

January 1999

Beyond Wrongful Adoption: Expanding Adoption Agency Liability to Include a Duty to Investigate and a Duty to Warn

Jennifer Emmaneel

Follow this and additional works at: <http://digitalcommons.law.ggu.edu/ggulrev>



Part of the [Family Law Commons](#)

Recommended Citation

Jennifer Emmaneel, *Beyond Wrongful Adoption: Expanding Adoption Agency Liability to Include a Duty to Investigate and a Duty to Warn*, 29 Golden Gate U. L. Rev. (1999).
<http://digitalcommons.law.ggu.edu/ggulrev/vol29/iss2/3>

This Note is brought to you for free and open access by the Academic Journals at GGU Law Digital Commons. It has been accepted for inclusion in Golden Gate University Law Review by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.

NOTE

BEYOND WRONGFUL ADOPTION: EXPANDING ADOPTION AGENCY LIABILITY TO INCLUDE A DUTY TO INVESTIGATE AND A DUTY TO WARN

As keepers of the conscience of the community, we cannot countenance conduct which would allow persons who desire entrance into the emotional realm of parenting to be unprotected from schemes or tactics designed to discharge societal burdens onto the unsuspecting or unwary. As trustees of the child's destiny the [adoption agencies are] obligated to act with morals greater than those found in a purveyor's common marketplace.¹

I. INTRODUCTION

In *Jackson v. Montana*,² the Montana Supreme Court considered whether Montana law allowed adoptive parents to recover for the tort of wrongful adoption and, if so, what duty it imposed upon adoption agencies.³ Following the recent deci-

1. *Michael J. v. L.A. County Dep't of Adoptions*, 247 Cal. Rptr. 504, 513 (Cal. Ct. App. 1988).

2. 956 P.2d 35 (Mont. 1998).

3. *See id.* at 42.

182 GOLDEN GATE UNIVERSITY LAW REVIEW[Vol. 29:181

sions of other jurisdictions, the *Jackson* court recognized the negligence-based tort of wrongful adoption in Montana, finding that both common law and Montana statutory law imposed a duty upon adoption agencies to accurately represent and disclose information regarding a child's background to adoptive parents.⁴ First, the court held that foreseeability and public policy interests imposed a common law duty upon adoption agencies to refrain from negligently misrepresenting a child's background to adoptive parents.⁵ Second, the court found that adoption agencies had a statutory duty to disclose a child's background to adoptive parents.⁶ Finally, the court held that in order to recover for emotional and financial injuries, adoptive parents need only demonstrate that they would not have adopted the child had they known of his background.⁷

Part II of this note discusses the evolution of the tort of wrongful adoption. At first, state courts would only allow adoptive parents to recover for wrongful adoption if they could prove that the adoption agency's conduct constituted fraud, a common law tort that requires the adoption agency's conduct to be intentional.⁸ In time, public policy interests, such as the need for adoptive parents to be emotionally and financially prepared to raise a special needs child, persuaded state courts to allow adoptive parents to recover under the less stringent tort of negligence.⁹ As opposed to fraud, a showing of negligence does not require that the adoption agency know its representations are untrue, but merely requires that the adoption

4. See *id.* at 48-49, 51.

5. See *id.* at 48-49.

6. See *Jackson*, 956 P.2d at 51.

7. See *id.* at 52-53. For ease of reference, a masculine pronoun will be used to refer to an adopted child. The applicable pronoun will be used when referring to a specific child.

8. See *Michael J. v. L.A. County Dep't of Adoptions*, 247 Cal. Rptr. 504 (Cal. Ct. App. 1988); *Reidy v. Albany County of Social Servs.*, 598 N.Y.S.2d 115 (N.Y. App. Div. 1993); *Burr v. Board of County Comm'rs*, 491 N.E.2d 1101 (Ohio 1986). But see *Richard P. v. Vista Del Mar Child Care Serv.*, 165 Cal. Rptr. 360 (Cal. Ct. App. 1980); *MacMath v. Maine Adoption Placement Servs.*, 635 A.2d 359 (Me. 1993); *Zernhelt v. Lehigh County Office of Children and Youth Servs.*, 659 A.2d 89 (Pa. Commw. Ct. 1995).

9. See *Roe v. Catholic Charities of the Diocese*, 588 N.E.2d 354 (Ill. App. Ct. 1992); *M.H. v. Caritas Family Servs.*, 488 N.W.2d 282 (Minn. 1992); *Gibbs v. Ernst*, 647 A.2d 882 (Pa. 1994); *Meracle v. Children's Serv. Soc'y*, 437 N.W.2d 532 (Wis. 1989).

agency's conduct in regard to the truth be unreasonable.¹⁰ Part III discusses the facts underlying the decision in *Jackson v. Montana*. Part IV explains the procedural history of the case, including the District Court's opinion and the Jacksons' appeal to the Montana Supreme Court. Part V details the Montana Supreme Court's analysis and its focus on an adoption agency's common law duty to refrain from negligently misrepresenting a child's background to adoptive parents and its statutory duty to fully disclose information in its possession. Part VI criticizes the Montana Supreme Court for failing to read Montana's disclosure statute broadly and suggests that adoption agencies should be liable for failing to investigate a child's background and for failing to warn adoptive parents of any health risks stemming from the child's history. Imposition of such duties would ensure that adoptive parents are aware of the financial and emotional burdens likely to result from the adoption of a special needs child.

II. BACKGROUND: THE EVOLUTION OF WRONGFUL ADOPTION AS A CAUSE OF ACTION

At common law, adoption agencies did not have a duty to disclose information regarding a child's familial and medical history and, as a consequence, were not held liable for their misrepresentations to potential adoptive parents.¹¹ The courts strictly enforced complete anonymity between adoptive and biological parents, serving as a philosophical reminder that adoption was essentially a "rebirth" of an illegitimate child into a new family.¹² However, within the last decade and a half, courts in many jurisdictions have condemned the historical code of silence followed by adoption agencies because of its impact on adoptive parents who are unprepared or unable to care for a special needs child.¹³ Instead, these courts have recognized an adoptive parent's right to recover for injuries sus-

10. See *Gibbs v. Ernst*, 647 A.2d 882, 890 (Pa. 1994).

11. See Susan G. James, *Disclosure Of The Mental Health Of Biological Families In Adoptions*, 34 U. LOUISVILLE J. FAM. L. 717, 731 (1996).

12. See Laura W. Morgan, *Telling The Truth In Adoption Proceedings: Tort Actions For Wrongful Adoption*, 10 NO. 1 DIVORCE LITIG. 11 (1998).

