adopted person is the lawful child of adoptive parents with the same rights and privileges as any child born to them.

Id.

¹⁴ To annul is to make void; to dissolve that which once existed. BARRON'S LAW DICTIONARY 22 (2d ed. 1984); see Hayes, *supra* note 12, at 88. In the context of this Note, "annulment" means adoptive parents return to court to undo the adoption.

¹⁵ Wrongful adoption is an action in tort providing a remedy of compensatory damages to adoptive parents of children who possess a serious physical or emotional disability, which disability is either later diagnosed, or which latently manifests itself. Hayes, *supra* note 12, at 88.

¹⁶ In the context of this Note and, specifically, tort litigation, the "adverse effect theory" is predicated on the notion that "some day the child might be adversely affected by learning he or she was unwanted . . ." Michael C. Pallesen, Note, *Wrongful Pregnancy Actions: Should Courts Allow Recovery for Childrearing Expenses?*—Burke v. Rivo, 406 Mass. 764, 551 N.E.2d 1 (1990), 70 NEB. L. REV. 361, 367 (1991).

I. Inadequacies of the Adoption System

The initial step in any adoption proceeding is the selection of a child to be adopted.¹⁷ Such selection may be arranged through public placement agencies, whose methods of operation are governed by state laws and regulations, thereby providing certain benefits and safeguards¹⁸ to the adoption parties, or by unregulated private placement agencies.¹⁹ The process appears quite simple on its face. In practice, however, the adoption system contains serious flaws²⁰ and adoptive parents are becoming increasingly vulnerable to mistreatment.²¹ Such mistreatment is the product of nondisclosure and fraud, two problems which are most troubling to adoptive parents.²² With respect to the latter problem, agencies are less than forthright²³ in the pre-placement process and the fraud involved usually centers on the health or the background²⁴ of the prospective adoptive child.²⁵ Generally, fraud in the placement setting is the exception rather than the rule.²⁶ However, there has been an

¹⁷ LEAVY, *supra* note 3, at 4.

¹⁸ *Id.*

¹⁹ Private placement adoptions are also an option, but are beyond the scope of this Note and will not be discussed. For a discussion of private placement adoptions, see Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1481-86 (1992).

²⁰ Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 934 (1991).

²¹ *Id.* at 921.

²² In essence, these two concepts co-exist as nondisclosure, or disclosure of incorrect information, giving rise to fraudulent misrepresentation by the agency. *Id.* at 922.

²³ *Id.* at 937; see Bodenheimer, *supra* note 8, at 103. "[T]here is the additional problem that in the current competitive search for adoptable infants a reporting agency's potential conflicting interest may consciously or unconsciously color its report and detract from the impartiality required to fully inform." *Id.*

²⁴ See *In re Morningstar*, 1521 N.E.2d 150 (Ind. 1958); *Burr v. Board of County Comm'rs*, 491 N.E.2d 1101 (Ohio 1986).

²⁵ John R. Maley, *Wrongful Adoption: Monetary Damages as a Superior Remedy to Annulment for Adoptive Parents Victimized by Adoption Fraud*, 20 IND. L. REV. 709, 712 (1987).

²⁶ *Id.*

increase²⁷ in instances of fraud in society due to the sharp decline in the number of available children placed for adoption.²⁸ As a result of this "baby shortage,"²⁹ agencies have attempted to compensate by facilitating special-needs³⁰ adoptions through a practice of deceiving the adoptive parents.³¹

Even more prevalent than misrepresentation is the serious continuing problem of nondisclosure.³² The disclosure statutes, now in existence in several states,³³ suffer from a myriad of defects³⁴ and prevent achieving the goal of greater disclosure of health-related

²⁷ *Id.* As evidence, there are reports of agencies misleading adoptive parents with the hope of facilitating special needs adoptions. *Id.*

²⁸ Clare Collins, *A Shortage of Babies for Adoption*, N.Y. TIMES, Feb. 4, 1990, § CT Weekly, at 1, 6; see Bodenheimer, *supra* note 8, at 13; Tamar Lewin, *Fewer Children Up for Adoption, Study Finds*, N.Y. TIMES, Feb. 27, 1992, at A15 (finding that the demand for adoptive children exceeds the supply because there has been an increased acceptance of single parenting, legalization of abortion, and the use of contraception).

²⁹ "Baby shortage" is the term used by professionals in the adoption field to describe the current problem, which is that the number of people interested in adopting infants exceeds the number of infants in need of adoption. ADAMEC & PIERCE, *supra* note 2, at 51.

³⁰ "Special needs" are conditions and/or characteristics "that make a child difficult to place by the state adoption unit or an adoption agency." *Id.* at 266. The conditions or characteristics may include not only the health or temperament of a child, but also other characteristics, such as age and race. *Id.* at 266-67. The phrase "hard to place children" is now disfavored among adoption professionals, and has been replaced by "children with special needs." *Id.* at 143.

³¹ Maley, *supra* note 25, at 712; see Mary E. Schwartz, Note, *Fraud in the Nursery: Is the Wrongful Adoption Remedy Enough?*, 26 VAL. U. L. REV. 807, 824 (1992) (stating that the reason agencies withhold information is not because they do not trust the prospective adoptive parents, but because the adoption will probably be blocked if the adoptive parents knew of some "special need"). However, many couples are willing to, and even prefer to, adopt special-needs children and agencies should not take it upon themselves to determine that full disclosure will necessarily discourage certain adoptions. See Susan Stock, *Finding Adoptive Parents for Children With Special Needs*, N.Y. TIMES, May 23, 1993, § 8, at 4; Michael T. Kaufman, *Finding Miracles, One Child at a Time*, N.Y. TIMES, May 1, 1993, § 1, at 27; Ralph Blumenthal, *Perseverance Triumphs and a Couple Bring a Child Home*, N.Y. TIMES, Apr. 29, 1992, at B6.

³² Dickson, *supra* note 20, at 946-47.

³³ For a general listing and discussion of disclosure statutes, see Paula K. Bebensee, *In the Best Interests of Children and Adoptive Parents: The Need for Disclosure*, 78 IOWA L. REV. 397, 404 n.65 (1993).

³⁴ *When Love is Not Enough*, *supra* note 7, at 1761.

information.³⁵ Such defects include, but are not limited to: (1) failure to require the furnishing of all information necessary to make an informed decision;³⁶ (2) failure to articulate a specific standard or duty of disclosure that agencies must meet;³⁷ (3) allowing for too much agency discretion;³⁸ (4) providing no real penalty for nonconformity with statutory guidelines for disclosure of information;³⁹ (5) encouraging post-placement disclosure as the rule rather than the exception;⁴⁰ and (6) not addressing the difficulty in obtaining accurate and complete information.⁴¹

An additional shortcoming of the existing disclosure laws is the foreseeability issue.⁴² Many disorders are difficult to diagnose, thereby making it increasingly difficult to give an accurate assessment of a child's condition.⁴³ Furthermore, attempts to predict the implications of a symptom for an adoptive child's future health creates its own set of problems because an inaccurate explanation for the symptom is usually given by the social worker.⁴⁴ Moreover, agencies are overwhelmed by heavy case loads and diminishing funds, resulting in the uncertainties associated with depending on

³⁵ Similar to fraud, nondisclosure problems also center on the health or background of prospective adoptive children. D. Marianne Brower Blair, *Lifting the Genealogical Veil: A Blueprint for Legislative Reform of the Disclosure of Health-Related Information in Adoption*, 70 N.C. L. REV. 681, 693 (1992).

³⁶ Dickson, *supra* note 20, at 950-51. The type of information that should be disclosed has been the subject of debate. See Bebensee, *supra* note 33, at 405-06; see also Schwartz, *supra* note 31, at 824 (maintaining that information related to an adopted child's social and medical background should be disclosed). One reason insufficient information is given to adoptive parents is that adoption agency workers do not reveal information in a way that can be comprehended. *Id.*

³⁷ *When Love is Not Enough*, *supra* note 7, at 1765.

³⁸ *Id.*; see Schwartz, *supra* note 31, at 824. An additional reason insufficient information is given to adoptive parents is the agency's failure to obtain the information in a systematic and complete manner. *Id.*

³⁹ *When Love is Not Enough*, *supra* note 7, at 1765.

⁴⁰ Dickson, *supra* note 20, at 954.

⁴¹ Tracking down records may be time consuming and expensive and birthparents may provide incomplete or inaccurate information. *Id.* at 946-47.

⁴² *Id.* at 963. To "foresee" implies nothing about how the knowledge is derived and may apply to ordinary reasoning and experience. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 483 (9th ed. 1985).

⁴³ Dickson, *supra* note 20, at 963.

⁴⁴ *Id.*

governmental financial support and with frequent worker burnout and turnover.⁴⁵ It is under these oppressive conditions that adoptive agencies function, or *attempt* to function. Such internal and external pressures increase, in part, the frequency of nondisclosure.⁴⁶

The nondisclosure problem is also exacerbated by the agencies' failure to view both child and adoptive parents as "clients." Rather, the agencies regard the latter as merely a "resource" to be used in meeting agency goals.⁴⁷ Additionally damaging is the fact that placement agencies do not perceive nondisclosure and the misleading of adoptive parents as especially egregious, taking the position that families, not agencies, are to blame for adoption disruption.⁴⁸ Agency apathy, therefore, may be a contributing factor to the travesty of nondisclosure in the adoption setting. By forcing adoptive parents to make adoption decisions without requiring agencies to disclose the complete medical and life histories⁴⁹ of prospective adoptive children, the current law fails to adequately

⁴⁵ WILLIAM FEIGELMAN & ARNOLD R. SILVERMAN, *CHOSEN CHILDREN: NEW PATTERNS OF ADOPTIVE RELATIONSHIPS* 31 (1983).

⁴⁶ Dickson, *supra* note 20, at 946-47.

⁴⁷ *Id.* at 948. Some contend that adoptive parents would probably not be willing to proceed if they were aware of the likelihood of future physical, mental or emotional problems with the child. Maley, *supra* note 25, at 714.

⁴⁸ Dickson, *supra* note 20, at 946-47. "Adoption disruption" describes adoption placements that end with the return of the child to the agency prior to finalization. *Id.* at 945 n.148. "Dissolution" refers to an adoption that fails after finalization. ADAMEC & PIERCE, *supra* note 2, at 98-99. However, sometimes the terms "dissolution" and "disruption" are used interchangeably. *Id.* But the definition of "disrupt" is to throw into disorder; to interrupt the normal course or unity of something. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 366 (9th ed. 1985). Therefore, "adoption disruption" is a term that *could* encompass that effect on the child resulting from a post-adoption proceeding; not just the return of the child, but the "disruption" caused by litigation which involves the child as a participant and which centers on the child's disability.

