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Wrongful Adoption: A Guide to Impending Tort Litigation in Texas.

Fred S. Wilson

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Wrongful Adoption: A Guide to Impending Tort Litigation in Texas

Fred S. Wilson

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I. INTRODUCTION

In 1964, Russell and Betty Burr adopted a seventeen month old boy.¹ The Burrs were informed that the child was a "nice, big, healthy, baby boy" and

1. *Burr v. Board of County Comm'rs*, 491 N.E.2d 1101, 1103 (Ohio 1986).

was being put up for adoption by a young, unwed mother who did not feel she could give him the life he deserved.² Based on this information, the Burrs welcomed the child, Patrick, as a member of their family.³

In the ensuing years Patrick suffered a number of maladies including mental retardation and hallucinations.⁴ Ultimately, Patrick was diagnosed as having Huntington's Disease, a genetically inherited disease that attacks the central nervous system.⁵ In a desperate attempt to treat Patrick's disease, the Burrs obtained a court order to open the sealed records containing the background information and medical history of Patrick's natural parents.⁶ The information these records disclosed was truly shocking.⁷

Astonishingly, the records revealed that, except for Patrick's age and sex, all of the information given to the Burrs in 1964 was false.⁸ Patrick's natural mother had, in reality, been a thirty one year old institutionalized, mental patient.⁹ Patrick's father was unknown but was presumed to have been a mental patient as well.¹⁰ Even more alarming was the fact that prior to Patrick's adoption, the adoption agency had performed psychological assessments which indicated that Patrick functioned at a low intellectual level and

2. *Id.* The adoption agency's caseworker explained that the child's natural mother was an eighteen year old unwed mother who believed adoption was the best alternative for her child. The Burrs were informed that the mother was attempting to work and take care of her child. The Burrs were further informed that the mother chose to place her child for adoption because she planned to pursue employment in Texas and did not want to leave him with her grandparents who mistreated him. *Id.*

3. *Id.* The Burrs alleged that it was the information provided by the adoption agency which cemented their decision to adopt. *See id.* at 1104 (alleging that if provided with truthful information, no decision to adopt would have been made).

4. *Id.* Patrick suffered from a number of physical as well as mental problems and was eventually classified as mentally retarded but educable through special education classes. Patrick's maladies included, among other things, poor motor skills, a speech impediment, and learning disabilities. *Id.*

5. *Burr*, 491 N.E.2d at 1103. Huntington's Disease is defined as "a chronic disease affecting persons between the ages of 30 and 50, marked by choreic movement [irregular, involuntary movement] in the limbs and face, loss of mental faculties, and dementia (mental deterioration). Death usually follows within 15 years." 1 J.E. SCHMIDT, M.D., ATTORNEY'S DICTIONARY OF MEDICINE AND WORD FINDER § C-153 (1991). If the disease develops during childhood, as it did with Patrick, the average life expectancy is reduced to 8.5 years. *Burr*, 491 N.E.2d at 1103.

6. *Burr*, 491 N.E.2d at 1103.

7. *See id.* at 1103-04 (adoption agency intentionally misrepresented pertinent medical history of adopted child).

8. *Id.*

9. *Id.* at 1104. Patrick's natural mother had been diagnosed as idiopathic and bovine. *Id.* An idiopathic disease is defined as "a disease the cause of which is unknown." 2 J.E. SCHMIDT, M.D., ATTORNEYS' DICTIONARY OF MEDICINE AND WORD FINDER § I-7 (1991). Bovine is defined as "like cattle, resembling the facial appearance of a cow." *Id.* § B-116.

10. *Burr*, 491 N.E.2d at 1104.

had the potential for future deviant social and emotional behavior.¹¹ Most shocking was the revelation that the adoption agency potentially had knowledge that Patrick was at risk for Huntington's Disease.¹²

Based on these tragic facts, in 1986 the Supreme Court of Ohio, in *Burr v. Board of County Commissioners*,¹³ affirmed an award of damages for the Burrs.¹⁴ Thus, the tort known as wrongful adoption¹⁵ was created.¹⁶

This comment examines the circumstances that necessitated the development of a cause of action for wrongful adoption and, after explaining the current state of the tort nationally, proposes a direction for its continued development and application in Texas.

11. *Id.*

12. *Id.* Although Patrick's natural mother was never diagnosed as suffering from Huntington's Disease, expert testimony established that his family history put him at risk for developing the disease. *Id.*

13. 491 N.E.2d 1101 (Ohio 1986).

14. *See id.* at 1108 (affirming award of \$125,000). The Ohio Supreme Court affirmed the award determining that the record amply proved the existence of each element of a fraud. *Id.* The court listed the elements of a fraud as:

- (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.

Id. at 1102 (citing *Cohen v. Lamko, Inc.*, 462 N.E.2d 407, 409 (Ohio 1984)). The facts in *Burr* established a set of circumstances fulfilling the requirements of each of these elements. Claire Grandpre' Combs, Note, 56 U. CIN. L. REV. 343, 350-51 (1987). Texas case law defines fraud in much the same way. *See Chemetron Corp. v. Business Funds, Inc.*, 682 F.2d 1149, 1171-72 (1982) (defining elements of fraud in Texas).

15. NATIONAL COMMITTEE FOR ADOPTION, ADOPTION FACTBOOK, UNITED STATES DATA, ISSUES, REGULATIONS AND RESOURCES 132 (1989).

Wrongful adoption refers to a growing number of lawsuits filed by adoptive parents against public adoption agencies. These families have claimed that the agencies misrepresented the physical and/or emotional condition of the child at the time of adoption and that, had they had complete and accurate information, they either would not have adopted the child in the first place or would have provided early and necessary treatment for the child.

Id.

16. *Burr*, 491 N.E.2d at 1103-04. The term "wrongful adoption" had not been used by any appellate court in the nation prior to the *Burr* case. John R. Maley, Note, *Wrongful Adoption: Monetary Damages as a Superior Remedy to Annulment for Adoptive Parents Victimized by Adoption Fraud*, 20 IND. L. REV. 709, 710 (1987).

II. BACKGROUND

The practice of adoption¹⁷ is ancient and has followed a unique path of development.¹⁸ Early adoption, as practiced by the Romans, was governed by well established, intricate laws.¹⁹ However, the common law of England failed to follow the direction of the Romans and neither recognized, nor established rules governing the adoption of children.²⁰ Similarly, the United

17. NATIONAL COMMITTEE FOR ADOPTION, ADOPTION FACTBOOK, UNITED STATES DATA, ISSUES, REGULATIONS AND RESOURCES 2 (1989).

Adoption is a legal procedure in which a person or couple takes a child that is not their offspring into the family and raises the child as their own; this child may be unrelated to either adoptive parent, may be the child of one member of the couple, or may be related in some other way to the adoptive parents. Adoption severs all legal ties between the adoptee and his or her birth parents (except when one birth parent is a member of the adopting couple), and establishes such ties between the adoptee and the adoptive parents. Legally, the adoptee has the same status with respect to his or her adoptive parents as do any nonadopted siblings.

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Id. In Texas, the adoptee possibly has more status than his nonadopted siblings. See TEX. FAM. CODE ANN. § 15.07 (Vernon Supp. 1992) (providing that after termination of natural parent-child relationship, child retains right to inherit from and through divested parent).

18. Louis Quarles, *The Law of Adoption—A Legal Anomaly*, 32 MARQ. L. REV. 237, 237 (1949). See Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 923 (1991) (discussing development of adoption in United States). See generally HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 20.1 (2d. ed. 1988) (tracing historical background of adoption).

19. Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 446-48 (1971). While the earliest codes of law refer to adoption, the Romans most fully developed adoption law. Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 744 (1956). Roman adoption law established that once an adoption was finalized, the adoptee's ties with his natural family were severed and he was incorporated as a full member of the new, adoptive family. *Id.* at 745. Furthermore, the Romans recognized adoption in two forms: *adoptio* and *adrogatio*. HOMER H. CLARK, JR., THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES § 20.1, at 850-51 (2d ed. 1988). *Adrogatio* applied to the adoption of adults. *Id.* § 20.1, at 851. *Adoptio* dealt with the adoption of unemancipated children and is the precursor of modern adoption law. *Id.* § 20.1, at 850-51. However, unlike modern adoption law, which serves the "best interests" of the child, Roman adoption law clearly benefited the adopter. See Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 745 (1956) (noting that under Roman law, welfare of adoptee irrelevant). In fact, Roman adoption law served only two broad purposes: to prevent extinction of a family, and to perpetuate family religious worship. John Francis Brosnan, *The Law of Adoption*, 22 COLUM. L. REV. 332, 332 (1922).

20. See Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 745-46 (1956) (explaining that English regard for blood lineage curtailed development of adoption). As a result of this lack of recognition, legal fictions were occasionally necessary to achieve the same result as an adoption. *Id.* at 746. The use of one such fiction, that the child of a married woman is the offspring of her husband, led to the amusing result that although a woman's husband had been at sea for over three years, her child was held to be legitimate. *Id.* Ultimately logic triumphed and in 1926 adoption was statutorily recognized in England. Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L.

States, whose laws are based on the English common law, was slow to recognize the legitimacy and necessity of adoption law.²¹

Despite the slow recognition of adoption in the United States, the development of modern American adoption law can be isolated to a single, key event: passage of the "Act to Provide for the Adoption of Children"²² by the Massachusetts Legislature in 1851.²³ The Massachusetts statute, and those that followed its lead, placed the welfare of the child before the interests of the adoptors, thus marking a dramatic break with the precepts of the

443, 443 (1971). Despite the logic of recognizing adoption, almost a century passed before lobbying efforts convinced Parliament of the need for statutory adoption law. Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038, 1045 (1979).

21. See Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 923 (1991) (noting that early English substitutes for adoption were imported by America). Early American substitutes for adoption included indentured servitude, as well as the more appealing use of "orphan trains," precursors of modern adoption agencies. *Id.* at 923-24. Under these early practices the "adopters" never formally adopted the children and had no legal responsibility to care for them. *Id.* at 924. Adoption did receive some recognition on a case-by-case basis in those states which were influenced by Roman adoption law through prior French or Spanish rule. See *Teal v. Sevier*, 26 Tex. 516, 521 (1863) (denying adoption because Spanish law forbade parent with legitimate child to adopt); see also Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 747 (1956) (noting existence of Roman-style adoption in early Louisiana and Texas case law). Similarly, "private" acts authorizing a specific adoption were enacted in the first half of the nineteenth century. See generally Stephen B. Presser, *The Historical Background of the American Law of Adoption*, 11 J. FAM. L. 443, 461-464 (1971) (tracing private acts which predated general American adoption law).

22. MASS. REV. STAT. ch. 324 (1851).

23. Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038, 1042 (1979). In all fairness, other general adoption statutes were passed in Texas and Vermont prior to the Massachusetts provision. MORTON L. LEAVY & ROY D. WEINBERG, *LAW OF ADOPTION* 2 (4th ed. 1979). However, such statutes made no requirement of either public supervision or a determination of an adoption's propriety. *Id.* In reality, these statutes served merely to make private adoption agreements a matter of public record. *Id.* It also appears that Mississippi allowed adoption as early as 1846. Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 748 (1956). However, comparing the Mississippi provision with its counterpart in Massachusetts, the latter is more complete. *Id.* The Massachusetts provision pioneered American adoption law by requiring 1) the birth parents' written consent, 2) a joint petition including both adoptive parents, 3) a judicial adoption decree, and 4) a complete, legal severance between the child and the biological parents. NATIONAL COMMITTEE FOR ADOPTION, *ADOPTION FACTBOOK, UNITED STATES DATA, ISSUES, REGULATIONS AND RESOURCES* 18 (1989). This sudden development of statutory adoption law is all the more unique because there is no clear explanation as to what prompted such action. Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038, 1043 (1979). Furthermore, passage of the Massachusetts' statute received little attention and the provision was seldom used for several years after its conception. *Id.*

ancient Roman adoption law.²⁴ It is this focus on the "best interests"²⁵ of

24. See ARTHUR D. SOROSKY ET AL., *THE ADOPTION TRIANGLE* 32 (1978) (noting that from outset, American adoption law focused on welfare of adopted child). The Massachusetts statute acknowledged the adopted child as the prime beneficiary of the adoption transaction. Jamil S. Zainaldin, *The Emergence of a Modern American Family Law: Child Custody, Adoption, and the Courts, 1796-1851*, 73 NW. U. L. REV. 1038, 1042-43 (1979). However, the statute may have also served the purpose of protecting adoptive parents from extortion by biological parents threatening to regain custody of an adopted child. *Id.* at 1044 n.13. Notwithstanding this other purpose, the focus on the "best interests" of the adopted child is a unique American contribution to modern adoption law. Leo Albert Huard, *The Law of Adoption: Ancient and Modern*, 9 VAND. L. REV. 743, 749 (1956). Using the Massachusetts statute as a template, several other states soon recognized adoption, and today adoption is uniformly recognized throughout the United States. Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 924 (1991). Adoption law in the United States is, for all practical purposes, overseen by the states via judicial interpretation of statutory law. NATIONAL COMMITTEE FOR ADOPTION, *ADOPTION FACTBOOK, UNITED STATES DATA, ISSUES, REGULATIONS AND RESOURCES* 2 (1989).

25. Because of its abstract nature, the term "best interests" is not commonly given a precise definition. See David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 480-81 (1984) (describing best interests standard as simple, egalitarian, and flexible). Because of this flexible standard, a number of relevant factors can be considered in ascertaining the child's best interests. See generally Richard A. Edwards, Note, *Adoption—The Welfare and Best Interest of the Child*, 5 WILLIAMETTE L. REV. 93, 93-103 (1968) (discussing factors considered in determining child's best interests). Furthermore, because statutes which require that a decision affecting a child's welfare be in his best interests commonly do not name the factors to be considered, it is most often case law that defines these elements. See *id.* at 93 (explaining that Oregon statute leaves court with wide discretion to determine child's best interests). For example, in Texas the factors used to determine whether the termination of a parent-child relationship is in the child's best interests include:

1) the child's desires; 2) the child's emotional and physical needs now and in the future; 3) the emotional and physical danger to the child now and in the future; 4) the parental abilities of those seeking custody; 5) their plans for the child; 6) the stability of the existing home; 7) the parent's acts or omissions which may indicate that the existing parent-child relationship is not a proper one; and 8) any excuses for the parents acts or omissions.

Byrne v. Catholic Charities, Diocese of San Angelo, 710 S.W.2d 780, 781-82 (Tex. App.—Austin 1986, no writ) (citing *Holley v. Adams*, 544 S.W.2d 367, 371-372 (Tex. 1976)). Although the flexibility of the best interest standard seemingly allows judges to make decisions concerning a child's welfare based on a number of relevant factors, it is possible that a judge will give unjustified weight to a given factor that may itself be impossible to measure. See David L. Chambers, *Rethinking the Substantive Rules for Custody Disputes in Divorce*, 83 MICH. L. REV. 477, 481-82 (1984) (discussing strengths and weaknesses of best interest standard). Because of this uncertainty, other standards have been proposed. See JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTERESTS OF THE CHILD* 53-54 (1973) (proposing "the least detrimental available alternative for safeguarding the child's growth and development" as superior standard). However, if the standard is viewed not as a legal principle but simply as an understanding that the child's welfare must prevail against other competing claims, it serves as an effective guideline. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 14.2, at 788 (2d. ed. 1988) (analyzing application of best interest standard as applied in child custody disputes).

the adopted child that is common to the uniform recognition of adoption within the United States today.²⁶

Notwithstanding the fact that the best interests of the child is the overarching concern of modern adoption law, present statutes also seek to protect the interests of the biological parents.²⁷ However, adoptive parents, the last element in the adoption triangle, are noticeably lacking in statutory protection.²⁸ Regardless of the causes for this anomaly,²⁹ the fact remains that

26. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 20.7, at 909 (2d. ed. 1988) (categorizing best interest of adoptee as ultimate standard in analyzing propriety of adoption); see also Christopher J. Dodd, Comment, *The Adoption of Baby Lenore: Two Interpretations of a Child's Best Interests*, 11 J. FAM. L. 285, 287-88 (1971) (noting modern adoption law's emphasis on welfare of child). Statutes governing adoption also take into account the interests of other relevant parties. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 20.1, at 851 (2d ed. 1988) (purpose of statutes is to protect all parties to adoption process). However, it is the child's best interests that clearly controls modern adoption statutes. See, e.g., CAL. CIV. CODE § 221.63 (Deering Supp. 1991) (providing for court order of adoption if interest of child promoted by such action); IOWA CODE ANN. § 600.1 (West 1981) (mandating welfare of adopted child as paramount consideration); TENN. CODE ANN. § 36-1-101 (1991) (making protection of children primary purpose); TEX. FAM. CODE ANN. § 16.08 (Vernon 1986) (judicial determination of child's best interests prerequisite to granting of adoption decree). The trial courts which apply such statutes are given wide discretion to determine a child's best interests. See, e.g., *In the Interest of W.E.R.*, 669 S.W.2d 716, 717 (Tex. 1984) (finding no basis for reversal of trial court's denial of adoption absent abuse of discretion); *Green v. Remling*, 608 S.W.2d 905, 908 (Tex. 1980) (interpreting state adoption law as investing trial court with broad discretionary power). As such, the fate of an adoptee may rest in the hands of an individual judge. See Susan L. Brooks, Comment, *Rethinking Adoption: A Federal Solution to the Problem of Permanency Planning for Children with Special Needs*, 66 N.Y.U. L. REV. 1130, 1136 (1991) (arguing that vague standards leave fate of adoptee completely within judicial discretion).

