

Summer 1992

Fraud in the Nursery: Is the Wrongful Adoption Remedy Enough?

Mary E. Schwartz

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

Recommended Citation

Mary E. Schwartz, *Fraud in the Nursery: Is the Wrongful Adoption Remedy Enough?*, 26 Val. U. L. Rev. 807 (1992).

Available at: <https://scholar.valpo.edu/vulr/vol26/iss3/8>

This Notes is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



Notes

FRAUD IN THE NURSERY: IS THE WRONGFUL ADOPTION REMEDY ENOUGH?

I. INTRODUCTION

For many adults who are unable to conceive or who choose not to conceive, adoption is the most viable alternative for raising a family. Information on adoption is widely available, and those who are looking for children to adopt often advertise in the newspapers.¹ This openness reflects society's more accepting attitude toward adoption, an attitude that stands in stark contrast to the days when adoption was a secret process not openly discussed. Often even the adoptees were not told of their biological heritages. Yet, despite society's more liberal attitude, adoption agencies frequently do not fully disclose information to the prospective parents. When potential parents are not given full information on a child that they intend to adopt, those parents are unable to make an informed decision about the adoption. An example² highlights the difference between the choices confronting adults considering conception and adults considering adoption.

Mr. and Mrs. Lake have no children of their own but decide they would like to adopt a child. They apply to an agency,³ are accepted, and eventually an infant is placed with them. The agency assures the Lakes that the baby is healthy and comes from a "good family"; however, the agency actually knows that the infant has an incurable, debilitating disease that probably will not show symptoms for at least three years. When the child is three years old, she is diagnosed as having an incurable, hereditary illness that will eventually severely cripple and retard her.

Meanwhile, Mr. and Mrs. Smith, having decided to forego any prenatal

1. For example, a recent newspaper advertisement read: "Let us help you through this confusing time. We will provide your child with a future of financial & emotional security. Loving, full-time mom, devoted, fun dad & first-time grandparents await the arrival of your baby. Lots of love & laughter to share. Help us become a family. . . ." CHI. SUN-TIMES, Mar. 17, 1992, at 58.

2. This scenario is merely a hypothetical and not based on any case known to the author. However, it does reflect what has happened in wrongful adoption cases.

3. See *infra* notes 46-50 and accompanying text.

testing or genetic counselling, conceive a child, and nine months later a baby is born. Although the baby appears to develop normally, when she is three years old she is diagnosed as having the same illness as the Lake's child. Obviously assuming that there has been no medical malpractice, the Smiths have no cause of action for their child's illness. Is the fact that Mr. and Mrs. Lake adopted their child in reliance on the agency's statement that the infant was healthy, when the agency possessed actual knowledge that their statement was false, significant enough to allow the Lakes to recover for the agency's misrepresentation; or, is the risk that both sets of parents face in raising a child the same?

Several cases in which parents have alleged that they were not given complete, pertinent information about the adoptee by the adoption agency have led to the assertion of a tort claim of wrongful adoption.⁴ Unlike parents seeking annulment of adoption,⁵ the adoptive parents in wrongful adoption actions are seeking neither to annul the adoption nor to sever their ties with the adoptee. Rather, the claims seek compensation for the extraordinary expenses involved in caring for a child with serious physical and/or mental problems⁶ and for the emotional distress suffered by the parents as a result of the agency's withholding of information.⁷

Wrongful adoption actions raise issues about what information is collected by the agency, what information is given to the adoptive parents, and what information should be given to the adoptive parents to ensure that they will be able to meet the needs of the adoptee.⁸ Statutory requirements for collection

4. See *infra* notes 108, 117, 123-24, 130 and accompanying text. A case was filed in a Texas federal district court alleging that the Texas Department of Human Services had violated the adoptees' and adoptive parents' Due Process and Equal Protection rights when the department failed to release the children's pertinent background information to the adoptive parents. The Fifth Circuit found no Due Process or Equal Protection violations in the case and held that neither a fundamental right in adopting children nor a right in informed decision making existed. *Griffith v. Johnston*, 899 F.2d 1427 (5th Cir. 1990), *cert. denied*, 111 S. Ct. 712 (1991). Wrongful adoption needs to be distinguished from recent cases that have alleged adoption agency malpractice, which deals with the agency's handling of the adoption. See, e.g., *Petrowsky v. Family Serv. of Decatur*, 518 N.E.2d 664 (Ill. App. Ct. 1987) (adoptive parents brought unsuccessful suit for agency malpractice after the biological mother changed her story about the child's paternity and the biological father recanted his prior denial of paternity); *Engstrom v. State*, 461 N.W.2d 309 (Iowa 1990) (adoptive parents brought unsuccessful claim for agency malpractice after biological father, previously thought to be dead, appeared during the pre-adoptive period and asked for custody of his daughter).

5. See *infra* note 56 and accompanying text.

6. See *infra* notes 101, 111-12, 118-20, 123, 131 and accompanying text.

7. See *infra* notes 146-47 and accompanying text.

8. See *infra* notes 72-91 and accompanying text. Adoptive parents need to be financially and emotionally able to meet the adoptee's needs.

and dissemination of information about the adoptee vary from state to state.⁹ Since all adoption in the United States today is done pursuant to state statutory law,¹⁰ these variances may lead to serious discrepancies in factors considered in making adoption placements.

Unfortunately, many state adoption statutes provide only cursory requirements and thus offer little protection for either the adoptee or the adoptive parents. While most adoption statutes purport to protect the best interests of the adoptee,¹¹ many decisions relevant to adoption are left to judicial discretion.¹² Only when concrete judicial standards exist do state statutes offer more than illusory protection to the adoptee and to the biological and adoptive parents.¹³ Lack of protection for the adoptee will be a continuing problem until state statutes directly address the issues involved in the adoption process.

This Note will address the issue of wrongful adoption in light of the statutory mandate that adoption serves the child's best interests. Section II of this Note provides an historical survey of adoption procedures and law, tracing the changes in legal policies from finding a child to match a set of parents to finding parents most suitable for a particular child.¹⁴ Section III analyzes the best interests of the child standard to ascertain what the court must know about the adoptee, the biological parents, and the adoptive parents to fully implement the standard.¹⁵ Section IV surveys jurisdictions that have extended tort law to include an action for wrongful adoption. The applicability of the tort of wrongful adoption to a pending case in Illinois will be examined in this section.¹⁶ Finally, Section V will offer a proposal for statutory reform in

9. Many states require reports on the physical, mental, and social history of the adoptee and his biological family. See, e.g., ARK. CODE ANN. § 9-9-212 (Michie 1991); COLO. REV. STAT. § 19-5-207(2) (1990); FLA. STAT. ANN. § 63.082 (West 1985); and MISS. CODE ANN. § 93-17-11 (1973). Other states have similar requirements, with the additional requirement of a genetic history of the biological parents. See, e.g., ARIZ. REV. STAT. ANN. § 8-129 (1985); CONN. GEN. STAT. ANN. §§ 45-63(b) and 45-68e(f), (m) (West 1981); IOWA CODE ANN. § 600.8 (West 1981); KAN. STAT. ANN. § 59-2278 (1985); and LA. REV. STAT. ANN. § 9:422.13 (West 1981). Illinois requires information on the age, race, religion, ethnic background, general physical appearance, education, hobbies, interests, talents, and other children of the biological parents, as well as their health histories. ILL. REV. STAT. ch. 40, para. 1522.4 (1990). The language in some statutes is quite vague. See, e.g., ME. REV. STAT. ANN. tit. 19, § 533 (West Supp. 1990) (agency obtains whatever medical and genetic information is available) and NEB. REV. STAT. § 43-128 (1988).

10. Adoption did not exist at the common law. See, e.g., *Petition of Simaner*, 147 N.E.2d 419 (Ill. App. Ct. 1957), *aff'd*, 155 N.E.2d 555 (Ill. 1959).

11. See *infra* note 59 and accompanying text.

12. See *infra* note 62 and accompanying text.

13. See *infra* note 63 and accompanying text.

14. See *infra* notes 18-57 and accompanying text.

15. See *infra* notes 58-99 and accompanying text.

16. See *infra* notes 100-76 and accompanying text.

Illinois, which focuses on concrete implementations of the best interests of the child standard.¹⁷

II. THE HISTORY AND DEVELOPMENT OF ADOPTION LAW

A. *The Early History of Adoption*

While adoption statutes were not enacted into American law until the mid-1800s,¹⁸ the tradition of adoption can be traced to ancient civilizations.¹⁹ Family units served as the basis for primitive communities,²⁰ and the family unit transmitted the community's religious and cultural values.²¹ To ensure the survival of the family, and thus of organized society, laws were established allowing men²² without children to adopt, thus ensuring the perpetuation of family lines.²³

17. See *infra* notes 177-85 and accompanying text.

18. The earliest American adoption statutes were enacted in Mississippi in 1846 and in Massachusetts in 1851. Leo A. Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743-48 (1955-56). The Massachusetts statute required the following: written consent of the biological parents and termination of their parental rights; joint petition by both of the prospective parents; judicial satisfaction that the prospective parents could raise the adoptee; the possibility of an appeal; and, legal status as a natural child for the adoptee once the adoption was complete. Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 465 (1972).

19. Ancient literature contains many stories of adoption. For example, Zeus persuaded Hera to adopt Hercules. The adoption was complete after Hera, in bed, clasped Hercules to her breast, pushed him through her robes, and let him fall to the ground. I JAMES FRAZER, *THE GOLDEN BOUGH: THE MAGIC ART AND EVOLUTION OF KINGS* 74 (1935). The Biblical stories of Moses and Esther also begin with adoptions. Moses was hidden by his mother for three months, contrary to the Pharaoh's orders, and then placed in a basket and sent down the river. He was rescued by the maidens of the Pharaoh's daughter and later was taken to the "Pharaoh's daughter, and he became her son." *Exodus* 2:10. Esther was raised by a relative: "when her father and mother were dead, Mordecai took her for his own daughter." *Esther* 2:7.

20. Huard, *supra* note 18, at 743.

21. Two purposes of early adoption law were to perpetuate the rites of the family religion and to avoid extinction of the family. See Presser, *supra* note 18, at 446. Primitive adoption had a deeply religious significance and was carried out by solemn rites. Huard, *supra* note 18, at 743.

22. Until 291 A.D., only men were allowed to adopt. John F. Brosnan, *The Law of Adoption*, 22 COLUM. L. REV. 332, 333 (1922).

23. Roman law provided that childless couples could take in a stranger and designate that stranger as a lawful heir. Joan H. Hollinger, *Introduction to Adoption Law and Practice*, in *ADOPTION LAW AND PRACTICE* 1-18 (Joan H. Hollinger ed., 1988). Mesopotamia's Code of Hammurabi, dated approximately 1720 B.C., stressed the permanency of the relationship created between the adopted son and his father: 185: "If a man has taken a young child 'from his waters' to sonship and has reared him up no one has any claim against that nursling"; and, 186: "If a man has taken a young child to sonship and when he took him his father and mother rebelled, that nursling shall return to his father's house." Brosnan, *supra* note 22, at 333. The Introduction to the Code of Hammurabi also stated that the Code was enacted so that the "strong oppress not the weak, that the orphan and widow be protected." FRED POWLEDGE, *THE NEW ADOPTION MAZE* 6 (1985).

Roman adoption law, upon which American adoption statutes are based,²⁴ had two central characteristics: first, it required a complete severance of the adoptee from the biological family²⁵ coupled with complete acceptance into the adoptive family;²⁶ and second, it established adoptive parents' rights as superior to the rights of either the adoptee or the biological parents.²⁷ Both of these features ensured that the adoptee became a full member of the new family and, in turn, that family lines survived. Since the emphasis of Roman adoption law was on survival of the family line, the welfare of the adoptee was not a prime legal consideration.

Early American adoption law²⁸ continued to emphasize the creation of a new family for the adoptee and the importance of the adoptive parents' interests.²⁹ The first American adoption statutes legitimized relationships that had existed informally for years and brought the force and structure of the judicial system into the private affairs of the family.³⁰ These early statutes took two forms: those that served merely as a means of authenticating and publicly recording a private agreement,³¹ and those that provided for judicial

24. Roman law provided for two types of adoption: adrogation, in which an independent person was adopted by an adult; and adoption, in which a person fell out of the power of his family and came under the power of a new father. See also Huard, *supra* note 18, at 747. Blood lineage was a cornerstone of English culture and thus, English society had no place for strangers entering into intimate family life as rightful heirs. *Id.* at 745-46. As Glanville said, "Only God can make heres [sic], not man." Quoted in, HELEN L. WITMER ET AL., *INDEPENDENT ADOPTIONS* 23 (1963). However, a low birth rate, war, and an influenza epidemic led to *de facto* adoption. In 1926, England passed its first adoption statute, the Adoption of Children Act. *Id.* at 32.

