

The Tort of Wrongful Adoption
A View of Agencies, Attorneys, and Social Workers

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The Tort of Wrongful Adoption is an action parents² may have for the misrepresentation of material facts about the child whom they adopted. Many materials discuss the cause of action and the parents' right to sue. This article shall explore the issue from another view, that of the agency, attorney, and social worker as well as strategies of good practice and practicing preventive law.

Standard for Tort of Wrongful Adoption

Common Law Fraud

In determining the standard for liability for wrongful adoption, courts first relied upon the common law elements of fraud. Those elements, defined in Burr v. Board of County Com'rs of Stark County, 23 Ohio St. 3d 69, 491 N.e.2d 1101, 56 A.L.R.4th 357 (1986), the first case to recognize the action and define the elements for wrongful adoption are:

- (a) a representation or, where there is a duty to disclose, concealment of a fact,
- (b) which is material to the transaction at hand,
- (c) made falsely, with knowledge of its falsity or with such utter disregard and recklessness as to whether it is true or false that knowledge may be inferred,
- (d) with the intent of misleading another into relying upon it,
- (e) justifiable reliance upon the representation or concealment, and
- (f) a resulting injury proximately caused by the reliance. *Burr*, 491 N.E. 2d at 1102.

¹To all my fellow Academy members who responded to my appeal for assistance for relevant case law, statutes, and regulations. Thank you!!!!

²For the ease of reference, and in respect to all who adopt, the word parents shall refer to all who adopt, whether an individual or couple.

Negligence

It is a black letter law that a negligence action consists of the existence of a duty, breach of that duty, causation, and damages. One of the first cases to recognize wrongful adoption as a cause of action sounding in negligence, was *Roe v. Catholic Charities of the Diocese of Springfield*, 225 Ill.App.3d 519, 588 N.E.2d 354, 167 Ill. Dec.713, 60 USLW 2602, 2 NDLR P 269 (1992). In that case, the court readily recognized a duty of the agency to “give a complete and honest response ... requests concerning.. the potentially adoptable child”. *Roe v. Catholic Charities*, 225 Ill. App. 3d at 538. The agency represented to three different prospective families the children’s conditions were normal, when in fact all tended to be violent, with uncontrolled behavior and two of the children had social and emotional delays. *Id.*

Massachusetts recognized the tort of wrongful adoption in the seminal case, *Mohr v. Commonwealth*, 421 Mass. 147, 653 N.E. 2d 1104 (1995). The Massachusetts Supreme Judicial Court ruled against an agency for its failure to “disclose to adoptive parents information about a child that will enable them to make to knowledgeable decision as to whether to accept the child for adoption.” *Mohr*, 521 Mass at 161. The court held that an agency may be held liable for not only intentional misrepresentation, but negligent misrepresentation as well. *Id* at 161. The court based the agency’s duty upon the Code of Massachusetts Regulations, 110 MA ADC 7.213(3) which requires the Department³ provide the adoptive parents with all relevant information about a child to enable the adoptive parent to knowledgeably determine whether to accept the child for adoption.

Specifically, the court found liability because the social worker employed by the state agency failed to disclose what she knew about the child’s medical and biological background, and misrepresented that no medical records relevant to the child’s family history were available. In fact, the social worker knew the birth mother was schizophrenic, in a state hospital; the child diagnosed with mental retardation and moderate cerebral atrophy, and the social worker was in possession of documentation evidencing such. *Mohr*, 421 Mass. at 150.

³The Department also refers to licensed placement agencies.

Previously, other courts recognized a duty to disclose: e.g., *M.H. v. Caritas Family Servs.*, 288 N.W.2d 282, 284-285, 288 (Minn.1992) (agency did not fully disclose child was born of incestuous relationship); *Meracle v. Children's Serv. Soc'y of Wis.*, 149 Wis.2d 19, 32-33, 437 N.W.2d 532 (1989) (agency told adoptive parents that child's biological father tested negative for Huntington's disease and therefore child had no more chance of developing it than any other child, even though paternal grandmother had died of Huntington's disease and no reliable test existed to determine whether biological father had it; subsequently diagnosed as having Huntington's disease). See also *Juman v. Louise Wise Servs.*, 159 Misc.2d 314, 320, 608, 608 N.Y.S.2d 612 (1994), *aff'd*, 211 A.D.2d 446, 620 N.Y.S.2d 371 (1995).