27. See Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 924 (1991) (noting protection modern adoption statutes grant biological parents). The decision to terminate a parent-child relationship can be very traumatic. See ARTHUR D. SOROSKY ET AL., *THE ADOPTION TRIANGLE* 54 (1978) (discussing psychological effect of adoption on biological parents). As such, it is a general rule under today's adoption statutes that absent the consent of the biological parents, an adoption is void. Christopher J. Dodd, Comment, *The Adoption of Baby Lenore: Two Interpretations of a Child's Best Interests*, 11 J. FAM. L. 285, 288 (1971); see TEX. FAM. CODE ANN. § 16.03(b) (Vernon 1986) (requiring termination of parent-child relationship prior to consideration of adoption petition).

28. Constance J. Miller, Comment, *Best Interests of Children and the Interests of Adoptive Parents: Isn't it Time for Comprehensive Reform?*, 21 GONZ. L. REV. 749, 756 (1986). This is in no way an indication that the adoption process is somehow less troublesome to adoptive parents. See generally NATIONAL COMMITTEE FOR ADOPTION, *ADOPTION FACTBOOK, UNITED STATES DATA, ISSUES, REGULATIONS AND RESOURCES* 12-14 (1989) (noting effect of nine social trends on adoption process). For example, the legalization of abortion has reduced the number of children which would have potentially been adopted. *Id.* at 12. At the same time, adoptable babies remain in high demand due to increased infertility. *Id.* at 13. In situations where the individuals seeking to adopt are infertile, the emotional impact that comes with this condition compounds the difficulty of the adoption process. See ARTHUR. D.

adoptive parents hold a precarious position in the adoption process.³⁰

Those who choose to adopt necessarily rely on the information provided by an adoption agency in making their decision.³¹ As such, adoptive parents

SOROSKY ET AL., *THE ADOPTION TRIANGLE* 74, 84 (1978) (discussing impact of infertility on adoption process).

29. Traditional views on adoption and the participants in the adoption process have not been favorable. See Nancy Gibbs, *The Baby Chase*, *TIME*, Oct. 9, 1989, at 87 (noting past use of derogatory language in defining parties to adoption). The birthmother was portrayed as "promiscuous," the child as a "bastard," and the adoptive parents as "barren". *Id.* Today, those who choose to adopt may be viewed as wealthy baby-shoppers who exploit the poorer, biological parents. See Comment, *Revocation of Parental Consent to Adoption: Legal Doctrine and Social Policy*, 28 U. CHI. L. REV. 564, 569 n.42 (1961) (describing revocation of adoption based on judge's sentimental view of adoption process). A more appropriate view is to recognize that those who adopt may do so for reasons which are common to all parents, biological or adoptive. See ARTHUR D. SOROSKY ET AL., *THE ADOPTION TRIANGLE* 74 (1978) (citing sense of societal duty, value of having children as incentives for adoption). The obstacles presented by outdated stereotypes are compounded by the lack of progressive statutory change in adoption laws since their inception. See Linda F. Smith, *Adoption—The Case for More Options*, 1986 UTAH L. REV. 495, 500-01 (noting uniform history of adoption legislation). Many of these outdated practices may have been a cause of, rather than a shield from, many of the problems within the adoption process. See ARTHUR D. SOROSKY ET AL., *THE ADOPTION TRIANGLE* 220 (1978) (arguing for reevaluation of adoption policies).

30. See, e.g., *Michael J. v. County of Los Angeles, Dep't of Adoptions*, 247 Cal. Rptr. 504, 505-06 (Cal. App. 1988) (probability of adopted child's future complications withheld); *Burr v. Board of County Comm'rs*, 491 N.E.2d 1101, 1103-04 (Ohio 1986) (adoptive parents victimized by fraud); *Meracle v. Children's Serv. Soc. of Wis.*, 437 N.W.2d 532, 533 (Wis. 1989) (adoptive parents negligently misinformed as to health of adopted child). As these cases represent, the lack of clear, up-to-date guidelines has allowed for the disclosure of inadequate information concerning the pertinent history of an adopted child. Susan L. Brooks, Comment, *Rethinking Adoption: A Federal Solution to the Problem of Permanency Planning for Children with Special Needs*, 66 N.Y.U. L. REV. 1130, 1141 (1991). As such, adoptive parents are denied the opportunity to make an informed choice about adoption. See *Burr*, 491 N.E.2d at 1109 (analogizing adoptive parents' right to informed decision with similar right held by biological parents). A related vulnerability for adoptive parents is a misrepresentation made, not by the party providing information about the adoptee, but instead from a related party. See John R. Maley, Comment, *Wrongful Adoption: Monetary Damages as a Superior Remedy to Annulment for Adoptive Parents Victimized by Adoption Fraud*, 20 IND. L. REV. 709, 711 n.18 (1987) (discussing "related adoption"). In this situation the misrepresentation is made by one adoptive parent against the other and usually serves some financial purpose for the party making the misrepresentation. *Id.* at 711-12. Because a wrongful adoption action involves an unrelated adoption (no connection between child and adopters prior to the adoption), a discussion of the risks involved in a related adoption is beyond the scope of this comment.

31. Generally, there are two categories of infant adoption: 1) adoptions through licensed agencies, and 2) adoptions independent of licensed agencies. Sharon Fast Gustafson, *Regulating Adoption Intermediaries: Ensuring that the Solutions are no Worse than the Problem*, 3 GEO. J. LEGAL ETHICS 837, 842 (1990). The majority of unrelated adoptions are performed by agencies. See NATIONAL COMMITTEE FOR ADOPTION, *ADOPTION FACTBOOK, UNITED STATES DATA, ISSUES, REGULATIONS AND RESOURCES* 3 (1989) (approximately 69% of unrelated adoptions in 1986 were handled by agencies). Also, state-operated agencies perform

are particularly vulnerable to misrepresentations about the pertinent history of the adoptee.³² Although a number of potential remedies exist to assist those who are intentionally or negligently misled,³³ an increasing number of adoptive parents who have been denied the right to make an informed deci-

more adoptions than their private counterparts. *See id.* (approximately 57% of unrelated, agency adoptions in 1986 were handled by state-operated agencies). When an adoption is handled by an agency, the biological mother releases her child to the agency, and the agency makes the choice of an appropriate adoptive home. Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 934 (1991). In an independent adoption the adoptive parents and the biological parents meet prior to the adoption and arrange the transaction amongst themselves or with the aid of an intermediary. Sharon Fast Gustafson, *Regulating Adoption Intermediaries: Ensuring that the Solutions are No Worse than the Problem*, 3 GEO. J. LEGAL ETHICS 837, 842 (1990). The growing number of wrongful adoption lawsuits reflect a desire to recover for the misrepresentations of a public adoption agency. NATIONAL COMMITTEE FOR ADOPTION, ADOPTION FACTBOOK, UNITED STATES DATA, ISSUES, REGULATIONS AND RESOURCES 132 (1989). However, under Texas adoption law, any facility placing children for adoption in Texas is either state-operated or must be licensed by the state. TEX. HUM. RES. CODE ANN. § 42.041 (a), (b) (Vernon 1990). Accordingly, this comment will use the term "adoption agency" in a generic manner to mean either a private or state-operated facility.

32. *See Meraclé*, 437 N.W.2d at 533 (adoptive parents victimized by agency's negligent misrepresentations); *see also Michael J.*, 247 Cal. Rptr. at 513 (adoptive parents potentially victimized by agency's fraudulent concealment); *Burr*, 491 N.E.2d at 1103-04 (adoptive parents victimized by agency's fraudulent representations). These misrepresentations deny the adoptive parents the right to make an informed decision about adoption. *See Susan Kempf LeMay*, *The Emergence of Wrongful Adoption as a Cause of Action*, 27 J. FAM. L. 475, 487 (1989) (analogizing denial of informed decision to wrongful birth tort). The greater the surprise which inevitably comes from these misrepresentations, the greater the difficulty borne by the adoptive parents. *See Janet Hopkins Dickson*, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 945 (1991) (noting that adoptions fail less frequently when adopters are given accurate information).

33. *See Susan Kempf LeMay*, *The Emergence of Wrongful Adoption as a Cause of Action*, 27 J. FAM. L. 475, 488 (1989) (noting inadequacy of current remedies). One alternative is an annulment, or setting aside, of the adoption decree. *Id.* at 480-81. This remedy is impractical because the majority of jurisdictions have very short limitations periods which allow little time for adoptive parents to discover an agency's misrepresentations. *See Anne Harlan Howard*, Note, *Annulment of Adoption Decrees on Petition of Adoptive Parents*, 22 J. FAM. L. 549, 565 app. (1984) (listing limitations periods of annulment provisions within United States). Furthermore, although it traditionally has been accepted that an adoption decree can be annulled upon a showing of fraud or misrepresentation, only one state allows an annulment of an adoption if the adopted child develops some mental illness or developmental disability which existed prior to the adoption. *See CAL. CIV. CODE* § 227b (Deering 1990) (allowing annulment if complications occur within five years of adoption decree). However, even under this provision, the court's decision to grant an annulment is discretionary. *See id.* (providing that court "may" grant annulment if necessary facts are proven). Financial subsidies are another possible remedy. *Susan Kempf Lemay*, *The Emergence of Wrongful Adoption as a Cause of Action*, 27 J. FAM. L. 475, 483-84 (1989). However, such subsidy programs are designed to encourage the adoption of children with special needs and require that the subsidy agreement be signed before adoption. *See Sanford N. Katz*, *Subsidized Adoption in America*, 10 FAM. L.Q. 3, 4

sion about adoption are turning to wrongful adoption as their only recourse.³⁴

III. THE DEVELOPMENT OF WRONGFUL ADOPTION

A. Case Law: Determining the Boundaries of an Emerging Tort

1. *Burr v. Board of County Commissioners*

The importance of disclosing the pertinent history of an adopted child and the vulnerability of adoptive parents to inadequacies in the adoption process are tragically displayed in the facts of the 1986 decision by the Ohio Supreme Court, *Burr v. Board of County Commissioners*.³⁵ In *Burr*, the court recognized a cause of action for wrongful adoption and strengthened the rights of adoptive parents by affirming an award of monetary damages for victims of adoption fraud.³⁶

(1976) (discussing purpose of Model State Subsidized Adoption Act, upon which a number of state statutes are based).

34. See NATIONAL COMMITTEE FOR ADOPTION, ADOPTION FACTBOOK, UNITED STATES DATA, ISSUES, REGULATIONS AND RESOURCES 132-33 (1989) (discussing increasing number of wrongful adoption lawsuits). The divergence in the rules developed in these cases demonstrates the evolving nature of this tort. See *id.* at 132-33 (noting inadequate exploration of issues involved in wrongful adoption). The Supreme Court of Wisconsin paved the way for the emerging trend of adoptive parents seeking recovery under the wrongful adoption theory. See *Burr*, 491 N.E.2d at 1109 (allowing recovery for adoption agency's fraudulent misrepresentations). The tort has subsequently evolved. See *Michael J.*, 247 Cal. Rptr. at 513 (allowing recovery for fraudulent concealment of adoptee's history); see also *Meracle*, 437 N.W.2d at 537 (allowing recovery for adoption agency's negligent misrepresentations). However, the tort is not fully developed. See Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 962-63 (1991) (noting inconsistency in wrongful adoption case law). Nevertheless, because wrongful adoption does not seek to terminate the parent-child relationship, it is a more suitable remedy for those victimized by the misrepresentations of an adoption agency. John R. Maley, Comment, *Wrongful Adoption: Monetary Damages as a Superior Remedy to Annulment for Adoptive Parents Victimized by Adoption Fraud*, 20 IND. L. REV. 709, 710-11 (1987).

35. 491 N.E.2d 1101 (Ohio 1986). The facts in *Burr* serve to support the growing emphasis that is placed on the disclosure of an adopted child's medical and physical history. See ARTHUR D. SOROSKY ET AL., THE ADOPTION TRIANGLE 219 (1978) (arguing that sealed adoption records impede one's identity formation). See generally Claire Grandpre' Combs, Note, 56 U. CIN. L. REV. 343, 343-44 (1987) (discussing facts in *Burr*). In particular, disclosure serves the adopter's right to make an informed decision. See Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 944 (1991) (arguing that adoptive parents should be treated as biological parents). Furthermore, the adoptee is also served by disclosure. See *id.* at 942 (noting that disclosure allows adoptee to diagnose hereditary illness). Also, disclosure serves to benefit both the adopted child and the adoptive parents by creating a better chance of a successful adoptive relationship. See *id.* at 945 (noting adoptions more likely to fail when adoptive parents not fully informed).

36. See *Burr*, 491 N.E.2d at 1108 (awarding compensatory damages to adoptive parents

Although the *Burr* decision led to the development of a cause of action for wrongful adoption, the court tempered its decision by stating that it did not intend to make adoption agencies guarantors of the children they place.³⁷ Instead, the court's interpretation of wrongful adoption only permitted a suit based upon the fraudulent misrepresentations of an adoption agency.³⁸

2. *Michael J. v. County of Los Angeles, Department of Adoptions*

Two years after the *Burr* decision, in a case styled *Michael J. v. County Of Los Angeles, Department Of Adoptions*,³⁹ the California Court of Appeals followed Ohio's lead and recognized wrongful adoption as a cause of action

because of agency's fraudulent misrepresentations). The court's decision established wrongful adoption as a legitimate cause of action. Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 957 (1991). The decision in *Burr* was groundbreaking because, although previous cases in the nation had similar factual situations, no court had seen fit to award monetary damages for fraud on the part of an adoption agency. John R. Malley, Comment, *Wrongful Adoption: Monetary Damages as a Superior Remedy to Annulment for Adoptive Parents Victimized by Adoption Fraud*, 20 IND. L. REV. 709, 718 n.75 (1991). Compare *County Dep't of Public Welfare v. Morningstar*, 151 N.E.2d 150, 155 (Ind. App. 1958) (affirming annulment of adoption after adoptive parents fraudulently induced into adoption) with *Richard P. v. Vista Del Mar Child Care Serv.*, 165 Cal. Rptr. 370, 373-74 (Cal. App. 1980) (refusing to recognize cause of action for adoption agency's negligent misrepresentations).

37. See *Burr*, 491 N.E.2d at 1109 (stating that mere failure to disclose risks discoverable in child's background not actionable). This view appears to be based on the court's understanding that the adoption agency in question had a policy of not providing adoptive parents with the personal history of the adopted child. John R. Maley, Comment, *Wrongful Adoption: Monetary Damages as a Superior Remedy to Annulment for Adoptive Parents Victimized by Adoption Fraud*, 20 IND. L. REV. 709, 722 (1987). Arguably, had a duty to disclose existed, the court could have found the mere failure to meet such a duty actionable. *Id.* at 723. However, a later decision makes it clear that in Ohio, only fraud on the part of an adoption agency establishes a wrongful adoption action. See *Allen v. Children's Serv.*, 567 N.E.2d 1346, 1349 (Ohio App. 1990) (stating that only cause of action against adoption agency for material misrepresentations is fraud). Thus, the court clearly did not establish a negligence standard. See Susan Kempf LeMay, Comment, *The Emergence of Wrongful Adoption as a Cause of Action*, 27 J. FAM. L. 475, 478 (1989) (discussing court's decision to create cause of action only for rare, fraudulent abuse by adoption agency).