⁴⁹ See generally Bebensee, *supra* note 33, at 405-06 (comparing disclosure statutes of various states). Examples of information that should be disclosed are: records of the adopted child's medical examinations; physical characteristics of the biological parents; a gynecological and obstetric history of the biological family; occurrence of drug or alcohol use during pregnancy; and information concerning the child's physical and mental condition. *Id.* at 406. Additional types of information include information pertaining to the biological parents' education, religion, nationality, occupation, talents, hobbies, other children, relationship of the biological parents and reasons for placing the child for adoption. *Id.*

safeguard the rights of adopting parents.⁵⁰ This ultimately affects the child, who becomes part of a post-placement proceeding as the adoptive parents seek recourse for a violation of his or her rights.⁵¹

Notwithstanding the deficiencies in the existing disclosure laws, they are a significant step in the right direction.⁵² The benefits of disclosure laws are twofold: (1) they impose a duty of disclosure, whereby failure to uphold such a duty would facilitate a wrongful adoption or other suit;⁵³ and (2) they make disclosure aspirational.⁵⁴ Nondisclosure, therefore, should be actionable if a duty to disclose exists. The central issue, then, is whether in a particular case such a duty arises in connection with the placement of a prospective adoptive child.⁵⁵

The question of whether a disclosure duty exists has been discussed in the context of "a degree of trust and confidence."⁵⁶ If it appears from the facts and circumstances that the parties have a trust and confidence in one another, then a duty to disclose is recognized.⁵⁷ In cases such as *Burr v. Board of County Commissioners*,⁵⁸

⁵⁰ *When Love is Not Enough*, *supra* note 7, at 1761.

⁵¹ *See infra* notes 176-87 and accompanying text.

⁵² Dickson, *supra* note 20, at 955.

⁵³ *Id.* This Note will only discuss the options of annulment and wrongful adoption. The other possible alternatives, breach of contract and substantive due process claims against an agency, are beyond the scope of this Note and will not be discussed. For cases discussing these types of claims, see *Griffith v. Johnston*, 899 F.2d 1427 (5th Cir. 1990) (holding that adoptive parents could not proceed on a due process claim); *Young v. Francis*, 820 F. Supp. 940 (E.D. Pa. 1993) (holding that adoptive parents could not maintain constitutional claims for interference with their right to family association because they lacked standing due to the fact that the adoption was never completed); *Collier v. Krane*, 763 F. Supp. 473 (D. Colo. 1991) (deciding that an adoptive mother could not proceed on a § 1983 civil rights action after alleging that misrepresentations that the adopted child "came from good physical and mental stock" violated her constitutional rights); *Engstrom v. State*, 461 N.W.2d 309, 313 (Ohio 1990) (stating that one of three claims by adoptive parents was a breach of contract claim); *Petrowsky v. Family Serv.*, 518 N.E.2d 664 (Ill. App. 1987) (recognizing a cause of action for breach of an adoption contract in the private adoption setting).

⁵⁴ Dickson, *supra* note 20, at 955.

⁵⁵ Maley, *supra* note 25, at 723.

⁵⁶ Bennison, *supra* note 3, at 928.

⁵⁷ *See* Michele Schiffer, Comment, *Torts: Fraud in the Adoption Setting*, 29 ARIZ. L. REV. 707, 712-13 (1987) An example of when the parties have trust and confidence in one another is when there exists a confidential or fiducial relationship between the

there can be little doubt that the adoptive parents placed their trust and confidence in the placement agency because the agency has superior knowledge of the child's condition and background.⁵⁹ Such information is not within the fair and reasonable reach of the adoptive parent,⁶⁰ and a strong argument exists for imposing a duty to disclose upon the party placing the child.⁶¹ Therefore, recovery should flow from such a duty when the party which placed the child failed to disclose known risks, and injury results.⁶²

Finally, the welfare of the child is the primary consideration in all adoption proceedings.⁶³ Undeniably, the best interests of the

agency and the adoptive parents. *Id.* A "fiduciary" is one who stands in a confidential relation to another such that the other reposes special confidence in the fiduciary's devotion to his best interests. *Id.* These fiduciary characteristics are arguably present in the adoption setting. *Id.*

⁵⁸ 491 N.E.2d 1101 (Ohio 1986).

⁵⁹ An agency has superior knowledge because the child's records are in the possession and control of the agency, and the records are then sealed by court order upon entry of a final decree. Bennisson, *supra* note 3, at 928.

⁶⁰ Maley, *supra* note 25, at 724. Directly attributable to this obstacle is the existing requirement of sealed records. *See, e.g.,* N.Y. DOM. REL. LAW § 114 (McKinney 1993) (stating that an order of adoption and all related documents are to be sealed and withheld from inspection, except if allowed by a court order issued upon a showing of good cause); OHIO REV. CODE ANN. § 3107.17 (Baldwin 1993) (stating that all papers, books and records pertaining to adoption are subject to inspection only upon consent of the court); *see also* Maley, *supra* note 25, at 720 n.81 (noting that practically every state provides for making records relating to adoption proceedings secret and available for inspection only by a court order issued for good cause, such as a need for medical information or a claim of inheritance). Although the rationale for such nondisclosure is compelling because it may shield the child from possibly disturbing facts surrounding his or her birth or parentage, "sealed records have the tendency of allowing material information about the [adopted child's] condition or background to be kept from the adoptive parents." Bennisson, *supra* note 3, at 932.

⁶¹ *See* Maley, *supra* note 25, at 725. "The argument can certainly be made that a party failing to inform adoptive parents about known risks of a prospective adoptive placement violates standards to which the ordinary [sic] ethical person would conform." *Id.*

⁶² *See id.* "Allowing recovery in such situations will not make agencies or others who place children through independent channels the 'guarantors of their placement.'" *Id.* (quoting *Burr*, 491 N.E.2d at 1109). "Adoptive parents will be able to recover only when they can prove actual fraud or a failure to disclose known material facts." *Id.*

⁶³ *See, e.g.,* 2 AM. JUR. 2d *Adoption* § 82 (1962). "The welfare of the child is the paramount consideration in all proceedings involving the adoption of children and the courts adhere to the view that the welfare of the child is also of paramount consideration

child would be better served when the adoptive parents are fully informed of the child's condition and background.⁶⁴ Informed decision making prevents needless post-placement proceedings, which by focusing on some physical or mental deficiency, could have a negative effect on the child.⁶⁵

Inauspiciously, the potential for fraud and nondisclosure has become an unfortunate reality in adoption proceedings.⁶⁶ Because the evils of fraud and nondisclosure will remain a part of American society for the foreseeable future, it is necessary to analyze the remedies available to the victims of fraud and nondisclosure, and to determine which remedy⁶⁷ best supports the public interest.⁶⁸

in cases involving annulment or vacation of an adoption decree." *Id.*; see Bodenheimer, *supra* note 8, at 86 (discussing *Rothstein v. Lutheran Social Serv.*, 405 U.S. 1051 (1972), which held that the interest of a child in completing an adoption may outweigh a father's rights).

⁶⁴ Bennisson, *supra* note 3, at 928.

⁶⁵ See, e.g., Maley, *supra* note 25, at 733 (discussing how mandatory disclosure of adoption information would serve the best interest of the child by assuring that the adoptive parents would be better able to accept any of the child's physical or mental risks that become realities). Disclosure would also serve adoptive parents, by "allowing them to prepare for any special needs the child may develop," and adoption agencies, because "they would not have to fear future wrongful adoption suits." *Id.* at 733; see Hayes, *supra* note 12, at 88. "[U]n-adoption' may be a less realistic option in cases involving apparently healthy adopted infants who are later found to be afflicted with serious physical disorders [because] [s]ignificant time may have passed before the illness is discovered, and it may be too late for the family to consider giving up the adopted child." *Id.*

⁶⁶ Maley, *supra* note 25, at 714. It has been theorized that the potential for fraud and nondisclosure exists because of certain societal factors, namely, that the substantial increase in demand to perfect adoptions cannot necessarily be met by the existing supply of potential adoptive children. *Id.* at 713.

⁶⁷ This reference pertains to those remedies of annulment and wrongful adoption which are now in existence. See *infra* notes 69-157 and accompanying text. Any other remedies are beyond the scope of this Note and will not be discussed. For discussions of other remedies, see generally Maley, *supra* note 25, at 713-14 (discussing attempts to codify criminal remedies for adoption fraud and nondisclosure of adoption information) and Shannon M. Connelly, Note, *A Survey of the Wrongful Adoption Cause of Action and Statutory Remedies for Adoption Fraud*, 10 REV. LITIG. 793, 807-21 (1991) (examining various criminal and civil statutory remedies).

⁶⁸ Maley, *supra* note 25, at 714.

II. Current State of Remedies Available

A. Annulment

Adoption is normally a heartwarming experience. Children are integrated into the adoptive family and, like virtually all familial relationships, the child becomes dependent on his or her adoptive parents for maintenance, love and affection.⁶⁹ However, like emotional ties, "legal bonds between children and adoptive parents can also break," and the adoptive parents must return to court in an attempt to undo the adoption.⁷⁰

Early statutes permitted an adoptive parent to bring an annulment action⁷¹ against the agency which intentionally or negligently misrepresented, or failed to disclose a child's physical or emotional disability.⁷² Under these early statutes, if the annulment petition was successful,⁷³ the adoptive relationship was rendered void and the child was returned to the foster care system.⁷⁴ If the

⁶⁹ Hayes, *supra* note 12, at 88.

⁷⁰ *Id.*

⁷¹ See Bebensee, *supra* note 33, at 410-12.

⁷² Bennison, *supra* note 3, at 910. Those states that do allow annulment under these limited circumstances are the exception rather than the rule. "Most states do not have statutory provisions that authorize [annulment] of adoption." JUDITH AREEN, CASES AND MATERIALS ON FAMILY LAW 1595 (3d ed. 1992).

⁷³ Judges have vast discretion in this area and "[v]ery few annulments of adoption decrees occur." *When Love is Not Enough*, *supra* note 7, at 1768. "This is because courts realize that an annulment means abandonment for at least the second time in the adopted child's life." *Id.* But see *In re Lisa Diane G.*, 537 A.2d 131 (R.I. 1988) (finding that the lower court properly exercised its jurisdiction in setting aside the adoption where the adoption agency gave the adoptive parents fraudulent information and failed to inform them that a mental health institution recommended the child not be placed for adoption because of behavioral problems).