25. This complete severance of ties with the biological parents represents a change from the earlier Code of Justinian, which was a compilation of Roman law made at the direction of the Byzantine Emperor Justinian in the sixth century A.D. Under this Code, the adoptee retained the right of succession to his natural father. Presser, *supra* note 18, at 446.

26. Huard, *supra* note 18, at 744. See also, ARTHUR SOROSKY ET AL., *THE ADOPTION TRIANGLE* 2 (1978).

27. Huard, *supra* note 18, at 745.

28. See *supra* note 18 and accompanying text.

29. The adoptee's interests were considered secondary to those of the adoptive parents, many of whom were infertile couples wanting a child. SOROSKY ET AL., *supra* note 26, at 34.

30. Hollinger, *supra* note 23, at 1-20, 1-22. American society had a long tradition of informal transfer of parental rights. Through the Puritan practice of "putting out", in which children were placed with families who could afford to raise them, or through apprenticeships, many children were raised by parents other than their biological parents. Also, in the South in the 1700s, wealthy citizens often took large groups of orphans into their families. Presser, *supra* note 18, at 456-59. However, these informal adoptions did not result in a legal change of status for the adoptee. The adults had no legal responsibility for the children, and the relationship was at-will. Janet H. Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter*, 38 U.C.L.A. L. REV. 917, 924 (1991).

31. These states, with the date of the first statute, included Texas (1850), Vermont (1850), Tennessee (1851-1852), Missouri (1857), and Iowa (1858). WITMER ET AL., *supra* note 24, at 30.

supervision over the adoption process.³²

Despite such judicial and legislative involvement in the adoption process, the adoptive parents' interests remained paramount to the adoptee's when a child was placed with an adoptive family.³³ Adoption agencies matched children with adoptive parents by external variables, such as hair or eye color and intelligence, so that the child's physical and intellectual characteristics would give the appearance of a biological connection.³⁴ Because comparatively few children were available for adoption, and many of those available were illegitimate, court records were sealed.³⁵ Sealed records supported the secrecy of the child's biological background by making it virtually impossible for anyone to discover the identity of the adoptee's biological parents.³⁶

32. These states, with the date of the first statute, included Massachusetts (1851), Pennsylvania (1855), Indiana (1855), Georgia (1855-1856), Wisconsin (1858), Ohio (1859), Michigan (1861), New Hampshire (1862), Oregon (1864), Connecticut (1864), Maine (1871), Rhode Island (1872), North Carolina (1872-1873) and New York (1873). Michigan, in 1891, became the first state to require that a judge make an investigation before granting an adoption decree. *Id.* at 30, 34.

33. Between 1853 and 1929, more than 90,000 orphaned and abandoned children were shipped from the East coast to the Midwest for adoption. These children were displayed on high platforms, and families selected the children they wanted. The Midwestern farm families, interested in selecting children who could help out on the farms, could return the children if the match did not work out. POWLEDGE, *supra* note 23, at 6.

34. RICHARD P. BARTH & MARIANNE BERRY, *ADOPTION AND DISRUPTION: RATES, RISKS, AND RESPONSES* 14 (1988). Early adoption practice tried to match children to adoptive parents on physical appearance, intellectual capacity, and religion. James B. Boskey, *Placing Children For Adoption*, in *ADOPTION LAW AND PRACTICE* 3-41 (Joan Hollinger ed. 1988).

35. WITMER et al., *supra* note 24, at 38. Adoptive parents preferred a child without ties because of cultural attitudes toward sexual conduct. Illegitimacy was disfavored, and parents wanted the child to have a complete break with his past because of the illegitimacy. Rita Dukette, *Value Issues in Present-Day Adoptions*, 63 *CHILD WELFARE* 236, 237 (1984). *See, e.g.,* *People v. Doe*, 138 N.Y.S.2d 307 (1955) (sealed record statutes protect the out-of-wedlock biological mother by assuring her that her indiscretion will not be made public, the adoptee by not permitting his illegitimacy to be known, and the adoptive parents by knowing that records cannot be a way of harming the adoptee or themselves). The first sealed record laws were passed in Minnesota in 1871. In 1938, the Child Welfare League endorsed secrecy in adoption. JEANNE W. LINDSAY, *OPEN ADOPTION: A CARING OPTION* 63 (1987). Courts do allow records to be opened under specific circumstances, such as for good cause, exceptional circumstances, protection of the adoptee's welfare, and the best interests of the adoptee. *See, e.g.,* *Hubbard v. Superior Court of Yuba County*, 11 Cal. Rptr. 700 (Cal. App. 1961) (records may be opened for good cause or in exceptional circumstances); *In re Wells*, 281 F.2d 68 (D.C. Cir. 1960) (records may be opened for the child's welfare); *Adoption of Spinks*, 232 S.E.2d 479 (N.C. App. 1977) (records may be opened if in the child's best interest).

36. Sealed records contained the adoptee's original birth certificate. At adoption, the birth certificate was taken from the child's official file, filed separately, and replaced with an amended birth certificate reflecting the legal name change. SOROSKY et al., *supra* note 26, at 14. While sealed records are traditional in the United States, European countries occasionally follow different procedures. Scotland, for example keeps public records of every adoption order, and one can trace biological connections through these records. Also, any person over the age of seventeen can write

B. Modern American Adoption

As mental health theory began to have an impact on juvenile law,³⁷ a significant shift in adoption policy occurred. Statutory law expressed this policy shift by emphasizing that adoption was to serve the interests of the child.³⁸ Contemporary statutes regulate the adoption process to ensure and support the adoptee's welfare.

Adoption regulation begins with the placement services available to prospective parents. Today, two types of placement services are available for adults desiring to adopt a child.³⁹ Prospective parents may arrange for an independent adoption⁴⁰ done through an unlicensed third-party, such as a doctor

to the Register House in Edinburgh and obtain a copy of his original birth certificate. While the exact origins of these traditions are not known, one speculation is that public records were kept because Scottish law allowed adoptees to collect inheritance from their biological parents. Since 1964, however, adoptees have only been allowed to inherit from their adoptive parents. JOHN TRISELIOTIS, *IN SEARCH OF ORIGINS: THE EXPERIENCE OF ADOPTED PEOPLE* 1 (1973).

37. In a juvenile proceeding, the court acts in a protective capacity, under its *parens patriae* power. Procedurally, however, the rights of juveniles and adults are the same, with exceptions made for the rights to bail and trial by jury. CHICAGO BAR ASS'N & JUSTICE FOR YOUTH CAMPAIGN, *GUIDE TO THE JUVENILE JUSTICE SYSTEM* 1, 2 (2d ed. 1991). Juvenile law reflects the significant differences between children and adults. Children are constantly developing in all areas of life: emotional, social, and psychological. Also, children are part of a parent-child relationship, and the law must deal with children as part of that relationship. JACK C. WESTMAN, *CHILD ADVOCACY* 251 (1979). Children are not considered competent to determine their own interests, unlike the adult whose personal life is safeguarded from governmental intrusion. JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 3 (1973). And, as the Supreme Court has stated: "although children generally are protected by the same constitutional guarantees against governmental deprivations as are adults, the State is entitled to adjust its legal system to account for children's vulnerability and their needs for 'concern, . . . sympathy, and . . . paternal attention.'" *Bellotti v. Baird*, 443 U.S. 622, 635 (1979).

38. See *infra* note 59. This standard is vague and rarely codified. Statutes usually give no guidelines and so courts focus on the physical, psychological, and economic needs of the adoptees. However, because of the arbitrary nature of these statutes, the standard may lead to inconsistent judicial interpretation. Constance J. Miller, Note, *Best Interests of Children and the Interests of Adoptive Parents: Isn't It Time for Comprehensive Reform?*, 21 GONZ. L. REV. 749, 759, 764, 799 (1986).

39. SOROSKY et al., *supra* note 26, at 34. A third alternative, not encouraged by agencies, is legal risk adoption. This involves the pre-adoptive placement of children who have not been legally freed for adoption. Families who take these children do so with the knowledge that the children not only may never be freed for adoption but also may be returned to their biological parents. POWLEDGE, *supra* note 23, at 62.

40. Also available, though as a subset of independent adoption, is an alternative known as open adoption. In open adoption, the biological parents and adoptive parents meet and exchange identifying information. Such an exchange of information, assuming it is passed along to the adoptee at the right time, may help the child feel more secure in his identity. A face-to-face meeting between the two sets of parents may also diminish the fantasies and fears that each has about the

or lawyer.⁴¹ Typically, the third-party interviews the biological mother to assess, among other factors, her commitment to the adoption proceeding.⁴² The state mandated study of the prospective parents is done by an adoption agency or by a certified social worker.⁴³ Because independent adoptions are usually done at birth, the hospital adoption procedure is important.⁴⁴ Surrender papers are signed by the biological mother, and the adoptive parents then petition the court for adoption.⁴⁵

Adults may also adopt children through a licensed agency.⁴⁶ After the interested parties contact an adoption agency, the agency conducts in-depth interviews with the prospective parents.⁴⁷ These interviews allow the agency to study closely the prospective parents, and also give the prospective parents an opportunity to learn about adoption in general.⁴⁸ Once the agency approves

other. JUNIOR LEAGUE OF CHICAGO, *ADOPTION: A GUIDE TO ADOPTION IN ILLINOIS* 15, 16 (1988). See also, SOROSKY et al., *supra* note 26, at 207; POWLEDGE, *supra* note 23, at 223-41.

41. Independent adoptions are also known as grey market adoptions. Because the third-party is not licensed by the state and because investigation of the adoptive parents is often not done until the child has been placed, this type of adoption is often criticized. In some states, it is either severely restricted or prohibited. Barbara L. Atwell, *Surrogacy and Adoption: A Case of Incompatibility*, 20 COLUM. HUM. RTS. L. REV. 1, 13, 14 (1988). Forty-two states permit parents to place their children directly or through an unlicensed third-party. Only Colorado, Connecticut, Delaware, Massachusetts, Michigan, Minnesota, North Dakota, and Tennessee require licensed public or private agencies to place children for adoption. Boskey, *supra* note 34, at 3-41. In independent adoptions, the biological parents retain all their legal rights to their children until the court finalizes the adoption. SOROSKY et al., *supra* note 26, at 34. The majority of healthy white infants are placed through independent adoption, in which adoptive parents have more security in the process because of more knowledge about the biological parents. POWLEDGE, *supra* note 23, at 194-97.

42. Several advantages of independent adoption encourage the biological parents to use that route rather than agency adoption. Not only is independent adoption often less trying for the biological parents, but the biological parents also are compensated for many of their expenses and have some say in the placement of their child. POWLEDGE, *supra* note 23, at 195, 206-07.

43. *Id.* at 207.

44. Hospitals vary in their procedures, from supporting the biological parents to making the experience traumatic for them. *Id.* at 207-08.

45. *Id.* at 209.

46. Private adoption agencies were created out of philanthropic motives. Before such agencies existed, orphaned children were taken to almshouses and cared for by women consigned to prison terms. Early private agencies taught the children to read and write and then provided the children with apprenticeships. As public education took hold in the United States, the need for agencies to teach academic skills lessened. Because of the diminished demand for private education, agencies were no longer under pressure to keep children for long periods of time, and foster placements at earlier ages became more common. Presser, *supra* note 18, at 471-77. Before turning their child over to an adoption agency, the biological parents must receive counselling about their course of action and the attendant legal consequences; thereafter, they relinquish their parental rights to the agency. Hollinger, *supra* note 23, at 1-8, 1-10.

47. POWLEDGE, *supra* note 23, at 72-73.

48. *Id.*

the prospective parents, their names are placed on a waiting list of qualified adopters.⁴⁹ The final step in the procedure is a court appearance to finalize the adoption.⁵⁰

Whichever type of placement is used, all legal adoptions today share a number of characteristics. Before any court adoption proceeding can begin, either the biological parents must give their voluntary, informed consent to the adoption and relinquish all their parental rights⁵¹ or the state must show that the biological parents have abandoned, abused, or neglected their child.⁵² The consent requirement supports the state's interest in preserving the ties between biological parents and their children, and protects the adoptive parents from future claims by the biological parents.⁵³ Adoption proceedings are

49. *Id.* at 73.

50. *Id.* at 74.

51. Hollinger, *supra* note 23, at 1-8. Among the reasons given by parents who have voluntarily released their children for adoption are: unmarried and wanting the baby to have a family; unprepared for parenthood, either emotionally or financially; and desire to finish high school, but are unable to with a child. For a more detailed study of these reasons, see SOROSKY et al., *supra* note 26, at 49-53. Informed consent requires that the agency advise the biological parents of the legal ramifications of the permanent severance that they are contemplating. The parents should also be made cognizant of the psychological dimensions of the decision. Many states consider pre-birth consent invalid because biological parents cannot know how they will react to giving up their child until that child is born. Consent is not voluntary if based on duress, undue influence, fraud, mistake, or if it is bought. Atwell, *supra* note 41, at 18-21. See, e.g., County Dep't of Pub. Welfare of St. Joseph County v. Morningstar, 151 N.E.2d 150 (Ind. Ct. App. 1958) (annulment granted when agency had knowingly made false statements to the adoptive parents about the character of the adoptee's biological parents and family); Fiske v. Director, Dep't of Pub. Welfare, 236 P.2d 427 (Cal. Ct. App. 1951) (revocation of adoption granted where biological mother had given her consent to agency with the misunderstanding that her child would be returned if she so requested within one year); Phillips v. Chase, 89 N.E. 1049 (Mass. 1909) (adoption annulled on grounds of undue influence); and Warner v. Ward, 401 S.W.2d 62 (Ky. 1966) (where biological mother's consent had been given under circumstances of distress, the court permitted her to withdraw consent).