38. *Burr*, 491 N.E.2d at 1109. This continues to be the rule in Ohio. See *Allen*, 567 N.E.2d at 1349 (Ohio App. 1990) (finding no cause of action for adoption agency's breach of agreement to provide "healthy" child). It is important to note that after the Burrs adopted Patrick, the Ohio Legislature did much to aid adoptive parents in obtaining information about an adoptee by encouraging the collection of data concerning the pertinent history of an adoptee's biological parents. See OHIO REV. CODE ANN. § 3107.12(D)(2),(3) (Baldwin 1991) (requiring disclosure of pertinent history of biological parents); see also Timothy N. O'Connell, Legislative Note, *S. B. 340: Disclosure of Social and Medical History of the Biological Parents of an Adopted Child*, 4 U. DAYTON L. REV. 533, 534 (1979) (discussing amendments to Ohio adoption statute).

39. 247 Cal. Rptr. 504 (Cal. App. 1988).

as well.⁴⁰ The facts in *Michael J.*, although not as shocking as those in *Burr*, paint an equally sad picture of parents fraudulently induced into an adoption.⁴¹ Mary Trout adopted Michael in 1970.⁴² Unfortunately, Mary mistakenly believed that a large port wine stain covering Michael's face and upper torso was merely a birthmark.⁴³ Eleven years after the adoption, Michael began to suffer seizures and, upon diagnosis, the "birthmark" was discovered to be a manifestation of Sturge-Weber Syndrome, a congenital nerve disorder which causes epilepsy.⁴⁴ Mary soon discovered that the adoption agency knew that Michael's future health was questionable even at the time of his adoption, and quite possibly concealed this fact intentionally.⁴⁵

The California Court of Appeals, although acknowledging a previous decision which barred any wrongful adoption suit based on an adoption agency's negligent misrepresentations,⁴⁶ recognized an action against an

40. See *id.* at 512-13 (recognizing action against adoption agencies for intentional misrepresentation or fraudulent concealment). The *Michael J.* case allowed recovery for wrongful adoption for the first time in California. Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 958 (1991). A similar case based on the negligent misrepresentations of an adoption agency had previously failed in the California courts. See *Richard P. v. Vista Del Mar Child Care Serv.*, 165 Cal. Rptr. 370, 373-74 (Cal. App. 1980) (finding no liability for adoption agency's negligent misrepresentation).

41. Compare *Burr v. Board of County Comm'rs*, 491 N.E.2d 1101, 1104 (Ohio 1986) (adoptive parents victimized by adoption fraud) with *Michael J.*, 247 Cal. Rptr. at 505 (adoption agency intentionally concealed pertinent medical history of adopted child).

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

43. *Id.* Michael had been voluntarily relinquished for adoption by his natural mother. *Id.* Because of the port wine stain, Michael had been classified as "hard-to-place" and as a result of this classification, appeared on a television broadcast seeking to recruit adoptive parents. *Id.* It was this broadcast which led Mary Trout to eventually adopt Michael. *Id.*

44. *Id.* Sturge-Weber Syndrome is defined as "a congenital disorder marked by the presence of red stains on the face, . . . angiomas (blood vessel tumors) of the meninges [protective envelope of the brain and spinal cord], calcification (deposits of calcium) of the structures within the cranium, hemiplegia (paralysis affecting one side of the body), mental retardation, etc." 2 J.E. SCHMIDT, M.D., ATTORNEYS' DICTIONARY OF MEDICINE AND WORD FINDER § E-63 (1991).

45. *Michael J.*, 247 Cal. Rptr. at 513. A report made shortly after Michael's birth noted that a medical examination had resulted in a doctor's refusal to make a definite prognosis. *Id.* at 545. Expert testimony established that the medical examination should have diagnosed Sturge-Weber Syndrome and recognized the potential for epilepsy. *Id.* at 506.

46. *Id.* at 511-13. The court felt bound by its prior decision in *Richard P.* that, on public policy grounds, barred an action against an adoption agency for its negligent misrepresentations of an adopted child's health. See *Michael J.*, 247 Cal. Rptr. at 512 (discussing public policy rationale behind decision in *Richard P.*). In *Richard P.*, the court ruled that holding adoption agencies liable for negligent misrepresentations would place an unreasonable burden on such agencies. *Richard P.*, 165 Cal. Rptr. at 374. In reality, *Richard P.* was the first attempt in the nation to recover for wrongful adoption. Compare *Burr*, 491 N.E.2d at 1103

agency which intentionally misrepresents or fraudulently conceals the true health of an adopted child.⁴⁷ Although the court refused to develop a negligence standard for wrongful adoption, its decision nevertheless advanced the scope of the tort by recognizing a duty on the part of adoption agencies to disclose the pertinent history of an adopted child.⁴⁸ However, because the California court limited liability to intentional rather than negligent acts of misrepresentation, the apparent advances made by the decision are limited by the possibility that an adoption agency could inadequately gather or disclose pertinent data and yet remain invulnerable to a wrongful adoption lawsuit.⁴⁹

3. *Meracle v. Children's Service Society of Wisconsin*

In 1989, the next piece in the wrongful adoption puzzle was fit into place by the Supreme Court of Wisconsin.⁵⁰ In *Meracle v. Children's Service Society of Wisconsin*,⁵¹ an adoption agency was, for the first time, held liable for negligent misrepresentations concerning the health of an adopted child.⁵²

(allowing recovery for fraudulent misrepresentations by adoption agency concerning pertinent history of adopted child) with *Richard P.*, 165 Cal. Rptr. at 374 (barring recovery for negligent misrepresentations by adoption agency concerning pertinent history of adopted child). Because the agency in *Richard P.* had negligently informed the adoptive parents of the child's health, this case is easily distinguished from the fraudulent circumstances involved in *Burr*. See Susan Kempf Lemay, *The Emergence of Wrongful Adoption as a Cause of Action*, 27 J. FAM. L. 475, 479 (1989) (noting that agency in *Richard P.* had negligently failed to inform parents of potential health risks caused by premature birth).

47. *Michael J.*, 247 Cal. Rptr. at 513. Reminiscent of the *Burr* decision, the California court was quick to qualify its decision stating that it was not imposing a duty on adoption agencies to predict the future health of the children they place. *Id.* Rather, the court sought only to acknowledge a cause of action for deliberate concealment or intentional misrepresentations that misleads adoptive parents. *Id.* The court determined that the adoption agency's failure to disclose a physician's refusal to make a definite prognosis for Michael suggested such a fraud. *Id.*

48. *See id.* (requiring full disclosure of facts material to existing or past conditions concerning health of adopted child). This decision is somewhat confusing in that at the time Michael was adopted, California had no mandatory disclosure law. Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 960 (1991). As such, the court apparently recognized a common law duty of disclosure that predated any statutory duty. *Id.*

49. *See Michael J.*, 247 Cal. Rptr. at 513 (making only intentional misrepresentation or fraudulent concealment actionable). This reduced standard of liability potentially discourages adoption agencies from making efforts to fully disclose pertinent information. Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 961 (1991).

50. *See Meracle v. Children's Serv. Soc'y of Wis.*, 437 N.W.2d 532, 537 (Wis. 1989) (holding adoption agency liable for negligent misrepresentation of health of adopted child).

51. 437 N.W.2d 532 (Wis. 1989).

52. *Id.* at 537. The Wisconsin court gave much deference to the California Court of Appeals' decisions in *Richard P.* and *Michael J.* *See id.* at 536-37 (discussing the holdings of

However, the significance of this holding is shadowed by the apparent limits of the court's decision.⁵³

The Meracles adopted a three year old girl, Erin, in 1980.⁵⁴ Prior to the adoption, the Meracles were informed that Erin had a family history of Huntington's Disease.⁵⁵ The Meracles were also informed that because Erin's father had not tested positive for the disease there was no exceptional risk of Erin developing the disease.⁵⁶ Unfortunately, the Meracles later discovered that there was in fact no test available to determine if Erin's father had inherited the disease.⁵⁷ In 1984, Erin was diagnosed as having Huntington's Disease.⁵⁸

The Meracles sued the adoption agency for wrongful adoption basing their action on the negligent misrepresentations of the agency's caseworker.⁵⁹ The Wisconsin Supreme Court held that liability exists for an adoption agency which, after voluntarily choosing to provide a child's medical history and prognosis, negligently discharges that duty.⁶⁰ Thus, for the

Richard P. and Michael J.). In particular, the court echoed the primary concern of the *Richard P.* decision: Holding adoption agencies liable for negligent misrepresentations would expose them to unlimited liability. *Id.* at 537. Ultimately, the Wisconsin court determined that their holding would not place an unreasonable burden on adoption agencies, but would instead increase confidence in the adoption process. *See id.* (reasoning that immunity for adoption agencies would erode public confidence).

53. *Compare* Michael J. v. County of Los Angeles, Dep't of Adoptions, 247 Cal. Rptr. 504, 513 (Cal. App. 1988) (declining to find cause of action for negligent misrepresentation) with *Meracle*, 437 N.W.2d at 537 (declining to find duty of disclosure). Because the *Meracle* court refused to find a duty of disclosure, it in effect encourages adoption agencies to remain silent concerning the pertinent history of an adopted child. Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 962 (1991).

54. *Meracle*, 437 N.W.2d at 533. The Meracles contacted the Children's Service Society of Wisconsin about adopting a child in 1977. *Id.* In 1979, the Meracles were informed by the agency that a twenty-three month old girl was available for adoption. *Id.* Erin was placed with the Meracles in late 1979 and the adoption was completed approximately thirteen months later. *Id.*

55. *Id.* The agency's caseworker disclosed the fact that Erin's grandmother had died of the disease. *Id.*

56. *Id.* The Meracles were informed that if one generation tested free from Huntington's Disease, the next generation would also be free. *Id.* As such, the Meracles were led to believe that because Erin's father had not tested positive for the disease, Erin was at no greater risk than any other child for developing the disease. *Id.*

57. *Id.* This discovery came after the Meracles viewed a television news program and their subsequent research confirmed this report. *Id.*

58. *Meracle*, 437 N.W.2d at 533.

59. *Id.* It is important to note that the caseworker remembered discussing Huntington's Disease but could not recall discussing the likelihood of Erin's developing the disease. *Id.*

60. *Id.* at 536. However, the court emphasized that no injury occurred until the Meracles learned that Erin had developed Huntington's Disease. *Id.* As the court explained, only with the discovery of Erin's condition could the Meracles demonstrate the reasonably certain future

first time an adoption agency was held liable for negligent misrepresentations which induced adoptive parents to proceed with an adoption.⁶¹ Although the court acknowledged concerns that its holding would place an excessive burden on adoption agencies,⁶² it ultimately concluded that a negligence standard would increase confidence in the adoption process.⁶³ Notwithstanding the significance of the *Meracle* decision, the court limited the impact of its holding by stating that it was in no way placing a duty on adoption agencies to disclose material facts concerning an adopted child's health.⁶⁴ As such, the *Meracle* decision encourages agencies to follow a "policy of silence" under which only negligent or intentional misrepresentations are actionable and no action lies for nondisclosure.⁶⁵

expenses they would incur as the result of relying on the agency's affirmative misrepresentation. *Id.*

61. Compare *Richard P. v. Vista Del Mar Child Serv.*, 165 Cal. Rptr. 370, 374 (Cal. App. 1980) (refusing to hold agency liable for negligent misrepresentation) with *Meracle*, 437 N.W.2d at 537 (holding adoption agency liable for negligent misrepresentation).

62. See *Meracle*, 437 N.W.2d at 536-37 (discussing public policy arguments for immunizing adoption agencies from liability).

63. *Id.* The court determined that because the adoption agency had assumed the affirmative duty of informing the Meracles of their child's risk of developing Huntington's Disease, it had a responsibility to perform that duty in a reasonable manner. *Id.* The court based this decision on the understanding that by holding agencies liable for negligently false representations, it was necessarily assuring the accuracy of the information that would be provided to adoptive parents. *Id.*

64. *Id.* at 537. The court further appeased concerns about the burden being placed on adoption agencies by stating that agencies could avoid liability by simply refusing to make any affirmative representations concerning an adoptee's health. *Id.* This analysis is at odds with circumstances that prompt a wrongful adoption suit, the denial of the opportunity to make an informed decision to adopt a child. See *Michael J.*, 247 Cal. Rptr. at 505 (finding agency's concealment deprived adoptive parents of opportunity to inquire further); see also *Burr*, N.E.2d at 1109 (misleading adoptive parents determined to be cause of compensable injuries). As such, allowing an agency to simply refuse to disclose any information serves only to insulate poorly run adoption agencies and maintain the vulnerable status of adoptive parents. *Cf.* Note, *Wrongful Birth Actions: The Case Against Legislative Curtailment*, 100 HARV. L. REV. 2017, 2023 (1987) (discussing purpose of wrongful birth cause of action).

65. See Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 962 (1991) (contending that under *Meracle*, agencies are not responsible if nothing is said concerning pertinent history of adopted child). A possible reason for this outcome may have been the public policy considerations expressed in other jurisdictions. See *Richard P.*, 165 Cal. Rptr. at 373 (stating that negligence standard would impede proper functioning of agencies). Similar considerations may have been a factor in a prior wrongful adoption decision. See *Burr*, 491 N.E.2d at 1109 (finding no cause of action for failure to disclose). However this holding may have been based on the court's recognition that no statutory duty of disclosure existed at the time of the decision. See Claire Grandpre' Combs, Note, 56 U. CIN. L. REV. 343, 354 (1987) (arguing that *Burr* relied on lack of statutory duty in not imposing duty of disclosure).

B. *Analysis of Case Law*

It is ironic that the three cases responsible for the creation and expansion of wrongful adoption jurisprudence also demonstrate potential inadequacies remaining with this developing tort.⁶⁶ With each new decision, the scope of liability for wrongful adoption has increased, from intentional fraud to negligence.⁶⁷ However, this expansion is deceptive since both *Burr* and *Michael J.* refused to impose any liability for negligent misrepresentations⁶⁸ and *Meracle*, although creating a negligence standard, refused to impose any duty on adoption agencies to disclose relevant information.⁶⁹ The disappointing result of these decisions is that under the common law adoptive parents have no absolute right to receive the information they desperately need in deciding to adopt a child.⁷⁰

66. See, e.g., *Michael J. v. County of Los Angeles, Dep't of Adoptions*, 247 Cal. Rptr. 504, 513 (Cal. App. 1988) (imposing duty of disclosure with no negligence standard); *Burr v. Board of County Comm'rs*, 491 N.E.2d 1101, 1109 (Ohio 1986) (finding liability for fraud with no duty to disclose); *Meracle v. Children's Serv. Soc'y of Wis.*, 437 N.W.2d 532, 537 (Wis. 1989) (imposing negligence standard with no duty of disclosure). Although the rights of adoptive parents have been greatly improved by this series of decisions, the impact on the adoption process as a whole may be less than positive. See Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 963 (1991) (arguing that no jurisdiction is willing to create absolute right to know adopted child's history). As is the case with any developing area of law, these inadequacies may be corrected in time. Susan Kempf LeMay, *The Emergence of Wrongful Adoption as a Cause of Action*, 27 J. FAM. L. 475, 475 (1989).

67. See, e.g., *Michael J.*, 247 Cal. Rptr. at 513 (imposing liability for negligent concealment); *Burr*, 491 N.E.2d at 1109 (imposing liability for intentional fraud); *Meracle*, 437 N.W.2d at 537 (imposing negligence standard). Thus, the tort of wrongful adoption appears to be expanding. Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 962 (1991). However, similar cases indicate that courts continue to show resistance to expanding the application of wrongful adoption. See *Allen v. Children's Serv.*, 567 N.E.2d 1346, 1349 (Ohio App. 1990) (refusing to find adoption agency liable for breach of contract to provide "healthy" baby); see also *Foster by Foster v. Bass*, 575 So. 2d 967, 978-79 (Miss. 1990) (reasoning that adoption agency could not reasonably foresee physicians' failure to test adoptee for PKU).

68. Compare *Michael J.*, 437 N.W.2d at 537 (imposing no duty of disclosure) with *Burr*, 491 N.E.2d at 1109 (imposing duty only for fraud). Furthermore, recent case law, although acknowledging a negligence standard, also falls short of fully developing the tort. See *Foster*, 575 So. 2d at 982 (refusing to hold adoption agency liable for hospital's negligence).