⁷⁴ Bennison, *supra* note 3, at 910. Foster care "[g]enerally refers to the system set up to protect children who are . . . abandoned or whose parents" have voluntarily chosen not to fulfill their parenting obligations. ADAMEC & PIERCE, *supra* note 2, at 126. Because the term "foster care" encompasses all children in the system, foster and adoptive, there is still much confusion as to the difference between an adoptive home and a foster home. The difference between the two is as follows:

An adoptive family has the same parental rights and obligations as a birth family does when the child is born to them. A foster family must defer many decisions about a child's welfare to a state or

annulment petition was unsuccessful,⁷⁵ or if the adoptive parents chose to take no action upon learning of the physical or emotional disability, they could keep the child and meet the expenses themselves.⁷⁶

Courts are understandably averse to granting annulments⁷⁷ because, as a remedy, an annulment is a harsh result.⁷⁸ Any mistreatment perpetrated on the parents will ordinarily not be discovered until well after family bonding has occurred.⁷⁹

county social worker. Although a child may remain in a foster home for years as a foster child, the state can (and has) removed foster children for a variety of reasons. An adopted child, however, can only be removed for the same reasons as a birth child.

Id.

⁷⁵ See *In re Adoption of L.*, 151 A.2d 435 (N.J. Essex County Ct. 1959) (refusing to set aside an adoption despite the contrary desire of all parties, including the biological parents, because, according to the court, that the child's best interests would be better served in the adoptive home, and a mere change in attitude or regret does not constitute proper grounds for annulments); *In re Adoption of a Minor*, 214 N.E.2d 281 (Mass. 1966) (refusing to set aside an adoption of seven years merely because adoptive parents were having difficulty disciplining the child).

⁷⁶ Susan Kempf LeMay, *The Emergence of Wrongful Adoption as a Cause of Action*, 27 J. FAM. L. 475, 476 (1988-89).

⁷⁷ *When Love is Not Enough*, *supra* note 7, at 1761. Complete abandonment of the child is the result of granting an annulment petition. Elizabeth N. Carroll, *Abrogation of Adoption by Adoptive Parents*, 19 FAM L. Q. 155, 159 (1985). Additionally, the intent behind a final adoption order is that "the familial relationship becomes natural and final"; to grant an annulment would contravene that intent. Anne Harlan Howard, *Annulment of Adoption Decrees on Petition of Adoptive Parents*, 22 J. FAM. L. 549, 558 (1985).

⁷⁸ Bennison, *supra* note 3, at 911. "[T]he child would lose all rights with regard to the adoptive parents. The child would be removed from his or her home and would be without the care and nurturing all children need The outcome for such children is grim." Carroll, *supra* note 77, at 176. For a heartbreaking plea of a child to his adoptive parents, who wished to void the adoption, thereby returning the child to the system and separating him from his brother, see Johnson, *supra* note 11, § 1, at 22 ("I'm very sorry and I hope to get to see you again I just want to say I miss you.").

⁷⁹ ADAMEC & PIERCE, *supra* note 2, at 71. Bonding and attachment refers to:

[T]he mutual affectionate connection that is cemented between a child and a parent, whether the child is a biological child or an adopted child. The process of establishing this connection includes a growing feeling of entitlement to family life, love, responsibility and a variety of other emotions normally experienced by a parent

Consequently, to sever such a bond and grant an annulment of the adoption harms the family unit and the child, which is contrary to the child's best interests.⁸⁰

The recent trend in state legislatures is to not make a provision for annulment of an adoption.⁸¹ This is a result of the policy of fostering stability in family relationships and the emphasis on children's welfare.⁸² Alternatively, even if a state has provided for the statutory remedy of annulment,⁸³ most jurisdictions are still hesitant to grant an annulment of a completed adoption.⁸⁴

The overall consensus seems to be that "[p]arents should never be permitted to return a child once they have established a legal parent-child relationship and the child has become part of the family."⁸⁵ There also appears to be a consensus that "[s]ince the

and child.

Id. Some adoption experts differentiate between the two terms and believe "bonding" can only occur between child and biological parent, while "attachment" occurs between child and adoptive parent. See LOIS RUSKAI MELINA, *RAISING ADOPTED CHILDREN: A MANUAL FOR ADOPTIVE PARENTS* 39 (1986).

⁸⁰ Bennison, *supra* note 3, at 919; see Bodenheimer, *supra* note 8, at 83 (stating that securing finality of adoptions is a paramount goal). Adoptions "'should assume the characteristics of permanence as early as possible' and . . . an adoption decree once rendered should be 'final and the child secure in a permanent family relationship.'" *Id.* (quoting SANFORD N. KATZ, *WHEN PARENTS FAIL* 131 (1971)).

⁸¹ Maley, *supra* note 25, at 715.

⁸² See *Pierce v. Pierce*, 522 S.W.2d 435 (Ky. 1975).

⁸³ Availability of annulment to an adoptive parent is severely limited by statute in the overwhelming majority of jurisdictions. Maley, *supra* note 25, at 715. Five states (Alaska, Arkansas, New Hampshire, North Dakota and Ohio) have even adopted the relatively strict provision of the Uniform Adoption Act. AREEN, *supra* note 72, at 1595; see *infra* notes 197-99 and accompanying text (discussing the Uniform Adoption Act).

⁸⁴ As with any subject of debate, there are exceptions to every rule, California being perhaps the most egregious example, having annulled 69 adoptions between 1983 and 1987. Dickson, *supra* note 20, at 946. Similarly, in 1990, a Florida court dealt with the issue of annulment and, after finding a fraud had been perpetrated on the parents, permitted annulment of the adoption. *M.L.B. v. Department of Health and Rehab. Services*, 559 So. 2d 87 (Fla. Dist. Ct. App. 1990). *But see Prime News: Florida Court Accepts Couple's Request to Give Up Kids* [hereinafter *Prime News*] (CNN television broadcast, Oct. 16, 1992) (noting that failed adoptions are uncommon—only 11 in Florida since 1989).

⁸⁵ Bennison, *supra* note 3, at 915; see Maley, *supra* note 25, at 709 (stating that one of the primary reasons annulments are disfavored is that they break up the newly created family unit and force the child once again to undergo a dramatic change in environment).

adoptive relationship was initially found to promote the child's best interests, this relationship should not be ended simply because the parents have changed their minds.⁸⁶ Even if fraud is found, severing the parent-child tie is not in the best interests of the child and an annulment should not be granted.⁸⁷

Case law concerning annulment is illustrative of such unanimity of sentiment. For example, the Michigan Supreme Court, in *In re Leach*,⁸⁸ a petition for annulment which was based on fraud.⁸⁹ The court found the fraud committed on the adoptive parents by the agency, with respect to the alleged nondisclosure of an underlying mental illness, insufficient to sever an eleven year relationship.⁹⁰ Similarly, the Missouri Supreme Court, in *McDuffee v. Rehm*,⁹¹ stated that "in the absence of some compelling reason," an adoption should never be annulled where the child's family unit would be severed and the child would become a public charge.⁹²

Cases opposing annulment of adoption⁹³ make it apparent that downfalls exists when annulments are granted as a remedy.⁹⁴ These include the inherent lack of deterrent value against future fraud and nondisclosure.⁹⁵ More importantly, annulments have a harsh effect

⁸⁶ Bennison, *supra* note 3, at 918; see Johnson, *supra* note 11, § 1, at 22 (quoting David S. Liederman, executive director of the Child Welfare League of America, as follows: "This is not like going to the 5- and 10-cent store, where you can return something if you decide you don't like it."). Although as a remnant of "ancient" adoption, it may have been appropriate to provide for the return of a "defective child" like substandard merchandise not up to specifications or the seller's warranty, such action is inconsistent with the modern emphasis on the best interests of the child. Bodenheimer, *supra* note 8, at 84.

⁸⁷ Bennison, *supra* note 3, at 915.

⁸⁸ 128 N.W.2d 475 (Mich. 1964).

⁸⁹ *Id.* at 476.

⁹⁰ *Id.* at 477.

⁹¹ 352 S.W.2d 23 (Mo. 1961).

⁹² *Id.* at 27.

⁹³ See, e.g., *Allen v. Allen*, 330 P.2d 151 (Or. 1958); *In re Adoption of L.*, 151 A.2d 435 (N.J. Super. 1959); *In re Anonymous*, 213 N.Y.S.2d 10 (N.Y. Fam. Ct. 1961); *In re Adoption of a Minor*, 214 N.E.2d 281 (Mass. 1966).

⁹⁴ Maley, *supra* note 25, at 718.

⁹⁵ It is unlikely that any fraud or mistreatment perpetrated on the parents will be discovered before bonding has occurred. Bennison, *supra* note 3, at 919. As such, "annulment will have only a limited effect upon those who perpetrated the fraud." *Id.*

on the child.⁹⁶ Understandably, "judges who are sympathetic to the plight of the unwanted child often refuse to grant this extreme remedy."⁹⁷ In light of these downfalls, serious consideration and evaluation should be given to an alternative remedy now in existence—the tort of wrongful adoption.⁹⁸

B. Wrongful Adoption—The Current State of Wrongful Adoption Tort Rationale and its Continued Development

While annulment of adoptions is unlikely in most cases,⁹⁹ an emerging trend, with the potential to benefit adoptive parents, is the establishment of the new tort of wrongful adoption.¹⁰⁰ Wrongful adoption is a preferable remedy that provides compensatory damages¹⁰¹ to adoptive parents of children who are later diagnosed as having serious physical or emotional disabilities.¹⁰²

There seems to be a general agreement that if an adoption agency engages in a practice of fraud, whether in the form of fraudulently withholding or intentionally concealing information about an adoptive child, "common sense and basic fairness dictate that the interest of the adoptive parents should be given some weight in resolving the dispute."¹⁰³ Yet, the tort of wrongful adoption represents a relatively unprecedented phenomenon. In fact, wrongful adoption was virtually unheard of prior to 1980, when California

⁹⁶ Maley, *supra* note 25, at 718; *see supra* notes 77-80 and accompanying text.

⁹⁷ *When Love is Not Enough*, *supra* note 7, at 1766.

⁹⁸ Maley, *supra* note 25, at 718.

⁹⁹ Hayes, *supra* note 12, at 88.

¹⁰⁰ Dickson, *supra* note 20, at 922.

¹⁰¹ *See Schwartz*, *supra* note 31, at 832-33 (discussing what types of damages should be recoverable by wrongful-adoption plaintiffs). Consequential damages and extraordinary medical expenses, including future medical expenses, should be recoverable; routine expenses of raising a child should not. *Id.* at 832. Damages for emotional distress have also been the subject of debate; opponents believe that despite the "special needs" of the child, the adoptive parent has benefitted from the parenting experience. *Id.* Additionally, to allow recovery for parents' emotional distress would not further the interests of the child. *Id.*

¹⁰² Hayes, *supra* note 12, at 88.

¹⁰³ Dickson, *supra* note 20, at 922.

became the first state called upon to consider the interests of the adoptive child in the context of this tort theory.¹⁰⁴ Although the California Court of Appeals, in *Richard P. v. Vista Del Mar Child Care Services*,¹⁰⁵ did not allow the adoptive parents to recover, the court's decision framed the issues that have arisen in all subsequent wrongful adoption actions.¹⁰⁶ These subsequent actions have confirmed that the tort of wrongful adoption raises the issues of: (1) intentional misrepresentation; (2) fraudulent concealment; or (3) negligent misrepresentation.