52. Grounds for termination of parental rights include abandonment or evidence of failure or refusal to perform one's parental duties. Incapacity to parent, abuse, and neglect are examples of failure or refusal to perform parental duties. Such failure or refusal must persist for a statutorily specified time, usually six to twelve months. WESTMAN, *supra* note 37, at 279. See generally Susan B. Fallek, Note, *In the Child's Best Interests: Termination of Parental Rights in Minnesota: In re J.J.B.*, 390 N.W.2d 274 (Minn. 1986), 10 HAMLIN L. REV. 693 (1987); Sanford W. Stark, Note, *Abandonment v. Adoption: Terminating Parental Rights and the Need for Distinct Legal Inquiries*, 7 ALASKA L. REV. 247 (1990). See, e.g., *In Interest of Buttram*, 372 N.E.2d 1135 (Ill. App. Ct. 1978) (evidence of biological father's extensive criminal background and imprisonment is sufficient basis for termination of parental rights); *In re Hrusosky*, 351 N.E.2d 386 (Ill. App. Ct. 1976) (parental rights terminated when mother found unfit due to failure to maintain reasonable degree of interest, concern, and responsibility as to child's welfare); and ILL. ANN. STAT. ch. 40, para. 1501 (Smith-Hurd 1990) (lists features that make a parent unfit and under which parental rights can be terminated).

53. Atwell, *supra* note 41, at 17.

confidential throughout⁵⁴ and, at their completion, a new birth certificate is issued to the child, signifying a new start to the child's life.⁵⁵ Once legally finalized, the adoption decree is permanent, with only a few legal exceptions allowed.⁵⁶ The adoption is not a contractual arrangement as no consideration may be given in exchange for the biological parents' agreement to surrender the child.⁵⁷ Further, the judicial standard used in the majority of adoptions is that of the best interests of the child.

54. Hollinger, *supra* note 23, at 1-8, 1-13 to 1-14.

55. SOROSKY et al., *supra* note 26, at 14. The procedure of issuing a new birth certificate may be different for an older child who obviously has intimate knowledge of his biological parents and for whom such a complete break with the biological parents might be psychologically damaging. Dukette, *supra* note 35, at 240. The importance of a symbolic start of a new life is evident in many societies. For example, in Bulgaria a complex adoption ceremony was developed. The adoptive mother took the boy she intended to adopt and pushed and pulled him through her clothes. The boy was then regarded as her son and was able to inherit his adoptive parents' property. In Sarawak, if a woman adopted an adult, a public ceremony was held in which the adoptee crawled from behind his new mother and between her legs. He then was tied to the mother, and they walked back and forth together. That society also considered any offense committed against an adopted child as more heinous than an offense committed against one's biological child. FRAZER, *supra* note 19, at 74-75.

56. Mental illness or other deficiency of the adoptee is the most common ground for seeking annulment. Some states do not have particular annulment statutes. In those states, annulment is granted on a basis similar to that for other civil decrees. States with annulment statutes may be divided into two groups: states that allow annulment only on procedural defects or irregularities; and states that provide comprehensive, substantive grounds for annulment. Elizabeth N. Carroll, Comment, *Abrogation of Adoption by Adoptive Parents*, 19 FAM. L.Q. 155, 159 (1985). See, e.g., CAL. CIV. CODE § 227(b) (West 1982) (revocation allowed within five years of adoption if evidence of mental illness as a result of conditions prior to adoption is shown); KY. REV. STAT. ANN. § 199.540 (Michie/Bobbs-Merrill 1982) (revocation allowed if traits of a different ethnological ancestry than that of the adoptive parents are evident and if the adoptive parents did not know of the different ancestry at the time of the adoption). See generally Anne H. Howard, Note, *Annulment of Adoption Decrees On Petition of Adoptive Parents*, 22 J. FAM. L. 549, Appendix A (1983-1984) (state-by-state list of grounds for annulment and statutes of limitation).

57. Hollinger, *supra* note 23, at 1-8, 1-14. When the adoption is considered a contractual arrangement and contractual remedies are applied, the child is essentially treated as defective merchandise that can be returned. Carroll, *supra* note 56, at 171. Surrogate parenting agreements raise similar contractual issues. In a surrogate parenting agreement, the surrogate agrees to be impregnated through artificial insemination, to carry the fetus to term, and to deliver the baby to the biological father and surrender all her parental rights. All this is done for a fee paid to the surrogate mother. Courts have found that the surrogate parent agreement is a form of adoption. See generally Atwell, *supra* note 41. See also, *In re Baby M*, 537 A.2d 1227 (N.J. 1988) (state supreme court held that surrogate parenting agreement was not enforceable).

III. A MODERN JUDICIAL STANDARD FOR APPROVAL OF ADOPTIONS: IN THE BEST INTERESTS OF THE CHILD

A. Assessment of the Suitability of the Adoptive Parents

While placement under early adoption law was often made on the basis of the adoptive parents' religion, race or financial status,⁵⁸ most modern adoption statutes stress the best interests of the child as the judicial standard used in decreeing adoption.⁵⁹ By incorporating this standard, the law reflects a societal

58. Hollinger, *supra* note 23, at 1-29, 1-30. Those adoptive parents who only marginally fulfilled an agency's requirements were often given those children who now would be termed special needs children. SOROSKY et al., *supra* note 26, at 201. See also Cynthia J. Bell, *Adoptive Pregnancy: Legal and Social Work Issues*, 65 CHILD WELFARE 421, 424 (1986). See, e.g., Ellis v. McCoy, 124 N.E.2d 266 (Mass. 1955) (a Roman Catholic mother, after learning that her illegitimate child had been given to a Jewish couple for adoption, was allowed to revoke her consent for adoption).

59. State statutes that specifically include the child's best interests as the appropriate judicial standard include: ALA. CODE § 26-10-4 (1986); ALASKA STAT. § 25.23.120 (1983); ARIZ. REV. STAT. ANN. § 8-116 (1985); ARK. REV. STAT. ANN. § 9-9-212 (1991); CAL. CIV. CODE § 227 (West 1982); COLO. REV. STAT. § 19-5-210 (1990); CONN. GEN. STAT. ANN. § 45-61a (1981); DEL. CODE ANN. tit. 13 §§ 915, 929 (1981); D.C. CODE ANN. § 16-309 (1981); GA. CODE ANN. § 19-8-13(b) (Michie 1981); HAW. REV. STAT. § 578-8 (1985); IDAHO CODE § 16-1507 (Supp. 1990); ILL. ANN. STAT. ch. 40, para. 1525 (Smith-Hurd 1990); IND. CODE ANN. § 31-3-1-8 (West 1979); LA. REV. STAT. ANN. § 9.432 (West 1981); MICH. COMP. LAWS ANN. § 710.21a (Callaghan Supp. 1990); MINN. STAT. ANN. § 259.28 (West 1982); MISS. CODE ANN. § 93-17-13 (1973); MO. ANN. STAT. § 453.005 (Vernon 1986); MONT. CODE ANN. § 40-8-123 (1981); NEB. REV. STAT. § 43-109 (1988); NEV. REV. STAT. ANN. § 127.280 (Michie Supp. 1989); N.J. STAT. ANN. § 9.3-37 (West Supp. 1990); N.M. STAT. ANN. § 40-7-51A(7) (1989); N.Y. DOM. REL. LAW § 114 (McKinney 1988); N.D. CENT. CODE § 14-15-11 (1981); OHIO REV. CODE ANN. § 3107.14 (Baldwin 1990); OKLA. STAT. ANN. tit. 10 § 60.13 (West Supp. 1990); 23 PA. CONS. STAT. ANN. § 2902 (Purdon 1986); R.I. GEN. LAWS § 15-7-2 (1988); S.C. CODE ANN. § 20-7-1760 (Law Co-op 1985); S.D. CODIFIED LAWS ANN. § 25-6-13 (1985); TEX. FAM. CODE ANN. § 16.08 (1985); UTAH CODE ANN. § 78-30-9 (1978); VA. CODE ANN. § 63.1-230 (Supp. 1990); WASH. REV. CODE ANN. § 26.33.010 (1986); W. VA. CODE § 48-4-9 (1986); WIS. STAT. § 26.33.010 (1986); and WYO. STAT. § 1-22-111 (1988). The Delaware and Michigan statutes also specify that if a conflict of interests arises between the child and parents, the child's interests will prevail. Florida's adoption statute states that its purpose is to "protect and promote the well-being of persons being adopted and their natural and adoptive parents and to provide all children who can benefit it by a permanent family life." FLA. STAT. ANN. § 63.022 (West 1985). Iowa's adoption statute holds the child's best interests as paramount with "due consideration" given to the adoptive parents' interests. IOWA CODE ANN. § 600.1 (West 1981). Maine requires that, to decree an adoption, the judge must be satisfied "of the identity and relations of the parties, of the ability of the petitioners to bring up and educate the child properly." ME. REV. STAT. ANN. tit. 19 § 533 (West Supp. 1990). In Massachusetts, the judge must consider the child's need for "loving and responsible parental care and all factors relevant to the physical, mental, and moral health of the child." MASS. GEN. LAWS ANN. ch. 210 § 210.1 (West 1987). The adoption statutes of Maryland, New Hampshire, North Carolina, and Tennessee all have similar purposes: to protect children from unnecessary separations from their biological parents and from adoption by unfit persons; to protect biological parents from hasty, ill-considered decisions; and to protect adoptive parents by providing information on the adoptee and

preference for protecting children rather than adults.⁶⁰ However, while the law clearly states that the child's best interests are paramount, the law does not specify factors to use in determining the child's best interests.⁶¹ The interpretation of the standard is left to the judge's discretion;⁶² thus, the interpretation of the best interests standard varies from state to state, affording different levels of protection to adoptees.⁶³

from future disturbances in their relationship with the adoptee. MD. FAM. LAW CODE ANN. § 5-303 (1984); N.H. REV. STAT. ANN. § 170-B:1 (1990); N.C. GEN. STAT. § 48-1 (1984); TENN. CODE ANN. § 36-1-101 (1984). The Kansas adoption statute requires the court to consider "the social assessment and all evidence offered by any interested party" when it is considering adoption petitions. KAN. STAT. ANN. § 59-2278(d) (1985). Section 109.350 of the Oregon adoption statutes requires judicial satisfaction as to "the identity and relations of the person, that the petitioner is of sufficient ability to bring up the child and furnish suitable nurture and education." OR. REV. STAT. § 109.310 (1987). The Vermont adoption statute specifies that "the judge . . . shall make an investigation of the conditions and circumstance attending the proposed adoption." VT. STAT. ANN. tit. 15 § 439 (1989). Section 199.520 of the Kentucky adoption statutes requires the court to assess if the "petitioners are of good moral character, of reputable standing in the community and of ability to properly maintain and educate the child." KY. REV. STAT. ANN. § 199.520 (Baldwin 1985). The Uniform Adoption Act also lists the best interests as the purpose of the adoption statute. 9 U.L.A. 11. Although the best interests standard is traditionally used in juvenile proceedings, it has been criticized as being too value-laden and too indeterminate. See e.g., Katharine T. Bartlett, *Re-Expressing Parenthood*, 98 YALE L.J. 293 (1988); Jon Elster, *Solomonic Judgments: Against the Best Interests of the Child*, 54 U. CHI. L. REV. 1 (1987); Robert H. Mnookin, *Child-Custody Adjudication: Judicial Functions in the Face of Indeterminacy*, 39 LAW & CONTEMP. PROBS. 226 (1975).

60. Gary Skoloff, *Family Law Section Seeks to Educate*, NAT'L L.J., Aug. 6, 1990, at 25, col. 1. While states generally minimize their coercive interventions into family relationships, this value yields to that of the child's best interests once the state has become involved in the child's placement, as is the case in adoption. 2 THE CHILD AND THE LAW 596-97 (F. Bates ed. 1976) [hereinafter THE CHILD AND THE LAW].