Level of Duty Defined by Statute

As other courts have also set liability based upon a duty to disclose, they have looked to their statutory law to set the standard. For example, in 1994, a Pennsylvania case held that an adoption agency's duty to disclose fully and accurately all relevant non-identifying information in its possession. *Gibbs v. Ernst*, 538 Pa. 193, 647 A.2d 882 (1994). The court defined the level of duty to be a good faith effort based upon two statutes, which set the standard of good faith and full and accurate disclosure. 23 Pa. Cons. Stat. § 2909(a); 23 Pa. Cons. Stat. § 2533(b) (12).

Washington State also relied upon two statutes to impose liability on an agency. *McKinney v. State of Washington*, 134 Wn.2d 388, 950 P.2d. 461(1988) recognized an agency's statutory duty to provide to prospective adoptive parents the information required by RCW 26.33.350 and 26.33.380 about the child or children to be adopted. The court characterized the duty as the obligation to make a reasonable investigation of their records and fully and accurately disclose what it has. *McKinney*, 134 Wn. 2d at 389 citing *Gibbs v. Ernst*, 538 Pa. 193, 647 A.2d 882 at 893 (1994).

Good Faith, Full and Accurate Disclosure

Some state statutes define specific actions an agency must take to meet the standard of care, while others fall short. Although many states now recognize an agency's duty to

disclose, this author was not able to find a case that mandates the extent to which an agency has a duty to disclose; whether that duty includes a duty to investigate and if so, the extent of the investigation. For example, in a footnote, in the *Mohr* case the court refused to address an agency's duty to investigate the child's background, or the extent of such investigation. *Mohr* 421 Mass at 163; n.11.

Fortunately, some states have promulgated meaningful regulations, which set specific guidelines as to the steps the agency must take in gathering information about the child. A good example is the Utah Administrative Code 538 R-501-7-9 E, which inter alia, requires the following comprehensive actions:

- ⌚ A medical examination by a qualified physician to determine not only the state of the child's health, but also any known or potentially significant factors that may interfere with normal development or may signal any potential medical problems.

As the regulation states, this information must be documented and shared *at a minimum* (emphasis supplied) with parents, potential adoptive parents and the casework, *prior* (emphasis supplied) to placement. UAC 538 R-501-7-9 E.

- ⌚ An evaluation of the child, which includes genetic and laboratory tests. UAC 538R-501-7-9 EI.

The Utah Administrative Code also requires the information the agency obtains about the birth parents and their family backgrounds include not only medical, social, and mental health history, but genetic history as well. UAC 538R-501-7-9 GI.

Another excellent example of specific actions may be found in the California Code of Regulations, 22CA ADC § 35195(a), which requires form used for the written medical report and that the prospective adoptive parents acknowledge in writing, their receipt of the report before or at the time of placement. A particularly significant requirement is

that the agency is not permitted to interpret or summarize medical terminology or any health condition indicated in the original source reports, except as noted in the regulation, but shall cite the information “verbatim”. 22CA ADC § 35195(a) (4). Furthermore, if the birth parent received psychiatric or psychological evaluations, the diagnosis must also be cited verbatim. 22CA ADC § 35195 (a)(4)(A).

Another significant regulation requires the agency to advise the prospective adoptive parents to consult its own medical/mental health experts once given the birth parent’s medical and psychiatric history. Furthermore, the agency is required to document in its own file and report to the court, any required document, report or information it was unable to secure. 22 CA ADC § 35195 (a)(7). Such documents, reports and information include:, inter alia, All known medical background about the child’s birth parents; 22 CA ADC § 35000 (m)(2)(A) I; Medical reports from the child’s prenatal physician and the physician who delivered the child, or from the hospital in which the child was born, if available; 22 CA ADC § 3500 (m)(2)(A) 6; and photocopies of all original source reports on the child’s and his or her birth parents’ medical and family backgrounds obtained during the agency’s investigation of the child. 22 CA ADC § 35000 (m)(2)(A) 7.