1. Intentional Misrepresentation¹⁰⁷

In 1986, the first reported successful case of wrongful adoption occurred in *Burr v. Board of County Commissioners*.¹⁰⁸ Basing its decision on the elements of fraud,¹⁰⁹ the Ohio Supreme

¹⁰⁴ See Schwartz, *supra* note 31, at 825 (stating that *Richard P. v. Vista Del Mar Child Care Services*, 165 Cal. Rptr. 370 (Cal. Ct. App. 1980) was the "first case that alleged what later became known as wrongful adoption.").

¹⁰⁵ 165 Cal. Rptr. 370 (Cal. Ct. App. 1980).

¹⁰⁶ See *id.*

¹⁰⁷ For a general discussion of the cases involving intentional misrepresentation, see Connelly, *supra* note 67, at 803.

¹⁰⁸ 491 N.E.2d 1101 (Ohio 1986). This case involved adoptive parents who brought a civil action after their child, Patrick, was diagnosed as suffering from Huntington's Disease, a genetically-inherited disorder which destroys the central nervous system. *Id.* at 1103. The Burrs' success followed from the opening of the child's sealed records which revealed that Patrick's family background and medical profile made him at risk for the disease. *Id.* at 1103-04; see *Meracle v. Children's Serv. Soc'y*, 437 N.W.2d 532 (Wis. 1989) (allowing recovery by adoptive parents in their wrongful adoption lawsuit). *Meracle* also involved a child diagnosed with Huntington's Disease and an agency that assured the adoptive parents that the child was not at risk of contracting the disease. *Id.* at 533.

¹⁰⁹ The *Burr* court restated the elements of fraud as they were enumerated in *Friedland v. Lipman*, 429 N.E.2d 456 (Ohio Ct. App. 1980):

- (a) a representation, or, where there is a duty to disclose, a concealment of, a fact;
- (b) which is material to the transaction at hand;
- (c) made falsely, with knowledge of its falsity, or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred;
- (d) with the intent of misleading another into relying upon it;

Court found an adoption agency liable for an intentional, material misrepresentation of a child's background and physical condition, and affirmed an award of money damages¹¹⁰ for fraudulent inducement of adoption via a deliberate misrepresentation of the child's health.¹¹¹

After *Burr*, other jurisdictions followed the reasoning of the Ohio Supreme Court and allowed such a tort action to proceed.¹¹² In *Meracle v. Children's Service Society*,¹¹³ the Wisconsin Supreme Court allowed recovery by adoptive parents, who brought a wrongful adoption lawsuit.¹¹⁴ As in *Burr*, this case involved a child diagnosed with Huntington's Disease and an agency that assured the adoptive

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- (e) justifiable reliance upon the representation or concealment; and
 - (f) a resulting injury proximately caused by the reliance.

Burr, 491 N.E.2d at 1105.

¹¹⁰ A jury awarded the Burrs \$125,000 for medical and emotional damages. *Id.* at 1108. Although the decision was appealed, the award was affirmed by both the Franklin County Court of Appeals and the Ohio Supreme Court. *Id.*

¹¹¹ *Id.* at 1109. "Fraud in the inducement" is fraud:

"[C]onnected with [an] underlying transaction and not with the nature of the contract or document signed. Misrepresentation as to the terms, quality or other aspects of a contractual relation, venture or other transaction that leads a person to agree to enter into the transaction with a false impression or understanding of the risks, duties or obligations she has undertaken."

BLACK'S LAW DICTIONARY 661 (6th ed. 1990).

¹¹² Apparently, seven states have recognized or will recognize the claims of adoptive parents in the agency setting to sue in tort for wrongful adoption: Ohio (*Burr v. Board of County Commissioners*, 491 N.E.2d 1101 (Ohio 1986)); Allen *v. Children's Services*, 567 N.E.2d 1346 (Ohio Ct. App. 1990)); California (*Michael J. v. Los Angeles County Department of Adoptions*, 201 Cal. App. 3d 859 (1988)); Wisconsin (*Meracle v. Children's Services Soc'y*, 437 N.W.2d 532 (Wis. 1989)); Iowa (*Engstrom v. State*, 461 N.W.2d 309 (Iowa 1990)); Minnesota (*M.H. v. Caritas Family Services*, 488 N.W.2d 282 (Minn. 1992)); Illinois (*Roe v. Catholic Charities*, 588 N.E.2d 354 (Ill. Ct. App. 1992)); and the Fifth Circuit Court of Appeals, applying Texas law (*Griffith v. Johnston*, 899 F.2d 1427 (5th Cir. 1990)). In *Griffith*, although the court rejected the parents' due process claim, its opinion seems to suggest that the parents would have successfully recovered damages had they proceeded on a tort claim. *Id.* Florida has allowed for recovery in tort for wrongful adoption in the *private* adoption setting and, thus, may be considered the eighth state to allow recovery under this theory. See *Wallerstein v. Hospital Corp.*, 573 So. 2d 9 (Fla. Dist. Ct. App. 1990).

¹¹³ 437 N.W.2d 532 (Wis. 1989).

¹¹⁴ The Wisconsin Supreme Court awarded medical damages, but denied damages for emotional distress. *Id.* at 536-37.

parents that the child was not at risk of contracting the disease.¹¹⁵ The court found that the adoption agency had assumed a duty to inform the adoptive parents about the health of the child.¹¹⁶ However, by misrepresenting the facts, the agency breached this duty.¹¹⁷ Thus, the parents were allowed to proceed on their wrongful adoption claim.¹¹⁸

The agencies in *Burr* and *Meracle* voluntarily assumed a duty to disclose, and their liability centered around a misrepresentation of facts, rather than an omission.¹¹⁹ Wrongful adoption actions in other jurisdictions, however, have centered not only on the basis of omission rather than commission, but on public policy arguments which focus on fairness and justice.¹²⁰ These arguments differ somewhat from the assumption of duty to disclose arguments present in the aforementioned cases and usually arise in fraudulent concealment actions.

2. Fraudulent Concealment¹²¹

Michael J. v. Los Angeles Department of Adoptions,¹²² involved an adoptive mother who brought an action against the county after her adoptive child was diagnosed as suffering from Sturge-Weber Syndrome.¹²³ The California Supreme Court, following the

¹¹⁵ *Id.* at 533.

¹¹⁶ *Id.* at 537.

¹¹⁷ *Id.*

¹¹⁸ *Meracle*, 437 N.W.2d at 537.

¹¹⁹ *See, e.g., id.*; 491 N.E.2d at 1108.

¹²⁰ *See, e.g., Foster v. Bass*, 575 So. 2d 967, 981 (Miss. 1990) (holding that public policy demands that adoption agencies not be guarantors of children's placements); *Michael J. v. Los Angeles Dep't of Adoptions*, 201 Cal. App. 3d 859 (Cal. Ct. App. 1988) (holding that a cause of action exists against adoption agencies for intentional misrepresentation or fraudulent concealment because "[a]s trustees of the child's destiny the [adoption] agency was obligated to act with morals greater than those found in a purveyor's common marketplace"); *see also* Deborah L. Miller, *Are You Adopting a Child or a Heartache? Adoption Agencies May Have to Disclose or Face a Claim for Wrongful Adoption*, 26 NEW ENG. L. REV. 1145, 1153-54 (1992).

¹²¹ *See* Connelly, *supra* note 67, at 804.

¹²² 201 Cal. App. 3d 859 (1988).

¹²³ *Id.* at 893.

reasoning set forth in *Burr*, stated that a cause of action exists against a county adoption agency for fraudulent concealment in the adoption process.¹²⁴ Recovery was directly attributable to the actions of the agency which intentionally concealed and denied that the "port wine stain on the child's upper torso and face was a manifestation of Sturge-Weber Syndrome."¹²⁵ Rejecting the agency's argument, the court held that public policy considerations do not require that an adoption agency be immune from liability in such instances where the health of a prospective adoptive child is the issue.¹²⁶ However, this opinion is limited in that the court did state that recovery by the adoptive parents would be barred if the action was based on negligence of the agency, rather than on intentional misrepresentation or fraudulent concealment.¹²⁷

3. Negligent Misrepresentation

Contrary to the opinions of *Michael J.* and *Meracle*, public policy concerns were influential in the resolution of a number of opinions, which held that no cause of action should be recognized for negligence in tort as it pertains to wrongful adoption.¹²⁸

¹²⁴ *Id.* at 874-75.

¹²⁵ *Id.* at 875 (stating that the parents were repeatedly assured by the agency that the port wine stain was merely a birthmark).

¹²⁶ *Id.* (stating that "[p]ublic policy cannot extend to condone concealment or intentional misrepresentation which misleads prospective adoptive parents"). Similarly, in *Meracle*, the court rejected the agency's public policy argument. 437 N.W.2d at 874-75.

¹²⁷ *Michael J.*, 201 Cal. App. 3d at 874-75.

¹²⁸ *LeMay*, *supra* note 76, at 480. *But see* *M.H. v. Caritas Family Services*, 475 N.W.2d 94, 100 (Minn. App. 1991) (holding that a cause of action in *negligent* misrepresentation against an adoption agency *does not* offend public policy). Thus, courts vary on public policy grounds and the future possibility of parents proceeding on a wider range of tort theories is apparent. *See, e.g., Roe v. Catholic Charities*, 588 N.E.2d 354 (Ill. Ct. App. 1992) (holding that parents could recover for both negligent misrepresentation and fraud). The *Catholic Charities* court found the agency owed a duty to prospective parents to give an honest and complete response to their specific request concerning the characteristics of the child and that the agency breached its duty by failing to supply the parents with the requested information. *Id.* at 364-65.

In *Richard P. v. Vista Del Mar Child Care Services*,¹²⁹ the California Court of Appeals held that a suit against an adoption agency for negligence in providing information about an adopted child was barred on public policy grounds.¹³⁰ The court reasoned that justice and fairness warranted no recovery because the agency had disclosed all pertinent medical information and the adoptive parents had performed their own inquiry regarding the health of the child prior to placement.¹³¹ In 1990, three courts reached a similar result.¹³²

In *Engstrom v. State*,¹³³ adoptive parents alleged that an agency was negligent in their child's placement.¹³⁴ The parents argued that the agency had two duties—the statutory duty to properly terminate the biological parents' rights,¹³⁵ and the duty to properly investigate the child's background.¹³⁶ Consequently, the primary issue was whether the social worker had a duty to fully investigate the child's background.¹³⁷ Not surprisingly, the court was reluctant to imply a legal duty of care in the adoption setting without an express mandate from the legislature.¹³⁸ Addressing the public policy considerations, the court held that an agency should incur no liability absent fraud, willful intent to harm or personal injury to the parties to the adoption.¹³⁹

¹²⁹ 165 Cal. Rptr. 370 (Cal. Ct. App.1980).