13. See James, *supra* note 11, at 730-731.

184 GOLDEN GATE UNIVERSITY LAW REVIEW[Vol. 29:181

tained due to an adoption agency's misrepresentations.¹⁴ Accordingly, the historical "rebirth" rhetoric has been abandoned for a more conventional philosophy that promotes communication between an adoption agency and prospective adoptive parents regarding a child's background.¹⁵ This modern philosophy is based on the belief that it is essential for adoptive parents to know the medical and familial history of their adopted child in order to provide adequate care.¹⁶ As a result, in recent years state courts have been bombarded with claims from adoptive parents asserting that their child's medical and familial background was not fully disclosed to them by the adoption agency.¹⁷

Traditionally, adoptive parents had two methods of legal redress: annulment of the adoption and state statutory remedies.¹⁸ Until wrongful adoption actions were recognized in *Burr v. Board of County Commissioners*¹⁹ in 1986, annulment of the adoption was essentially an adoptive parent's only remedy.²⁰

14. See *id.*

15. See Morgan, *supra* note 12.

16. See *id.*

17. See Michael J. v. L.A. County Dep't of Adoptions, 247 Cal. Rptr. 504 (Cal. Ct. App. 1988); Richard P. v. Vista Del Mar Child Care Serv., 165 Cal. Rptr. 370 (Cal. Ct. App. 1980); Roe v. Catholic Charities of the Diocese, 588 N.E.2d 354 (Ill. 1992); M.H. v. Caritas Family Servs., 488 N.W.2d 282 (Minn. 1992); Burr v. Board of County Comm'rs, 491 N.E.2d 1101 (Ohio 1986); Gibbs v. Ernst, 647 A.2d 882 (Pa. 1994). This Note's reference to adoption agencies is meant to include both public and private agencies.

18. See Pat McDonald-Nunemaker, *Wrongful Adoption: The Development Of A Better Remedy In Tort*, 12 J. AM. ACAD. MATRIM. LAW. 391, 392-393 (1994). Annulment statutes allow courts to revoke the adoption decree and relieve the adoptive parents of any legal duty to the adopted child. Annulment proceedings can be invoked by the biological parents or the adoptive parents, though it is traditionally invoked by biological parents seeking to regain custody of their children. See Note, *When Love Is Not Enough: Toward A Unified Wrongful Adoption Tort*, 105 HARV. L. REV. 1761, 1765 (1992). Courts have been wary to allow annulment proceedings in wrongful adoption cases because they are hesitant to subject children to abandonment twice in their young lives. See *id.* at 1766. "Between 1983 and 1987, sixty-nine adoptions in California were reportedly annulled because county agencies had fraudulently misrepresented a child's background or mental or physical health." Janet Hopkins Dickson, *The Emerging Rights Of Adoptive Parents: Substance or Specter?*, 38 U.C.L.A. L. REV. 917, 946 (1991).

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

20. See *County Dep't. of Pub. Welfare v. Morningstar*, 151 N.E.2d 150 (Ind. App. 1958). Adoptive parents brought action to annul an adoption based on the adoption agency's fraudulent misrepresentations that the child was in good health. The child

At first, state courts that confronted allegations of wrongful adoption “were leery of letting the genie too far out of the bottle” by imposing too much liability upon adoption agencies.²¹ Thus, adoptive parents who could not fathom “returning” their child to an adoption agency, but who, nonetheless, needed assistance with medical bills, had no remedy.²²

Recently, however, a growing number of states have begun to recognize a rather new form of legal redress for adoptive parents: the tort of *wrongful adoption*.²³ A wrongful adoption cause of action allows adoptive parents to recover monetary damages for an adoption agency’s intentional or negligent misrepresentations regarding a child’s familial medical history and other pertinent information.²⁴ Adoptive parents may sue an adoption agency for wrongful adoption upon discovering, or upon the point at which they should have discovered, that the adoption agency misrepresented their child’s background.²⁵ Unlike its annulment and state statutory remedy counterparts, wrongful adoption allows courts to award compensatory and

subsequently suffered from mental retardation, violent tantrums, and engaged in “serious sex abnormalities.” The court granted the annulment because the adoption agency misrepresented that the biological father committed incest with the child. *Id.* at 151-152.

21. John Gibeaut, *Disclosing Birth Secrets*, A.B.A. J., July 1998, at 35.

22. See Dickson, *supra* note 18, at 956.

23. As of this writing, states that recognize wrongful adoption include California (see *Michael J. v. L.A. County Dep’t of Adoptions*, 247 Cal. Rptr. 504 (Cal. Ct. App. 1988)); Illinois (see *Roe v. Catholic Charities of the Diocese*, 588 N.E.2d 354 (Ill. 1992)); Massachusetts (see *Mohr v. Commonwealth*, 653 N.E.2d 1104 (Mass. 1995)); Minnesota (see *M.H. v. Caritas Family Servs.*, 488 N.W.2d 282 (Minn. 1992)); Montana (see *Jackson v. Montana*, 956 P.2d 35 (Mont. 1998)); New York (see *Juman v. Louise Wise Servs.*, 608 N.Y.S.2d 612 (N.Y. Sup. Ct. 1994), *aff’d*, 211 N.Y.S.2d 371 (N.Y. App. Div. 1995)); Ohio (see *Burr v. Board of County Comm’rs*, 491 N.E.2d 1101 (Ohio 1986)); Pennsylvania (see *Gibbs v. Ernst*, 647 A.2d 882 (Pa. 1994)); Rhode Island (see *Mallette v. Children’s Friend and Servs.*, 661 A.2d 67 (R.I. 1995)); Washington (see *McKinney v. State*, 950 P.2d 461 (Wash. 1998)); West Virginia (see *Wolford v. Children’s Home Soc’y*, 17 F.Supp. 2d 577 (S.D. W.Va. 1998)); and Wisconsin (see *Meracle v. Children’s Serv. Soc’y*, 437 N.W.2d 532 (Wis. 1989)). But see Maine (see *MacMath v. Maine Adoption Placement Servs.*, 635 A.2d 359 (Me. 1993)) and Mississippi (see *Foster v. Bass*, 575 So.2d 967 (Miss. 1990)).

24. See Gibeaut, *supra* note 21, at 34.

25. See McDonald-Nunemaker, *supra* note 18, at 394.

186 GOLDEN GATE UNIVERSITY LAW REVIEW[Vol. 29:181

punitive damages to adoptive parents and leaves the family unit intact.²⁶

The first wrongful adoption actions were brought under fraud theories, which required adoptive parents to prove that the adoption agencies gave them false information and intentionally deceived them.²⁷ Unfortunately, adoptive parents found fraud difficult to prove because the adoption agency's misrepresentations were not always intentional.²⁸ Instead, they began to bring actions based on negligence theories.²⁹ Under negligence-based wrongful adoption, adoption agencies may be held liable merely for failing to use reasonable care in their relations with adoptive parents.³⁰ These cases were also problematic for adoptive parents because courts were hesitant to impose unlimited liability on adoption agencies for assuring a child's future good health.³¹ Courts feared that allowing adoptive parents to prevail on negligence theories in wrongful adoption cases would result in "judge-made lemon law for adopted kids, as well as endless suits taxing the resources of adoption agencies."³² It wasn't until the early 1990s that courts began to approve of the less stringent negligence standard as an alternative to fraud.³³ By this time, most states had already begun

26. *See id.*

27. *See Gibbs v. Ernst*, 647 A.2d 862, 889 (Pa. 1994) (relying on W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 105 (5th ed. 1984)). To prove fraud, or intentional misrepresentation, a plaintiff must show the following elements:

(1) a representation; (2) which is material to the transaction at hand; (3) made falsely, with knowledge of its falsity or recklessness as to whether it is true or false; (4) with the intent of misleading another into relying on it; (5) justifiable reliance on the misrepresentation; and (6) the resulting injury was proximately caused by the reliance.

Id.

28. *See, e.g., Richard P. v. Vista Del Mar Child Care*, 165 Cal. Rptr. 370 (Cal. Ct. App. 1980); *MacMath v. Maine Adoption Placement Servs.*, 635 A.2d 359 (Me. 1993).

29. *See Gibeaut, supra* note 21, at 35.