California statutes further provide that the biological parent may provide a blood sample which maybe used later for DNA testing, West’s Ann.Cal.Fam.Code § 8706(c)(1).

Washington State extends the duty for entities and person obligated to provide information to make reasonable efforts to locate records and information concerning the child’s family background and social history. There is a duty to provide the information, but as specifically stated by the statute, there is no duty to explain or interpret either the records or the information. RCW 26.33.380 (2).

Other regulations, such as those in British Columbia, provide that the agency has a duty to “...obtain information about the medical and social history of the child and the child’s biological family... *as practical. ...*” B.C. Reg. 260/2001, s. (a) 4 (1).

Causation

As in any negligence claim, to prevail in an action for wrongful adoption, the breach of duty is the proximate cause of the alleged injury or damage. *Dresser v Cradle of Hope Adoption Center*, 358.Supp. 2d. 620, 638 (E.D. Mich.2005). In that case the court did not find liability because there was no evidence that the primary cause of the child's medical condition existed prior to the adoption. Therefore, the agency could not have made any representations as to the child's medical condition, now complained of, when the prospective adoptive parents adopted the child. *Dresser*, 358 F.Supp. 2d at 636.

Damages

Compensatory and Punitive

The most recent reported case⁴, on wrongful adoption is *Ross v. Louise Wise Services, Inc.*, 28 A.D.3d 272, 812 N.Y.S.2d 325, N.Y.A.D. 1 Dept. (2006). In that case, the court confirmed that damages for wrongful adoption, could include not only compensatory damages, but punitive damages as well. *Ross*, 28 A.D. 3d at 294. In that case, the adoption agency, in accordance with the then prevailing custom and standard, did not reveal the child's family history of medical illness and schizophrenia at the time of the adoption. Despite requests from the adoptive parents several years later, and statutory changes, the agency continued to withhold information relevant to the adoptee's mental health and family history. The court allowed the punitive damages claim to proceed based upon the agency's actions and omissions. In particular, the court focused on the failure to warn the prospective adoptive parents, of the child's potential for violence, notwithstanding the agency's policy to withhold information and the agency's false report to child's psychiatrist. *Ross*, 28 A.D.3d at 331⁵. The agency's gravamen was its continued failure to disclose the child's medical and social-psycho history, long after the statute, agency policy, and standard of good practice changed.

⁴At the time of this writing, August 2006.

⁵The dissent to preclude potential punitive liability for actions, which at the time were the norm, *Ross v. Louise Wise Services, Inc.*, 28 A.D.3d 272, 812 N.Y.S.2d at 294, NY.A.D. 1 Dept. (2006) would be rather persuasive, if not for the agency's continued refusal to disclose critical information, years later, in contravention of the change in the standard of practice and the law.

In Defense of Agencies

Agencies have argued that indeed they did provide information as to the child's and the biological family's background. E.g. *Jackson v. State*, 287 Mont. 473, 956 P.2d 35 (1998). In making such an argument, agencies, such as the one in the Jackson case claimed that the statute does not specifically state the information that must be included in the medical and social histories and does not mandate disclosure of birth parent psychological histories. *Jackson* 956 P.2d at 50. However, as in the Jackson case, there may be other applicable standards, not necessarily found in either the case law, or statutes, but in regulations, or policies and procedural manuals. *Id.*

Inasmuch as none of us can hide behind the cloaks of considerations of public policy and children do not come with warranties, like products, *Richard P. v. Vista Del Mar Child Care Service*, 106 Cal.App.3d 860, 165 Cal. Rptr. 370, Cal. App.2 Dist., 1980, we need to realize that the law and standards continue to evolve. What was standard practice one day, could easily give rise to liability the next.