69. *Meracle*, 437 N.W.2d at 537 (imposing no duty of disclosure).

70. See Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 962-63 (1991) (discussing limitations in decisions which have developed wrongful adoption).

IV. DEVELOPING WRONGFUL ADOPTION IN TEXAS

A. *Proposed Duty and Standard of Liability*

As the small amount of case law dealing with wrongful adoption indicates, the tort is young and inadequacies remain in its application. Accordingly, Texas has the opportunity to further develop this relatively new cause of action. This development should impose a duty on adoption agencies to disclose the pertinent history of an adoptee.⁷¹ Absent such a duty, adoption agencies will choose to remain silent and thus avoid any potential liability.⁷²

71. See Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 964 (1991) (calling for duty of good faith disclosure of pertinent history of adopted child). The absence of such a duty may rob the adoptee of vital information. See Ann T. Lamport, *The Genetics of Secrecy in Adoption, Artificial Insemination, and In Vitro Fertilization*, 14 AM. J.L. & MED. 109, 112 (1988) (explaining that adoption files may be only source of medical information for adoptee). Similarly, nondisclosure serves as an injustice to the adoptive parents by denying them the relevant information they need to make an informed decision to adopt a child. See NATIONAL COMMITTEE FOR ADOPTION, ADOPTION FACTBOOK, UNITED STATES DATA, ISSUES, REGULATIONS AND RESOURCES 184 (1989) (noting considerable number of children with hidden "special needs"). Besides these strong arguments in favor of disclosure, the relationship between the adoptive parents and the adoption agency may in itself be sufficient to warrant disclosure. See John R. Maley, Comment, *Wrongful Adoption: Monetary Damages as a Superior Remedy to Annulment for Adoptive Parents Victimized by Adoption Fraud*, 20 IND. L. REV. 709, 723-24 (1987) (arguing that fiduciary relationship creates duty of disclosure). Under such a fiduciary relationship, analogous to that between a seller and purchaser, "material information that is not discoverable by the exercise of ordinary care and diligence must be disclosed." See W. Page Keeton, *Rights of Disappointed Purchasers*, 32 TEX. L. REV. 1, 6 (1953) (discussing duty of disclosure in purchase transaction). Furthermore, the fact that a policy of nondisclosure in an adoption transaction is potentially unethical may be grounds enough to disallow it. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 106, at 739 (5th ed. 1984) (noting trend to find duty of disclosure based on standard of ethical person). Ultimately, a policy of disclosure serves the adoptee's best interest and should not be too difficult to impose since most adoption agencies claim to do so already. See NATIONAL COMMITTEE FOR ADOPTION, ADOPTION FACTBOOK, UNITED STATES DATA, ISSUES, REGULATIONS AND RESOURCES 174 (1989) (surveying risks and benefits of various methods of adoption). Any increased cost in the adoption process for this benefit could feasibly be passed to the adopters. See TEX. FAM. CODE ANN. § 16.032 (k) (Vernon Supp. 1992) (authorizing payment of reasonable cost for report).

72. See *Meracle v. Children's Serv. Soc'y of Wis.*, 437 N.W.2d 532, 537 (Wis. 1989) (explaining that absent duty of disclosure, adoption agency need only avoid making affirmative representations to avoid liability). The result is that adoption agencies who are not required to disclose the relevant history of an adoptee will follow a "policy of silence" under which they will avoid liability by providing no information at all to adoptive parents. See *Burr v. Board of County Comm'rs*, 491 N.E.2d 1101, 1108 (Ohio 1986) (finding liability based on affirmative misrepresentations, not on policy of silence). This marks a return to the outdated secretive practices once used by adoption agencies. Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 962 (1991). This is in contrast to the growing movement towards openness in the adoption process. See NA-

Furthermore, adoption agencies which negligently discharge this duty should be held liable for the injuries resulting from their misconduct.⁷³

Although these advances are essential to the proper development of wrongful adoption, this proposal should in no way be taken as requiring adoption agencies to become guarantors of the children they place. Conditions such as the acquired immune deficiency syndrome (AIDS)⁷⁴ and fetal alcohol syndrome⁷⁵ can be impossible to detect.⁷⁶ Placing a burden on

TIONAL COMMITTEE FOR ADOPTION, ADOPTION FACTBOOK, UNITED STATES DATA, ISSUES, REGULATIONS AND RESOURCES 111 (1989) (discussing development of "open" or "experimental" adoption). Although this retreat into the practices of the past may not be disastrous, see *id.* (expressing concern over lack of scientific evaluation of open adoption), it is recognized that the availability of information can be of aid to the adopted child. See ARTHUR D. SOROSKY ET AL., THE ADOPTION TRIANGLE 221-24 (1978) (arguing that lack of background information inhibits development of adoptee's sense of identity).

73. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 107, at 745 (5th ed. 1984) (misrepresentation involving non-disclosure indistinguishable from other forms of negligence).

No doubt virtually all courts today would recognize the existence of some situations where the nature of a representor's activity or a pre-existing relationship between the representor and the representee, or the two factors together, will constitute the basis for the imposition of a duty to exercise reasonable care to avoid harm from reasonable and expectable reliance on what is said about certain matters related to the subject matter of the transaction.

Id. at 746. As such, a misrepresentation, although believed to be true, may still be negligent due to the representor's unreasonable lack of care in determining the truth of the matter asserted. *Id.* at 745.

74. AIDS, a syndrome having a high rate of mortality, results in a suppressed immunity mechanism which increases the susceptibility to a number of diseases. 1 J.E. SCHMIDT, ATTORNEYS' DICTIONARY OF MEDICINE AND WORD FINDER § A-138 (1991).

75. Fetal Alcohol Syndrome, the result of a mother's consumption of alcohol during pregnancy, is the primary cause of mental retardation in the United States. L. Rachel Eisenstein, *Prenatal Health Care: Today's Solution to the Future's Loss*, 18 FLA. ST. U. L. REV. 467, 471 (1991). The condition is characterized by disorders in the central nervous system, growth deficiencies, and other abnormalities and malformations. Of the three leading causes of mental retardation, fetal alcohol syndrome is the only preventable cause. *Id.*

76. See NATIONAL COMMITTEE FOR ADOPTION, ADOPTION FACTBOOK, UNITED STATES DATA, ISSUES, REGULATIONS AND RESOURCES 130-31 (1989) (discussing impact of AIDS on adoption process). Although the number of pediatric (children under age 13) AIDS cases is relatively small, the virus cannot be detected in infants until they are 15 months old. Subsequent tests may then show no sign of the virus. This problem is further complicated by the fact that approximately one-third of babies infected with the AIDS virus will be abandoned and become probable candidates for adoption. *Id.* Similarly, Fetal Alcohol Syndrome is not always present at birth. Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 963 n.246 (1991). Other conditions such as mental retardation and congenital malformations manifest themselves in the children of incest. See Ann T. Lamport, *The Genetics of Secrecy in Adoption, Artificial Insemination, and In Vitro Fertilization*, 14 AM. J.L. & MED. 109, 114 (1988) (encouraging the evaluation of children from incest prior to adoption). The risk of a child developing these conditions is

adoption agencies to bear the unforeseeable risk of a child developing such conditions would be unreasonable and disastrous.⁷⁷ Rather, this proposal simply advances the realization that, “just as couples must weigh the risks of becoming natural parents, taking into consideration a host of factors, so too should adoptive parents be allowed to make their decision in an intelligent manner.”⁷⁸

B. *Griffith v. Johnston: Adoption and the Constitution*

With an understanding of what the appropriate standard of liability should be for wrongful adoption, it is essential to determine the applicability of that standard in Texas. As was recently made clear by the United States Fifth Circuit Court of Appeals in *Griffith v. Johnston*,⁷⁹ the conditions are

unpredictable because most women placing such children for adoption do not report the identity of the father. *Id.*

77. See Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 963 (1991) (advocating liability only for conditions reasonably foreseeable at time of adoptee's placement). Where an adopted child develops some condition which could not have been predicted, the adoption agency should be excused from any liability under the concept of “unavoidable accident.” See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 29, at 162 (5th ed. 1984) (defining unavoidable accident as event not proximately caused by negligence of party to event). Making an adoption agency guarantee every act it takes would be an intolerable burden. *Id.* at 163. If no foresight could prevent the outcome, an agency cannot be blamed. See OLIVER WENDELL HOLMES, JR., THE COMMON LAW 92 (Little, Brown & Co. 1881) (discussing application of unavoidable accident). Although it may be unavoidable that an adopted child will develop some undetectable condition, the agency still must have a duty to warn all adoptive parents of such risk. See Ann T. Lamport, *The Genetics of Secrecy in Adoption, Artificial Insemination, and In Vitro Fertilization*, 14 AM. J.L. & MED. 109, 114 (1988) (emphasizing disclosure of incest related defects to adoptive parents). With such information it will then be the adoptive parents' option to risk that the adopted child has unforeseen impairment. See Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 964 (1991) (discussing appropriate standard of liability for wrongful adoption). Without such a policy, it would be the absence of a warning which causes an injury to the adoptive parents, not the child's undetectable defect. Cf. Marsha Ternus Rundall, Note, “Act of God” as a Defense in Negligence Cases, 25 DRAKE L. REV. 754, 757 (1976) (explaining necessity of proximate cause in unavoidable accident defense).

78. *Burr*, 491 N.E.2d at 1109. In this respect, a wrongful adoption action should be analogous to a wrongful birth lawsuit. See Susan Kempf Lemay, *The Emergence of Wrongful Adoption as a Cause of Action*, 27 J. FAM. L. 475, 487 (1988-89) (analogizing wrongful adoption to wrongful birth). Wrongful birth is an action by natural parents against a physician for negligent genetic counseling which denies them the opportunity to abort an impaired child. Thomas DeWitt Rogers, III, *Wrongful Life and Wrongful Birth: Medical Malpractice in Genetic Counseling and Prenatal Testing*, 33 S.C. L. REV. 713, 740-41 (1982).

79. 899 F.2d 1427 (5th Cir. 1990), *reh'g denied*, 904 F.2d 705, and *cert. denied*, ___ U.S. ___, 111 S. Ct. 712, 112 L. Ed. 2d 701 (1991).

ripe for Texas to recognize wrongful adoption as a cause of action.⁸⁰

Over a six-year period, the Griffiths adopted five "hard-to-place" or "special needs" children through the Texas Department of Human Services (TDHS).⁸¹ The extent of these special needs became apparent when, during their adolescence, the children attacked their parents and siblings with lethal weapons, destroyed property, and committed other criminal acts within the community.⁸²

Although the Griffiths were informed of the special classifications of their adopted children, they claimed that TDHS had in fact taken measures to avoid discovering the extent of the children's problems, thereby avoiding the necessity to communicate such information to the Griffiths.⁸³ In particular, the Griffiths alleged that TDHS had withheld facts concerning the extent that their children were physically, sexually, or emotionally abused; facts concerning mental and physical handicaps; and other vital information concerning the children's family histories.⁸⁴ The Griffiths further alleged that this concealment was part of TDHS' policy to encourage the adoption of hard-to-place and special needs children.⁸⁵ Believing that they were so induced, the Griffiths claimed that they were injured because they were denied the opportunity to make an informed decision whether or not to adopt.⁸⁶

80. *See id.* at 1435-36 (noting appropriateness of tort claim against adoption agency under circumstances resembling wrongful adoption claim).

81. *Griffith*, 899 F.2d at 1433. The terms "hard-to-place" or "special needs" describe children that are difficult to place in adoptive homes for various reasons such as age, race, handicap, or being a member of a sibling group. TEX. HUM. RES. CODE ANN. § 47.001 (Vernon 1990). Texas operates a special program designed to promote the adoption of such children. *Id.* § 47.002. Within this classification are children that are difficult to place due to a number of reasons including age, race, ethnicity, language, handicap, or being a member of a group of siblings who should be adopted together. *Id.* § 47.001. The program encourages the adoption of such children by providing information, financial assistance, and post-adoption services. *Id.* §§ 47.003, 47.004, 47.031, 47.032. These programs are furthered with aid from the federal government. *See* Adoption Opportunities Program, 42 U.S.C. § 5111 (1978) (providing grants to non-profit programs promoting adoption of special needs children); *see also* The Adoption Assistance Program, 42 U.S.C. § 608 (1980) (reimbursing state subsidies made for special needs adoptions).

82. *Griffith*, 899 F.2d at 1434. A number of the children were eventually institutionalized. *Id.*

83. *Id.* at 1433-34. In particular, the Griffiths alleged that TDHS failed to hire necessary personnel who could competently handle the children's peculiar problems. *Id.* Furthermore, the Griffiths alleged that psychologists employed by TDHS were not "competent to learn and communicate the information essential for parents to make informed adoption decisions." *Id.*

84. *Id.* at 1434.

85. *Id.* The Griffiths alleged that TDHS followed this policy despite Texas statutes which require disclosure of the pertinent history of an adoptee. *Id.*

86. *Griffith*, 899 F.2d at 1434. As a result of making this uninformed decision, the Griffiths claimed that not only did they incur unforeseen expenses caring for their children, but also the children were injured because of delays in such treatment. *Id.*

Although the Griffiths' allegations fit within the mold of previous wrongful adoption actions, they based their lawsuit not in state tort law, but instead on the provisions of the United States Constitution.⁸⁷ Thus, the case dealt exclusively with federal questions.⁸⁸ The Griffiths alleged that the actions of TDHS deprived them of their "fundamental right" to make an informed decision about adoption and therefore violated the Due Process Clause of the Fourteenth Amendment.⁸⁹ In examining the validity of this claim, the court acknowledged that under the Civil Rights Act, Title 42, Section 1983, one is entitled to recover for Due Process Clause violations made under color of state law, as had possibly occurred to the Griffiths under Texas adoption laws.⁹⁰ However, the court was quick to state that both the United States Supreme Court and the Fifth Circuit have established that for a due process violation to exist, one must first have a recognized "liberty or property" interest under the Fourteenth Amendment.⁹¹ In determining whether the Griffiths had established such an interest, the court noted that the Supreme Court, although having expanded the definition of "liberty" to include interests not specifically stated by the Constitution,⁹²

87. See *id.* at 1432 (basing claim on alleged 14th Amendment violations). Despite the Griffiths' due process and equal protection allegations, their claims resemble those of a wrongful adoption cause of action. Compare *Griffith*, 899 F.2d at 1433-34 (alleging intentional misrepresentation of condition of adopted children) with *Burr v. Board of County Comm'rs*, 491 N.E.2d 1101, 1103 (Ohio 1986) (alleging fraud in adoption process); see also NATIONAL COMMITTEE FOR ADOPTION, ADOPTION FACTBOOK, UNITED STATES DATA, ISSUES, REGULATIONS AND RESOURCES 132 (1989) (defining wrongful adoption as misrepresentation of condition of child which denies adoptive parents opportunity to make informed decision to adopt).

88. *Griffith*, 899 F.2d at 1435-36. Even so, the court made it a point to note the tort-like qualities of the Griffiths' claim. *Id.*

89. *Id.* at 1437. Specifically, the Griffiths alleged that the actions of TDHS amounted to governmental interference with their "fundamental interest" in making an "informed" decision to adopt. *Id.* The Griffith children also advanced a due process claim based on their interest in the "uninhibited development of their personalities" and an "interest in living in non-restrictive circumstances." *Id.* at 1438. The court determined that these interests were insufficient for constitutional protection. *Id.* at 1440. Similarly, the children claimed that the TDHS adoption program violated their equal protection rights by providing greater care for children in state custody than to children, like themselves, who are in private custody. *Griffith*, 899 F.2d at 1441. These claims were also denied based on a determination that the interests advanced did not warrant constitutional protection. *Id.* at 1440-41.

90. *Id.* at 1435. The court's analysis is well founded in both United States Supreme Court and Fifth Circuit decisions. See, e.g., *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986) (denying relief under 42 U.S.C. § 1983 for negligent deprivation of liberty interest); *Davidson v. Cannon*, 474 U.S. 344, 347-48 (1986) (finding negligence on part of prison official insufficient to qualify as due process violation); *Brantley v. Surlis*, 718 F.2d 1354, 1358-59 (1983) (acknowledging parental right to choose child's school).

91. *Griffith*, 899 F.2d at 1435.