30. *See Gibbs*, 647 A.2d at 890. As opposed to fraud, in order to prove negligent misrepresentation, a plaintiff need only show that (1) the defendant misrepresented a material fact; (2) the defendant knew or should have known of the misrepresentation, or made the "misrepresentation without knowledge as to its truth or falsity"; (3) the defendant intended the plaintiff to rely on the misrepresentation; and (4) the plaintiff was injured as a result of his justifiable reliance on the defendant's misrepresentation. *See id.* (quoting KEETON, *supra* note 27, § 107, at 745-58).

31. *See Gibbs*, 647 A.2d at 891.

32. Gibeaut, *supra* note 21, at 35.

33. *See id.*

to impose liability upon adoption agencies by enacting their own statutes mandating the disclosure of a child's family medical history to his prospective adoptive parents.³⁴ By 1998, only a handful of jurisdictions allowed adoptive parents to sue on a negligence-based theory.³⁵ The Montana Supreme Court joined these jurisdictions in *Jackson v. Montana*, agreeing with their public policy concerns and imposing negligence-based liability upon adoption agencies for wrongful adoption.³⁶

A. WRONGFUL ADOPTION IS INTRODUCED AS A FRAUD-BASED TORT

As previously noted, the first wrongful adoption claims were brought under fraud theories.³⁷ To prove that an adoption agency was fraudulent in its disclosures or representations regarding a child's background, adoptive parents had to show that: (1) the adoption agency made a material representation or disclosure regarding the child's medical or familial background; (2) the adoption agency made the representation or disclosure knowing it to be false or with recklessness as to its truth; (3) the adoption agency intended to mislead adoptive parents into relying on the representation or disclosure; (4) the adoptive parents justifiably relied on the representation or the disclosure; and (5) the resulting damages were proximately caused by the adoptive parents' reliance on the adoption agency's representation or disclosure.³⁸

34. See *id.* As of this writing, all states have statutes mandating or permitting adoption agencies to disclose some medical information to adoptive parents. For a list of current disclosure statutes, see Morgan, *supra* note 12, at 12-13.

35. See Gibeaut, *supra* note 21, at 34. By the time *Jackson* reached the Montana Supreme Court, states that recognized negligence-based wrongful adoption included Illinois (see *Roe v. Catholic Charities of the Diocese*, 588 N.E.2d 1101 (Ill. 1992)); Massachusetts (see *Mohr v. Commw.*, 653 N.E.2d 1104 (Mass. 1995)); Minnesota (see *M.H. v. Caritas Family Servs.*, 488 N.W.2d 282 (Minn. 1992)); Pennsylvania (see *Gibbs v. Ernst*, 647 A.2d 882 (Pa. 1994)); Rhode Island (see *Mallette v. Children's Friend & Serv.*, 661 A.2d 67 (R.I. 1995)); and Wisconsin (see *Meracle v. Children's Serv. Soc'y*, 437 N.W.2d 532 (Wis. 1989)).

36. See *Jackson v. Montana*, 956 P.2d 35, 47 (Mont. 1998).

37. See *Michael J. v. L.A. County Dep't of Adoptions*, 247 Cal. Rptr. 504 (Cal. Ct. App. 1988); *Richard P. v. Vista Del Mar Child Care Servs.*, 165 Cal. Rptr. 370 (Cal. Ct. App. 1980); *Burr v. Board of County Comm'rs*, 491 N.E.2d 1101 (Ohio 1986).

38. See *Gibbs*, 647 A.2d at 889.

188 GOLDEN GATE UNIVERSITY LAW REVIEW[Vol. 29:181

In 1986, the Ohio Supreme Court became the first state to recognize the fraud-based tort of wrongful adoption in *Burr v. Board of County Commissioners*.³⁹ In *Burr*, the adoptive parents accused an adoption agency of fraudulently misrepresenting facts concerning the family medical history of their adopted son, Patrick.⁴⁰ At the time of Patrick's adoption in 1964, welfare officials told the Burrs that Patrick was a healthy baby born to an unwed mother who had surrendered him to the state for adoption.⁴¹ Years later, Patrick began to suffer from psychological and learning disabilities.⁴² By high school, Patrick was experiencing hallucinations and was diagnosed with Huntington's Disease, a fatal genetic disease that attacks the central nervous system.⁴³ After obtaining a court order to open Patrick's pre-adoption background files, the Burrs learned that Patrick's mother was a mental patient with psychotic tendencies and that his father was unknown, although presumed to have been a mental patient as well.⁴⁴ Patrick's history placed him at risk for mental illness.⁴⁵ The adoption agency did not reveal this information to the Burrs at any time subsequent to its representation that Patrick was healthy.⁴⁶

In its discussion, the Ohio Supreme Court determined that the adoption agency made material misrepresentations regarding Patrick's medical background with the intention of misleading the Burrs into relying on the information in their decision to adopt.⁴⁷ As a result of their justifiable reliance on the adoption agency's misrepresentations, the Burrs suffered damages that they would not have otherwise incurred had the

39. 491 N.E.2d 1101 (Ohio 1986).

40. *See id.* at 1104.

41. *See id.* at 1103.

42. *See id.*

43. *See Burr*, 491 N.E.2d at 1103.

44. *See id.* at 1104.

45. *See id.*

46. *See id.* The court did not indicate whether the Burrs inquired about Patrick's health at the time of adoption or whether the adoption agency volunteered the information. However, the court did acknowledge that the agency knew its statements to the Burrs regarding Patrick's health were false and that the agency had in its possession Patrick's sealed medical records. *See id.* at 1105-1106.

47. *See Burr*, 491 N.E.2d at 1106.

adoption agency fully disclosed Patrick's background.⁴⁸ In concluding that the adoption agency's misrepresentations constituted fraud, the Ohio Supreme Court noted that "it would be a travesty of justice and distortion of truth to conclude that deceitful placement of this infant, known by appellants to be at risk, was not actionable when the tragic but hidden realities of the child's infirmities came to light."⁴⁹ However, the court emphasized that its decision addressed the "deliberate act of misinforming" the adoptive parents and not merely the agency's negligent "failure to disclose" Patrick's background.⁵⁰ Therefore, despite its explicit recognition of fraud-based wrongful adoption, the Ohio Supreme Court remained hesitant to extend an adoption agency's liability into the realm of negligence.⁵¹ Recognition of fraud-based wrongful adoption, however, finally provided a monetary remedy to adoptive parents.⁵²

After *Burr*, courts began to address the public policy concerns as well as the legal implications of wrongful adoption.

48. See *id.* The court assessed the damages as being "Patrick's medical expenses (in excess of \$80,000 for the Huntington's Disease treatment alone), together with other damages." *Id.* at 1104.

49. *Id.* at 1107.

50. *Id.* at 1109. The full excerpt reads:

In no way do we imply that adoption agencies are guarantors of their placements. Such a view would be tantamount to imposing an untenable contract of insurance that each adopted child would mature to be healthy and happy. Such matters are solely in the hands of a higher authority. Adoptive parents are in the same position as, and confront risks comparable to those, of natural parents relative to their child's future. Our decision should not be viewed as altering traditional family relationships and responsibilities, nor should it be read as shifting part of the burden of parenting to society. However, 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. It is not the mere failure to disclose the risks inherent in this child's background which we hold actionable. Rather, it is the deliberate act of misinforming this couple which deprived them of their right to make a sound parenting decision and which led to the compensable injuries.