¹³⁰ *Id.* at 373.

¹³¹ After receiving a copy of the neurological report, the parents consulted a pediatrician who conducted his own tests and found the child to be in good health. *Id.* at 372-73.

¹³² *Engstrom v. State*, 461 N.W.2d 309 (Iowa 1990); *Allen v. Children's Services*, 567 N.E.2d 1346 (Ohio Ct. App. 1990); *Foster v. Bass*, 575 So. 2d 967 (Miss. 1990).

¹³³ 461 N.W.2d 309 (Iowa 1990). In 1981, the Engstroms received a child from a state agency for the purpose of pre-adoption placement. *Id.* at 312. The couple was informed that the child's mother was in a women's reformatory and that the child's father was deceased. *Id.* However, five years after they took the child into their home, the biological father appeared and asserted his parental rights. *Id.*

¹³⁴ *Id.* at 314.

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Engstrom*, 461 N.W.2d at 314.

¹³⁹ *Id.* at 316.

In *Allen v. Children's Services*,¹⁴⁰ parents brought an action against an agency alleging, in part, negligence, after their adopted child suffered a profound hearing loss.¹⁴¹ The court did not entertain the parents' negligence claim and tried the case solely on the breach of contract theory.¹⁴² The court held that adoption agreements are not contracts of insurance, and that only intentional misrepresentations should lead to compensable injuries.¹⁴³

The Mississippi Supreme Court, in *Foster v. Bass*,¹⁴⁴ has also refused to allow recovery, absent a showing of fraudulent concealment of material facts.¹⁴⁵ The *Foster* court held that the agency was not negligent for failing to test the child.¹⁴⁶ Specifically, the court did not find that the agency owed a duty to the parents because the harm was not foreseeable and the agency did not conceal any information from the parents.¹⁴⁷ Thus, the court's decision implies a public policy consideration limiting agency liability.¹⁴⁸

These cases clearly illustrate the principle that "recognition of the wrongful adoption theory will not serve to make those placing

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

¹⁴¹ *Id.* at 1348.

¹⁴² *Id.* at 1349.

¹⁴³ *Id.* (citing *Burr*, 491 N.E.2d at 1109).

¹⁴⁴ 575 So. 2d 967 (Miss. 1990).

¹⁴⁵ *Id.* Adoptive parents brought suit against the adoption agency and two physicians alleging negligence in the placement of their adopted son, Geoffrey. *Id.* at 968. They claimed that the agency was negligent in failing to have the child tested for phenylketonuria, a very rare, recessive, genetic disorder which causes phenylalanine to accumulate in the blood, causing brain damage and requiring special treatment for the remainder of the child's life. *Id.* at 968-70.

¹⁴⁶ *Id.* at 982.

¹⁴⁷ *Id.* at 975-76.

¹⁴⁸ Unless the agency undertakes to have the child examined by a doctor or supervises the medical treatment, an agency will not be liable for failing to diagnose, but only for its fraudulent concealment of material facts. *Foster*, 575 So. 2d at 981-83; see *Allen v. Children's Servs.*, 567 N.E.2d 1346, 1347 (Ohio 1990) (finding that the agency made no express promise to investigate the child's health or background, that all parties thought the child was healthy, and that the child had been medically examined prior to placement).

children guarantors of their placements."¹⁴⁹ They also support the idea that "[j]ust as there are risks and benefits inherent in becoming [biological] parents; so too are there risks and benefits present in the adoption process."¹⁵⁰

By way of commentary, proponents of the wrongful adoption theory contend that adoptive parents should be allowed to recover damages in tort which are commensurate with the child's medical expenses.¹⁵¹ The remedy of wrongful adoption is far superior and preferable to annulment of adoption because "it keeps the child within the family unit while compensating the adoptive parents for damages incurred."¹⁵²

To reiterate, the best interest of the child is the paramount consideration in any adoption proceeding.¹⁵³ Persuasive arguments can be, and have been, made contending that wrongful adoption is the lesser of the two evils.¹⁵⁴ However, it is possible that such post-placement proceedings will cause the child to experience rejection,

¹⁴⁹ *Richard P.*, 106 Cal. App. 3d at 860; *Allen*, 567 N.E.2d at 1348 (stating that the defendant was not the guarantor of the health of the child); see *Schwartz*, *supra* note 31, at 826 (stating that it would be unreasonable to make an agency the guarantor of the child's *future* good health as this guarantee is also unavailable to biological parents).

¹⁵⁰ *Maley*, *supra* note 25, at 726; see *Johnson*, *supra* note 11, § 1, at 22 (quoting Patrick Murphy, Cook County Public Guardian, regarding the unrealistic expectations of adoptive families, as follows: "They expect some TV sitcom family. Instead, they got a kid who marches to his own drummer. But it's not like he was swinging from the chandeliers. He's a normal kid who got into the kind of mischief you'd expect of an 11-year old boy.").

¹⁵¹ *Bennison*, *supra* note 3, at 931; see *Meracle*, 437 N.W.2d at 537; *Burr*, 491 N.E.2d at 1108; *Michael J.*, 247 Cal. Rptr. at 513. All of the plaintiffs in these cases were allowed to pursue an action for extraordinary medical expenses incurred. See *Schwartz*, *supra* note 31, at 832-33 (stating that to allow "recovery for . . . parents' emotional distress would not further the interests of the child" and damages should be restricted to extraordinary, unusual expenses).

¹⁵² *Bennison*, *supra* note 3, at 931. Parents who commence wrongful adoption actions are seeking neither to annul an adoption nor to sever their ties with the child; they merely seek compensation for the expenses involved in caring for a child with physical and/or mental problems. *Schwartz*, *supra* note 31, at 808.

¹⁵³ *Maley*, *supra* note 25, at 715 n.44.

¹⁵⁴ The second evil being annulment of adoption. See Fred S. Wilson, *Wrongful Adoption: A Guide to Impending Tort Litigation in Texas*, 24 ST. MARY'S L.J. 273 (1992).

doubt and instability.¹⁵⁵ Therefore, wrongful adoption litigation may conflict with the judicial and social policy of promoting the best interests of the child.

While fairness and sound public policy may support a cause of action for wrongful adoption in limited circumstances, the extension of tort law to this form of misrepresentation or fraudulent concealment does not go far enough in protecting the adoptive child's interests. There are no clear guidelines as to when agencies must disclose medical history and/or risks relating to the adoptive child.¹⁵⁶ And, while wrongful adoption actions may provide a remedy for an injury that the child and the adoptive parents have suffered, such actions do little to prevent the situation from re-occurring.¹⁵⁷

III. Best Interests of the Child

When a society recognizes *the personhood of its smallest and most vulnerable members* and not only protects them but does so in a manner that promotes their dignity, it sets a tone conducive to promotion of democratic ideals. When such conditions are not present, the message is clear that raw power is more important than either reason or caring.¹⁵⁸

Just as the nation's first adoption statute¹⁵⁹ made the welfare of the child its primary concern¹⁶⁰ modern adoption laws also make the best interests of the child the paramount goal of the adoption pro-

¹⁵⁵ *Burke v. Rivo*, 551 N.E.2d 1, 4 (Mass 1990).

¹⁵⁶ *Wilson*, *supra* note 154, at 277 n.23.

¹⁵⁷ *Schwartz*, *supra* note 31, at 837-38.

¹⁵⁸ *Melton*, *supra* note 1, at 531 (emphasis added).

¹⁵⁹ *See Wilson*, *supra* note 154, at 277 n.23 (stating that although Mississippi provided for adoption as early as 1846, the Massachusetts statute, enacted in 1851, was much more comprehensive and actually pioneered adoption law).

¹⁶⁰ *See id.*

cess.¹⁶¹ Although, in theory, the standard is encouraging, deciding what really is in the best interests of the child is a basic question, yet unanswered.¹⁶²

It has been noted that an experience that causes a child to endure rejection, doubt and instability conflicts with the court's policy of promoting the best interests of the child.¹⁶³ Therefore, even though recovery in a wrongful adoption suit, unlike annulment, does not sever the family unit, litigation involving the adoptive child, which focuses on the child's defect, is sufficiently likely to have an effect which is contrary to the child's best interests.¹⁶⁴

Purely economic factors should not be the primary consideration in the post-placement adoption setting.¹⁶⁵ Rather, courts need to use information from the child development field to evaluate a child's physical, mental and emotional needs.¹⁶⁶ As a policy matter, justice dictates that adoptive parents, like any other tort victim, should be entitled to some form of compensatory damages in cases of fraud or nondisclosure.¹⁶⁷ However, more viable alternatives should be sought¹⁶⁸ which would avoid subjecting the child to

¹⁶¹ Dickson, *supra* note 20, at 924; *see* Schwartz, *supra* note 31, at 813-14. The modern American adoption system illustrates a significant shift in adoption policy. By incorporating the best interests of the child standard, the law reflects a societal preference for serving and protecting children rather than adoptive parents. *Id.*

¹⁶² The best interest standard is hard to define, and its vagueness has led to confusion and divisiveness in the child welfare field. Gary N. Skoloff, *Family Law Section Seeks to Educate*, NAT'L L.J., Aug. 6, 1990, at 25.

¹⁶³ JOHN DE WITT GREGORY ET AL., UNDERSTANDING FAMILY LAW 149 (1993) ("[C]ases make it clear that conduct that is harmful to the child . . . will be weighed in the determination of what constitutes the child's best interests.") The best interests standard is the judicial standard utilized in the majority of adoption proceedings. Schwartz, *supra* note 31, at 814.

¹⁶⁴ "Children 'respond to any threat to their emotional security with fantastic anxieties . . . distortion of reality . . . displacement of feelings—reactions which are no help for coping, but rather put [the child] at the mercy of events.'" Carroll, *supra* note 77, at 174 (quoting JOSEPH GOLDSTEIN, ANNA FREUD & ALBERT SOLNIT, BEYOND THE BEST INTEREST OF THE CHILD 12 (1979)).

¹⁶⁵ Schwartz, *supra* note 31, at 813.

¹⁶⁶ Courts cannot neglect non-economic facts that contribute heavily to a child's psychological growth and development. *Id.*

¹⁶⁷ *See id.* at 831-33.