92. *Id.*

had also encouraged courts to keep the Fourteenth Amendment's reach within those rights deemed to be fundamental.⁹³ With this in mind, the court reasoned that neither previous Supreme Court decisions nor current analysis would justify the recognition of a fundamental right to adopt.⁹⁴ Furthermore, the court recognized that the Griffiths did not necessarily seek to establish a fundamental right to adopt, but rather were asserting a right to informed decision-making which had been denied when the state withheld information.⁹⁵ However, the court reasoned that a claim that TDHS should have given more information before and after adoption was unfounded because the Due Process Clause does not impose an affirmative obligation on states to protect life, liberty, and property, but is instead a limitation on the states' power to deprive such interests.⁹⁶ Therefore, the court determined that the Griffiths had presented no liberty interest which was deprived by the state and as such could not recover under the Fourteenth Amendment for any concealment of information by TDHS.⁹⁷

1. The Implications of *Griffith*

Despite the Fifth Circuit's decision that adoptive parents have no constitutional right to receive the pertinent history of an adopted child, the court's decision is in no way a limitation on the validity of wrongful adoption in Texas. The court made it a point to establish that although the Griffiths'

93. *Id.* This point is supported by recent United States Supreme Court decisions. See *Michael H. v. Gerald D.*, 491 U.S. 110, 122-23 (1989) (limiting reach of Due Process Clause to interests traditionally protected by society); see also *Bowers v. Hardwick*, 478 U.S. 186, 194-96 (1986) (refusing Due Process Clause protection of homosexual sodomy).

94. *Griffith*, 899 F.2d at 1437. The court explained that an opposite decision would create a conflict between the adoptive parents' fundamental right to adopt and the biological parents' right to privacy, a balancing of interests it chose not to perform. *Id.*

95. *Id.* The Griffiths argued that although the state could possibly regulate the "right to adopt" initially, it should be prevented from causing subsequent interference by providing incomplete information about an adoptee. *Id.*

96. *Id.* at 1438. This decision is supported by a number of recent United States Supreme Court decisions. See, e.g., *Webster v. Reproductive Health Serv.*, 491 U.S. 490, 509 (1989) (finding no Due Process Clause violation in state's use of public facilities to encourage childbirth over abortion); *DeShaney v. Winnebago County DSS*, 489 U.S. 189, 195 (1989) (explaining that Due Process Clause contains no requirement that state protect its citizens from private invasion of interests); *Youngberg v. Romeo*, 457 U.S. 307, 318-19 (1982) (requiring training of involuntarily committed, retarded individual to protect his liberty interest in freedom from restraint).

97. *Griffith*, 899 F.2d at 1438. The court rationalized this decision on the basis that if it were to find the state's conduct to be a due process violation, it would not establish any clear standards for a what would qualify as a "constitutional" adoption program. *Id.* The Griffiths also asserted a claim that because the state provided inadequate care for their children, they were deprived of a property interest in the funds they had to spend on necessary treatment. *Id.* at 1440. This claim also failed under the court's analysis. *Id.* at 1440-41.

claim was valid, they had simply brought the wrong cause of action.⁹⁸ The court repeatedly stressed that the Griffiths' claim would have been proper under Texas tort law, emphasizing this point by stating that its decision should not be read to preclude such a claim.⁹⁹ Accordingly, *Griffith* stands not as a disparagement of the validity of wrongful adoption in Texas, but rather as an argument for recognition of the tort.

C. Texas Adoption Law: The Duty of Disclosure

One reason for the delayed recognition of wrongful adoption in Texas is the state's adoption process which takes steps towards preventing the circumstances that have led to wrongful adoption lawsuits in other states.¹⁰⁰

The adoption process in Texas comes under the jurisdictional umbrella of the Texas Department of Human Services (TDHS).¹⁰¹ As such, any adoption agency operating within the state is subject to a number of provisions designed to guarantee effective and appropriate operation.¹⁰² TDHS also holds dominion over children who have become wards of the state because neglect or delinquency necessitated the termination of a natural parent-child relationship.¹⁰³ Ultimately, the state can authorize the adoption of these children under its control.¹⁰⁴

The common thread linking all Texas adoption programs is a mandatory disclosure provision, Section 16.032 of the Texas Family Code, which requires that adoption agencies provide the pertinent history of an adopted child.¹⁰⁵ Mandatory disclosure provisions are not uncommon within the

98. See *Griffith v. Johnston*, 899 F.2d 1427, 1436 (5th Cir. 1990), *reh'g denied*, 904 F.2d 705, *and cert. denied*, ___ U.S. ___, 111 S. Ct. 712, 112 L. Ed. 2d 701 (1991) (emphasizing tort-like nature of claim).

99. See *id.* at 1441 (expressing no opinion on merits of claim brought under state law).

100. See *Griffith v. Johnston*, 899 F.2d 1427, 1436 (5th Cir. 1990), *reh'g denied*, 904 F.2d 705, *and cert. denied*, ___ U.S. ___, 111 S. Ct. 712, 112 L. Ed. 2d 701 (1991) (noting extensive statutory safeguards provided by Texas adoption process).

101. See TEX. HUM. RES. CODE ANN. §§ 42.001, 42.002 (12), 42.021(a) (Vernon 1990) (placing adoption agencies within jurisdiction of Department of Human Services).

102. See, e.g., TEX. HUM. RES. CODE ANN. §§ 42.041, 42.049, 42.051, 42.052 (Vernon 1990) (requiring licensing and certification of adoption agencies); *id.* § 42.043 (setting rules for immunizations); *id.* §§ 42.071, 42.076 (establishing sanctions for noncompliance).

103. See TEX. HUM. RES. CODE ANN. § 41.001(a) (Vernon 1990) (providing for enforcement of laws protecting dependent, neglected children). After such children come under the state's control, TDHS can seek to terminate the natural parent-child relationship and become their managing conservator. TEX. FAM. CODE ANN. §§ 11.02(a) (Vernon 1986), 15.02 (Vernon Supp. 1992). As the managing conservator of such children, the state must provide for their welfare. *Id.* §§ 14.02, 15.05(b) (Vernon Supp. 1992).

104. TEX. FAM. CODE ANN. § 14.02(b)(8) (Vernon Supp. 1992) (giving managing conservator right to consent to child's adoption upon termination of parent-child relationship).

105. See TEX. FAM. CODE ANN. § 16.032 (Vernon Supp. 1992) (requiring production of report containing pertinent history of adoptee prior to adoption). Had such a provision been

United States.¹⁰⁶ However, Section 16.032 is one of the most comprehensive provisions in the nation¹⁰⁷ and provides in part:

Before placing a child for adoption with any person other than the child's stepparent, aunt, or uncle by birth, marriage or prior adoption, the Texas Department of Human Services, an authorized agency, or the child's parent or guardian shall compile a report on the available health, social, educational, and genetic history of the child to be adopted.¹⁰⁸

As is common to other provisions across the nation, Section 16.032 provides for the disclosure of the health and genetic history of a child.¹⁰⁹ Un-

in place under the circumstances that led to past wrongful adoption suits, such conflicts may have been avoided. *See Meracle v. Children's Serv. Soc'y of Wis.*, 437 N.W.2d 532, 537 (Wis. 1989) (imposing no liability for nondisclosure); *see also Burr v. Board of County Comm'rs*, 491 N.E.2d 1101, 1109 (Ohio 1986) (basing liability on intentional misrepresentation, not failure to disclose). *But see Michael J. v. County of Los Angeles, Dep't of Adoptions*, 247 Cal. Rptr. 504, 513 (Cal. App. 1988) (mandating full disclosure of facts concerning adoptee's health).

106. At least twenty-one states have provisions requiring disclosure prior to the adoption. *See, e.g.*, ALA. CODE § 26-10A-19 (1991); ARIZ. REV. STAT. ANN. § 8-129 (1989); ARK. STAT. ANN. §§ 9-9-501(8), 9-9-505 (1991); CAL. CIV. CODE §§ 222.26, 224.70 (Deering Supp. 1992); FLA. STAT. §§ 63.082(3)(b), 63.162(1)(f) (West Supp. 1992); IND. CODE ANN. § 31-3-1-2 (Burns Supp. 1992); IOWA CODE § 600.81(1)(c) (West Supp. 1990); ME. REV. STAT. ANN. tit. 19 § 533 (West Supp. 1991); MICH. COMP. LAWS ANN. §§ 710.27, 710.68 (West Supp. 1992); MONT. CODE ANN. §§ 40-8-109, 40-8-122 (Supp. 1992); NEB. REV. STAT. §§ 43-128, 43-146 (1988); N.J. STAT. ANN. § 9:3-41.1 (West 1992); N.M. STAT. ANN. § 40-7-46 (1989); N.Y. SOC. SERV. LAW § 373-a (McKinney Supp. 1992); N.D. CENT. CODE § 14-15.1-04 (Supp. 1991); OHIO REV. CODE ANN. § 3107.12 (Baldwin 1988); 23 PA. CONS. STAT. ANN. §§ 2102, 2909 (Purdon 1991); TEX. FAM. CODE ANN. § 16.032 (Vernon Supp. 1992); VA. CODE ANN. § 63.1-223 (Michie Supp. 1992); WASH. REV. CODE ANN. § 26.33.350 (West Supp. 1992); W. VA. CODE § 48-4-6 (1992). Similarly, a number of states require disclosure of information regarding the biological parents of an adopted child, but not the child himself. *See, e.g.*, CONN. GEN. STAT. ANN. § 45a-746 (West Supp. 1992); HAW. REV. STAT. § 578-14.5 (Supp. 1991); ILL. ANN. STAT. ch. 40, para. 1522.4 (Smith-Hurd Supp. 1992); KY. REV. STAT. ANN. § 199.520 (Michie/Bobbs-Merril 1991); LA. REV. STAT. ANN. § 9.422.13 (West Supp. 1991); MD. FAM. LAW CODE ANN. § 5-328 (1991); N.C. GEN. STAT. 48-25 (d), (e) (1991). A third group of states provide for disclosure but do not make this requirement until the adoption is finalized. *See, e.g.*, OR. REV. STAT. § 109.342 (1991); UTAH CODE ANN. §§ 78-30-16, 78-30-17 (1992); WIS. STAT. ANN. § 48.93 (West Supp. 1991); WYO. STAT. § 1-22-116 (1988). Although the provisions established in this last group of states give the adoptive parents information essential to them in their duties as parents, they do not acknowledge any right of adoptive parents to make an informed decision concerning adoption. *See Janet Hopkins Dickson, Comment, The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 953 (1991) (discussing weaknesses in various disclosure provisions).

107. Janet Hopkins Dickson, *Comment, The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 952 n.191 (1991).

108. TEX. FAM. CODE ANN. § 16.032(a) (Vernon Supp. 1992).

109. TEX. FAM. CODE ANN. § 16.032(a), (b), (e) (Vernon Supp. 1992). The absence of this information has the obvious result that an adopted child's impairment may go undetected or, if detected, impossible to diagnose. *See Ann T. Lamport, The Genetics of Secrecy in Adop-*

like other provisions however, the Texas statute explicitly requires that adoptive parents be provided with information concerning any prior emotional, sexual, or physical abuse suffered by an adopted child, as well as any data concerning previous attempts to place the child in an adoptive home.¹¹⁰ Also, the provision makes an important distinction between the information provided to those who adopt a newborn and those who adopt an older child.¹¹¹ Furthermore, Section 16.032 is particularly well drafted because it recognizes three relevant purposes for disclosure. First, the provision requires that a detailed report be provided to adoptive parents prior to the finalization of adoption, thus ensuring an informed decision.¹¹² Second, it allows for the review of an adopted child's record after an adoption is finalized, thus assisting in the parenting of the child.¹¹³ Finally, it guarantees that the adopted child is benefited directly by allowing adult adoptees to recover relevant information concerning their history, thus allowing them to better predict any future complications they may suffer.¹¹⁴

1. Analysis of Texas Adoption Law: Inadequacies in the System

Notwithstanding the protection granted adoptive parents under Texas

tion, Artificial Insemination, and In Vitro Fertilization, 14 AM. J.L. & MED. 109, 113-14 (1988-89) (discussing inability to diagnose illness of adoptee absent complete genetic pedigree).

110. TEX. FAM. CODE ANN. § 16.032(a) (Vernon Supp. 1992). See Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 952 (1991) (noting comprehensiveness of Texas statute). By acknowledging the importance of the background of these "orphans of the living," the Texas statute does much to assist in creating a lasting, beneficial placement. See ARTHUR D. SOROSKY ET AL., *THE ADOPTION TRIANGLE* 199 (1978) (encouraging careful, sensitive planning in adoption of older, experienced children).

111. See TEX. FAM. CODE ANN. § 16.032(d) (Vernon Supp. 1992) (providing for disclosure of child's scholastic performance if applicable). Such a distinction is essential because it acknowledges that events in a child's history may have significant repercussions in the future. See Andrea Sachs, *When the Lullaby Ends: Should Adoptive Parents Be Able to Return Unwanted Children?*, TIME, June 1990, at 82 (noting greater success rate in adoption of children under two). For example, 2% of adoptions in America fail. *Id.* Of these, only 10% involved the adoption of a child under 2 years old. *Id.* However, for the ages between 12 and 17, the rate increases to 24%. *Id.*

112. TEX. FAM. CODE ANN. § 16.032(f) (Vernon Supp. 1992); see Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 953 (1991) (arguing that disclosure prior to finalization of adoption is essential to adoptive parents' interests in making informed decision to adopt).

113. TEX. FAM. CODE ANN. § 16.032(n) (Vernon Supp. 1992). The statute also provides for the supplementing of an adoptee's report as information becomes available. *Id.* § 16.032(l).

114. See TEX. FAM. CODE ANN. § 16.032(i)(3) (Vernon Supp. 1992) (providing for disclosure to adoptee upon majority). This may be an invaluable gift to the adoptee. See Ann T. Lampert, Note, *The Genetics of Secrecy in Adoption, Artificial Insemination, and In Vitro Fertilization*, 14 AM. J.L. & MED. 109, 112 (1988) (noting that adoption records may be only source of adoptee's medical history).

adoption law, two key inadequacies remain. First, Texas requires only the disclosure of "known" or "available" information concerning the adoptee.¹¹⁵ Although this language may represent an understanding on the part of the provision's framers that some information about a child placed for adoption is simply unavailable, it leaves room for subjectivity and non-compliance.¹¹⁶ The second weakness with the Texas adoption process is critical: few meaningful remedies are available to adoptive parents who have been injured in the adoption process.¹¹⁷ Absent the possibility of bringing a cause of action for wrongful adoption, the only other possible remedy available is an annulment of the adoption.¹¹⁸ However this remedy has at least two significant weaknesses: 1) a short limitations period may deny adoptive

115. See TEX. FAM. CODE ANN. § 16.032(a), (b) (Vernon Supp. 1992) (requiring report of only "available" information); see also *id.* § 16.032(c), (d), (e) (limiting disclosure to extent information is "known"). Although requiring a disclosure of known information indicates progress, absent a duty to affirmatively discover the pertinent history of an adopted child, a "policy of silence" remains probable. See *Meracle v. Children's Serv. Soc'y of Wis.*, 437 N.W.2d 532, 537 (Wis. 1989) (allowing adoption agencies to avoid liability by not making affirmative representations about child's health).

116. See Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 951 (1991) (discussing weaknesses in California disclosure provision). For example, a caseworker who suspects a problem may exist with a potential adoptee could intentionally avoid discovering the problem, yet still remain within the boundaries of the law. *Id.* at 951-52. Further potential for subjectivity under the Texas provision is present because, if an adoptee's parents cannot be found, a genetic history report may not be generated despite the availability of relevant information. See TEX. FAM. CODE ANN. § 16.032(m) (Vernon Supp. 1992) (allowing waiver of report where insufficient information available due to inability to locate adoptee's biological parents).