Id.

51. See *Burr*, 491 N.E.2d at 1109. The adoption agency also claimed that it was immune from this action since the Burrs were covered by a state statutory remedy that would allow them to receive a subsidy for adopting a special needs child. However, the court denied the adoption agency's argument, holding that the statute applied only to "the knowing placement" of special needs children where both the adoption agency and the prospective adoptive parents have agreed to subsidy arrangements before the finalization of the adoption. *Id.* at 1108-1109.

52. See Gibeaut, *supra* note 21, at 34.

190 GOLDEN GATE UNIVERSITY LAW REVIEW[Vol. 29:181

The California Court of Appeal was faced with a fraud-based wrongful adoption case in *Michael J. v. Los Angeles County Department of Adoptions*.⁵³ There, an adoptive mother and her son sued for negligence and fraud, alleging that the adoption agency misrepresented the son's health.⁵⁴ The adoption agency failed to disclose that the child's physician at the time of adoption "refused to make a prognosis on the child's health" due to a port wine stain on his face and torso.⁵⁵ The child was eventually diagnosed with epilepsy and Sturge-Weber Syndrome, a genetic degenerative nerve disorder present at birth.⁵⁶ The trial court granted the adoption agency's motion for summary judgment, holding that it was immune from liability.⁵⁷ The adoptive parents appealed.⁵⁸

The Court of Appeal addressed whether the adoption agency fraudulently failed to disclose material facts that were within the adoption agency's possession at the time of the child's adoption.⁵⁹ Relying on dicta in *Burr*, the court conceded that an adoption agency cannot be deemed the guarantor of a child's future good health and should not be held liable for negligence in providing such information.⁶⁰ The court reasoned, however, that the adoption agency's failure to disclose the doctor's refusal to diagnose the child and the its representation that the port wine stain was merely a birthmark were material facts that should have been disclosed to the adoptive parents during

53. 247 Cal. Rptr. 504 (Cal. Ct. App. 1988).

54. *See id.* at 505.

55. *Id.* The court did not indicate why the physician refused to make a prognosis.

56. *See id.* at 506. Sturge-Weber Syndrome is identified by an angioma, "a knot of distended blood vessels overlaying and compressing the surface of the brain." THE BANTAM MEDICAL DICTIONARY at 20 (1982). It may cause conditions such as epilepsy and hemorrhaging and is often associated with a purple birthmark on the face. *See id.* Here, Michael was diagnosed as having a port wine stain on his upper torso and face since birth. *See Michael J.*, 247 Cal. Rptr. at 505. Based on medical information known at the time, the adoption agency's doctors should have known that the port wine stain was a manifestation of this disease. *See id.*

57. *Michael J.*, 247 Cal. Rptr. at 506.

58. *See id.*

59. *See id.* at 511. Eight years earlier, the California Court of Appeal had refused to recognize a fraud-based wrongful adoption cause of action. *See Richard P. v. Vista Del Mar Child Care Servs.*, 165 Cal. Rptr. 370 (Cal. Ct. App. 1980).

60. *See id.* at 512-513.

the adoption process.⁶¹ Had the adoptive parents known of these facts before the finalization of the adoption, they would have been effectively put on notice of the significance of the doctor's refusal to diagnose the child and, thus, would have been given an opportunity to conduct an independent background investigation.⁶² The court held that the non-disclosure of such significant facts constituted fraud, and concluded that an adoption agency must fully disclose, in good faith, material facts regarding the existing and past medical conditions of the children it places.⁶³ The court further noted that public policy cannot tolerate such blatant concealment or intentional misrepresentations by adoption agencies.⁶⁴ As a result, the California Court of Appeal held that the lower court erred in granting the adoption agency's motion for summary judgment since the adoption agency's deliberate misrepresentations were actionable as fraud.⁶⁵ Accordingly, the court allowed fraud as a basis for wrongful adoption.⁶⁶

B. THE MOVEMENT TOWARDS NEGLIGENCE-BASED ACTIONS

Despite the success of some adoptive parents under fraud-based theories, others found that they could only prevail in cases that clearly involved intentional misconduct on the part

61. *See Michael J.*, 247 Cal. Rptr. at 513.

62. *See id.*

63. *See id.*

64. *See id.* The court stated:

Public policy cannot extend to condone concealment or intentional misrepresentation which misleads prospective adoptive parents about the unusual calamity they are assuming. The adoption of a child is an act of compassion, love, humanitarian concern where the adoptive parent voluntarily assumes enormous legal, moral, social and financial obligations. Accordingly, a trustworthy process benefits society, as well as the child and parent. As keepers of the conscience of the community, we cannot countenance conduct which would allow persons who desire entrance into the emotional realm of parenting to be unprotected from schemes or tactics designed to discharge societal burdens onto the unsuspecting or unwary. As trustees of the child's destiny the agency was obligated to act with morals greater than those found in a purveyor's common marketplace.

Id.

65. *See Michael J.*, 247 Cal. Rptr. at 513.

66. *See id.* *See also Reidy v. Albany County Dep't of Social Servs.*, 598 N.Y.S.2d 115, 116 (N.Y. App. Div. 1993) (Adoption agency misrepresented that a child was sexually abused. The New York Supreme Court recognized fraud as a basis for wrongful adoption).

192 GOLDEN GATE UNIVERSITY LAW REVIEW[Vol. 29:181

of the adoption agency.⁶⁷ As a result, courts began to acknowledge that public policy interests favored disclosure to adoptive parents. Slowly, courts recognized adoptive parents' negligence-based claims as acceptable standards under which to hold adoption agencies liable.⁶⁸ As opposed to fraud, which requires the adoptive parents to prove an intentional misrepresentation or omission, negligence requires that adoptive parents show: (1) the adoption agency had a duty to the adoptive parents to accurately represent or disclose information regarding the child's background; (2) the adoption agency breached that duty; (3) the adoption agency's breach caused the adoptive parents to be injured; and (4) the adoptive parents sustained damages.⁶⁹ Thus, negligence-based wrongful adoption claims did not have to rise to the level of intentional fraud in order to provide adoptive parents a basis for recovery.⁷⁰

In 1992, in *Roe v. Catholic Charities of the Diocese of Springfield*,⁷¹ the Illinois Appellate Court specifically addressed the issue of whether a common law cause of action such as negligent wrongful adoption was permissible when no adoption statute explicitly provided for it.⁷² Since adoption is an area traditionally controlled by state statutory law, the court was concerned that the statutes might not allow such an extension.⁷³ Specifically, the court was concerned that adoption agencies, being bound by statutory law, could not also be bound by common law principles.⁷⁴

67. See, e.g., *Richard P. v. Vista Del Mar Child Care Servs.*, 165 Cal. Rptr. 370 (Cal. Ct. App. 1980). See also *MacMath v. Maine Adoption Placement Servs.*, 635 A.2d 359 (Me. 1993).

68. See e.g., *Meracle v. Children's Serv. Soc'y*, 437 N.W.2d 532 (Wis. 1989); *M.H. v. Caritas Family Servs.*, 488 N.W.2d 282 (Minn. 1992).

69. See *Jackson*, 956 P.2d 35 at 42. These elements are applicable in any negligence action. See KEETON, *supra* note 27, § 30, at 164-65.