¹⁶⁸ "While it is true that adoptive parents have legal rights and privileges, these should be subordinate to those of the child" Carroll, *supra* note 77, at 174-75.

litigation.¹⁶⁹ As a practical matter, wrongful adoption is often viewed as a superior remedy to annulment, as no severance of family ties results, and the child remains a part of an established family.¹⁷⁰ Despite this apparent advantage of wrongful adoption over annulment, it does not necessarily follow that no decay or destruction of the family unit, via the child, has occurred. In fact, in light of recent wrongful birth cases,¹⁷¹ to which the emerging wrongful adoption tort has been analogized,¹⁷² one conceivable disadvantage in wrongful adoption litigation is the possible adverse psychological effect¹⁷³ that may result when the child learns that he or she was the subject of a lawsuit.¹⁷⁴ Hence, one theory which the court should consider in

¹⁶⁹ "Continuity and stability . . . are assumed to be important and desirable for children But a substantial and impressive consensus exists among psychologists and psychiatrists that disruption of the parent-child relationship carries significant risks." Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226, 265 (1975). Although this statement was made in the context of child custody, this Note contends that litigation is "disruptive;" therefore, this same theme also pervades wrongful adoption litigation which not only involves the child, but in which the *child* is the focus.

¹⁷⁰ Maley, *supra* note 25, at 730; *see* Schwartz, *supra* note 31, at 808.

¹⁷¹ *E.g.*, *Burke v. Rivo*, 551 N.E.2d 1 (Mass. 1990) (holding that a physician's liability for unsuccessfully performing a sterilization procedure includes cost of raising the child to adulthood); *McKeanan v. Aasheim*, 687 P.2d 850 (Wash. 1984) (holding that physician was not liable for unsuccessful sterilization procedure because it was impossible to ascertain whether parents were damaged); *University of Arizona v. Superior Court*, 667 P.2d 1294 (Ariz. 1983) (holding that cost of raising a child is compensable in a wrongful pregnancy action); *Boone v. Mullendore*, 416 So. 2d 718 (Ala. 1982) (holding that physician's liability for failing to remove a patient's fallopian tubes included damages for physical pain and suffering the patient experienced as a result of her pregnancy). "Wrongful birth" is an action in tort, sounding in negligence, brought by the parents of an infant born with genetic defects or other abnormalities. Michael H. Knight, *Johnson v. University Hospitals of Cleveland: A Misapplied Public Policy*, 13 GEO. MASON U. L. REV. 153, 154 (1990).

¹⁷² Maley, *supra* note 25, at 730.

¹⁷³ This has been the concern raised in wrongful birth cases and analogies can and should be made to wrongful adoption as wrongful adoption is a new and developing area of tort and family law. Maley, *supra* note 25, at 730. "[F]amily law, also called domestic relations law, involves the legal relationships between . . . parent and child as a social, political and economic unit." *See* GREGORY, *supra* note 163, at 1.

¹⁷⁴ *See* *Boone v. Mullendore*, 416 So. 2d 718 (Ala. 1982) (denying the parents' wrongful adoption request because of the psychological effect on the child).

evaluating whether a wrongful adoption action should proceed is "the adverse effect on the child" theory.¹⁷⁵

In wrongful birth cases, the "fear of an adverse effect on the child is predicated on the tenuous assumption that the child is in fact [the] 'damage' "¹⁷⁶ In opposition, proponents of parental recovery in wrongful birth cases have argued to the contrary, contending that the child itself is not the "damage."¹⁷⁷ Rather, it is the reasonably foreseeable consequence of the negligence—the cost of raising the child—that is the damage.¹⁷⁸ However plausible this argument appears in the wrongful birth context, this same distinction cannot be made within the framework of wrongful adoption cases.

Adoptive parents commence a wrongful adoption action and seek to recover money damages because they contend the child is in fact "damaged" or "defective."¹⁷⁹ Accordingly, the foreseeable consequence of the agency's misrepresentation, concealment or negligence, is not the cost of raising the child,¹⁸⁰ but is either the physical, mental, emotional or developmental disability that the agency failed to fully disclose, and thus, the focus in wrongful adoption litigation is the disability of the child.¹⁸¹ This is not a nebu-

¹⁷⁵ Pallesen, *supra* note 16, at 363-64, 367. This theory is discussed in the context of wrongful birth and wrongful pregnancy actions, but similarities between such a tort action and the tort of wrongful adoption have been recognized and it is this Note's contention that an "adverse effect on the child" theory can also be readily equated in the wrongful adoption context.

¹⁷⁶ *Id.* at 368. It "is not an aspersion upon the value of the child's life . . . [but] is instead a recognition of the importance of the parents' fundamental right to control their reproductivity." *Id.* (quoting *Cockrum v. Baumgartner*, 425 N.E.2d 968, 970 (Ill. App. Ct. 1981)).

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

¹⁷⁹ See *Burr v. Board of County Comm'rs*, 491 N.E.2d 1101 (Ohio 1986); *Richard P. v. Vista Del Mar Child Care Serv.*, 106 Cal. App. 3d 860 (1980).

¹⁸⁰ This is not meant to suggest that the cost of raising the child is not a component of the wrongful adoption suit but, unlike wrongful birth, it is not a basis of the claim itself. Rather, it is a key factor that determines, in part, the amount of damages, if any. See generally *Maley, supra* note 25, at 727-29 (discussing the appropriate measure of damages for wrongful birth claims versus wrongful adoption claims).

¹⁸¹ Precedent-setting case law in the wrongful adoption arena has involved parents' entitlement to sue due to the fact that the child has been diagnosed as suffering from some disability or disease. See generally *id.* at 718-21 (discussing *Burr*, where the agency misrepresented that the child was a "nice, big, healthy baby boy" when in fact

lous assumption, and it is this focus upon which the fear of an adverse effect is predicated.¹⁸²

The adverse effect theory has led some courts to deny recovery in wrongful birth cases,¹⁸³ and consequently, commentators have stated that the adverse effect theory merits attention in wrongful adoption.¹⁸⁴ Opponents of disallowing recovery by adoptive parents have stated that "some day the child might be adversely affected by learning he or she [was unwanted] and that someone else paid his or her rearing expenses."¹⁸⁵ Those opposed to a court invoking this theory to deny recovery by adoptive parents state that wrongful adoption is the preferable alternative¹⁸⁶ and this theory should not act as a complete bar to recovery.¹⁸⁷

Once again, cogent arguments have been made for wrongful adoption as a superior remedy to annulment. However, as a matter of public policy, one does not want to give adoptive parents the "green light" to return their child, or to collect money for their child whenever they become dissatisfied, because above all, one must keep in mind the child's mental and emotional health.¹⁸⁸ Also, as a matter of public policy, "a child should not be treated as a piece of defective merchandise, returnable by the adoptive parents if not worthy of the

he suffered from physical and mental problems).

¹⁸² See Dickson, *supra* note 20, at 924 (discussing the best interest of the child approach in adoption proceedings).

¹⁸³ Maley, *supra* note 25, at 730 (citing *Boone v. Mullendore*, 416 So. 2d 718 (Ala. 1982); *Wilbur v. Kerr*, 628 S.W.2d 568 (Ark. 1982)).

¹⁸⁴ Maley, *supra* note 25, at 730.

¹⁸⁵ Pallesen, *supra* note 16, at 366-67; see Bodenheimer, *supra* note 8, at 19-20 (stating that to assume children can adapt to change with greater ease than adults may be misguided and heeding the advice of professionals in the field of psychology may be warranted). "[C]hildren are more emotionally delicate than adults . . . and more apt to be damaged, sometimes permanently, when uprooted from a secure environment . . . and they 'lack a sense of future' which prevents them from seeing beyond a current catastrophe." *Id.*

¹⁸⁶ "The adopted child would seem to be better off with her adoptive parents, even where she learns of the action, than if she were to be uprooted from her only family; in fact, the knowledge that her parents chose to seek monetary damages rather than annulment may serve to cement her relationship to the family." Maley, *supra* note 25, at 730 n.141.

¹⁸⁷ *Id.* at 730.

¹⁸⁸ Bennison, *supra* note 3, at 915.

price paid."¹⁸⁹ The paramount consideration—the best interests of the child—should not be discarded at any point along the adoption continuum to the advantage of adoptive parents if only done so in response to their whim of dissatisfaction. Even if there comes a point when the court decides an adoptive parent has been the victim of fraud or misrepresentation, the proper avenue of recourse for the parent should be determined in conjunction with society's primary consideration of what is best for the child.

The main impact of the findings of child psychology on the described developments in adoption law relate to the problem of the child being the subject of wrongful adoption litigation.¹⁹⁰ Specifically, litigation which focuses on the child's defect or disability as alleged by the adoptive parent is the evil¹⁹¹ to be avoided, and should be replaced with a more workable option.¹⁹² If the child's interest is to be recognized as paramount, there should be several changes in the law.

¹⁸⁹ *Id.* at 918-19; see Dirk Johnson, *Debate on Adoption is Focusing on Rights to See Family Histories*, N.Y. TIMES, Feb. 11, 1990, § 1, at 36 (quoting William Pierce, president of the National Committee for Adoption, as follows: "[W]e cannot warranty children like automobiles. In adoptions, just as in biological reproduction, there are many wild cards and no guarantees. After all, Adam was God's Son, and even Adam didn't turn out perfect.").

¹⁹⁰ Bodenheimer, *supra* note 8, at 29.

¹⁹¹ Such proceedings are likely to have a detrimental psychological, emotional and mental effect on the child. Bennison, *supra* note 3, at 912.

¹⁹² For example, judicial interviewing of children may "provide the child with an opportunity to vent her feelings about the perplexing and anxiety-provoking situation in which she finds herself." Frederica K. Lombard, *Judicial Interviewing of Children in Custody Cases: An Empirical and Analytical Study*, 17 U.C. DAVIS L. REV. 807, 810 (1984). An additional and more cogent justification for such a procedure is that "although the child is not technically a party litigant . . . [his or] her future may be profoundly affected by the outcome." *Id.* at 812.

The alternative dispute-resolution mechanism of mediation evolved due to the consequence of the traditional adversarial proceedings. Kenneth R. Feinberg, *Mediation—A Preferred Method of Dispute Resolution*, 16 PEPP. L. REV. 5, 5 (1989). Mediation is a "revolutionary approach to . . . disputes requiring new teamwork between legal and mental health professionals" thereby minimizing the possibility for escalation and compounding of disputes. JANET R. JOHNSON & LINDA E.G. CAMPBELL, *IMPASS OF DIVORCE: THE DYNAMICS AND RESOLUTION OF FAMILY CONFLICT* 4-5 (1988).

IV. Recommendations for Reform

A. Mandatory Disclosure

The amount of information provided to adoptive parents by an agency is a key factor in determining the success of the adoption. However, courts are not willing to impose a duty on agencies to collect and disclose information to prospective parents; such a step needs to come from the legislature.¹⁹³ One emerging trend is the enactment of mandatory disclosure laws which, if undertaken, could benefit adoptive parents.¹⁹⁴ These legislative proposals would require agencies and intermediaries in the adoption process to provide adoptive parents with the medical history¹⁹⁵ and background

¹⁹³ See Schwartz, *supra* note 31, at 830-31.