117. See TEX. HUM. RES. CODE ANN. §§ 42.071, 42.072, 42.073, 42.074, 42.075, 42.076 (Vernon 1990) (penalties focus on punishing adoption facilities for noncompliance, not on compensating adoptive parents). This weakness has been recognized by the courts as well. See *Griffith v. Johnston*, 899 F.2d 1427, 1436 (5th Cir. 1990), *reh'g denied*, 904 F.2d 705, *and cert. denied*, ___ U.S. ___, 111 S. Ct. 712, 112 L. Ed. 2d 701 (1991) (acknowledging tort action as potential remedy). Furthermore, individuals are penalized minimally if at all. See TEX. HUM. RES. CODE ANN. § 42.075(a)(1) (Vernon 1990) (providing for civil penalty between \$50 and \$100 per day of violation); see also *id.* § 42.076 (imposing criminal penalty only for unlicensed operation and unauthorized advertisement of agency); see also Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 954 (1991) (noting possible immunity for individuals responsible for agency's noncompliance). Admittedly, counsel for adoptive parents would demand compliance with disclosure provisions. John R. Maley, Comment, *Wrongful Adoption: Monetary Damages as a Superior Remedy for Adoptive Parents Victimized by Adoption Fraud*, 20 IND. L. REV. 709, 733 (1987). Nevertheless, complete disclosure laws should provide meaningful sanctions for noncompliance. *Id.*

118. See Susan Kempf LeMay, *The Emergence of Wrongful Adoption as a Cause of Action*, 27 J. FAM. L. 475, 480-82 (1989) (explaining limitations on and disfavor annulment alternative); see also John R. Maley, Comment, *Wrongful Adoption: Monetary Damages as a Superior Remedy to Annulment for Adoptive Parents Victimized by Adoption Fraud*, 20 IND. L. REV. 709, 715 (1987) (noting trend in state legislatures to disallow annulment).

parents any recourse,¹¹⁹ and 2) in most cases, a termination of the parent-child relationship is the last thing any party to the action wants.¹²⁰ Thus, the only legitimate recourse that may be available to adoptive parents who are not given the information they need to make an informed decision is an action for wrongful adoption.¹²¹

D. *Imposing a Negligence Standard for Wrongful Adoption in Texas*

Although it seems clear that a negligence standard is justified for an adoption agency's failure to disclose the pertinent history of an adoptee,¹²² sufficient bases must exist to support the imposition of such a standard. A negligence standard can be justified for two reasons: 1) analogous causes of

119. See TEX. FAM. CODE ANN. § 16.12 (Vernon Supp. 1992) (adoption decree subject to attack only for two years after entered). The deception caused by an adoption agency's fraudulent or negligent conduct may go undiscovered for a period of time well over the two year limitation. See *Burr v. Board of County Comm'rs*, 491 N.E.2d 1101, 1103-04 (Ohio 1986) (agency's fraudulent conduct not discovered for some 18 years). Thus, adoptive parents may discover an agency's deception and at the same time discover that they have no remedy. See John R. Malley, Comment, *Wrongful Adoption: Monetary Damages as a Superior Remedy to Annulment for Adoptive Parents Victimized by Adoption Fraud*, 20 IND. L. REV. 709, 717-18 (1987) (explaining unlikelihood of adoptive parents asking themselves of remedy where fraud is involved).

120. See Susan Kempf LeMay, *The Emergence of Wrongful Adoption as a Cause of Action*, 27 J. FAM. L. 475, 483 (1989) (discussing faults inherent in annulment alternative). Furthermore, because the best interests of the child must always be considered, an otherwise valid annulment may be denied if the annulment would not benefit the child's welfare. See Anne Harlan Howard, Note, *Annulment of Adoption Decrees on Petition of Adoptive Parents*, 22 J. FAM. L. 549, 562 (1984) (explaining courts' unwillingness to annul adoption when best interest of child not served). It should also be noted that annulment has at least one other fault: although an annulment may inconvenience an adoption agency, it does not serve as a deterrent to prevent an agency's future tortious conduct. John R. Maley, Comment, *Wrongful Adoption: Monetary Damages as a Superior Remedy to Annulment for Adoptive Parents Victimized by Adoption Fraud*, 20 IND. L. REV. 709, 718 (1987).

121. See *Griffith*, 899 F.2d at 1436 (noting applicability of tort law to facts resembling wrongful adoption). Allowing adoptive parents to recover the compensatory damages they have endured because of the unexpected cost of raising an impaired child allows them to keep their family intact and still recover for their injuries. John R. Malley, Comment, *Wrongful Adoption: Monetary Damages as a Superior Remedy to Annulment for Adoptive Parents Victimized by Adoption Fraud*, 20 IND. L. REV. 709, 729 (1987).

122. See Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 964 (1991) (proposing negligence standard for wrongful adoption). Such a standard is of course premised upon a duty of disclosure. See John R. Maley, Comment, *Wrongful Adoption: Monetary Damages as a Superior Remedy to Annulment for Adoptive Parents Victimized by Adoption Fraud*, 20 IND. L. REV. 709, 723 (1987) (discussing various bases for imposing duty of disclosure). This duty of disclosure is clearly established in Texas under statutory law. See TEX. FAM. CODE ANN. § 16.032(a) (Vernon Supp. 1992) (requiring disclosure of adoptee's pertinent history).

action within the state have imposed such a standard; and 2) violation of the state's disclosure statute establishes negligence per se.

1. The Wrongful Birth Analogy

Compensating individuals who have been denied the opportunity to make a fully informed decision as to whether or not they shall be parents is not a novel idea in Texas.¹²³ In 1975, the Supreme Court of Texas in *Jacobs v. Theimer*,¹²⁴ recognized a cause of action for natural parents who, due to a physician's negligence, are denied the opportunity to make an informed decision whether or not to abort the birth of a seriously handicapped child.¹²⁵ A cause of action for wrongful birth was thus recognized for the first time in the nation.¹²⁶ The tort has subsequently achieved general acceptance.¹²⁷

123. See *Nelson v. Krusen*, 678 S.W.2d 918, 925 (Tex. 1984) (Robertson, J., concurring) (acknowledging legitimacy of suit based on physician's negligent prenatal advice); see also *Jacobs v. Theimer*, 519 S.W.2d 846, 848 (Tex. 1975) (establishing cause of action for physician's negligent prenatal advice).

124. 519 S.W.2d 846 (Tex. 1975).

125. *Id.* at 848. In *Jacobs*, a physician informed Mrs. Jacobs of her pregnancy but was negligent in failing to diagnose rubella. *Id.* at 847. As a result of the doctor's negligent diagnosis, the Jacobs' child was born with rubella and had to undergo a number of costly operations. *Id.* *Jacobs* was a particularly unique decision in that it recognized that the Jacobs had been denied the opportunity to abort their troubled child even though at that time abortions were allowed in Texas only to save the life of the mother. See *id.* at 847-48 (explaining that decision whether to abort or not should have been made by plaintiffs). It is this denial that is the gravamen of a wrongful birth action. Susan Kempf LeMay, *The Emergence of Wrongful Adoption as a Cause of Action*, 27 J. FAM. L. 475, 487 (1989).

126. James M. Parker, Jr., Comment, *Wrongful Life: The Child's Cause of Action for Negligent Genetic Counseling in Texas*, 16 ST. MARY'S L.J. 639, 663 (1985). Wrongful birth is related to two similar causes of action, wrongful life and wrongful pregnancy, which is also known as wrongful conception. See Benjamin Lee Locklar, Comment, *Jackson v. Bumgardner: A Healthy Newborn—A Blessing or a Curse?*, 12 AM. J. TRIAL ADVOC. 153, 153-54 (1988) (noting that these terms are used interchangeably in some jurisdictions). However, these terms represent three distinct causes of action. See Teddy Lee Mann, *Wrongful Pregnancy: Damages Recoverable for the Birth of a Normal, Healthy Child*, 7 AM. J. TRIAL ADVOC. 385, 385-86 (1984) (distinguishing the three causes of action). Wrongful birth is recognized as an action brought by the parents of a child born with birth defects against a physician who failed to inform them that their unborn child was at risk for such defects, thereby denying the parents the option to abort the pregnancy. *Phillips v. United States*, 508 F. Supp. 544, 551 (D.S.C. 1981). Wrongful life is a cause of action brought by or on behalf of a child born with birth defects against a physician who failed to inform his parents of the risk of such defects, thereby denying the parents the option of aborting the pregnancy. *Elliot v. Brown*, 361 So. 2d 546, 547 (Ala. 1978). Wrongful pregnancy, also known as wrongful conception, is a cause of action brought by the parents of a healthy, yet unwanted, child to recover against a physician who negligently performed a sterilization operation. *Schark v. Huber*, 648 S.W.2d 861, 862 (Ky. 1983). Wrongful life is not recognized as a cause of action in Texas. See *Nelson*, 678 S.W.2d at 925 (allowing wrongful birth, denying wrongful life). Similarly, Texas courts have refused to allow recovery for wrongful pregnancy. See, e.g., *Hickman v. Myers*, 632 S.W.2d 869, 870

Recognizing the magnitude of the decision to become parents, courts in Texas have been very willing to impose a duty on physicians to disclose pertinent information to prospective parents concerning the potential complications their child may face.¹²⁸ Physicians who fail to discharge this duty in a

(Tex. App.—Fort Worth 1982, writ ref'd n.r.e.) (finding no damage in birth of healthy child); *Sutkin v. Beck*, 629 S.W.2d 131, 131-32 (Tex. App.—Dallas 1982, writ ref'd n.r.e.) (finding benefit of healthy child outweighs economic loss); *Silva v. Howe*, 608 S.W.2d 840, 842 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (stating that regardless of statute of limitations bar on claim, no recovery for wrongful birth); *Terrell v. Garcia*, 496 S.W.2d 124, 127-28 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.) (finding wrongful birth action barred by public policy). Wrongful pregnancy is generally denied because courts recognize that the costs of raising a defective child are outweighed by the benefit of having any child regardless of birth defects. See *Hickman*, 632 S.W.2d at 870 (finding benefits of parenthood exceed monetary burden). Recovery has also been denied for wrongful pregnancy based on public sentiment which disfavors abortion and contraception. *Teddy Lee Mann*, Comment, *Wrongful Pregnancy: Damages Recoverable for the Birth of a Normal, Healthy Child*, 7 AM. J. TRIAL ADVOC. 385, 386-87 (1984). However, United States Supreme Court decisions have done much to diminish the validity of these public policy concerns. *Id.* at 386-87. Wrongful life is generally denied as a cause of action for a number of policy reasons including: 1) the inherent value of human life, 2) the inability to measure the difference between life in a defective condition and no life at all, 3) the difficulty in determining the proximate cause of a child's defects, 4) the deference by courts to legislative decision-making, 5) the nonexistence of a right not to be born, 6) the flood of litigation that would be caused by recognition of a cause of action, and 7) the excessive economic burden that would be placed on the medical profession if the cause of action were allowed. Elizabeth F. Collins, *An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time for a New Framework*, 22 J. FAM. L. 677, 703 (1984); see *Nelson*, 678 S.W.2d at 929 (determining injury in wrongful life action is impossible).

127. Wrongful birth has been recognized in at least eighteen states and the District of Columbia. See, e.g., ME. REV. STAT. ANN. tit. 24, § 2931 (Supp. 1990) (Maine); *Robak v. United States*, 658 F.2d 471, 474 (7th Cir. 1981) (Alabama); *Ghallager v. Duke Univ.*, 638 F. Supp. 979, 982 (M.C.N.C. 1986), *aff'd in part, vacated in part*, 852 F.2d 773 (4th Cir. 1988) (North Carolina); *Phillips v. United States*, 508 F. Supp. 544, 548-49 (D.S.C. 1981) (South Carolina); *Andalon v. Superior Court*, 208 Cal. Rptr. 899, 905 (Cal. App. 1984) (California); *Haymon v. Wilkerson*, 535 A.2d 880, 883 (D.C. 1987) (District of Columbia); *Moores v. Lucas*, 405 So. 2d 1022, 1026 (Fla. Dist. Ct. App. 1981) (Florida); *Siemieniec v. Lutheran Gen. Hosp.*, 512 N.E.2d 691, 695 (Ill. 1987) (Illinois); *Pitre v. Opelousas Gen. Hosp.*, 530 So. 2d 1151, 1158 (La. 1988) (Louisiana); *Proffitt v. Bartolo*, 412 N.W.2d 232, 238 (Mich. App. 1987) (Michigan); *Smith v. Cote*, 513 A.2d 341, 348 (N.H. 1986) (New Hampshire); *Procanik v. Cillo*, 478 A.2d 755, 762 (N.J. 1984) (New Jersey); *Becker v. Schwartz*, 386 N.E.2d 807, 813 (N.Y. 1978) (New York); *Speck v. Finegold*, 439 A.2d 110, 113 (Pa. 1981) (Pennsylvania); *Jacobs*, 519 S.W.2d at 850 (Texas); *Naccash v. Burger*, 290 S.E.2d 825, 829-30 (Va. 1982) (Virginia); *Harbeson v. Parke Davis, Inc.*, 656 P.2d 483, 488 (Wash. 1983) (Washington); *James G. v. Caserta*, 332 S.E.2d 872, 882 (W. Va. 1985) (West Virginia); *Dumer v. St. Michael's Hosp.*, 233 N.W.2d 372, 377 (Wis. 1975) (Wisconsin).

128. See *Jacobs*, 519 S.W.2d at 848 (placing duty on physician to disclose risk of continued pregnancy); see also *Nelson*, 678 S.W.2d at 925 (finding wrongful birth to be action based in established negligence law). A key to this recognition is almost certainly the United States Supreme Court's acknowledgement that the right to have an abortion falls within a woman's

reasonable manner have been held liable for the damages their negligence creates.¹²⁹

The ultimate duty of an adoption agency is to act in the best interests of the child, not the adoptive parents.¹³⁰ Notwithstanding this duty, the adoption agency serves much the same purposes for adoptive parents as the physician does for natural parents.¹³¹ Therefore, just as Texas imposes liability on a physician who negligently misleads natural parents to believe that no

constitutional right of privacy. *Roe v. Wade*, 410 U.S. 113, 155 (1973). Prior to the Court's recognition of this right, few courts in the nation examined the validity of wrongful birth as a cause of action. Note, *Wrongful Birth Actions: The Case Against Legislative Curtailment*, 100 HARV. L. REV. 2017, 2020 (1987). In one case, the New Jersey Supreme Court determined that the plaintiffs had failed to state a claim upon which relief could be granted. *Gleitman v. Cosgrove*, 227 A.2d 689 (N.J. 1967). A key element of this decision was the fact that only a few states allowed eugenic abortions, those abortions performed for reasons other than to preserve health of mother. *Id.* Therefore, denying a woman the right to make a decision whether or not to adopt was insubstantial. Accordingly, the case law quickly developed after the United States Supreme Court placed greater emphasis on a woman being denied the opportunity to decide whether or not to proceed with her pregnancy. See Susan Kempf LeMay, *The Emergence of Wrongful Adoption as a Cause of Action*, 27 J. FAM. L. 475, 487 (1989) (denial of opportunity to make informed decision is basis of wrongful birth action).

129. See *Nelson*, 678 S.W.2d at 928 (permitting parent's cause of action for negligence); see also *Jacobs*, 519 S.W.2d at 850 (allowing suit to recover cost of caring for child born with birth defects due to physicians negligence). Determining the amount of damages caused by a doctor's negligence presents some problems. See John R. Brantley, Comment, *Wrongful Birth: The Emerging Status of a New Tort*, 8 ST. MARY'S L.J. 140, 152 (1976) (explaining that parents receive some benefit from child). For example, it is not uncommon for a court to reduce the amount recovered for the wrongful birth of a defective child by the benefit one receives in having a child regardless of defects. See John R. Maley, Comment, *Wrongful Adoption: Monetary Damages as a Superior Remedy to Annulment for Adoptive Parents Victimized by Adoption Fraud*, 20 IND. L. REV. 709, 727 (1987) (discussing application of "benefit rule"). Notwithstanding this possible reduction in the amount of damages for which doctors may be liable, the possibility of a wrongful birth suit encourages doctors to exercise due care in their prenatal duties. See Note, *Wrongful Birth Actions: The Case Against Legislative Curtailment*, 100 HARV. L. REV. 2017, 2022 (1987) (doctors will take care to provide expecting parents with necessary information).

130. See HOMER H. CLARK, JR., *THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES* § 201, at 851 (2d ed. 1988) (purpose of statutes is to protect all parties to adoption process). Ideally, the adoptee should benefit the most from an adoption. Constance J. Miller, Comment, *Best Interests of Children and the Interests of Adoptive Parents: Isn't it Time for Comprehensive Reform?*, 21 GONZ. L. REV. 749, 755 (1985-86).