70. See Thanda A. Fields, *Declaring a Policy of Truth: Recognizing The Wrongful Adoption Claim*, 37 B.C. L. REV. 975, 1005 (1996).

71. 588 N.E.2d 354 (Ill. App. Ct. 1992).

72. See *id.* at 357.

73. See *id.*

74. See *id.* at 359-360.

In *Roe*, three sets of parents sought to adopt children.⁷⁵ Each set of parents specifically stated that they would only consider a physically and mentally healthy child and each requested that the adoption agency provide any information available regarding the child's background.⁷⁶ The adoption agency informed each set of parents that the children were healthy, but claimed that it did not possess any background information on the children.⁷⁷ In reality, the adoption agency knew that each of the three children had engaged in uncontrollable and disruptive behavior.⁷⁸ Each of the adoptive parents relied on the adoption agency's representations in their decisions to adopt the children.⁷⁹ Furthermore, each child continued to exhibit violent behavior after the adoptions were complete.⁸⁰ The adoptive parents filed a lawsuit against the adoption agency for fraudulent and negligent misrepresentation for failing to disclose the children's psychological and medical information.⁸¹ The circuit court granted the adoption agency's motion to dismiss and the adoptive parents appealed.⁸²

The court of appeal began its analysis by briefly addressing whether Illinois recognized a cause of action for fraud-based wrongful adoption.⁸³ Following previous fraud cases such as *Burr* and *Michael J.*, the court concluded that recognition of fraud-based wrongful adoption was merely an extension of

75. See *Roe*, 588 N.E.2d at 356.

76. See *id.*

77. See *id.*

78. See *id.* Specifically, the adoption agency knew that Jane Roe had seen several psychiatrists for "violent and uncontrollable behavior as well as intellectual, social and emotional retardation," Billy Doe exhibited "abnormal behavior such as smearing feces on the interior walls of past foster homes" and other uncontrollable behavior, and Joe Boe "displayed destructive behavior in past foster homes such as stomping the family's dog to death" and suffered from "emotional and social retardation." *Id.*

79. See *Roe*, 588 N.E.2d at 356.

80. See *id.* The court noted that since being placed with their adoptive parents, "one child cut the whiskers off the family cat and flattened the mother's tires. Another child painted a neighbor's house and exposed himself to neighbors. The other child had severe episodes of violent behavior requiring the aid of professional counseling ... Joe Boe was institutionalized." *Id.*

81. See *id.* at 356.

82. See *id.* at 357. The court did not indicate what the adoption agency alleged in its motion to dismiss or what the Circuit Court concluded in its decision to grant the motion.

83. See *Roe*, 588 N.E.2d at 357.

194 GOLDEN GATE UNIVERSITY LAW REVIEW[Vol. 29:181

common law fraud into the realm of adoption law.⁸⁴ To avoid liability, adoption agencies only need to follow the law.⁸⁵ The court reasoned that since statutorily created laws such as corporations are bound by common law principles as well as statutory principles, it would be reasonable to conclude that adoption agencies would also be bound by both common law and statutory principles.⁸⁶ Since the extension of common law fraud in the adoption context was already recognized in other states, the court concluded that recognition of common law negligence for wrongful adoption would not be a radical departure from common law principles.⁸⁷ Rather, it would merely be an extension of common law fraud.⁸⁸ Thus, the court concluded that an adoption agency could be liable for both fraud and negligence.⁸⁹

After finding that common law causes of action for fraud and negligence applied to statutorily governed adoptions, the court addressed whether the adoption agency breached its duty to the adoptive parents by failing to disclose information to them.⁹⁰ The court held that the duty owed in all misrepresentation cases, whether negligent or fraudulent, is the same since an adoption agency can be liable for failing to provide adequate information as well as for providing false information.⁹¹ Here, the adoption agency had a duty to provide honest and complete responses to the adoptive parents' requests for background information on the children.⁹² When the adoption agency failed to give the adoptive parents the information that it had available, it breached this duty.⁹³ Further, the adoption agency could reasonably have foreseen the unfortunate consequences of placing these mentally ill children with parents who were

84. *See id.*

85. *See id.* at 360.

86. *See id.* at 359.

87. *See Roe*, 588 N.E.2d at 357.

88. *See id.*

89. *See id.* at 357, 366.

90. *See id.* at 361.

91. *See Roe*, 588 N.E.2d at 361.

92. *See id.* at 365.

93. *See id.*

unaware of any problems.⁹⁴ Accordingly, the court reversed the lower court's dismissal, finding that the adoptive parents had stated claims for both fraudulent and negligent misrepresentation.⁹⁵

The Supreme Court of Minnesota also addressed the issue of negligent misrepresentation in the adoption setting in *M.H. v. Caritas Family Services*.⁹⁶ There, the adoption agency claimed that the plaintiffs appeared to be willing to adopt any child that was not seriously mentally ill.⁹⁷ The adoption agency provided the plaintiffs with background information that indicated the child's biological family was generally healthy.⁹⁸ However, the adoption agency mentioned on several occasions that there was a possibility of incest in the child's family.⁹⁹ After the child was placed with the plaintiffs, he began to exhibit jumpy and nervous behavior.¹⁰⁰ At the request of the child's psychologist, the adoption agency sent the adoptive parents information about the child's genetic background.¹⁰¹ This information indicated that the adoption agency knew from the beginning that the child's biological parents were a 17-year old boy with mental health history, and his 13-year old sister.¹⁰²

The plaintiffs alleged that the adoption agency negligently misrepresented the child's familial background by failing to fully and accurately disclose what it knew.¹⁰³ The adoption agency moved for summary judgment on public policy grounds, claiming that recognition of common law negligent misrepresentation

94. *See id.* In noting that the burden should be placed on the adoption agency since it has the information, the court said that "the consequences of placing that burden on defendant is defendant discloses what information it has in response to an adopting parent's inquiry, so that adoptive parents assume the awesome responsibility of raising a child with their eyes wide open." *Id.*

95. *See Roe*, 588 N.E.2d at 366. The court affirmed the lower court's dismissal of the adoptive parents' breach of contract claim since their allegations and the relief prayed for sounded in tort rather than contract law. *See id.*

96. 488 N.W.2d 282 (Minn. 1992).

97. *See id.* at 284.

98. *See id.* at 285.

99. *See id.*

100. *See Caritas*, 488 N.W.2d at 285.

101. *See id.*

102. *See id.*

103. *See id.* at 286.

196 GOLDEN GATE UNIVERSITY LAW REVIEW[Vol. 29:181

sentation would place an unreasonable burden on adoption agencies by requiring them to confirm every child's familial background.¹⁰⁴ The adoption agency further claimed that imposition of such liability upon adoption agencies would inevitably discourage adoptions of hard-to-place and special needs children.¹⁰⁵ The lower court denied the adoption agency's motion.¹⁰⁶

On appeal, the Supreme Court of Minnesota addressed whether public policy precluded them from holding an adoption agency liable for negligently misrepresenting a child's medical and familial background.¹⁰⁷ The court acknowledged the adoption agency's concerns, but recognized the compelling need for adoptive parents to be informed of background information known to the adoption agency in order to obtain adequate care for the child and to make personal family decisions.¹⁰⁸ The court held that imposition of a duty upon adoption agencies only requires that they exercise due care in disclosing a child's history fully and adequately to avoid misleading potential adoptive parents.¹⁰⁹

Here, the adoption agency was aware from the beginning that the child's biological parents were siblings.¹¹⁰ The court concluded that once the adoption agency disclosed the possibility of incest to the adoptive parents, it assumed a duty to ensure that the disclosure was complete and adequate.¹¹¹ Thus, after finding that public policy did not preclude them from holding an adoption agency liable for negligent misrepresentation, the court found that the adoption agency was liable for wrongful adoption in negligently misrepresenting the child's background.¹¹²

104. *See Caritas*, 488 N.W.2d at 286.