¹⁹⁴ See, e.g., N.Y. SOC. SERV. LAW § 373-a (McKinney 1993) (mandating that adopting parents be provided with a medical history of the child to be adopted, which should include information on hereditary diseases, any drugs or medication taken by the natural mother during pregnancy, and the child's psychological condition); OHIO REV. CODE ANN. § 3107.12 (Baldwin 1993) (mandating that the Department of Social Services undertake an investigation and prepare a report to be provided to prospective adoptive parents concerning the physical and social condition of the adoptive child and biological parents); CAL. CIV. CODE §§ 222.26, 224.70 (West 1993) (directing that histories of the adoptive child and biological parents be compiled and made available to the prospective adoptive parents—the history of the child should include medical reports, psychological evaluation, scholastic information, developmental history and information on the child's existing family life); see also Dickson, *supra* note 20, at 950 n.175 (listing twenty-one states that have enacted disclosure statutes and discussing the advantages and disadvantages of disclosure statutes in general); Connelly, *supra* note 67, at 808-15 (discussing, in detail, the disclosure statutes of California, Arizona, Ohio and Texas, and mentioning the disclosure statutes of Louisiana, Michigan, Maine, Kentucky, Kansas, Missouri, and North Carolina).

¹⁹⁵ See *supra* note 194 (discussing statutes that require disclosure of medical history information). Adoptors are like biological parents and they:

Should have the right to make an informed decision about parenthood In many cases, biological parents do have the opportunity to consider risks involved in bearing offspring. They may choose to avoid having children if there is a history of congenital disease in their family; an individual who is HIV positive can choose to avoid or terminate pregnancy."

Dickson, *supra* note 20, at 943-44; see Connelly, *supra* note 67, at 816 (discussing the policy of informed consent underlying medical disclosure statutes). The requirement of medical history disclosure is rooted in precedent. The court in *Michael J.* announced there should be a standard of good faith, full disclosure of material facts concerning

information on prospective adoptive children, prior to the final adoption.¹⁹⁶

The Uniform Adoption Act¹⁹⁷ is a current statute that addresses the best interests of the child.¹⁹⁸ If states intend to seriously promote the best interests of the child, enactment of this model Act by all states, along with mandatory disclosure laws, must eventually be achieved.¹⁹⁹ Mandatory disclosure is an ultimate goal

existing or past conditions of the child's health. 247 Cal. Rptr. at 512.

¹⁹⁶ See *supra* note 194 (discussing statutes that require disclosure of information pertaining to a child's background); see also Dickson, *supra* note 20, at 922 (contending that adoptive parents should be given the opportunity to forego adopting children with injuries stemming from a troubled background).

¹⁹⁷ 9 U.L.A. 11-78 (1988). This model Act, originally drafted in 1953, has been enacted by Alaska, Arkansas, New Hampshire, North Dakota and Ohio. Bennison, *supra* note 3, at 922 n.88. The Act's purpose is to protect and promote "not only the welfare of children, but also the [biological] parents, and adoptive parents, and thereby promote the welfare of the state." LEAVY, *supra* note 3, at 91.

¹⁹⁸ See Uniform Adoption Act § 15 cmt., 9 U.L.A. 62 (1988). This comment to the Act states that "[t]he policy of stability in a family relationship, particularly when a [child] is involved, outweighs the possible loss to a person whose rights are cut off through fraud or ignorance." *Id.*

¹⁹⁹ See Bennison, *supra* note 3, at 922 n.88 (stating that "[a]lthough currently enacted in five states, enactment of this statute [the Uniform Adoption Act] should be the trend in the future if states intend to promote the child's best interest."); see also Dickson, *supra* note 20, at 955 (stating that "[a] truly adequate law . . . would require a substantial investigation into the medical, genetic, psychological, behavioral, and emotional condition of the child").

because public policy²⁰⁰ "cannot condone concealment or intentional misrepresentation that misleads potential adoptive parents."²⁰¹

Opponents of mandatory disclosure laws should be appropriately advised that requiring agencies to provide adoptive parents with complete and accurate information on a prospective adoptive child is not equivalent to promising them a "blue ribbon" baby.²⁰² Rather, it is a modest provision which paves the way for

²⁰⁰ The court in *Michael J.* expressed the underlying public policy rationale for mandatory disclosure:

The adoption of a child is an act of compassion, love and humanitarian concern where the adoptive parent voluntarily assumes enormous legal, moral, social and financial obligations. Accordingly, a trustworthy process benefits society, as well as the child and parent. As keepers of the conscious of the community [and as trustees of the child's destiny], we cannot countenance conduct which would allow persons who desire entrance into the emotional realm of parenting to be unprotected from schemes or tactics designed to discharge societal burdens onto the unsuspecting or unwary.

201 Cal. App. 3d at 859.

²⁰¹ Bennison, *supra* note 3, at 929. As an alternative to placing the disclosure burden solely on an adoption agency, the state should, perhaps, impose an affirmative duty, as a supplementary safeguard, on prospective parents to arrange a thorough examination of the child to be adopted. See Dickson, *supra* note 20, at 959 n.228 (discussing *Richard P.*, in which tort liability was not imposed on a placement agency because the adoptive parents relied on their own pediatrician's examination to verify the agency's report on the adopted child's medical condition). Such implementation of the mandatory disclosure proposal would make the investigatory requirement a two-way street. Decreased agency liability would result by requiring the adoptive parents to bear a portion of the disclosure burden. See *Bebensee*, *supra* note 33, at 407-08 (discussing verification procedures which would act as a check on the type and amount of information received by prospective adoptive parents).

²⁰² See Dickson, *supra* note 20, at 949 (contending that mandatory disclosure laws recognize that "adoptions work better when adoptors are fully informed, and that adoptors should have the right to make a considered decision about what special parenting responsibilities they are willing or able to take on"). Critics also argue that too much information may dissuade families from adopting children who might possess latent abnormalities. Connelly, *supra* note 67, at 816. However, because of long adoption waiting lists, many prospective adoptive parents "when faced with a one to two year wait . . . are willing to adopt a health impaired child provided that they are fully informed of the child's history." *Id.*

adoptive parents to make an informed choice about adoption.²⁰³ Moreover, imposing a duty of reasonable, good faith investigation and disclosure should not be unduly burdensome.²⁰⁴ By implementing more thorough child assessment practices, agencies should be able to protect themselves from unwarranted liability.²⁰⁵ Such a modest disclosure policy will ultimately benefit both adoptive parents²⁰⁶ and children.²⁰⁷

The goal of adoption is to create a new legal family with some semblance of permanence.²⁰⁸ The avoidance of annulment petitions and wrongful adoption actions further upholds the goal of acting in the child's best interests. It is true that full disclosure may initially slow the placement process²⁰⁹ but, once placed, rather than increase the potential for suit, as critics may fear, disclosure would

²⁰³ See LeMay, *supra* note 76, at 487. "The denial of the opportunity to make an informed choice is the gravamen of the wrongful birth tort. Parents should have a parallel right to make an informed decision to adopt a child and should be entitled to recover damages for misrepresentations which deny them this opportunity." *Id.*; see Connelly, *supra* note 67, at 817 (arguing that if adoptive parents are to be treated as the parents of the child, they should have access to the same information as biological parents, and should be able to consider a myriad of factors before taking on the same parental responsibilities).

²⁰⁴ Dickson, *supra* note 20, at 964; see *Foster v. Bass*, 575 So. 2d 967, 981, 983-84 (Miss. 1990) (holding that in the absence of fraud or misrepresentation, where an agency has done all it could before placing the child by releasing all information available to the adoptive parents, and where the agency could not have foreseen the injury or anticipated negligence by medical professionals, the agency cannot be held to the unreasonable responsibility of guaranteeing the health of the child).

²⁰⁵ See Dickson, *supra* note 20, at 964.

²⁰⁶ See Connelly, *supra* note 67, at 821. "The secrecy of the adoption process and the potentially extraordinary financial and emotional damage to be suffered years after adoption necessitate the imposition of disclosure rules to protect parents from underinformed decisionmaking." *Id.*

²⁰⁷ Dickson, *supra* note 20, at 964; see *When Love is Not Enough*, *supra* note 7, at 1763-64. "[F]ull disclosure of an adopted child's history offers psychological and practical benefits to the child and to [the child's] family." *Id.* at 1764; see Connelly, *supra* note 67, at 821 (concluding that nondisclosure does not adequately protect the child).

²⁰⁸ See Bennison, *supra* note 3, at 909-12.

²⁰⁹ *Id.* at 933. *But see* Connelly, *supra* note 67, at 816 (stating that "[f]aced with a one- to two-year wait, many people are willing to adopt a health-impaired child, provided they are fully aware of the child's history").

likely decrease post-placement adoption litigation by providing clearer guidelines.

B. Federal Assistance—Supplementing the Current Subsidy Program

"Leaving adoption to the option of state and local governmental entities will only continue to deprive many children of permanent nurturing homes. . . . Attention must be directed toward viewing adoption as a viable alternative for . . . children other than white healthy infants The problem is national in scope and so massive that Federal leadership is required to establish and maintain the expertise which will solve the problem."²¹⁰

Whether an adoptive parent knowingly petitions for a special-needs child or if a latent disability manifests itself years after an adoption has been finalized, the fact remains that the child is a special-needs child. And, because mandatory disclosure will result in an increased number of special-needs adoptions, the legislature must act to make money available for these children in every circumstance.²¹¹

Subsidized adoption programs²¹² are a relatively new child welfare option for children in need of long-term substitute care.²¹³ It was not until the late 1950s that a formalized concept of subsidized

²¹⁰ Brooks, *supra* note 2, at 1130 n.1 (quoting *Adoption of Children With Special Needs: Testimony to Subcomm. on Child and Human Development of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 57 (1977) (statement of Gerald B. Adcock, Chairman of Public Policy Committee of the North American Council on Adoptable Children)).

²¹¹ See Brooks, *supra* note 2, at 1163-64.

²¹² The term "subsidized adoption" is synonymous with the Adoption Assistance Program. See ADAMEC & PIERCE, *supra* note 2, at 272. For a comprehensive examination of federal adoption statutes and programs, see Brooks, *supra* note 2, at 1145-50.