61. Justice Stewart noted the problems with the best interests standard when he stated "that standard provides little real guidance to the judge, and his decision must necessarily reflect personal and societal values and mores. . . ." *Bellotti v. Baird*, 443 U.S. 622, 655 (1979). See, e.g., Christopher J. Dodd, *The Adoption of Baby Lenore: Two Interpretations of a Child's Best Interests*, 11 J. FAM. L. 285 (1971). Baby Lenore was born to an unwed alien and was given to an adoption agency when she was four days old. The adoption agency placed her with a family interested in adopting the child, but less than one month later, the biological mother asked to have the baby returned. When the adoption agency would not do so, the mother filed suit against the agency in New York. The court ordered the baby to be returned, but the adoptive parents moved to Florida to avoid the New York *habeas corpus* decree. In Florida, the mother filed suit against the adoptive parents, again requesting return of the child. The Florida court dismissed the New York writ because Florida courts do not recognize foreign decrees that jeopardize the best interests of the child.

62. Nancy B. Shernow, Note, *Recognizing Constitutional Rights of Custodial Parents: The Primacy of the Post-Divorce Family in Child Custody Modification Proceedings*, 35 U.C.L.A. L. REV. 677, 683 (1987-88). The best interests standard is hard to define, and its vagueness has led to confusion and divisiveness in the child welfare field. NAT'L L.J., Aug. 6, 1990, at 25, col. 1.

63. Protection to adoptees is illusory because no substantive standards are enunciated. Thus, implementation of the standard often depends on the adoption worker's qualifications, interest, and ability in doing more than a cursory study of those involved in the adoption process. William M. Schur, *Adoption Procedure*, in ADOPTION LAW AND PRACTICE, 4-10, 4-12 (Joan Hollinger ed., 1988).

In assessing the child's best interests, courts often rely primarily on economic considerations, thereby neglecting the non-economic factors that contribute heavily to any child's psychological growth and development.⁶⁴ Although economic factors are fairly objective and thus easy to assess, they should not be the primary consideration in adoption placement. Courts need to use general information from the child development field to evaluate a host of other criteria: the adoptive parents' abilities to meet the child's needs; the child's physical, mental and emotional needs; and, for older adoptees, the adoptee's desires and relationships with both the biological and adoptive parents.⁶⁵

Assessment of the adoptive parents' abilities to meet the child's needs is done through an investigation of the adoptive parents.⁶⁶ Adoption agencies typically conduct extensive interviews to gather information on the prospective parents and to share information on available children with the prospective parents.⁶⁷ Thus, the investigation develops along two lines: the prospective parents' suitability as adoptive parents in general, and the prospective parents' suitability as parents for a particular child. To determine the prospective parents' general suitability, agencies assess many factors.⁶⁸

64. Skoloff, *supra* note 60.

65. JUNIOR LEAGUE OF CHICAGO, *supra* note 40, at 26. Government policies on children derive from society's conceptions of childhood. This is reflected in age regulations for voting, driving, working, marrying, buying alcoholic beverages, attending school, and entering into contracts. Because a relative lack of contact between the law and psychology has existed, some have argued that policies based on knowledge of child development should be developed. Arlene Skolnick, *The Limits of Childhood: Conceptions of Child Development and Social Context*, 39 LAW & CONTEMP. PROBS. 38, 39 (1975). The blend of law and psychology does present legal problems, particularly in the area of evaluating expert opinions. Objective, reliable, and impartial measures should be used by scientists, including psychiatrists and psychologists. Peggy C. Davis, *Law, Science, and History: Reflections Upon In the Best Interest of the Child*, 86 MICH. L. REV. 1096, 1097-98, 2000, 2002 (1988).

66. Atwell, *supra* note 41, at 8. See also WESTMAN, *supra* note 37, at 321.

67. SOROSKY et al., *supra* note 26, at 21-22. Such extensive procedures are a change from earlier adoption proceedings, which were cursory and often done in less than one hour. While financial status was often dispositive of the suitability issue in earlier times, today it is only one of many factors examined. Hollinger, *supra* note 23, at 1-30.

68. Boskey, *supra* note 34, at 3-4. While religion and marital status formerly were controlling issues, today they are only factors to be considered along with a host of others. Race is a more controversial factor and, if used as a criterion to reject a parent, usually must be on a specific showing of not being in the child's best interest. See, e.g., Drummond v. Fulton County Dep't of Family & Children's Servs., 547 F.2d 835, (5th Cir. 1977), cert. denied, 437 U.S. 910 (1978) (race is a relevant factor in an adoption proceeding because of the inherent difficulties in inter-racial adoption, but race alone is not dispositive). Adult sexual orientation, though not litigated as frequently as race, can be used as a basis for rejecting adults because of the threat that homosexual preference may pose to the child's best interests. *Id.* at 3-44 to 3-53. For example, the New Hampshire adoption statute specifies that a homosexual may not adopt. N.H. REV. STAT. ANN. § 170-B:4 (1990). Some researchers believe that it is easier to identify indicators of potentially "bad"

One highly significant factor is determining the adoptive parents' motivations.⁶⁹ Adults may choose to adopt a child for many reasons, and understanding the basis for such a decision is crucial both for the adoptive parents and the agency placing the child. Reasons for wanting to adopt a child may include infertility,⁷⁰ the psychological replacement of a dead child, humanitarian concerns, a desire to add to the family coupled with an inability to conceive more children, and a desire for a child but a need to avoid passing along known hereditary defects.⁷¹ An evaluation of the adoptive parents' reasons, along with an assessment of more objective factors such as their financial status, age, and marital status, leads to a determination of whether the parents are generally suitable as adoptive parents.

In evaluating the adoptive parents' suitability as parents for a particular child, all the child's pertinent needs must be considered.⁷² Because these needs vary according to the child's age and developmental level, the child's age is a crucial factor.⁷³ Adults may vary significantly in their abilities to parent different ages of children. Some find the constant attention required to care for an infant's needs too demanding, while others find that relationship very satisfying. Likewise, the tumultuous adolescent years are gratifying for some

parents than indicators of "good" parents. Indicators of "bad" parents include uncertainty about the motivation for adoption and health and energy limitations of the parents. WESTMAN, *supra* note 37, at 321.

69. For example, adoptive parents who imagine that they are rescuing the adoptee are often frustrated when problems develop with the child and then may direct irrational anger at the adoptee. Adoptive parents often harbor fantasies about the adoptee's heritage, and such fantasies can result in unsureness about dealing with the child. Marshall D. Schechter, *About Adoptive Parents in PARENTHOOD: ITS PSYCHOLOGY AND PSYCHOPATHOLOGY* 353, 362-67 (E. James Anthony & Therese Benedek eds., 1970).

70. Researchers view infertility as a developmental crisis that one must successfully confront before one fully develops the ability to successfully parent. Coping with infertility involves many of the same stages as coping with death: sadness, anger, grief, and accepting resignation. Adrienne Kraft & Joseph Palombo, *The Psychological Dimensions of Infertility*, 50 AM. J. ORTHOPSYCHIATRY 618, 620-24 (1980). See also Schechter, *supra* note 69, at 360-62; GROUP FOR THE ADVANCEMENT OF PSYCHIATRY, *THE JOYS AND SORROWS OF PARENTHOOD* 81-85 (1973) [hereinafter GAP].

71. Hollinger, *supra* note 23, at 1-61. See also SOROSKY et al., *supra* note 26, at 73.

72. These needs consist of both physical and psychological needs. See generally GOLDSTEIN et al., *supra* note 37, at 9-28.

73. WESTMAN, *supra* note 37, at 319. Children born in the United States and adopted as infants now account for twenty to thirty percent of all adoptions. This figure is a dramatic decrease from the over fifty percent figure for such adoptions done between the 1930s and the 1960s. The decrease is due to two factors: a decrease in illegitimate children given up for adoption and an increase in the abortion rate. These declining figures stand in contrast to the rising number of adoptions of foreign-born children. Hollinger, *supra* note 23, at 1-55 to 1-58. See also Margaret S. Mahler et al., *The Mother's Reaction to Her Toddler's Drive for Individuation*; E. James Anthony, *The Reactions of Parents to the Oedipal Child*; Judith S. Kestenberg, *The Effect on Parents of the Child's Transition into and out of Latency*; and E. James Anthony, *The Reactions of Parents to Adolescents and to Their Behavior*, all found in Anthony & Benedek, *supra* note 69.

parents to work through with their children even though other parents find these years very difficult.

B. Assessment of the Child

Adoption at birth, or at least within the first six months of life, is usually the most successful.⁷⁴ Early adoption allows a continuous, nurturing relationship to develop from early infancy, when the need for stimulation and relatedness is intense.⁷⁵ Because the child's development requires successful negotiation of phase-specific developmental tasks, each phase depends on successful resolution of earlier developmental tasks.⁷⁶ Thus, a defect in one phase may distort development in subsequent stages.⁷⁷ The early establishment of a nurturing, continuous relationship with a psychological parent⁷⁸ who can see the child through years of developmental tasks is certainly in the child's best interest. And for the adoptive parent, who has been unable to undergo the important physiological and psychological changes that occur during conception, pregnancy, and delivery, adoption of an infant helps stimulate the bonding that naturally occurs between the biological parents and the infant.⁷⁹

During the first three years of a child's life, significant psychological and physical growth occurs. For example, the rapid development of the brain in the early years produces the most dramatic changes in the life cycle.⁸⁰ If given proper stimulation, the infant learns rapidly; however, deprivation at this young

74. JOINT COMMISSION ON MENTAL HEALTH OF CHILDREN, MENTAL HEALTH: FROM INFANCY THROUGH ADOLESCENCE 47 (1973) [hereinafter JOINT COMM'N.]. Before instituting the best interests standard, an infant was often held in a foster home until his physical and neurological status was known. However, studies have shown that children who remained in foster care differed significantly from those who were moved into adoptive homes. Children were especially vulnerable in the areas of emotional adjustment and adaptability. WESTMAN, *supra* note 37, at 319.

75. JOSEPH GOLDSTEIN & JAY KATZ, THE FAMILY AND THE LAW 1060 (1965). See generally SELMA FRAIBERG, THE MAGIC YEARS (1959); RENE SPITZ, THE FIRST YEAR OF LIFE (1965); and DANIEL STERN, THE INTERPERSONAL WORLD OF THE INFANT (1985).

76. See generally ANNA FREUD, NORMALITY AND PATHOLOGY IN CHILDHOOD (1965).

77. WESTMAN, *supra* note 37, at 74.

78. To develop as an individual, a child needs a psychological parent who provides a continuous relationship. THE CHILD AND THE LAW, *supra* note 60, at 595. The term psychological parent is defined as "one whom on a continuing, day-to-day basis, through interaction, companionship, interplay, and mutuality, fulfills the child's physical needs." GOLDSTEIN et al., *supra* note 37, at 98.

79. Adoptive parents miss out on the "mutual gratification of procreation and the physical confirmation of their love; they are denied the fantasies and redefinition of their changing feelings of masculinity and femininity. . . ." Kraft & Palombo, *supra* note 70, at 626. However, going through the adoption process can mobilize many parental attitudes and help prepare the adoptive parents for their roles as parents. *Id.* at 629.

80. WESTMAN, *supra* note 37, at 74.

age may result in emotional and intellectual constriction.⁸¹ Psychologically, the infant moves from operating on sensory motor impressions and tension-reduction experiences⁸² to a child communicating and having social interchanges with both the family and others.⁸³

Children adopted at an older age show significantly more problems adjusting to the adoption than do adoptees placed early in life.⁸⁴ Moreover, once a child is eight years old, the likelihood of his being adopted, rather than remaining in foster care, decreases.⁸⁵ The older adoptee has often experienced many separations and losses before adoption.⁸⁶ Those experiences may lead to a tense beginning with the adoptive parents because the child, afraid to believe that the situation is permanent, constantly tests the parents' commitment to keeping the child.⁸⁷ Also, the older child is more vulnerable to feelings of rejection and more likely to develop depression.⁸⁸

81. JOINT COMM'N., *supra* note 74, at 9-10.

82. The infant reacts to sensations within his body and sensations outside of his body. The infant regulates tension through activity, such as vocalization and generalized motoric activity. SPITZ, *supra* note 75, at 61, 97.

83. See generally MARGARET MAHLER, *THE SELECTED PAPERS OF MARGARET S. MAHLER, M.D. II: SEPARATION-INDIVIDUATION* (1979) (a psychoanalytic study of the first three years of life, concentrating on the early stages of psychological development in both normal and pathological cases); THEODORE LIDZ, *THE PERSON* (1968) (a detailed study of human development, from birth through death).

84. WITMER et al., *supra* note 24, at 29. A disruption is defined as an adoption that has ended, legally or otherwise. Approximately 14,400 older child adoptions yield an annual disruption of about 1,500 children. The average cost of re-placing the child in foster care and subsequent re-adoption or long-term care is \$36,621 per child. Thus, the overall cost to agencies is about \$55 million per year. While the financial loss to agencies is measurable, the lost value to the child is probably greater and less susceptible to measurement. *Id.* at 220. A child over the age of two has images of his biological parents and his experiences with them. While these images may create problems for the child as he tries to accept the adoptive parents, the images also may interfere with the adoptive parents' fantasies that they are the most important persons to the adoptee. GAP, *supra* note 70, at 85.