131. Compare *Jacobs*, 519 S.W.2d at 848 (finding physician had duty to disclose risk in continuing pregnancy) with *Michael J. v. County of Los Angeles, Dep't of Adoptions*, 247 Cal. Rptr. 504, 513 (Cal. App. 1988) (finding adoption agency had duty to disclose facts concerning health of adopted child). See Susan Kempf LeMay, *The Emergence of Wrongful Adoption as a Cause of Action*, 27 J. FAM. L. 475, 486-87 (1989) (analogizing wrongful birth with wrongful adoption). Unfortunately, the interests of the adoptive parents are most commonly the last to be considered, if ever. See NATIONAL COMMITTEE FOR ADOPTION, *ADOPTION FACTBOOK, UNITED STATES DATA, ISSUES, REGULATIONS AND RESOURCES* 169 (1989) (stating that, in agency adoption, main client is child not adoptive parents).

unusual risk will exist if they have a child,¹³² so too should Texas impose liability for an adoption agency's negligent misrepresentation or non-disclosure.¹³³

2. Negligence Per Se

It is a cornerstone of tort law that when a statute establishes what actions shall or shall not be taken under certain circumstances, deviation from this standard may constitute negligence in itself.¹³⁴ However, although Section 16.032 of the Texas Family Code clearly requires an adoption agency to report the pertinent history of an adoptee,¹³⁵ a violation of this provision does not necessarily establish negligence per se.

To establish negligence per se in a Texas court, there must be an unexcused violation of a legislative enactment.¹³⁶ Focusing on what constitutes

132. See *Jacobs*, 519 S.W.2d at 848 (imposing upon physician duty to reasonably disclose risks of continuing pregnancy); see also *Nelson*, 678 S.W.2d at 925 (Robertson, J., concurring) (characterizing wrongful birth as cause of action based on negligent prenatal advice). In other words, the physician "must have and use the knowledge, skill and care ordinarily possessed and employed by members of the profession in good standing." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 32, at 187 (5th ed. 1984).

133. See Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 964 (1991) (proposing liability for both negligent misrepresentation and nondisclosure). Even where information about an adoptee cannot be obtained, notice of this unavailability must be given to the adoptive parents so that they can make a decision whether to continue with the adoption or not. *Id.* Individuals simply cannot be denied the opportunity to make informed decisions regarding parenthood. See Note, *Wrongful Birth Actions: The Case Against Legislative Curtailment*, 100 HARV. L. REV. 2017, 2020-21 (1987) (discussing woman's right to choose abortion).

134. *Osborne v. McMasters*, 41 N.W. 543, 544 (Minn. 1889) (comparing common law negligence with negligence per se). Case law in Texas dealing with negligence per se is plentiful. See, e.g., *El Chico Corp. v. Poole*, 732 S.W.2d 306, 313 (Tex. 1987) (finding sale of liquor in violation of license negligence per se); *Moughon v. Wolf*, 576 S.W.2d 603, 606 (Tex. 1978) (determining that violation of traffic statute qualifies as negligence per se); *Parrott v. Garcia*, 436 S.W.2d 897, 900 (Tex. 1969) (finding participant in drag race negligent per se). Negligence per se is commonly employed to impose civil liability on one who has violated a criminal statute. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 220-21 (5th ed. 1984). For example, violations of traffic regulations are commonly used as the basis for negligence per se. See *Carter v. William Sommerville & Son, Inc.*, 584 S.W.2d 274, 278 (Tex. 1979) (listing series of negligence per se decisions based on traffic violations). However, a court does not necessarily have to accept the violation of a statute as negligence in itself. RESTATEMENT (SECOND) OF TORTS § 288B (1965). Even if the violation is not taken as constituting negligence, it may still be used as evidence of negligence. *Id.*

135. TEX. FAM. CODE ANN. § 16.032 (Vernon Supp. 1992).

136. *Missouri Pacific R.R. Co. v. American Statesman*, 552 S.W.2d 99, 102 (Tex. 1977). This standard is a modification of § 288B of the RESTATEMENT (SECOND) OF TORTS which provides, "The unexcused violation of a legislative enactment or an administrative regulation which is adopted by the court as defining the standard of conduct of a reasonable man, is negligence in itself." RESTATEMENT (SECOND) OF TORTS § 288 (1965).

an excuse to the violation of a statute, the Supreme Court of Texas has followed the *Restatement (Second) of Torts* and determined that violations of a statute may be excused when

- a) the violation is reasonable because of the actor's incapacity;
- b) he neither knows nor should have known of the occasion for compliance;
- c) he is unable after reasonable diligence or care to comply;
- d) he is confronted by an emergency not due to his own misconduct; or
- e) compliance would involve a greater risk of harm to the actor or to others.¹³⁷

It is doubtful that an adoption agency failing to comply with Section 16.032 of the Texas Family Code would be able to assert any of these excuses for its noncompliance.¹³⁸ Although Texas courts also state that negligence per se is only established when the injured party belongs to the group of persons a statute is designed to protect,¹³⁹ Section 16.032 is clearly designed to protect

137. RESTATEMENT (SECOND) OF TORTS § 288A (1965). This provision of the *Restatement* has been cited verbatim by Texas courts. *Missouri Pacific R.R. Co.*, 552 S.W.2d at 102; *Impson v. Structural Metals, Inc.*, 487 S.W.2d 694, 696 (Tex. 1972). In a wrongful adoption action, the adoptive parents would have to prove that no excuse existed for an adoption agency's violation of Section 16.032 of the Texas Family Code. See *Southern Pacific Co. v. Castro*, 493 S.W.2d 491, 498 (Tex. 1973) (placing burden of proving unexcused violation on party claiming negligence per se); see also *Impson*, 487 S.W.2d at 696-97 (finding negligence per se based on lack of evidence excusing violation of statute).

138. See Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 964 (1991) (explaining that more thorough child assessment procedures should not be overly burdensome). Furthermore, because TDHS has already enacted its own policies which go beyond the statutory guidelines, it seems obvious that complying with Section 16.032 is not overly difficult. See *Griffith v. Johnston*, 899 F.2d 1427, 1432 (5th Cir. 1990), *reh'g denied*, 904 F.2d 705, and *cert. denied*, ___ U.S. ___, 111 S. Ct. 712, 112 L. Ed. 2d 701 (1991) (noting state policies going beyond requirements of disclosure provision).

139. See, e.g., *Nixon v. Mr. Property Management*, 690 S.W.2d 546, 549 (Tex. 1985) (finding victim raped in vacant apartment within class of persons protected by statute requiring security of such structures); *Missouri Pacific R.R. Co.*, 552 S.W.2d at 103 (finding owner of building damaged by railroad within class of persons covered by statute regulating railroad's operation); *Mundy v. Pirie-Slaughter Motor Co.*, 206 S.W.2d 587, 590 (Tex. 1947) (placing individual injured by non-licensed driver within class of persons protected by provision requiring license). This test for determining whether an injured party is within a protected class is also adapted from the *Restatement (Second) of Torts* which provides:

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

- (a) to protect a class of persons which includes the one whose interest is invaded, and
- (b) to protect the particular interest which is invaded, and
- (c) to protect that interest against the kind of harm which has resulted, and
- (d) to protect that interest against the particular hazard from which the harm results.

the adoptive parents' interest in making an informed decision.¹⁴⁰ Accordingly, where an adoption agency makes an unexcused violation of Section 16.032 of the Texas Family Code, thereby denying adoptive parents the right to make an informed decision, such noncompliance would constitute negligence per se.

3. Proximate Causation

Whether one determines negligence based on a wrongful birth analogy or based on the violation of Section 16.032 of the Texas Family Code, recovery will not be granted unless the injury incurred by the adoptive parents is proximately caused by the adoption agency's negligence.¹⁴¹ Texas has determined that proximate causation consists of two elements, cause in fact and foreseeability.¹⁴² Establishing causation in fact requires a determination that "but for" a party's negligent act, no harm would have occurred.¹⁴³ Foreseeability is a determination that an individual of ordinary intelligence would anticipate the possible injuries that could result from his negligent conduct.¹⁴⁴

The injuries flowing from an adoption agency's misrepresentations, such

RESTATEMENT (SECOND) OF TORTS § 286 (1965).

140. See TEX. FAM. CODE ANN. § 16.032 (Vernon Supp. 1992) (requiring adoption agency to provide adoptive parents with adoptee's history prior to first meeting with child).

141. See *Missouri Pacific R.R. Co. v. American Statesman*, 552 S.W.2d 99, 103 (Tex. 1977) (finding negligence per se only indicates possible liability). Thus, negligence will not be a basis for liability unless there would have been no injury but for the defendant's negligent conduct. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 266 (5th ed. 1984).

142. See *El Chico Corp. v. Poole*, 732 S.W.2d 306, 313 (Tex. 1987) (imposing liability for liquor licensee's negligence only after determination of proximate causation); see also *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 755-57 (Tex. 1975) (finding evidence sufficient to allow jury determination of proximate cause).

143. *Nixon v. Mr. Property Management*, 690 S.W.2d 546, 549 (Tex. 1985). "But for" causation means that the negligent act or omission was a substantial factor in the cause of an injury, and absent such an act, no injury would have occurred. *Missouri Pacific R.R. Co.*, 552 S.W.2d at 103. Although the "but for" requirement is indispensable, it is not the absolute rule that a defendant's negligent act which occurs somewhere in the chain of antecedents is the legal cause of an injury. Jeremiah Smith, *Legal Cause in Actions of Tort*, 25 HARV. L. REV. 103, 109 (1911). If this were the case, the mother of an unlawfully begotten child would be liable for all of his criminal acts because he would not have committed them "but for" being born. James Angell McLaughlin, *Proximate Cause*, 39 HARV. L. REV. 149, 155-56 (1925). Thus an adoption agency could feasibly claim that it is not liable for its negligent misrepresentation because such negligence did not cause an adopted child's unexpected impairment. See *Meracle v. Children's Serv. Soc'y of Wis.*, 437 N.W.2d 532, 536 (Wis. 1989) (denying claim for emotional distress because injury too remote from negligent conduct).

144. *El Chico*, 732 S.W.2d at 313. Foreseeability does not require establishing that the negligent actor should have anticipated the specific injury which occurred. *Nixon*, 690 S.W.2d at 550-51. Rather, all that must be established is that the actor should have reasonably antici-

as the cost of caring for a handicapped child with difficulties, are easily foreseeable.¹⁴⁵ With the aid of a properly researched report outlining the pertinent medical and familial background of an adoptee, adoptive parents would never unknowingly accept risks which would be made clear in the report.¹⁴⁶ However, where an adoption agency knows or should have known of the potential for such defects and yet negligently misrepresents or omits this information, an injury necessarily follows from such negligence.¹⁴⁷ Accordingly, there is little difficulty in determining proximate causation in a wrongful adoption action.

E. *Related Matters*

Although Texas mandates the disclosure of an adopted child's pertinent history, and sufficient bases exist to hold actionable the negligent performance of this duty, at least two related matters must be examined to fully determine the validity of wrongful adoption in the state. First, it is necessary to determine how the appropriate statute of limitations should be applied. Secondly, a proper standard for damages must be set.

1. The Statute of Limitations

Any wrongful adoption lawsuit based on a misrepresentation, whether intentional or negligent, would be governed by Section 16.003 of the Texas Civil Practice and Remedies Code which establishes that such a suit must be brought within two years after the cause of action accrues.¹⁴⁸ Therefore,

pated that some injury would come from his action. *Missouri Pacific R.R. Co.*, 552 S.W.2d at 103-104.

145. See *Burr v. Board of County Comm'rs*, 491 N.E.2d 1101, 1107 (Wis. 1986) (explaining that because risk of adoptee developing Huntington's Disease was foreseeable, agency engaged in deception); see also *Michael J. v. County of Los Angeles, Dep't of Adoptions*, 247 Cal. Rptr. 504, 513 (Cal. App. 1988) (finding injury to adoptive parents results in denial of opportunity to make informed decision). However, not all negligent misrepresentations concerning an adoptee's health are attributable to an adoption agency. See *Foster by Foster v. Bass*, 575 So. 2d 967, 978-79 (Miss. 1990) (excusing agency reliance on negligent misrepresentations of hospital).

146. See *Burr*, 491 N.E.2d at 1104 (adoptive couple testified that, with disclosure, they would not have considered child for adoption); see also Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 943-45 (1991) (discussing adoptors' need for disclosure).

147. Cf. James M. Parker, Comment, *Wrongful Life: The Child's Cause of Action for Negligent Genetic Counseling in Texas*, 16 ST. MARY'S L.J. 639, 647 (1985) (discussing determination of causation in wrongful life action). An agency's negligence does not cause a child's defects, but it does deny the adoptive parents an opportunity to make an informed choice, thereby causing their damages. Cf. *id.* (explaining that physician's negligent genetic counseling denies natural parents opportunity to abort defective child).

148. TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon 1986); see *Texas Am. Corp. v. Woodbridge Joint Venture*, 809 S.W.2d 299, 303 (Tex. App.—Fort Worth 1991, writ de-

determining the date of accrual is essential in establishing the validity of a wrongful adoption lawsuit.¹⁴⁹ Because an adopted child's impairment may not be discovered until many years after the adoption, an accrual date set at the date of an agency's misrepresentation would leave adoptive parents with little chance of discovering the agency's blameworthy conduct within the two years allotted under Section 16.003.¹⁵⁰

Fortunately for adoptive parents, in Texas a cause of action based in fraud will not accrue until the fraud is discovered or should have been discovered by reasonable diligence.¹⁵¹ Similarly, Texas has also been willing to apply this "discovery rule" to negligence cases involving "inherently undiscoverable causes of action."¹⁵² Applying this rule to a wrongful adoption action based in negligence will protect against adoptive parents being denied recovery simply because the effects of an adoption agency's negligence lay dormant until many years after the fact.

nied) (applying two year statute of limitations to action based on negligent misrepresentation); *Blum v. Elkins*, 369 S.W.2d 810, 812 (Tex. Civ. App.—Waco 1963, no writ) (applying two year statute of limitations to action based in fraud); *Vergal Bourlard Home Appliances v. Altheimer & Baer, Inc.*, 362 S.W.2d 201, 203 (Tex. Civ. App.—Forth Worth 1962, writ ref'd n.r.e) (applying two year statute of limitations to action based on intentional misrepresentation).

149. See *Burr v. Board of County Comm'rs*, 491 N.E.2d 1101, 1107-08 (Ohio 1986) (determining date of accrual for wrongful adoption). For example, in *Burr*, the case which created wrongful adoption as a cause of action, the accrual date of the applicable statute of limitations was the date that the damage was discovered. See OHIO REV. CODE ANN. § 2305.09 (Baldwin 1990) (delaying accrual for fraud until discovered). Accordingly, the Burr's action was not barred when they sued an adoption agency for wrongful adoption some eighteen years after the fraud occurred. *Burr*, 491 N.E.2d at 1108.

150. See John R. Maley, Comment, *Wrongful Adoption: Monetary Damages as a Superior Remedy to Annulment for Adoptive Parents Victimized by Adoption Fraud*, 20 IND. L. REV. 709, 721 (1987) (discussing implications of accrual date set at date of fraud).

151. See, e.g., *Escontrias v. Apodaca*, 629 S.W.2d 697, 698 (Tex. 1982) (denying recovery because fraud should have been discovered); *Mooney v. Harlin*, 622 S.W.2d 83, 85 (Tex. 1981) (denying recovery for fraud due to constructive notice of probate records); *Wise v. Anderson*, 359 S.W.2d 876, 879 (Tex. 1962) (denying recovery for fraud due to plaintiff's knowledge of facts which should have led to discovery); *Whatley v. National Bank of Commerce*, 555 S.W.2d 500, 505 (Tex. Civ. App.—Dallas 1977, no writ) (finding failure to plead date of discovery bars limitations as defense).

152. See *Mann v. A. H. Robins Co., Inc.*, 741 F.2d 79, 81-82 (5th Cir. 1984) (applying discovery rule to injury negligently caused by defective intrauterine device). The discovery rule was first recognized in Texas to allow recovery for objects negligently left in the body after an operation. See *Gaddis v. Smith*, 417 S.W.2d 577, 580 (Tex. 1967) (involving surgical sponge negligently left inside patient). This was the necessary recognition of the fact that a patient may not learn of such negligence for some time after the statute of limitations had run. *Id.* The discovery rule has subsequently been applied to other causes of action which are determined to be inherently undiscoverable. See *Wall v. Owens-Corning Fiberglass Corp.*, 602 F. Supp. 252, 254 (N.D. Tex. 1985) (applying discovery rule to injuries caused by exposure to asbestos).