105. *See id.* at 287.

106. *See id.* at 288.

107. *See id.*

108. *See Caritas*, 488 N.W.2d at 287.

109. *See id.* at 288.

110. *See id.* at 287.

111. *See id.* at 288.

112. *See Caritas*, 488 N.W.2d at 288. The court denied the H's intentional misrepresentation claim since there was no evidence that the adoption agency intended to mislead the H's by withholding background information. *See id.* at 289.

The Pennsylvania Supreme Court also addressed the issue of a negligence standard in the adoption arena in *Gibbs v. Ernst*.¹¹³ When the Gibbsses sought to adopt, they indicated that they would adopt a child who was hard to place due to age, but specifically requested a child that had not been exposed to physical or sexual abuse.¹¹⁴ The adoption agency placed 5 year-old Michael with the Gibbsses, disclosing that he was hyperactive, behind in school, and had been verbally abused by his biological mother.¹¹⁵ After the finalization of the adoption, the adoption agency assured the Gibbsses that it disclosed all the information it had regarding Michael's background.¹¹⁶ Immediately after the adoption, Michael began to exhibit violent behavior towards other children.¹¹⁷ Once it became evident that Michael's behavior would not change, he was placed in the custody of the Department of Human Services (DHS).¹¹⁸ Shortly thereafter, the Gibbsses learned from a DHS caseworker that Michael had been severely sexually and physically abused by his biological mother, had a history of violence towards children, and had been in ten foster homes before being placed with the Gibbsses.¹¹⁹ The Gibbsses sued the adoption agency for fraudulent and negligent misrepresentation and for negligent non-disclosure.¹²⁰

The Pennsylvania Supreme Court first addressed whether Pennsylvania should extend the common law torts of fraud and negligence to the adoption setting.¹²¹ The court focused on the competing interests of adoption agencies and adoptive parents.¹²² It recognized the prospective parents' interest in

113. 647 A.2d 882 (Pa. 1994).

114. *See id.* at 884.

115. *See id.* at 884-885.

116. *See id.* at 885.

117. *See Gibbs*, 647 A.2d at 885. The court indicated that Michael "attempt[ed] to amputate the arm of a five year old; attempt[ed] to suffocate his younger cousin; attempt[ed] to kill another cousin by hitting him over the head with a lead pipe; deliberately plac[ed] Clorox in a cleaning solution causing Ms. Gibbs to burn her hands badly; and start[ed] a fire which seriously injured a younger cousin." *Id.*

118. *See id.*

119. *See id.* at 885-886. The court noted that at one point, Michael's biological mother "attempted to cut off his penis." *Id.*

120. *See id.* at 886.

121. *See Gibbs*, 647 A.2d at 886.

122. *See id.*

198 GOLDEN GATE UNIVERSITY LAW REVIEW[Vol. 29:181

knowing as much as possible about the health and familial history of the child they want to adopt.¹²³ The court also balanced the parents' interests against the interests of the adoption agencies.¹²⁴ It recognized that adoption agencies might face a reduction in successful adoptions if courts placed too much liability upon them.¹²⁵ However, the court concluded that regardless of the adoption agency's concerns, the traditional common law causes of action for both fraud and negligence apply to adoptions despite the statutory nature of adoption proceedings.¹²⁶ The court explicitly held that under a fraud theory, the adoption agency had an "obligation to refrain from fraudulent and deceitful tactics."¹²⁷

Further, the court held the cause of action for negligent misrepresentation applicable as well, expanding an adoption agency's liability for negligence to "those conditions reasonably predictable at the time of placement."¹²⁸ The court reasoned that the increased burden on adoption agencies under causes of action for negligence was mitigated by the requirement that adoption agency efforts only be reasonable.¹²⁹ Additionally, the adoption agency may simply avoid making any representations at all if the burden seems overwhelming.¹³⁰ Thus, the court held that the Gibbsses had a cause of action against the adop-

123. *See id.* at 886-887.

124. *See id.*

125. *See Gibbs*, 647 A.2d at 887.

126. *See id.*

127. *Id.* at 890. The court stated:

We require no less from every other business or non-profit organization in this Commonwealth, and see no valid reason to release adoption intermediaries from the burden of truth in their daily operations. Indeed, we find it particularly apposite in this context because of the potentially devastating consequences that can result from fraudulent conduct here.

Id.

128. *Id.* at 891. The court stated it would

in no way imply that adoption agencies are insurers or warrantors of a child's health. The tort we now recognize is not similar to, nor can it be compared with products liability or contractual warranties. Adoption agencies must merely use reasonable care to insure that the information they communicate is accurate.

Id.

129. *See Gibbs*, 647 A.2d at 891.

130. *See id.*

tion agency for both fraudulent and negligent misrepresentation of Michael's background.¹³¹

Once it seemed evident that courts were willing to allow both fraud-based and negligence-based wrongful adoption claims, adoptive parents who could not prove fraud began to sue solely for negligence. One such case was *Mallette v. Children's Friend & Service*.¹³² In *Mallette*, the adoption agency told the Mallettes that Christopher's biological mother suffered from learning disabilities caused by head trauma she sustained as a child.¹³³ Several years after the adoption, the Mallettes learned that the adoption agency had a report on file regarding Christopher's medical and familial background, which confirmed that his biological mother was moderately retarded.¹³⁴ The report acknowledged the possibility that head trauma caused the mother's mental retardation, but indicated that there were no medical records to support such a conclusion.¹³⁵ By the time Christopher was thirteen years old, he was diagnosed as mentally retarded and severely disturbed.¹³⁶ The Mallettes sued the adoption agency for negligently misrepresenting and omitting important information regarding Christopher's background.¹³⁷ The Superior Court denied the adoption agency's motion to dismiss the case for failure to state a

131. See *id.* at 892. The court also held that the Gibbsses stated a cause of action for negligent non-disclosure since the unique relationship between the adoption agency and the adoptive parents imposed a duty upon the adoption agency to fully disclose all relevant non-identifying information regarding a child's background. See *id.* at 893. The court refused to recognize that an adoption agency had an affirmative duty to investigate a child's background since such a duty would place an undue burden on adoption agencies that had yet to be recognized by any other state. See *id.* at 894. See also *Zernhelt v. Lehigh County Office of Children & Youth Servs.*, 659 A.2d 89, 90-91 (Pa. Commw. Ct. 1995) (adoption agency was not liable for its intentional misrepresentations to adoptive parents because Pennsylvania law prohibits local agencies from being held liable for fraud).

132. 661 A.2d 67 (R.I. 1992).