85. Marianne Berry & Richard P. Barth, *A Study of Disrupted Adoptive Placements of Adolescents*, 69 CHILD WELFARE 209, 211 (1990).

86. Older adoptees have usually been in a number of foster homes and/or residential placements; thus, they have had multiple relationships with adult caretakers, rather than a consistent relationship with one or two parents. The older adoptee is also likely to have had a greater relationship with his or her biological parents. SOROSKY et al., *supra* note 26, at 198.

87. *Id.*

88. *Id.* at 200. Adolescence is a particularly trying time for the adoptee. The adolescent adoptee often has an intense desire for information about his or her biological parents. Also, adoptees sometimes use the fact of their adoption as a way to challenge the adoptive parents' authority. GAP, *supra* note 70, at 88.

Age is one factor that may classify a child as a special needs child,⁸⁹ thus requiring a specialized placement. While special needs children used to be placed with marginally eligible adoptive parents,⁹⁰ their placements now are regulated by legislation that mandates placement with parents who are able to meet the needs of these children.⁹¹ Federal law requires agencies to compile a detailed written health, genetic, and social history on each special needs child.⁹² While federal mandates require agencies to inform parents of a child's special needs, such information is not always revealed to adoptive parents. One research study has found that agencies often do not give pertinent information about the adoptee to the adoptive parents.⁹³ Of those parents in the research study who did not receive sufficient information, sixty-four percent said that the

89. The Adoption Assistance and Child Welfare Act, 42 U.S.C.A. § 673 (West 1980) provides ongoing adoption subsidy payments by the federal government to the states. The Act defines special needs children as children whom:

(1) the State has determined that the child cannot or should not be returned to the home of his parents; and

(2) the State had first determined (A) that there exists with respect to the child a specific factor or condition (such as his ethnic background, age, or membership in a minority or sibling group, or the presence of factors such as medical conditions or physical, mental, or emotional handicaps) because of which it is reasonable to conclude that such child cannot be placed with adoptive parents without providing adoption assistance under this section or medical assistance under subchapter XIX of this chapter, and (B) that, except where it would be against the best interests of the child because of such factors as the existence of significant emotional ties with prospective adoptive parents while in the care of such parents as a foster child, a reasonable, but unsuccessful, effort has been made to place the child with appropriate adoptive parents without providing adoption assistance under this section or medical assistance under subchapter XIX of this chapter.

Id.

See also Alice Brussiére & Ellen C. Segal, *Adoption Assistance for Children with Special Needs*, in *ADOPTION LAW AND PRACTICE* 9-11 (Joan Hollinger ed., 1988).

90. SOROSKY et al., *supra* note 26, at 201.

91. *Id.* However, even with this national legislation, states still delegate a great deal of authority for overseeing adoption to private agencies. Agencies are generally left to regulate themselves, free from public scrutiny. POWLEDGE, *supra* note 23, at 44.

92. POWLEDGE, *supra* note 23, at 44.

93. BARTH & BERRY, *supra* note 34, at 18. The types of information not given out to adoptive parents included facts such as that the adoptee had engaged in arson or had been placed in a prior residential placement. While more than one-half of the children in the study had been physically abused prior to their adoptions, about one-third of the adoptive parents were unaware of that pertinent information. Also, about one-third of the children studied had been sexually abused before adoption yet less than one-half of the adoptive parents knew of the abuse at the time of the adoption. Finally, a small but surprising percentage of adoptive parents did not know about the adoptee's physical or developmental disabilities prior to adoption. *Id.* at 108. Fewer than one-half of the families studied received psychological reports, dental histories, educational reports, neurological reports, birth histories, physical therapy reports, or reports on early childhood development. However, researchers noted that a discrepancy existed between what parents and social workers considered as a report. Such problems could be clarified if materials were given in writing with a cover checklist regarding the enclosed information. *Id.* at 111, 112.

missing information would definitely have affected their decisions to adopt the children.⁹⁴ Two reasons seem to exist for insufficient information being given to the adoptive parents: the information is not obtained in a systematic, complete manner; and the adoption worker either does not reveal all the gathered information or does not reveal the information in a way that the adoptive parents can comprehend and use in making their decisions to adopt.⁹⁵

The adoptee's best interests are effectively served only when the adoptive parents know as much as possible about the adoptee's history and health. While statutory requirements for the collection of such information have led to the collection of higher quality information over the past decade, inaccurate and incomplete information still remains a problem.⁹⁶ Only when the adoptive parents have complete, accurate information can they make plans to meet the child's needs and to carry out their parental responsibilities. For example, an adoptive parent who is aware of a potentially debilitating disease in the adoptee can seek early medical treatment and thus possibly reduce the symptoms or suffering of the child. Likewise, those children who will require special educational programs, either due to learning disabilities or to retardation, have a much better chance for achieving maximal academic progress if such programs are begun early in the child's academic career. Agencies, ironically, are willing to entrust prospective parents with a child but not with enough significant information about that child to enable the parents to make an informed decision.⁹⁷ The adoptive parents are in a position to make an informed choice about proceeding with the adoption only when they have all the pertinent information on the adoptee.

94. *Id.* at 110.

95. *Id.* at 110, 188. See also SOROSKY et al., *supra* note 26, at 31.

96. Joan Hollinger, *The Aftermath of Adoption: Legal and Social Consequences*, in ADOPTION LAW AND PRACTICE, 13-16 (Joan Hollinger ed., 1988). Lack of information may be due to several factors, including lack of diligence by the interviewer, good faith failure to ask certain questions, lack of knowledge on the part of the biological parents, or reluctance to disclose needed information. POWLEDGE, *supra* note 23, at 16.

97. SOROSKY et al., *supra* note 26, at 84-85. The adoptive parents should be given all information for:

[W]ho has a better right to uncensored and complete information about the child than the adoptive parents who are going to raise the child? They have been approved of as adoptive parents but not trusted with all of the information about the child, about his or her biological background, or about the true circumstances that led to her or his being relinquished for adoption. We have not shared with them such negative family history as mental illness, delinquency, drug addiction, incest, and even medical problems . . . The rationale cited was that positive information would help the adoptive parents to make a positive identification with the child. In this sense, adoptive parents were treated as second-class citizens.

Id. Also, "if the life and future of the child are to be entrusted to his new parents, they can be trusted with all the information pertinent to his individuality." BARTH & BERRY, *supra* note 34, at 108.

Despite the contention that biological parents often do not have access to such information when they conceive a child, significant differences exist between conceiving a child within the context of a relationship and adopting a child.⁹⁸ The judiciary has also recognized a basic difference between adoption and natural procreation: because adoption is based on statute, the state is intimately involved in balancing the competing interests of the child with the interests of the biological and adoptive parents.⁹⁹ The state can only balance these interests when complete information is available and given to the adoptive parents.

IV. WRONGFUL ADOPTION AS A CAUSE OF ACTION

A. Past Actions for Wrongful Adoption

1. Judicial Recognition of a Cause of Action

California was the first state to be called upon to balance the interests of the adoptee, the biological parents, and the adoptive parents when, in 1980, it heard *Richard P. v. Vista Del Mar Child Care Service*,¹⁰⁰ the first case that alleged what later became known as wrongful adoption. The adoptive parents alleged that the adoption agency had either negligently or intentionally misrepresented the infant's health at the time of placement¹⁰¹ and in the future.¹⁰²

The court's decision framed the issues that have arisen in all subsequent wrongful adoption actions. The court stressed that a claim of fraudulent misrepresentation had to be based on existing material facts rather than on

98. Biological parents conceive as a result of many different emotional and physical bonds. The genetic quality of the child produced may be only one factor that the parents consider. Lori B. Andrews, *Alternative Reproduction and the Law of Adoption*, in *ADOPTION LAW AND PRACTICE*, 14-17 (Joan Hollinger ed., 1988).

99. *Lindley for Lindley v. Sullivan*, 889 F.2d 124, 131 (7th Cir. 1989). See also *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977).

100. 165 Cal. Rptr. 370 (Cal. Ct. App. 1980).

101. The adoptive parents alleged that, although the adoption agency had told them that the adoptee was a prematurely born infant with large earlobes, the agency had represented the infant as otherwise healthy. The day after the placement, the adoptive parents took the infant to their own pediatrician, who also stated that the infant was healthy. However, three years later, the adoptive parents learned that the child had severe neurological damage and immaturity, and hyperactivity. Three years after that diagnosis, the adoptive parents learned from the pediatrician whom they had consulted immediately after the adoption that the child's later emotional and medical problems had been predictable at birth. The pediatrician's opinion was based on a medical report in the agency's possession and given to the adoptive parents at the time of the adoption. The report stated that the infant "was premature and had a poor suck [response] for one week. At the present time there is no neurological disease . . . recommend adoption." 165 Cal. Rptr. at 371-72.

102. *Id.* at 373.

predictions of future events.¹⁰³ Because the adoption agency had fully disclosed all the facts it had to the adoptive parents, the court determined that no fraudulent misrepresentation was made.¹⁰⁴ Moreover, no reliance was shown because the adoptive parents had taken the infant to a pediatrician the day after the placement, and the doctor had stated that the infant was healthy.¹⁰⁵

Public policy also barred this cause of action; in determining this, the court examined the traditional factors used to decide if the defendant owes a duty of care to the plaintiff.¹⁰⁶ In a statement quoted by future courts, the court in *Richard P.* held that "to impose liability in a case such as this would in effect make the adoption agency a guarantor of the infant's future good health. That, of course, would be entirely unreasonable. After all, such a guarantee is unavailable to natural parents. . . ."¹⁰⁷

The difference between negligent and intentional misrepresentation has been a crucial one for courts that have heard wrongful adoption actions. When plaintiffs have been able to prove intentional misrepresentation, courts have found a basis for wrongful adoption and have used the demonstrated fraud to detail exceptions to the general rule, first raised in *Richard P.*, of no liability for adoption agencies.

For example, in *Burr v. County Commissioners of Stark County*,¹⁰⁸ the plaintiffs easily established that the adoption agency had knowingly misrepresented material facts and had intended the adoptive parents to rely on those misrepresentations.¹⁰⁹ The agency had grossly distorted the facts of the adoptee's history and had not disclosed relevant medical and psychological

103. The court noted that predictions of the future are opinions, not facts, and are only actionable when the speaker "has knowledge of facts not warranting the opinion, or the opinion reasonably tends to induce the other party to consider and rely upon such representation as a fact. . . ." *Id.*

104. *Id.*

105. *Id.*

106. The court examined the following factors: the foreseeability of harm, the degree of certainty of injury, the nexus between the defendant's conduct and the plaintiff's injury, the prevention of future harm, the moral blame associated with the defendant's conduct, the burden on the defendant if liability were imposed and the consequences of that for the community, and the availability and cost of insurance to cover such risks. *Id.* at 373-74.

107. *Id.* at 374. Despite the court's assertion, one may disagree with this comparison between biological and adoptive parents. Biological parents certainly have the choice, during pregnancy, to undergo a wide variety of tests to discover various medical conditions of the fetus. And, genetic counselling is available for those who have specific concerns before pregnancy. Thus, biological parents have the resources available to find answers to many questions related to the decision to bear children.

108. 491 N.E.2d 1101 (Ohio 1986).

109. *Id.* at 1106.

information to the adoptive parents.¹¹⁰ Although the agency had described the adoptee as healthy, the child developed many physical and mental problems¹¹¹ and was eventually diagnosed as having Huntington's Disease.¹¹² Recognizing the seriousness of the agency's actions, the court stated that "[i]t would be a travesty of justice and a distortion of the truth to conclude that the deceitful placement of this infant . . . was not actionable. . . ."¹¹³

Once the court found that fraud was established, it examined the public policy issues raised by the *Richard P.* court. First, the court found that the child's history and condition at the time of adoption created a foreseeable risk of disease and only because of that foreseeability did the agency have to construct an elaborate deception to induce the plaintiffs to proceed with the adoption.¹¹⁴ The court reiterated that adoption agencies are not guarantors of the health of the children they place, but emphasized that when an agency deliberately misinforms adoptive parents about the health and history of an adoptee, the agency is liable.¹¹⁵ Such misinformation deprives the adoptive parents of the opportunity to make an informed, sound decision about parenting.¹¹⁶

110. When the plaintiffs adopted the seventeen-month-old boy, the adoption agency told them that the child's mother was eighteen years old, was living with her parents who were mean to the child, and was giving up the child so that she could move out of state to find a better job. In fact, the adoptee's mother was a thirty-one-year-old woman in-patient at a state mental hospital. The child had been delivered at the state hospital, and the hospital staff assumed that the child's father was also a mental patient. The biological mother had a low I.Q., a speech impediment, and psychotic reactions. Psychological assessments, indicating a low intellectual function, had been done on the child before the adoption, and these assessments were in the sealed records. Further, the child had been in two foster homes before his adoption by the plaintiffs. *Id.* at 1103-04.

111. The child developed twitches, had a speech impediment, learning disabilities, poor motor skills, and in school was classified as educable, mentally retarded. In high school, he began to have hallucinations. *Id.* at 1103.