2. The Open Courts Provision

The Texas Supreme Court has repeatedly stated that Article One, Section Thirteen of the Texas Constitution, the "open courts" provision,¹⁵³ protects "the right to bring a well-established common law cause of action" from unreasonable and arbitrary legislative restriction.¹⁵⁴ Although wrongful adoption itself is yet to be recognized in Texas, the basic principles of tort law which support the cause of action most certainly are.¹⁵⁵ Characterizing wrongful adoption not as a novel judicial creation, but instead as an action based in established tort law would protect those seeking to recover for wrongful adoption from an unreasonable limitations period.¹⁵⁶ A statute of limitations which required the impossible, that a party sue for wrongful adoption before knowing of his right to sue, would not only be unreasonable, it would be absurd.¹⁵⁷

3. Damages: The Inapplicability of the "Benefit Rule"

The rule for compensating those injured by the tortious behavior of another is that the injured party should be put into the position he would have been absent the tortfeasor's blameworthy conduct.¹⁵⁸ Texas courts applying this rule to wrongful birth actions have awarded damages equivalent to the

153. TEX. CONST. art. I, § 13. The "open courts" provision provides: "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." *Id.*

154. *See, e.g., Nelson v. Krusen*, 678 S.W.2d 918, 926 (Tex. 1984) (Robertson, J., concurring) (reasoning that wrongful birth qualifies as established cause of action); *Sax v. Votteler*, 648 S.W.2d 661, 665-66 (Tex. 1983) (refusing to allow statute of limitations to effectively bar minor's cause of action for medical malpractice); *Lebohm v. City of Galveston*, 192 Tex. 192, 195, 275 S.W.2d 951, 952-53 (1955) (ordinance which immunized city from liability for damages caused by defective streets violated Article I, § 13 of Texas Constitution).

155. *Cf. Nelson*, 678 S.W.2d at 925-26 (Robertson, J., concurring) (recognizing wrongful birth as nothing more than traditional negligence cause of action). There has been similar recognition of the underlying tort principles in other "new" causes of action. *See Phillips v. United States*, 508 F. Supp. 544, 551 (D.S.C. 1981) (recognizing wrongful birth as based in conventional tort law).

156. *Cf. Nelson*, 678 S.W.2d at 926 (Robertson, J., concurring) (arguing that Article I, § 13 of Texas Constitution protects wrongful birth from unreasonable statute of limitations).

157. *See, e.g., Nelson*, 678 S.W.2d at 923 (refusing to allow statute of limitations which potentially made wrongful birth action impossible); *Hays v. Hall*, 488 S.W.2d 412, 414 (Tex. 1973) (applying discovery rule to injury from negligently performed vasectomy); *Gaddis*, 417 S.W.2d at 581 (labeling statute of limitations which denied recovery for sponge left inside patient "shocking").

158. *See, e.g., Boles v. La Quinta Motor Inns*, 680 F.2d 1077, 1080 (5th Cir. 1982) (allowing future damages for rape victim); *see also Nelson v. Krusen*, 678 S.W.2d 918, 924-25 (Tex. 1984) (discussing possible damages for wrongful life). This necessitates comparing the plaintiff's position after the negligent conduct with his position had there been no negligence. *Id.*

extraordinary expenses necessary for the care and treatment of the child born with a physical impairment.¹⁵⁹ Thus, in a wrongful adoption suit similar damages would be an appropriate award for adoptive parents encumbered with the unforeseen expenses of raising an impaired child due to an adoption agency's negligent misrepresentations or nondisclosure.¹⁶⁰

It is also important to note that in determining damages for a wrongful birth action, courts commonly apply what is known as the "benefit rule,"¹⁶¹

159. See *Jacobs v. Theimer*, 519 S.W.2d 846, 850 (Tex. 1975) (allowing recovery for expenses reasonably necessary for care of child's impairment). In a wrongful birth action, the extraordinary expenses are those which are caused by the child's defect. See Brian McDonough, Comment, *Wrongful Birth: A Child of Tort Comes of Age*, 50 U. CIN. L. REV. 65, 77 (1981) (discussing various methods of determining damages for wrongful birth). However, the issue of determining damages in a wrongful birth action are not uniform across the nation. See *Phillips v. United States*, 575 F. Supp 1309, 1315 (D.S.C. 1983) (discussing divergence of approaches to wrongful birth damages). Some jurisdictions choose to go beyond Texas' allowance for extraordinary expenses and allow additional recovery for pain and suffering or mental anguish. See *Harbeson v. Parke-Davis, Inc.*, 656 P.2d 483, 494 (Wash. 1983) (determining that damages are recoverable in wrongful birth action for emotional stress proximately caused by physician's negligence). Furthermore, at least one jurisdiction has gone even further and allowed recovery for all the costs of raising the child, not just the extraordinary expenses. See *Robak v. United States*, 658 F.2d 471, 478-79 (7th Cir. 1981) (allowing recovery for all expenses resulting from birth of impaired child).

160. See *Burr v. Board of County Comm'rs*, 491 N.E.2d 1101, 1108 (Ohio 1986) (allowing recovery of extraordinary expenses in wrongful birth action). The extraordinary expenses incurred in the care of an impaired child are capable of objective determination. See *Jacobs*, 519 S.W.2d at 849 (explaining that expenses related to care of deformed child lie within methods of proof common to personal injury cases); see also Brian McDonough, Comment, *Wrongful Birth: A Child of Tort Comes of Age*, 50 U. CIN. L. REV. 65, 80 (1981) (arguing that damages for wrongful birth are analogous to those easily determined in other personal injury torts). However, the inability to determine damages does not necessarily bar recovery. See *Hindman v. Texas Lime Co.*, 157 Tex. 592, 600-01, 305 S.W.2d 947, 955 (1957) (allowing recovery of indeterminable damages occurring over long period of time); see also *Southwest Battery Corp. v. Owen*, 131 Tex. 423, 427-28, 115 S.W.2d 1097, 1099 (1938) (allowing recovery of damages where amount uncertain). However, it is the fact that the damages for wrongful adoption are within determinable bounds that reinforces the argument for their recognition in Texas. See *Nelson*, 678 S.W.2d at 925 (refusing to allow recovery for wrongful life because of impossibility of determining damages).

161. See John R. Maley, Comment, *Wrongful Adoption: Monetary Damages as a Superior Remedy to Annulment for Adoptive Parents Victimized by Adoption Fraud*, 20 IND. L. REV. 709, 728 (1987) (advocating non-application of benefit rule in wrongful adoption actions); see also John R. Brantley, Comment, *Wrongful Birth: The Emerging Status of a New Tort*, 8 ST. MARY'S L.J. 140, 152 (1976) (noting recognition in wrongful birth actions of benefits received by parents). For example, in a wrongful birth action the benefits of being a parent are weighed against all the damages caused by a physician's negligence. See Brian McDonough, Comment, *Wrongful Birth: A Child of Tort Comes of Age*, 50 U. CIN. L. REV. 65, 79-80 (1981) (discussing various applications of benefit rule to wrongful birth). In wrongful pregnancy cases, the benefit rule has been used to deny any recovery. See *Terrell v. Garcia*, 496 S.W.2d 124, 128 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.), cert denied, 415 U.S. 927 (1974) (denying recovery for damages in wrongful pregnancy suit); see also *Teddy Lee*

found in Section 920 of the *Restatement (Second) of Torts*, which provides:

When the defendant's tortious conduct has caused harm to the plaintiff or to his property 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, to the extent that this is equitable.¹⁶²

Thus, the benefit rule, as applied to a wrongful birth scenario, recognizes the fact that although a physician's negligence harms the parents, these parents still benefit from the parent-child relationship regardless of the child's impairments.¹⁶³ Relying on this reasoning, an adoption agency involved in a wrongful adoption lawsuit could similarly assert that any damages caused by its negligence should be reduced by the benefits received by the adoptive parents.¹⁶⁴

However, the logic supporting the benefit rule is not applicable to wrongful adoption.¹⁶⁵ Under the benefit rule, for one to receive a reduction in the

Mann, Comment, *Wrongful Pregnancy: Damages Recoverable for the Birth of a Normal, Healthy Child*, 7 AM. J. TRIAL ADVOC. 385, 387 (1984) (noting public policy argument that benefit of healthy child outweighs any detrimental economic consequences). Similarly, the benefit of a life, albeit an impaired life, can be seen as outweighing the damages in a wrongful life action. See James M. Parker, Jr., Comment, *Wrongful Life: The Child's Cause of Action for Negligent Genetic Counseling in Texas*, 16 ST. MARY'S L.J. 639, 649 (1985) (discussing barriers to recognition of wrongful life in Texas).

162. RESTATEMENT (SECOND) OF TORTS § 920 (1980).

163. See John R. Brantley, Comment, *Wrongful Birth: The Emerging Status of a New Tort*, 8 ST. MARY'S L.J. 140, 152 (1976) (explaining that benefit rule has been praised because it allows trier of fact to evaluate circumstances of particular case). Courts that apply the benefit rule claim that it will prevent parents from receiving a windfall and at the same time lessen any undue financial burden placed on physicians. Teddy Lee Mann, Comment, *Wrongful Pregnancy: Damages Recoverable for the Birth of a Normal, Healthy Child*, 7 AM. J. TRIAL. ADVOC. 385, 390 (1984). This logic apparently is applicable to other, analogous torts in Texas. See *Terrell*, 496 S.W.2d at 124, 128 (denying recovery for wrongful pregnancy because benefits of child outweigh economic loss). However, Texas courts refuse to adopt the benefit rule outright. See *Hickman v. Myers*, 632 S.W.2d 869, 870 (Tex. App. 1982, writ ref'd n.r.e.) (refusing to equate benefit of having child with economic burden of rearing child).

164. See John R. Maley, Comment, *Wrongful Adoption: Monetary Damages as a Superior Remedy for Adoptive Parents Victimized by Adoption Fraud*, 20 IND. L. REV. 709, 728 (1987) (discussing applicability of benefit rule to wrongful adoption). In fact, because the award in the case which created wrongful adoption was relatively low in value, \$125,000, there is some possibility that the benefit rule already has been applied. See *Burr*, 491 N.E.2d at 1108 (upholding award of \$125,000); see also John R. Maley, Comment, *Wrongful Adoption: Monetary Damages as a Superior Remedy for Adoptive Parents Victimized by Adoption Fraud*, 20 IND. L. REV. 709, 726 n.120 (1987) (noting possibility that during deliberations, jury deducted benefit of parent-child relationship). The decision in *Meracle* indicates the use of similar logic. See *Meracle v. Children's Serv. Soc'y of Wis.*, 437 N.W.2d 532, 537 (Wis. 1989) (awarding only extraordinary medical expenses incurred due to adoption agency's negligence).

165. See John R. Malley, Comment, *Wrongful Adoption: Monetary Damages as a Super-*

damages caused by his tortious conduct, it must be his tortious conduct which conferred the benefit.¹⁶⁶ In a wrongful birth action, the injured party would have no child, and thus no benefit, but for the physician's negligence.¹⁶⁷ Applying this rule to the circumstances surrounding a wrongful adoption suit, prospective adopters will eventually adopt a child and enjoy the benefits of that relationship regardless of tortious conduct on the part of a given adoption agency.¹⁶⁸ Accordingly, in a wrongful adoption suit, the amount of damages recovered by adoptive parents should not be offset under the benefit rule because any beneficial, parent-child relationship was not caused by the negligent acts of the adoption agency.¹⁶⁹

rior Remedy to Annulment for Adoptive Parents Victimized by Adoption Fraud, 20 IND. L. REV. 709, 728 (1987) (noting that applying benefit rule to wrongful adoption overlooks basic premise of rule).

166. See RESTATEMENT (SECOND) OF TORTS § 920 (1980) (requiring that if damages for tortious act are to be reduced, benefit must be conferred by tortious act); see also Teddy Lee Mann, Comment, *Wrongful Pregnancy: Damages Recoverable for the Birth of a Normal, Healthy Child*, 7 AM. J. TRIAL ADVOC. 385, 390 (1984) (explaining that for wrongful life, benefit rule mitigates damages only for benefits which result from birth of healthy child). As such, it is imperative that one determine the cause of the benefit. See Brian McDonough, Comment, *Wrongful Birth: A Child of Tort Comes of Age*, 50 U. CIN. L. REV. 65, 79 (1981) (discussing various interpretations of benefit rule). Under one interpretation of the benefit rule as it applies to wrongful birth, if the benefit is somehow not related to the purpose for the doctor's treatment, no reduction in damages is allowed. *Id.* Therefore, if a woman became pregnant after a sterilization operation which was performed to prevent aggravation of her kidneys, having the child would have to somehow benefit the woman's kidney condition. See *Custudio v. Bauer*, 59 Cal. Rptr. 463, 476 (Cal. App. 1967) (discussing application of benefit rule to wrongful pregnancy).

167. See *Jacobs*, 519 S.W.2d at 847 (noting that physician's negligence was undisputed cause of impaired child's birth); see also *Nelson*, 678 S.W.2d at 925 (Robertson, J., concurring) (explaining wrongful birth as action allowing recovery for expenses proximately caused by physician's negligence).

168. See John R. Maley, Comment, *Wrongful Adoption: Monetary Damages as a Superior Remedy to Annulment for Adoptive Parents Victimized by Adoption Fraud*, 20 IND. L. REV. 709, 728-29 (1987) (arguing against the application of benefit rule to wrongful adoption). The incredible number of couples seeking to adopt demonstrates the determination held by those unable to have a child on their own. See NATIONAL COMMITTEE FOR ADOPTION, ADOPTION FACTBOOK, UNITED STATES DATA, ISSUES, REGULATIONS AND RESOURCES 157 (1989) (prospective adopters could number in millions).

169. John R. Maley, Comment, *Wrongful Adoption as a Superior Remedy to Annulment for Adoptive Parents Victimized by Adoption Fraud*, 20 IND. L. REV. 709, 729 (1987). Allowing a blameworthy adoption agency to reduce its damages because of the benefit the adoptive parents receive from the adoptee would be a misinterpretation of the benefit rule which allows a reduction of damages only where the tortious conduct benefited the plaintiff's interest. *Cf.* Dierdre A. Burgman, Note, *Wrongful Birth Damages: Mandate and Mishandling by Judicial Fiat*, 13 VAL. U. L. REV. 127, 158 (1978) (explaining that only benefit to plaintiff's interest can be used to reduce damages). Because the adoptive parents' interest is to adopt a healthy child, an adoption agency's tortious conduct does nothing to benefit them. *Cf. id.* (explaining that determining application of benefit rule in wrongful pregnancy requires determination of

V. CONCLUSION

Recent cases interpreting wrongful adoption demonstrate the evolving process of tort law. These cases show a definite progression, yet inadequacies remain. Inherent within this development is the underlying lack of recognition in adoption law for the interests of adoptive parents. As matters stand, the necessary progression of wrongful adoption calls for the imposition of a duty on adoption agencies to disclose to adoptive parents the pertinent history of the adopted child and liability for agencies which negligently discharge this duty. Absent such a standard, outdated policies of silence and the inadequate examination of an adoptee's health will invariably continue. Such inadequacies do not benefit any member of the adoption triangle. Biological parents are hesitant to give up their child, adoptive parents bear unnecessary risks when they adopt, and adopted children may be denied treatment they unknowingly need.

Texas adoption law is advanced in comparison to the laws applied in other states. Even so, much needs to be done to perfect the adoption process. Ultimately, it must be acknowledged that adoptive parents deserve the opportunity to make a fully informed decision about adoption. However, what should be and what can be are not always in agreement. Fortunately, the climate is ripe for the application of wrongful adoption in Texas. Furthermore, both the substantive and procedural elements necessary to properly advance the tort are available within the state. As such, Texas has an opportunity to improve a necessary tool of family law by recognizing and advancing wrongful adoption.

purpose for attempted birth control). This principle is similar to the fact that an individual guilty of slander cannot reduce the damages his conduct caused by the benefit the injured party may have received, such as publicity, from the slanderous behavior. *Id.* As such, the recoverable damages should include all direct and consequential damages caused by an adoption agency's tortious conduct. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 110, at 766 (5th ed. 1984) (establishing appropriate damages for misrepresentation).