Attorneys, agency directors, and social workers ought to look at these cases from another standpoint, rather than muddle along in an evolving standard of care, often fact based. Cases cited thus far imposed liability on the agency. None of the cases cited thus far focused on what if anything the agency explicitly represented to the prospective adoptive parents:

1. The agency's role in the placement of the child;
2. The agency's role in acquiring the child and birth parents' medical background information and psycho-social history;
3. The responsibility to understand the information presented; and
4. The opportunities, if any, the prospective adoptive parents have to consult experts of their choice to review the information presented.

Validity of Waivers and Notice Risk

Agencies often have potential adoptive parents sign a waiver of liability and notice of risk. Carefully crafted waivers and notices, incorporating the agency's duty of care, relevant standards as imposed by case law, statutes, and regulations may shield an agency from certain liability. Exercising the proper duty of care may not be contracted away. Nevertheless, clearly delineating the agency's role in the placement and disclosure of information process can eliminate assumptions, which can easily spiral into causes of action. Quality drafting protected an agency from liability when a family sued them for intentional and negligent misrepresentation. *Forbes v. The Alliance for Children, Inc., et al*, Suffolk County, Civil Action No. 97-04860-B (Dec. 16, 1998), was a case of first impression for Massachusetts. In that case, the court upheld the release language included in the agreements signed by the adoptive parents and that such agreements are enforceable and do not violate public policy.

One of the most recent cases to question liability, but with a twist, is *Dresser v. Cradle of Hope Adoption Center*, 358F.Supp. 2d. 620 (E.D. Mich.2005). The federal district court held Michigan's public policy requires a full disclose of a child's medical information to prospective adopting parents. The court defined the duty to not only provide the medical and family records in its possession, but extended the duty to those records available to it within a reasonable period of time.

In that case, the court dismissed the claim of intentional misrepresentation, based upon the fact that there was no material misrepresentation by the agency and, again, based upon the facts, the plaintiffs knew or should have known the child's medical condition before the adoption. *Dresser* 358 F.Supp. 2d at 635-636.

The court dismissed the negligence claims in reliance upon the documents the plaintiffs signed with the agency, releasing the agency from such liability. *Dresser* 358 F.Supp. 2d at 636. However, the court did uphold the child's right to bring his claim against the agency on the grounds that the agency breached its duty to him, to provide his adoptive parents with his medical records within a reasonable period of time. *Dresser* 358 F.Supp. 2d at 639. Hence, the court extended the agency's duty of full disclosure of a child's

medical records to the adoptive parents to include the child, recognizing, as alleged in this case, the failure to do so, could jeopardize the child's future medical care. *Dresser* 358 F. Supp. 2d at 641.

Duty to Defend

It is critical for all adoption agencies to have liability insurance. Included in the liability policy is the duty to defend the agency in negligence actions. *In Travelers Indem. Co. v. Children's Friend and Service, Inc.*, Not Reported in A 2d.2005 WL 3276224, R.I. Super. (2005), an insurance companies that had issued a policy to the adoption agency sought to have other insurance companies, who had also issued policies during the relevant time period, share in the duty to defend the agency in a case brought by adoptive parents against the agency. The court held, that, according to the language of the policies, the "bodily-injury, not necessarily the occurrence," occur during the coverage period of the policy. The court concluded that it was possible that the injuries sustained could be during the policy period because the injury was an on-going one, and thus the terms of the policy in effect at that time could be invoked.

Conclusion

Unanswered questions still remain and liabilities still loom:

- ⌚ The duty to investigate;
- ⌚ The extent of the investigation; and
- ⌚ The role of the agency's attorney.

Preventative law equates with being three steps ahead of the wave. The customary standard, present case law, statues, and regulations cannot be relied on without an eye toward future liability. It is imperative that all agencies, attorneys, and social workers clearly delineate their respective role and responsibilities *in writing*, to the prospective adoptive parents. It is also critical that prospective adoptive parents be presented, *in writing* all known risks, the possibility of unknown risks, and the opportunities that may have to consult experts before agreeing to a placement. As a final point, it is negligent for any agency to operate without adequate liability coverage.