112. Huntington's Disease is not detectable until symptoms occur, usually in one's mid-thirties or later. However, the abnormal gene is present at conception and the statistical risk of offspring having the disease is fifty percent. The physical symptoms include involuntary, irregular movements, usually appearing first in the arms, neck, and face and then progressing to irregular trunk movements. The personality of the affected person also changes. Moodiness, lack of interest, and obstinacy may accompany the physical symptoms. Euphoria, violence, or paranoia are common. The symptoms increase as the disease progresses, until walking is impossible, swallowing difficult, and dementia profound. No treatment exists for the mental decline. *THE MERCK MANUAL* 1363, 1920 (Robert Berkow, M.D. ed., 1982) [hereinafter *THE MERCK MANUAL*]. While the adoptee's mother had not been diagnosed as having Huntington's Disease, expert testimony established that the child was at risk for the disease because of his background and medical history. 491 N.E.2d at 1104.

113. *Id.* at 1107.

114. *Id.*

115. *Id.* at 1108.

116. *Id.* at 1109.

The dramatic facts in *Burr* allowed the court to reach a decision different from that in the earlier *Richard P.* case. Clearly, the information presented by the agency did not coincide with the facts of the adoptee's background or parentage. The *Burr* court was able to use the case to expand on the public policy issues involved and to begin to look at the differences between the choices confronting adults considering conception and adults considering adoption. The court focused on the adoptive parents' rights to make informed decisions, an important factor in the adoption process; however, that focus fails to consider the rights of the adoptee, which are implicit in the best interests of the child policy behind most American adoption statutes.

A further step toward seriously considering the best interests of the child was taken in *Michael J. v. County of Los Angeles, Department of Adoptions*.¹¹⁷ The plaintiffs alleged that the adoption agency had fraudulently concealed or intentionally misrepresented the adoptee's health when the agency assured the adoptive mother that the infant was in good health, despite a portwine stain¹¹⁸ on the adoptee's face and upper torso.¹¹⁹ However, when the child was eleven years old, he was diagnosed as having Sturge-Weber syndrome, a congenital degenerative nerve disorder.¹²⁰

The court held that adoption agencies must make a "good faith full disclosure of material facts concerning existing or past conditions of the child's health"¹²¹ because such disclosures make the adoption process trustworthy. The adoptee benefits when adoptive parents can trust the adoption process and that further benefits society.¹²² Again, a dividing line was drawn between cases alleging intentional misrepresentation or fraudulent concealment, both of which are actionable, and those alleging negligent misrepresentation, which is

117. 247 Cal. Rptr. 504 (Cal. Ct. App. 1988).

118. A portwine stain is a flat, pink, red, or purplish lesion present at birth. THE MERCK MANUAL, *supra* note 112, at 2071.

119. At trial, adoption records revealed that the doctor who had examined the infant had noted the portwine stain and had refused to make a definite prognostic statement on the infant. The adoptive mother was unaware of this medical report at the time of the adoption. Also, a physician testified at the trial that the Sturge-Weber syndrome diagnosis, with a prognosis for epilepsy, should have been made at birth. 247 Cal. Rptr. at 504-06. The court noted that if the plaintiff had been aware of the doctor's refusal to make a prognosis, the plaintiff would have been placed on notice and could have made her own inquiry and evaluation of the situation. *Id.* at 513.

120. Sturge-Weber syndrome is one of the cerebral palsy syndromes. Cerebral palsy is a descriptive term that applies to non-progressive motor disorders resulting from gestational or perinatal central nervous system damage. Sturge-Weber syndrome symptoms include skin or eye abnormalities. THE MERCK MANUAL, *supra* note 112, at 1365, 1367.

121. 247 Cal. Rptr. at 513.

122. *Id.*

not actionable.¹²³

The distinction between negligent and intentional misrepresentation surfaced again in *Meracle v. Children's Service Society of Wisconsin*,¹²⁴ a case in which the adoptive parents alleged negligent misrepresentation by the adoption agency.¹²⁵ The adoptive parents alleged that the agency had told them that the adoptee's biological father had tested negative for Huntington's Disease, when in fact no test existed for determining if one were at risk for the disease.¹²⁶ Five years after the adoption was finalized, the child was diagnosed as having Huntington's Disease.¹²⁷

Finding that the agency had assumed a duty to inform the adoptive parents about the medical risks that the disease presented to their adopted child, the Wisconsin court then found that the agency had negligently breached its duty.¹²⁸ However, the court stressed the uniqueness of the case and the narrowness of its holding.¹²⁹ Echoing the earlier Ohio decision, the Wisconsin court found that public policy supported its decision because adoptive parents would thus feel increased confidence in the adoption process and in the reliability of information received from the adoption process.

This decision was followed in a Minnesota case, *M.H. and J.L.H. v.*

123. *Id.* Another case denying negligent misrepresentation was *Foster v. Bass*, 575 So. 2d 967 (Miss. 1990). In *Foster*, the adoptive father alleged that the defendants had negligently failed to give the adoptee a particular test at birth for retardation and had negligently failed to provide the adoptive father with this important medical information prior to the adoption. The court, noting that the adoption agency had neither a medical director nor a doctor on its staff, held that the adoption agency could not have foreseen the adoptee's medical condition and that the omission of medical information in the adoptee's record was not the proximate cause of his injury. *Foster*, 575 So. 2d at 968, 975, 981-82.

124. 437 N.W.2d 532 (Wis. 1989).

125. The Meracles claimed damages of \$10 million for loss of society and companionship of their adopted daughter, emotional pain and suffering, interference with their enjoyment of life, lost wages and medical expenses. *Id.* at 533-34.

126. The plaintiffs had told the agency that they wanted a normal, healthy child. According to the plaintiffs, the agency worker had told them that the adoptee's paternal grandmother had died of Huntington's Disease; but, the worker had also told them that if one generation was free from the disease, the next generation would also be free. The issue of whether or not the adoptee's father had the disease was crucial to the Meracles' decision to adopt the child. The plaintiffs learned from a television show that no reliable test existed for determining if one were at risk for Huntington's Disease. *Id.* at 533.

127. *Id.* See also *supra* note 112.

128. *Meracle*, 437 N.W.2d at 532, 533.

129. The court stated that the case was unique because it did not involve an agency placing a child without discovering and informing the adoptive parents about the adoptee's health problems. Since that was not the case, the court did not have to deal with the question of whether adoption agencies have a duty to discover and disclose health information to adoptive parents. *Id.*

Caritas Family Services,¹³⁰ heard in 1990. The adoptive parents in *Caritas* alleged that the adoption agency knew that the adoptee had been conceived in incest and yet failed to tell the adoptive parents that pertinent fact.¹³¹ The adoptive parents alleged both negligent and intentional misrepresentation by the agency.¹³²

The Minnesota appellate court held that negligent misrepresentation by an adoption agency is actionable.¹³³ Stressing that adoption agencies are the only source that adoptive parents have for obtaining information, the court found that public policy supported holding the agency liable for its negligent misrepresentation.¹³⁴ Referring to the concern that liability would make adoption agencies guarantors of children, the Minnesota court stated that “[t]he tort we recognize today, however, is not similar to products liability or contractual warranties. The agency must merely use reasonable care to ensure that the information it communicates is true, and the adoptive parents must show that any negligently communicated falsity is causally related to their damages.”¹³⁵

Together, these decisions show a judicial trend to recognize a cause of action for wrongful adoption if the plaintiffs can prove intentional misrepresentation or fraudulent concealment¹³⁶ or if the plaintiffs can show that the adoption agency assumed the duty of informing the plaintiffs about medical risks presented to the adoptee and then negligently breached that duty.¹³⁷ What courts clearly are not willing to do is find that adoption agencies have a duty to collect and disclose information to the prospective

130. 475 N.W.2d 94 (Minn. Ct. App. 1991).

131. An adoption worker had told the adoptive parents that there was a possibility of incest in the child's family but did not tell them that the child's parents were siblings. Further, the agency had told the adoptive parents that the biological father was in good health and of normal intelligence; however, the agency actually knew that the man was borderline hyperactive, of low average intelligence, and had received psychological counselling when he was a child. *Id.* at 96-97.

132. *Id.* at 96.

133. *Id.* at 97.

134. *Id.* at 98. The court noted that the Minnesota Supreme Court had held, in an earlier decision, that government employees may be held liable for negligent misrepresentation when the public has no other access to the factual information held by the government. Such liability supports accuracy, and that goal outweighs any possible inhibition on performance of duties created by the liability. *Id.*

135. *Id.* This crucial difference between adoption and contractual warranties is highlighted by the extensive consent provisions contained in adoption statutes. These provisions “reflect a recognition by the states that an agreement to surrender a child for adoption is different in kind, not just in degree, from an ordinary commercial contract.” Atwell, *supra* note 41, at 27. This reasoning is also applicable to the adoptive parents' agreement with the adoption agency.

136. *See supra* notes 108-23 and accompanying text.

137. *See supra* notes 124-35 and accompanying text.

parents. Such a step needs to come from the legislature, which creates statutes regulating adoption.

2. Unresolved Issues: Statutes of Limitation, Determination of Damages, and Government Liability

Legislatures also need to address other issues left open in these cases, specifically statutes of limitation, damages, and the liability of government adoption agencies. The statute of limitations problem is exemplified by comparing the decisions in *Burr*¹³⁸ and in *Meracle*.¹³⁹ Misrepresentation actions require that both an injury and the cause of that injury be known before the action can proceed. The adoptive parents in *Burr* learned of their child's debilitating disease before they learned of the adoption agency's misrepresentation; thus, the agency argued that the statute began to run as soon as the adoptive parents became aware of some of the child's problems.¹⁴⁰ The court held otherwise, noting that under Ohio law, an action for fraud does not accrue until both the fraud and the wrongdoer are discovered.¹⁴¹

The *Meracles*, on the other hand, learned of the agency's misrepresentation before their adopted daughter was diagnosed as having Huntington's Disease.¹⁴² The Wisconsin adoption agency argued that the *Meracles* could have stated a claim for future medical expenses when they discovered the agency's misrepresentation; however, the court held that future medical expenses are recoverable only when the plaintiff can show that such expenses are reasonably certain to occur.¹⁴³ Future wrongful adoption cases are likely to have similar claims that the action is barred because the statute of limitations has run. Adoption statutes creating a cause of action for wrongful adoption must specify that the action does not accrue until both the injury has been discovered and the adoptive parents learn of the agency's prior knowledge and misrepresentation. Until the time that both these prongs are satisfied, future medical expenses are unpredictable.

The *Burr* and *Meracle* cases also highlight the difficulties that arise in the

138. *Burr v. County Comm'n of Stark County*, 491 N.E.2d 1101 (Ohio 1986).

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

140. When the court ordered the adoptee's sealed records opened, the Burrs discovered that the agency had misrepresented the child's background and possible medical risks because of that background. *Burr*, 491 N.E.2d at 1104.

141. *Id.* at 1108.

142. The plaintiffs learned that no test existed for Huntington's Disease a few months after the adoption had been finalized. Four years later, the adoptee was diagnosed as having the disease. *Meracle*, 437 N.W.2d at 532-33.

143. *Id.* at 535.

determination of damages.¹⁴⁴ Both courts allowed consequential damages, thus permitting the adoptive parents to recover for unexpected, unusual expenses that they had incurred because of the adoptions.¹⁴⁵ Extraordinary medical expenses, including future medical expenses, should be recoverable if the parents can show that they would not have adopted a particular child absent the agency's misrepresentations. Routine expenses of raising a child should not be recoverable, nor should the adoption fee be recoverable because the parents would have had to pay the fee no matter whom they adopted; the payment of a fee is part of the decision to adopt.

These two cases differed in their approaches to claims for emotional

144. Damages in traditional misrepresentation actions must be well-established and are limited to those foreseeably expected to follow from the misrepresentation. Because misrepresentations are traditionally based on commercial transactions, damage remedies are phrased in terms of such transactions. Thus, two measurements for damages exist. The out-of-pocket measure gives the plaintiff the difference between the value of the object as represented less the value actually paid. The benefit-of-the-bargain measure gives the plaintiff the difference between the object's actual value and the value as it had been represented. Consequential damages, such as unusual expenses, are also recoverable if they are the proximate result of the misrepresentation. WILLIAM PROSSER, *HANDBOOK OF THE LAW OF TORTS* 731-35 (4th ed. 1971). These traditional remedies have no place in the wrongful adoption context. To use such measures would be to consider the child a commodity instead of a human being. Consequential damages, however, would allow recovery for the unexpected, unusual expenses that the adoptive parents have incurred. Wrongful birth and wrongful life actions raise damage issues similar to those in wrongful adoption claims. A wrongful life action is a suit filed on the genetically impaired child's behalf, alleging that the physician's negligence caused or allowed the child to be born. The four jurisdictions that recognize wrongful life claims limit recoverable damages to extraordinary care costs. A wrongful birth suit asserts a claim on the parents' behalves, alleging that the health care provider failed in one or more of three ways: to adequately inform the parents of their risk of conceiving a genetically defective child; to perform with due care the necessary prenatal diagnostic tests; or to report accurately the results of prenatal tests. Courts do not have a consistent philosophy on the determination of liability and damages in wrongful birth actions. Kristin Hackett, Note, *The Fragile X Omen: Scientific Advances Compel A Legislative Treatment of Wrongful Life and Wrongful Birth*, 2 J.L. & TECH. 249, 251 (1987).