133. See *id.* at 68.

134. See *id.*

135. See *id.* The Mallettes also learned that the child's biological mother was diagnosed with macrocephaly, pseudoepicanthal folds, a high arched palate, tachycardia, hand tremors, and poor coordination. See *id.*

136. See *Mallette*, 661 A.2d at 68.

137. See *id.*

200 GOLDEN GATE UNIVERSITY LAW REVIEW[Vol. 29:181

claim.¹³⁸ The adoption agency appealed to the Rhode Island Supreme Court.¹³⁹

The Rhode Island Supreme Court first addressed whether Rhode Island should recognize claims against adoption agencies for negligent misrepresentations made to adoptive parents.¹⁴⁰ Relying on *Gibbs* and *Caritas*, the court concluded that an adoption agency may be held liable for its negligent misrepresentations to adoptive parents.¹⁴¹ The court held that once the adoption agency began to volunteer information to the Mallettes, it assumed a duty to refrain from negligently misrepresenting information regarding Christopher's background.¹⁴² By misinforming the Mallettes of Christopher's familial history, the adoption agency breached its duty.¹⁴³ Further, since the Mallettes relied on the adoption agency's misrepresentations, they were denied the opportunity to adopt a child that would not require special care.¹⁴⁴ Accordingly, the court held that the Mallettes had a viable claim for negligent misrepresentation.¹⁴⁵

The court further addressed whether public policy interests precluded recognition of negligence-based wrongful adoption.¹⁴⁶ The court agreed with the decisions in *Gibbs* and *Caritas* that recognition of such a cause of action would promote public policy without making adoption agencies the guarantors of a child's future good health.¹⁴⁷ The court held that an adoption agency could either avoid making representations at all or could simply represent a child's background non-negligently.¹⁴⁸ Moreover, the court held that an adoption agency's duty to adoptive parents would only apply to conditions that were fore-

138. *See id.*

139. *See id.* at 69.

140. *See Mallette*, 661 A.2d at 70.

141. *See id.* at 70-71.

142. *See id.* at 71.

143. *See id.*

144. *See Mallette*, 661 A.2d at 71.

145. *See id.*

146. *See id.* at 72.

147. *See id.* at 72-73.

148. *See Mallette*, 661 A.2d at 73.

seeable at the time the adoption took place.¹⁴⁹ Thus, the Rhode Island Supreme Court denied the adoption agency's appeal and remanded the case to the Superior Court, finding that the Mallettes stated a cause of action for negligent misrepresentation.¹⁵⁰

Following this line of cases, recent court decisions have used wrongful adoption policy concerns to impose negligence liability for failing to comply with state disclosure statutes. Not long before the Montana Supreme Court addressed the issue in *Jackson*, the Washington Supreme Court in *McKinney v. Washington*¹⁵¹ held that an adoption agency can be held liable for negligence-based wrongful adoption for negligently failing to comply with mandatory disclosure laws. In 1988, the McKinnys applied to adopt Abby despite learning from a caseworker of the possibility that Abby was born with Fetal Alcohol Syndrome (FAS), was sexually abused, and/or was mentally retarded.¹⁵² The McKinnys applied for public subsidies provided to those who adopt special needs children.¹⁵³ In 1992, two years after the adoption was finalized, the McKinnys received the adoption agency's records which indicated that the agency knew as early as 1984 that Abby's problems might have been

149. *See id.*

150. *See id.* The court noted that:

We are of the opinion that an adoption system based on fairness and fuller disclosure of nonidentifying information concerning the child remains the ideal. We believe our decision moves us a small step closer to such an aspiration. If the adoption agency undertakes to make representations to adopting parents, fairness dictates that they do so in a nonnegligent manner. Conversely, if the adoption agency remains silent in the face of adopting parents' inquiries, the parents will at least be alerted that any decision to adopt should be made ever more cautiously. We note that the need for accurate disclosure becomes more acute when special-needs children are involved ... we believe extending the tort of negligent [mis]representation to the adoption context will help alleviate some of the artificial uncertainty imposed on a situation inherent with uncertainty.

Id.

151. 950 P.2d 461, 465 (Wash. 1998).

152. *See id.* at 463. The McKinnys were friends with Abby's foster parents and babysat her on weekends for about a year. At the time that they applied to adopt her, the McKinnys knew that Abby had 20 to 30 temper tantrums per day, did not talk or play with other children, was lethargic, was in special education programs and counseling, was removed from her biological mother because of neglect and possible sexual abuse, lived in several foster homes, and was developmentally delayed. *See id.*

153. *See id.*

202 GOLDEN GATE UNIVERSITY LAW REVIEW[Vol. 29:181

caused by her biological mother's alcohol abuse and that Abby was thought to have Down's Syndrome.¹⁵⁴ After Abby was officially diagnosed with FAS in 1993, the McKinnys filed a complaint against the adoption agency, claiming that, had they accurately known Abby's full history, they would not have adopted her.¹⁵⁵ The court addressed whether adoptive parents could sue an adoption agency for failing to disclose a child's familial history.¹⁵⁶

Using Washington's disclosure statute as a guide, the court reasoned that despite the statutory obligation of adoption agencies to disclose certain information to potential adoptive parents, public policy also requires such a duty.¹⁵⁷ The unique relationship between adoptive parents and the adoption agency created a duty to disclose even if the statute did not provide for it.¹⁵⁸ The court agreed with the policy considerations discussed by other state courts and concluded that the adoption agency was only required to make reasonable efforts to disclose information within its possession.¹⁵⁹ As a result, the court found that the adoption agency had a duty to disclose what it knew of Abby's background once the McKinney's became prospective adoptive parents.¹⁶⁰ However, the court further held that even though the adoption agency may have breached this duty, its breach was not the proximate cause of the McKinnys' injury since the agency's disclosure would have only confirmed what the McKinnys already knew about Abby's history.¹⁶¹ Thus, although the McKinney's could not recover, the court concluded that an adoption agency's negligent failure to comply with the state disclosure statute and public policy concerns in disclosing a child's background information may result in liability if the adoption agency failed to use reasonable efforts.¹⁶² The next

154. *See id.* at 464.

155. *See McKinney*, 950 P.2d at 464.

156. *See id.*

157. *See id.* at 466.

158. *See id.*

159. *See McKinney*, 950 P.2d at 467-468.

160. *See id.* at 468.

161. *See id.* at 471.

162. *See id.* at 465. The court also decided that an adoption agency's duty to disclose attaches once a person interested in adopting a child reaches the "prospective

court to address negligence-based wrongful adoption was the Montana Supreme Court in *Jackson v. Montana*.

III. FACTS OF *JACKSON v. MONTANA*

Eugene and Peggy Jackson adopted Aaron in 1986.¹⁶³ After Aaron began to show severe behavioral and psychological problems, the Jacksons learned that, at the time of the adoption, state social workers withheld psychological reports on Aaron's biological mother and the state adoption agency lied about Aaron's biological background.¹⁶⁴ The Jacksons sued the state adoption agency in Montana state court for negligently misrepresenting and negligently failing to disclose Aaron's medical and familial background.¹⁶⁵

A. THE BIOLOGICAL PARENTS

Deborah Annette Russell (hereinafter "Russell") gave birth to John Allen Russell, who was renamed Aaron Jon Jackson (hereinafter "Aaron") by his adoptive parents, on November 8, 1983.¹⁶⁶ Russell spent most of her pregnancy incarcerated in Montana.¹⁶⁷ During her pregnancy, psychological evaluations conducted by clinical psychologists characterized her as "emotionally immature and inappropriate," as "making marginal psychological adjustments," and as "disorganized, unconventional, diffused, [and, at times], delusional."¹⁶⁸ She was eventually diagnosed with "borderline intellectual functioning and inadequate personality."¹⁶⁹

In 1983, Robert Stevens, one of Aaron's possible biological fathers, was treated as an inpatient at the Veterans Admini-

adoptive parent status." *Id.* Here, the McKinnys became prospective adoptive parents when the adoption agency approved the McKinnys' request for subsidies, thereby formally recognizing the McKinnys' eligibility to adopt Abby. *See id.* at 468.