²¹³ Michael D.A. Freeman, *Subsidized Adoption*, in ADOPTION: ESSAYS IN ADOPTION: ESSAYS IN SOCIAL POLICY AND SOCIOLOGY 203 (Philip Bean ed., 1984).

adoption received serious attention.²¹⁴ One federal initiative, the Adoption Assistance and Child Welfare Act of 1980,²¹⁵ was the enabling legislation that authorized federal subsidies to adoptive parents.²¹⁶ Now there are state and federal subsidies²¹⁷ available for individuals who adopt children with "special needs."²¹⁸ However, the majority of statutes now in place provide that subsidy assistance is not applicable to all situations.²¹⁹ Rather, it applies to the "knowing" placement of a special-needs child²²⁰ where parents enter into subsidy assistance agreements before the adoption is finalized.²²¹ This limitation is the pitfall of the current subsidy program. Implementation of the current adoption assistance program is necessary and revisions to it should focus on addressing those situations

²¹⁴ *Id.*

²¹⁵ 42 U.S.C. § 673 (1980). Under this statute, monthly payments are made to the adoptive parents of special-needs children who were adopted through a public agency. *Id.* § 673(a)(1)(B)(i). Payment amounts may vary depending on the circumstances. *Id.* § 673(a)(3). Therefore, an open discussion of the needs of the child and the circumstances of the parents is an important part of the negotiations. Payments will end when one of several events enumerated by the statute occurs. *Id.* at § 673(a)(4).

²¹⁶ ADAMEC & PIERCE, *supra* note 2, at 19. State and federal government share the cost of these subsidies. *Id.*

²¹⁷ 42 U.S.C. § 673 (1988). Subsidy assistance is most commonly seen in the form of one-time payments for adoption-related expenses or tax deductions. *See* ADAMEC & PIERCE, *supra* note 2, at 272. *See generally* Collins, *supra* note 28, at 1, 6-7 (stating that in the case of a special-needs adoption, there are no fees, and the state provides for the child's needs and certain other expenses); Stock, *supra* note 31, at 4 (explaining that New Jersey provides a continuing subsidy for children in the special-needs category); John H. Cushman, Jr., *Your Taxes: Family Values in Legislation*, N.Y. TIMES, Aug. 8, 1992, § 1, at 38 (examining proposed legislation that would provide tax deduction for adoption-related expenses).

²¹⁸ 42 U.S.C. § 673(c) (1988).

²¹⁹ If the subsidy is not agreed to and approved before the adoption is finalized, subsidy assistance may not be an option. LeMay, *supra* note 76, at 488.

²²⁰ *See* ADAMEC & PIERCE, *supra* note 2, at 266-67.

²²¹ LeMay, *supra* note 76, at 484. A determination is made of the child's eligibility prior to the time of adoption and an adoption assistance agreement is drawn upon between the adopting parents and the state or other public agency. ADAMEC & PIERCE, *supra* note 2, at 19.

whose unusual circumstances would justify an exception to the general rule.²²²

Following the lead of states like Arizona, the government should implement a uniform system of post-placement subsidy assistance.²²³ Under such a program, "[at] any time after the adoption, families may apply for a subsidy for any undiagnosed preexisting condition which the child is discovered to have."²²⁴ Again, a child with special needs is one whose health, temperament or background make the child difficult to place. These needs exist regardless of whether the adoptive parent knew of the "condition" prior to the adoption, or whether the condition later manifests itself.²²⁵ Therefore, the unknowing parent should be entitled to some form of financial assistance.²²⁶ Advocates of parents' rights plead that fairness dictates that, as victims, adoptive parents should be entitled to receive subsidy assistance for their special-needs child, despite their lack of knowledge of a disability prior to adoption.²²⁷

Taking this proposal a step further, parents who have been induced by material misrepresentations²²⁸ or concealment²²⁹ and have

²²² "[T]he adoption assistance agreement will be completed *prior* to the decree of adoption. However, there may be unusual circumstances which would justify an exception to the general rule." LeMay, *supra* note 76, at 484 (emphasis added) (quoting Model Act for Adoption of Children With Special Needs, 46 Fed. Reg. § 50.038 (1981)).

²²³ See Ariz. Rev. Stat. Ann. § 8-144(D) (1981); see Schiffer, *supra* note 57, at 709-10. Similar to the subsidy programs now in place, the post-placement subsidies would consist of cash payments which vary with the needs and circumstances of the particular child and family and are subject to periodic review. *Id.* Additionally, the post-placement subsidies may include post-adoption services. *Id.* Post-adoption services (a/k/a post-legal adoption services) geared toward both child and parent, often make the difference between a successful and unsuccessful placement. See Brooks, *supra* note 2, at 1152. These services include, but are not limited to, psychological testing and evaluation, counseling, support groups, emergency psychiatric care for the child, and ongoing training, support and consultation for the parents. *Id.* at 1152-53. The need for these post-adoption services is, not surprisingly, greater for parents of special needs children. ADAMEC & PIERCE, *supra* note 2, at 231.

²²⁴ Schiffer, *supra* note 57, at 710.

²²⁵ See *supra* note 30.

²²⁶ LeMay, *supra* note 76, at 485.

²²⁷ *Id.* at 484.

²²⁸ See *supra* notes 107-20 and accompanying text.

²²⁹ See *supra* notes 121-27 and accompanying text.

not *knowingly* agreed to a special needs adoption, are forced to incur the same financial obligations as a parent who had the benefit of knowingly entering into such an adoption. Yet, as victims of a system fraught with inadequacies, these parents are not entitled to receive the benefits of the current subsidy programs.

On a larger scale, post-placement subsidy assistance could take the form of compensatory damages²³⁰ "awarded" to parents who have met their burden of successfully proving a case of agency fraud or misrepresentation, whether prior or subsequent to the final adoption decree. Payment of such damages would be taken from a proposed subsidy fund.²³¹ In essence, the parents' recovery is equivalent to recovery in a wrongful adoption suit where parents are fully compensated for their resulting injury.²³² More importantly, however, this non-adversarial procedure avoids subjecting the child to litigation.²³³

Unfortunately, the idea of subsidizing adoption is looked at with some disfavor and opponents often gather on two points—cost²³⁴ and economic fairness.²³⁵ With respect to the latter, the arguments proffered center on a concern that adoptive parents of children with

²³⁰ Again, the extent of recovery has been debated. See *supra* note 101. However, recovery should be restricted to the cost of extraordinary and unusual medical expenses because a message needs to be sent to adoptive parents that any action taken on behalf of the child is for the benefit of the *child*. See Schwartz, *supra* note 31, at 833.

²³¹ LeMay, *supra* note 76, at 485. In theory, the proposed subsidy program expansion to include actions for *subsequent* discovery of the adoptive child's disability seems uncomplicated. In practice, however, implementing the current subsidy scheme is likely to be somewhat problematic. See Lisa Sorg-Friedman, *Few Agencies Track Effectiveness of Children's Mental Health Care*, THE ARIZ. REPUBLIC/THE PHOENIX GAZETTE, August 18, 1993, at 6. Not surprisingly, therefore, the idea has met with disagreement: "Even if a particular jurisdiction provides that subsidy payments are available . . . where a physical or mental problem is discovered [*subsequent*] to adoption, subsidy payments may not be satisfactory to a parent who has been the victim of misrepresentation and seeks recourse for the injury." *Id.*

²³² *But see* sources cited *supra* note 101.

²³³ See *supra* part III.

²³⁴ Carol Lawson, *Getting Congress to Support Adoption*, N.Y. TIMES, Mar. 28, 1991, at C1. "[T]he Budget Enforcement Act places severe restrictions on tax legislation that is scored as losing revenue." *Id.*

²³⁵ Freeman, *supra* note 213, at 207.

special needs should not receive "special" treatment.²³⁶ In consideration of the interest being protected, such a rationale is disturbingly callous. As to the cost consideration, proponents of the program can allay the fears of doubters by demonstrating that adoption subsidies are more cost-effective than other long-term proposals.²³⁷

Although the character of adoption has changed, the current system has not provided a new approach to deal with the increased number of children with special needs. The idea of paying adoptive parents still meets with resistance.²³⁸ If subsidized adoption is to be a genuine child care option, designed for children in need, allowance should attach to the child, for the benefit of the child, not to or for the adoptive parents.²³⁹ And, since children are our nation's most precious resource, we must strive to convince society and lawmakers

²³⁶ *Id.* (stating that opponents maintain that adoptive parents of *special-needs children* should not be subsidized in their nurturing responsibilities when the majority of adoptive parents are not similarly supported). In a similar vein, some assert that "if adoptive families [are] to mirror birth families . . . they should be similarly treated . . . [and] receive no more allowance for the upbringing and support of [adoptees] than [natural] parents did for their own children." *Id.* at 203.

²³⁷ FEIGELMAN & SILVERMAN, *supra* note 45, at 29. Foster care is the largest single item in the child welfare budget. *Id.* It is generally acknowledged to be one of the least expensive alternatives offered to children living apart from their families. *Id.* By promoting the adoptions of many of these children, *even where some adoptions would be subsidized*, costs could be greatly reduced, especially in the long term. *Id.*

²³⁸ Those who adamantly oppose the payment of allowances express a concern "that adoption should be undertaken for love *not money*." Freeman, *supra* note 213, at 206 (emphasis added). However, the belief that adoptive parents can profit from subsidized adoption is "far wide of the mark." *Id.* But, the concept of paying adoptive parents is becoming more acceptable to policymakers. See Lawson, *supra* note 234, at C1. Illustrative of policymaker initiative, specifically congressional action, are the following proposals: (1) Senator Orin Hatch (R. Utah) proposed legislation calling for an increase in the maximum tax deduction to \$5000, providing for unreimbursed and legitimate adoption expenses; (2) Senator Lloyd Bentsen (D. Texas) proposed a \$3000 tax deduction for adoption of disabled children; and (3) Representative, Christopher H. Smith (R. New Jersey) participated in the Omnibus Adoption Act of 1991, comprehensive adoption legislation providing for, in part, tax credit for adoption expenses, benefits to federal employees who adopt, and grants to develop educational programs regarding adoption. *Id.* at C1, C5.

²³⁹ Freeman, *supra* note 213, at 221.

that public funding for all phases of adoption proceedings *is* in the public interest.²⁴⁰

Conclusion

This Note has discussed annulment and wrongful adoption, two remedies available to adoptive parents who have been the victims of fraud and nondisclosure throughout the adoption proceeding. In light of the possible detrimental effects on the child resulting from wrongful adoption litigation, this Note has proposed various approaches to reform which are aimed at fully protecting the child, namely, mandatory disclosure and subsidy assistance. Holding adoption agencies to a mandatory duty of disclosure and implementing a program which provides financial subsidies to adoptive parents, who knowingly adopt a special-needs child or who subsequently discover they have adopted a special-needs child, thereby avoiding post-placement litigation, enhances the effectiveness of the adoption process overall and is clearly in society's best interest.

In the present reality of adoption, most children have special needs. Lacking the resources to provide these children with the necessary resources, states are creating counter-productive situations by providing parents with detrimental alternatives—annulment proceedings and post-placement litigation involving the child and focusing on the child's special needs. In an attempt to avoid litigation, increased federal support for special needs children is necessary. The cost of caring for troubled and unwanted children—special children with special needs—should be borne by all of society. The proposed adoption schemes are not beyond implementation.

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²⁴⁰ *Id.* at 205.