145. The *Burr* court held that the adoptive parents were entitled to both general and special damages. Thus, the jury award of \$125,000 for medical bills, other expenses, and the adoptive parents' emotional damage was not excessive as it compensated the adoptive parents for damage suffered because of the agency's misrepresentation. While the agency argued that these expenses were incidental because they were expenses incurred by any parent raising a child, the court ruled otherwise. The plaintiffs testified that they would not have adopted the child had they known his true history; thus, had the adoption not occurred, they would never have incurred the expenses. *Burr v. County Comm'n of Stark County*, 491 N.E.2d at 1104, 1108. The *Meracle* court ruled that only extraordinary, unexpected expenses were recoverable. Costs such as the adoption fee and general costs of raising and caring for the child were not recoverable because those were costs that any adoptive parent would incur. *Meracle v. Children's Serv. Soc'y of Wisconsin*, 437 N.W.2d at 534-36.

damages,¹⁴⁶ thus raising the question of whether adoptive parents should be able to recover for the emotional distress suffered as a result of the wrongful adoption. Although the agency's misrepresentation deprives adoptive parents of the opportunity to make an informed decision on whether to adopt a particular child, the adoptive parents have psychologically gained something from their parenting experiences.¹⁴⁷ Furthermore, because adoption is founded on the principle of furthering the child's best interests, allowing recovery for the adoptive parents' emotional distress would not further the interests of the child. By restricting damages to extraordinary, unusual expenses, courts would send a clear message that the wrongful adoption action is a suit on the child's behalf, thereby furthering the best interests of the adopted child.

The final issue raised by these cases deals with the liability of a government adoption agency, an issue addressed by both the *Michael J.* and *Burr* courts. The court in *Michael J.* held that the agency's immunity defense, based on the state's Tort Claims Act, failed.¹⁴⁸ While the state act provided immunity for both negligent and intentional misrepresentations by public employees, the court found that the provided immunity was limited.¹⁴⁹ The California Supreme Court had previously found that misrepresentation applied only to interferences with financial or commercial interests; thus, the act protected public employees only from those types of liability.¹⁵⁰ Because the adoption process is a social service, not a commercial transaction, public adoption agency employees who misrepresent facts during the adoption process are liable for their misrepresentations.¹⁵¹

In *Burr*, the county adoption agency argued that its nondisclosure policy was protected by the doctrine of sovereign immunity.¹⁵² The court, however, emphasized that the action was based on the agency's intentional

146. Wisconsin requires that emotional damage be manifested by physical injury; since the adoptive parents had no such injury, their emotional damage claim was not allowed. *Meracle*, 437 N.W.2d at 535-36.

147. GOLDSTEIN & KATZ, *supra* note 75, at 1061 (the experience of helping one's child can be a maturing experience for the adoptive parents). The idea that recovery for emotional distress to the adoptive parents is limited by the benefit gained by the adoptive parent through parenting is supported by the Restatement of Torts Benefit Doctrine: "When the defendant's tortious conduct has caused harm to the plaintiff. . . and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages. . . ." RESTATEMENT (SECOND) OF TORTS § 920 (1979).

148. *Michael J. v. County of Los Angeles, Dep't of Adoptions*, 247 Cal Rptr. 504, 510-11 (Cal. Ct. App. 1988).

149. *Id.* at 508.

150. *Id.*

151. *Id.* at 510-11.

152. *Burr v. County Comm'n of Stark County*, 491 N.E.2d 1101, 1108.

misrepresentations, not on its nondisclosure policy.¹⁵³ Thus, the county adoption workers could be held liable for fraud and misrepresentations made in the performance of their work.¹⁵⁴

Holding government adoption agencies to the same standard to which private agencies are held supports public policy. Adoptive parents should be able to rely on the inherent trustworthiness of all adoption agency processes; for parents to harbor less trust to government adoption agencies would only defeat the purpose of such agencies, as parents would then be less likely to use the adoption services of the government agencies. Also, the agency is the only source that the adoptive parents have for receiving information, whether the agency is public or private. Liability for both types of agencies furthers the goal of increasing public confidence in the adoption agency and the adoption process.

B. Wrongful Adoption Applied to a Pending Case in Illinois

Krueger v. Leahy,¹⁵⁵ filed in 1989, was the first wrongful adoption action filed in Illinois. Like the adoptive parents in *Burr*, *Michael J.*, and *Meracle*, the Kruegers allege that the adoption agency workers misled them by misrepresentations.¹⁵⁶ The Kruegers stated that they would never have adopted the boy, now fifteen and in a private residential treatment center, if they had had all pertinent information at the time of the adoption.¹⁵⁷ The adoptive

153. *Id.*

154. *Id.*

155. No. 89 L 18751 (filed Dec. 28, 1989).

156. When the Kruegers adopted a fifteen-month-old boy from Lutheran Social Services, they asked the agency about the health of the boy and of his biological parents. The agency allegedly told them that the boy has been premature but now was "just fine." The agency also stated that the biological parents had an average education. The Kruegers later learned that the child's biological parents had been hospitalized in a mental hospital and had histories of mental illness. The biological mother was considered low-functioning, and her pregnancy had been high risk because of various medications she had taken while pregnant. Paul Marcotte, *Wrongful Adoption*, A.B.A. J. Apr. 1990, at 22.

157. The boy functions academically at a fourth grade academic level and a seven or eight year old level emotionally. He has been diagnosed as being mildly mentally retarded, hyperactive, and as having attention span and conduct disorders. *Id.* Mild mental retardation covers an I.Q. range of fifty to seventy. Those in this category are educable, with an upper reading grade level of fourth to sixth grade. THE MERCK MANUAL, *supra* note 112, at 1872. Attention deficit disorders are characterized by inappropriate attention and impulsivity. The symptoms vary with the situation and time. Soft neurological signs and EEG abnormalities may be present, but a diagnosable neurological disorder exists in only about five percent of the cases. AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 41-42 (3d ed. 1980) [hereinafter DSMIII]. In a conduct disorder, the child displays persistent, repetitive conduct that violates the basic rights of others or of age-appropriate societal norms. The child experiences difficulties both at home and at school and has low self-esteem. Impairment may be moderate to severe. *Id.* at 45-46.

parents have spent thousands of dollars over the years on medical expenses and tutors for the boy and are currently seeking \$2.6 million in damages.¹⁵⁸

Lutheran Social Services disagrees with the Krueger's factual statement. The agency states that it did inform the adoptive parents of the biological mother's "significant emotional problems" and also told the Kruegers to watch for signs of slow development in the boy.¹⁵⁹ The agency also states that its policy is to give prospective parents "all pertinent information about a child's medical/family history."¹⁶⁰ The Illinois Department of Children and Family Services, which is the state agency that oversees adoptions, noted that Illinois law did not require full disclosure to adoptive parents until 1985, nine years after the Kruegers adopted this child.¹⁶¹

Like previous wrongful adoption actions, this Illinois case raises complicated legal problems about the feasibility of applying traditional misrepresentation concepts outside of their traditional arena. These cases also raise questions about the degree of specificity required in statutes that regulate adoption. The most basic question in adoption proceedings, yet unanswered, is how courts should decide what is really in the child's best interests. To begin to find answers to these questions, adoption law and practice in Illinois today needs to be examined.

Presently in Illinois, about 250 children wait for adoption in any given month.¹⁶² The state's policy in placing children is the traditional best interests standard.¹⁶³ In furtherance of this standard, adoptive families must meet certain requirements.¹⁶⁴ While such regulations help secure a child's physical comfort and safety, the state provides little direction in meeting other areas of a child's needs. Agency policy in matching a child's needs with a parent's ability to meet those needs may vary widely.¹⁶⁵ Unless specific statutory guidelines are provided, the agency's performance at this initial, crucial stage

158. Marcotte, *supra* note 156, at 22.

159. *Id.*

160. *Id.*

161. "Wrongful Adoption" Case Filed, CHI. DAILY L. BULL., Dec. 29, 1989.

162. JUNIOR LEAGUE OF CHICAGO, *supra* note 40, at 24.

163. The Illinois statute states "[t]he best interests and welfare of the person to be adopted shall be of paramount consideration in the construction and interpretation of this Act." ILL. ANN. STAT. ch. 40, para. 1525 (Smith-Hurd 1990).

164. Each family must receive a foster care license to cover the period between placement and finalization of adoption. Each family member is required to have a physical exam and to be free from communicable or life-threatening diseases. Each home must also meet state and local requirements. The family must be fingerprinted to determine if any member has ever been charged with a crime, and personal references must be provided. JUNIOR LEAGUE OF CHICAGO, *supra* note 40, at 24.

165. Schur, *supra* note 63, at 7-30.

is left to the worker's discretion, experience, and time available.

The question of what information the adoption agency must provide to adoptive parents raises the issue of what constitutes misrepresentation. Tort law in Illinois divides misrepresentation into two types, negligent and fraudulent.¹⁶⁶ An action for misrepresentation must be pleaded with specificity, and the plaintiff must be able to establish what misrepresentations were made, by whom and to whom they were made, and when they were made.¹⁶⁷ The misrepresentations must have been the cause of the plaintiff's reliance; therefore, if the plaintiff knew of the misrepresentation at the time it was made, he could not have justifiably relied on it.¹⁶⁸

Illinois allows recovery of actual and compensatory damages for economic or other loss in a misrepresentation action.¹⁶⁹ Punitive damages are awarded only when the plaintiff is able to show that the defendant made a wilful, wanton, and grossly fraudulent misrepresentation.¹⁷⁰

Illinois misrepresentation law parallels tort law in the states that have allowed wrongful adoption as a cause of action.¹⁷¹ For the Illinois courts to apply misrepresentation to adoption, the courts must find that the traditional factors of foreseeability, proximity, degree of certainty of injury, moral blame,

166. Board of Educ. of City of Chicago v. A, C, & S Inc., 546 N.E.2d 580 (Ill. 1989). Negligent misrepresentation requires a false statement of material fact, an intention to induce the plaintiff to act, an action based on reliance of the statement's truth, damage resulting from such reliance, and a duty on the defendant's part to communicate accurate information to the plaintiff. *Id.* at 591. Three situations exist in which a duty to speak is imposed: when the defendant actively conceals the false statement in such a way that the plaintiff is hindered from uncovering the truth; when a duty is voluntarily undertaken by the defendant to tell the plaintiff part of the truth and the law imposes a duty to tell the whole truth; and, when a confidential relationship exists between the plaintiff and the defendant such that the truth must be disclosed. MICHAEL J. POLELLE & BRUCE L. OTTLEY, ILLINOIS TORT LAW 270 (1985 & Supp. 1991). In a negligent misrepresentation action, the defendant's carelessness or negligence in finding out the truth of the contested statement is sufficient. 546 N.E.2d at 591. Fraudulent misrepresentation requires that, in addition to the factors required for negligent misrepresentation, the defendant know or believe in the falsity of the statement. *Id.*

167. Such requirements serve a dual function. They weed out baseless complaints, and they protect defendants from harm to their reputations by baseless claims. *Id.* at 594.

168. POLELLE & OTTLEY, *supra* note 166, at 286-87.

169. *Id.* at 295.

170. *Id.* at Supp. 29.

171. Those jurisdictions allowing wrongful adoption actions have required proof that the adoption agency misrepresented a material fact to the adoptive parents, and that those parents relied on that misrepresentation in deciding to proceed with the adoptions. The agency must have either known or disregarded the misrepresentation. *See supra* notes 115, 127, 132, and 143.

and the prevention of future harm exist.¹⁷² An examination of *Krueger*¹⁷³ shows that these factors are present in that case, assuming the facts as stated are true.

The facts that the adoptee's biological parents had serious mental illnesses and that the biological mother had a high-risk pregnancy were indicators of potential problems in the adoptee.¹⁷⁴ The adoption agency could have foreseen that these factors predisposed the adoptee to certain types of problems. The degree of certainty of the injury would depend on the types of mental illnesses that the biological parents had and the precise medications that the biological mother had taken during her pregnancy.

Perhaps most significant are the factors of moral blame and the prevention of future harm. The *Burr*¹⁷⁵ court focused on moral blame when it emphasized that the adoptee's placement was "deceitful" and that to deny the adoptive parents a remedy "would be a travesty of justice."¹⁷⁶ When an agency intentionally misrepresents or fraudulently conceals information given to the adoptive parents, the agency prevents those parents from making an informed choice, yet that uninformed decision will affect their lives and the adoptee's life. Withholding or misrepresenting information is blameworthy because of the significant impact that the information has on the lives of those involved.

Moreover, prospective parents will have more trust in adoption agencies if such parents reasonably believe that the agencies provide full, accurate information. Harm to future adoptees through misrepresentation could be prevented by the allowance of wrongful adoption actions because agencies, knowing that they could be liable for intentional misrepresentations or fraudulent concealments, would feel pressured to disclose accurate information. Public

172. *Richard P. v. Vista Del Mar Child Care Serv.*, 165 Cal. Rptr. 370, 373 (Cal. Ct. App. 1980). See also, *supra* notes 119-21, 129-31, and 145 and accompanying text.

173. *Krueger v. Leahy*, No. 89L 18751 (filed Dec. 28, 1989).

174. Heredity is a major predisposing factor in the primary mood disorders, such as depression or manic-depression. THE MERCK MANUAL, *supra* note 112, at 1451. A genetic predisposition to schizophrenia is probably necessary for the illness to occur, and about ten percent of the relatives of schizophrenics will be recognized as schizophrenic. *Id.* at 1463. In regard to the high-risk pregnancy, the exact medications taken would of course determine the risk to the fetus. Examples of drugs taken during pregnancy and the potential problems to the fetus include: contraceptive pills or progestin taken early in pregnancy can cause such fetal abnormalities as masculinization of the external genitalia in female fetuses; anticonvulsants taken during pregnancy can cause cleft palate, cardiac abnormality, craniofacial anomalies, nail and digit hypoplasia, chromosomal aberrations, visceral defects, and mental subnormality; and, tetracyclines may cause permanent yellowish discoloration of the teeth, retarded bone growth, or congenital cataracts. *Id.* at 2289-90.

175. *Burr v. County Comm'n of Stark County*, 491 N.E.2d 1101 (Ohio 1986).

176. *Id.* at 1107.

policy clearly mandates judicial recognition of wrongful adoption as a cause of action.

V. PROPOSAL

While public policy supports a cause of action for wrongful adoption, the extension of tort law to this form of misrepresentation does not go far enough in protecting the adoptee's interests. Wrongful adoption actions provide a remedy for an injury that the adoptee and the adoptive parents have suffered, but such actions do little to prevent the situation from occurring. Further, such actions do not speak to the interests of the adoptee in being placed in a home that is able and prepared to meet his or her needs. Since the Illinois adoption statute is written to promote the adoptee's best interests, those interests must be primary in any consideration of adoption claims. Statutory amendments are necessary to ensure that the child's best interests are served. And, as the Seventh Circuit has stated, "because common law does not provide for adoption, all rights and duties relating to adoption are statutory. . . ." ¹⁷⁷

SECTION ONE: COLLECTION OF BACKGROUND DATA ON ADOPTEE; DISCLOSURE OF INFORMATION TO ADOPTIVE PARENTS

1.1: Collection of Data

The adoption agency, or a party acting in that capacity, must collect a detailed health history, including both physical and mental health, from both the biological mother and the biological father. If one of the biological parents is unavailable, the other may provide the requested information. The biological parents must also provide a detailed medical and developmental history for the adoptee, including both physical and mental development. Any available medical records, including special tests of either a medical or a psychological nature, must be submitted. If the adoptee has ever been placed in a foster home, residential treatment center, special school, or any similar placement, records from that placement must be submitted. The adoption agency, or anyone acting in its place, must make a good faith effort to obtain the required information.

177. The court further stated, "[b]ecause of its statutory basis, adoption differs from natural procreation in a most important and striking way. Adoption always involves the weighing and balancing of many competing interests. The rights of a couple to adopt must be reconciled with the state's interest in protecting the existing rights of the natural parents, as well as in securing ultimately the welfare of the child." *Lindley for Lindley v. Sullivan*, 889 F.2d 124, 130-31 (7th Cir. 1989).

1.2: Physical Examination

The adoptee, before finalization of the adoption, must undergo a complete physical examination by a licensed pediatrician. A report of this examination must be submitted and must include any developmental problems, physical abnormalities, or psychological problems found by the examiner. If necessary, a team of child development experts must be consulted and a report entered by them.

1.3: Disclosure

Prior to the finalization of the adoption, the adoptive parents must receive all the information collected pursuant to Sections 1.1 and 1.2 of this statute. This information must be disclosed to the adoptive parents, both orally and in writing.

1.4: Application to Agencies and Independent Adoptions

The above requirements apply to all adoptions, whether done through a public or private agency or done independently.

Commentary: This section ensures that the agency does not offensively enforce nondisclosure policies once it realizes that it may be held liable for misrepresenting an adoptee's background.¹⁷⁸ It also establishes minimum requirements for what types of information must be collected.¹⁷⁹ Such

178. Susan K. LeMay, Note, *The Emergence of Wrongful Adoption as a Cause of Action*, 27 J. FAM. L. 475, 487 (1988-89).

179. Illinois requires agencies to give the following information about the biological parents to the adoptive parents: their ages, race, religion, ethnic background, general physical appearance, education, hobbies, interests, and talents. ILL. ANN. STAT. ch. 40, para. 1522.4 (Smith-Hurd Supp. 1991). Many problems exist with state disclosure laws. For example, many statutes fail to differentiate between information pertinent to infants and information pertinent to older children. Only one state statute explicitly refers to disclosure of previous abuse or other placements, and only six states require that adoptive parents receive a report on the adoptee prior to placement. Dickson, *supra* note 30, at 951-53. An excellent example of information that should be obtained is found in the New Jersey Required Adoption Medical Information Form. It asks questions of the biological parents about the following conditions: clubfoot or orthopedic problems; harelip or cleft palate; chromosome abnormalities; Downs syndrome; hydrocephalus; muscular dystrophy; spina bifida; congenital heart disease; Tay-Sachs disease; eczema or skin conditions; hay fever or allergies; drug allergies; blindness, glaucoma, color blindness, visual problems; deafness or ear problems; speech problems; learning disability; retardation, mental or physical; hemophilia; sickle cell anemia or sickle cell trait; hypertension; stroke; heart attack; arthritis; kidney disease; diabetes; thyroid disorder; asthma; tuberculosis; mental illness; alcoholism or heavy drinking; drug usage; cancer; tumors; cystic fibrosis; Hodgkin's Disease; multiple sclerosis; Huntington's Disease; cerebral palsy; seizures or convulsions; epilepsy; repeated attacks of fever with known infection; repeated severe infection necessitating hospitalization; and hospitalization for operation or injury. These questions are asked about both biological parents and their relatives. Also covered are the cause, treatment, and medications given for any disease or condition. Questions relate to the parts of the body involved as well as the age of onset. The biological mother's pregnancy history is delved into,

requirements are necessary to counter the considerable discretion given to agencies in carrying out their duties on this issue.¹⁸⁰ Further, adoptive parents will feel more confident and secure with information received from the adoption agency if a duty to acquire and disclose information is imposed.¹⁸¹ These types of information also help the adoptees, not only in terms of giving them information that may be medically important¹⁸² but also in terms of giving them a greater sense of themselves and their genealogical roots.¹⁸³ These requirements must apply to both public and private agencies and to independent adoptions, as all perform basically the same functions and should be governed by the same regulations.¹⁸⁴ While some may argue that implementation of these requirements is too costly to be practical, studies have shown that disrupted adoptions cost adoption agencies about \$55 million a year.¹⁸⁵ These monies could be spent developing a comprehensive team evaluation process, which could then be instituted by the agencies. Agencies could also develop

including questions about conditions during her pregnancy, delivery history, and medications and drugs taken during pregnancy and five years prior to pregnancy. The birth and medical history of the child is asked with particular attention directed toward the personality and temperament of the child. Schur, *supra* note 63, at 7-69. This form could serve as a model for statutory requirements. However, the requirements must be flexible and not exhaustive so that new medical knowledge and procedures could easily be incorporated.

180. Social service agencies often do not see adoption as a priority, and many problems then arise. Caseworkers may not have time to devote to matching adoptees with prospective parents. Information from the biological parents may be sketchy and unclear. Also, all children legally freed for adoption may not be listed. Jane S. Wimmer & Sharon Richardson, *Adoption of Children with Developmental Disabilities*, 69 CHILD WELFARE 563, 567 (1990).

181. See *supra* note 179 and accompanying text.

182. Children of alcoholic parents are twice as likely to become alcoholic. Alcoholic mothers tend to have underdeveloped, malnourished babies. Mothers who are drug addicts have babies who are addicted and are developmentally disadvantaged. Malnutrition in one's early years is associated with retarded brain growth and retarded mental development. WESTMAN, *supra* note 37, at 7, 9. Premature infants with very low birth weights show high rates of mortality, serious handicaps, and congenital abnormalities. Undernourishment may have severe physical consequences as it affects the development of the nervous system and severe psychological consequences as it affects the child's body image and responsiveness to his environment. JOINT COMM'N., *supra* note 74, at 25, 34. Children of incest have an increased risk of recessive disorders such as homocystinuria, mental retardation, cystic fibrosis, and various congenital malformations. Ann. T. Lamport, *The Genetics of Secrecy in Adoption, Artificial Insemination and In Vitro Fertilization*, 14 AM. J.L. & MED. 109, 114 (1988-89). Other present-day medical data that an adoptee should know, but may not be told about, includes information on DES, AIDS, cancer, and heart problems.

183. Adoptees often experience genealogical bewilderment because they have no knowledge or only sketchy knowledge about their biological parents. This bewilderment about one's origins undermines the adoptee's sense of belonging and identity. TRISELIOTIS, *supra* note 36, at 19. See generally BETTY LIFTON, *TWICE BORN* (1975) (author learned of her adoption at two and one-half when she was seven years old and book chronicles her search for her biological mother); KATRINA MAXTONE-GRAHAM, *AN ADOPTED WOMAN* (1983) (story of an adoptee who pursued the secret file that the adoption agency held on her adoption).

184. See *supra* notes 39-50 and accompanying text.

185. See *supra* note 84 and accompanying text.

training programs for their workers so that they could become proficient in obtaining the necessary information from the biological parents.

SECTION TWO: WRONGFUL ADOPTION

2.1: Cause of Action

An adoption agency, or anyone acting in that capacity, is liable for intentional misrepresentation or for negligent misrepresentation of information about the adoptee to the adoptive parents.

2.2: Statute of Limitations

The statute of limitations begins to run at the time the adoptive parents discover, or should have discovered, the adoptee's physical, mental, or emotional condition and discover the fact that the adoption agency, or whomever acted in that capacity, misrepresented the adoptee's condition during the adoption process.

2.3: Remedy

The adoptive parents are entitled to recover medical expenses and other extraordinary expenses incurred in the raising of the adoptee. Future medical and other extraordinary expenses may also be recovered. Recovery does not include the cost of the adoption fee or everyday expenses of raising a child. Emotional damage or distress to the adoptive parents caused by the wrongful adoption is not recoverable.

2.4: Trust Fund

Any monies recovered by the adoptive parents are to be placed in a trust fund for the adoptee. This fund is to pay for the adoptee's care, education, medical treatments, and extraordinary expenses throughout his or her life.

2.5: Application

The above sections 2.1 through 2.4 apply to both public and private agencies and to independent adoptions.

Commentary: Creating a cause of action for wrongful adoption ensures that agencies and those doing independent adoptions collect the required information on the adoptee and disclose it fully to the adoptive parents. Thorough collection and dissemination of information is essential to placing the adoptee with parents who are able to fully meet his or her needs. Thus, the adoptee's best interests are more fully served by such a cause of action. Creation of a trust fund for the adoptee also supports the best interests standard because it ensures a financial resource to help cover extraordinary expenses, and it also

ensures that any monies recovered will be used only for the adoptee's care and support.

V. CONCLUSION

Adoption, which has existed since ancient times, has changed dramatically over the course of history. Initially, it was a process through which a family could ensure that family lines continued and thus the interests of the adopters were emphasized. As the rights of the biological parents came to the forefront, statutory schemes were developed to protect the biological parents' identities as well as to ensure that their parental rights were terminated only when actually necessary. The present day adoption policy of serving the adoptee's best interests has surfaced only in modern times.

Despite this mandate to serve the child's best interests, adoption statutes do little to actually protect such interests. These statutes are vague and do not specify factors that should be considered in determining what is in the child's best interests; thus, the interpretation is left to judicial discretion. Statutes do not usually impose a duty on the adoption agency to collect information on the adoptee's background and to disclose that information to the adoptive parents before the adoption is finalized. Several cases of wrongful adoption, alleging that adoption agencies have either negligently or intentionally misrepresented facts to the adoptive parents, have emerged in the past twelve years. Courts have increasingly found grounds to support this cause of action.

Despite judicial recognition of wrongful adoption as a cause of action, legislative attention must also be addressed to the issue of adoption. Only when the state legislature amends the adoption statute to specifically include both a cause of action for wrongful adoption and specific information collection and disclosure requirements will the adoptee's best interests be served.

MARY E. SCHWARTZ