163. *See Jackson v. Montana*, 956 P.2d 35, 40 (Mont. 1998).

164. *See id.* at 40-41.

165. *See id.* at 41.

166. *See id.* at 39.

167. *See Jackson*, 956 P.2d at 39.

168. *Id.*

169. *Id.* at 40.

204 GOLDEN GATE UNIVERSITY LAW REVIEW[Vol. 29:181

stration Medical Center in Wyoming.¹⁷⁰ His doctor diagnosed him with "schizophrenic disorder, paranoid type."¹⁷¹ The State obtained copies of these evaluations prior to placing Aaron for adoption.¹⁷²

A year after Russell's evaluation was conducted, Aaron, then two months old, was hospitalized for aspiration after Russell fed him carbonated soda, meat, and vegetables.¹⁷³ The State then ordered that it provide child protective services to Russell and Aaron.¹⁷⁴ A state social worker noted that Russell had a low IQ and "function[ed] as though she [was] retarded."¹⁷⁵ The social worker concluded that Russell was mentally disturbed and in need of professional counseling.¹⁷⁶ In addition to the social worker's evaluation, the State arranged for a psychologist to perform a psychological evaluation on Russell.¹⁷⁷ The psychologist ultimately diagnosed Russell with "Paranoid Personality Disorder with mild mental retardation."¹⁷⁸

In August 1984, Dave Wallace, a social worker employed by the State, submitted a report to the court detailing Russell's psychological evaluations, studies, and reports.¹⁷⁹ In his report, Wallace suggested that, due to Russell's psychological problems, Aaron should be separated from her to ensure his physical and emotional well being.¹⁸⁰ Based on Wallace's report, the

170. *See id.* at 39.

171. *Jackson*, 956 P.2d at 39. No other information regarding Aaron's two possible fathers is given in the court's opinion.

172. *See id.*

173. *See id.*

174. *See id.* The court's opinion did not indicate what services were actually provided to Russell and Aaron.

175. *Jackson*, 956 P.2d at 39.

176. *See id.*

177. *See id.* The psychologist determined that many patients with clinical profiles similar to Russell's often have chronic emotional problems and paranoid personality disorders. *See id.*

178. *Id.*

179. *See Jackson*, 956 P.2d at 39.

180. *See id.* In 1984, Wallace also provided the court with this statement:

As shown below, this worker sees little positive change in Deborah Russell Scott from 1980 to the present time. As demonstrated again and again in these reports, Debbie appears to be unable to control her anger, personal relationships, or her life, even with the threat of losing her child. In deference to the severity of breaking a mother-child bond, it is determined by this worker that such a break is the only reasonable recourse to assure [Aaron Jon

court terminated Russell's parental rights, as well as the parental rights of Aaron's two possible fathers, and awarded the State permanent custody "with the right to consent to his adoption."¹⁸¹

B. THE ADOPTION

In November 1983, the Jacksons submitted an adoption application to the State.¹⁸² As part of the application process, the Jacksons participated in several personal interviews with state resource worker Betty Petek.¹⁸³ During these interviews, the Jacksons advised Petek that they could not provide for a child who had a mental disorder or who might be at risk for developing one.¹⁸⁴ The Jacksons also indicated that they did not want to adopt a child whose familial background included "heavy drug or alcohol use during pregnancy."¹⁸⁵ After completing the necessary pre-adoption home study, Petek submitted her recommendation that the Jacksons be approved for the adoption, noting that they were willing to consider adopting a child with a "minor correctable handicap."¹⁸⁶ In May 1984, the State followed Petek's recommendation and approved the Jacksons' request to become adoptive parents.¹⁸⁷ Soon thereafter,

Jackson] his rights to an adequate physical and emotional environment to promote natural development....

Brief for Appellant at 13, *Jackson v. Montana*, 956 P.2d 35 (Mont. 1998) (No. 96-688).

181. *Jackson*, 956 P.2d at 39.

182. *See id.*

183. *See id.*

184. *See id.* The court's opinion does not indicate what reasons the Jacksons may have given for their inability to adopt a mentally ill child. The court only emphasized that the Jacksons would have chosen not to adopt Aaron had they known of his family background. *See id.* at 52. However, the Jacksons' brief indicates that, because of personal experience, they were concerned "about the mental stability of the prospective adoptive child [and] the mental health of the child's biological family." Brief for Appellant, *supra* note 180, at 15.

185. Brief for Appellant, *supra* note 180, at 15.

186. *Jackson*, 956 P.2d at 39. The court did not indicate what the home study entailed.

187. *See id.* at 39-40. Neither the court nor the Jacksons' brief indicated any other reason for the State's approval of the Jacksons' adoption application. At this point, the Jacksons had only been approved to become adoptive parents. Aaron was not available for adoption until September 1984. *See id.* at 39.

206 GOLDEN GATE UNIVERSITY LAW REVIEW[Vol. 29:181

the Jacksons were advised that Aaron was available for adoption.¹⁸⁸

In January 1985, the Jacksons met with Petek and Wallace to discuss the adoption, Aaron's family background, and initiating visits with him.¹⁸⁹ At this meeting, the Jacksons explicitly asked Wallace and Petek whether Aaron's familial history indicated that he would be at risk of developing a mental illness.¹⁹⁰ The Jacksons also asked for information concerning possible familial drug or alcohol abuse.¹⁹¹ Despite their direct inquiries, Wallace and Petek told the Jacksons that Aaron was separated from his biological mother because she came from a "multi-generation welfare family" that was "socially inept" and could not care for him.¹⁹² The Jacksons were also told that Aaron was hospitalized for aspiration after being fed solid food and soda.¹⁹³ However, although Wallace and Petek were each aware of the social study and the psychological reports regarding Aaron's biological parents at the time of the meeting, neither of them disclosed the content or the existence of these evaluations when responding to the Jacksons' inquiry.¹⁹⁴ Wallace had some of the reports, including his own report to the court, in his possession at the time of the meeting.¹⁹⁵ When asked what the mother was like, Wallace and Petek told the Jacksons that she was physically healthy, that there was a possibility of minimal drug use before she was incarcerated, and that she did not meet Aaron's needs nor did she show an interest in learning the skills necessary to take care of him.¹⁹⁶

188. See *id.* at 39.

189. See *id.* at 40.

190. See *Jackson*, 956 P.2d at 40.

191. See Brief for Appellant, *supra* note 180, at 17.

192. *Id.*

193. See *id.* The Jacksons were also told that "although there may have been a possibility of some drug usage it was minimal since Debbie had been incarcerated for most of her pregnancy." *Id.*

194. See *Jackson*, 956 P.2d at 40. The court did not indicate why this information was withheld from the Jacksons.

195. See *id.* "The State itself has admitted that it did not provide the Jacksons with information regarding either the birth mother's or putative fathers' psychological or emotional functioning." Brief for Appellant, *supra* note 180, at 18.

196. See *Jackson*, 956 P.2d at 40. The court did not indicate what Aaron's needs were at this time. However, the inference was that Aaron's biological mother did not know how to care for any child, healthy or otherwise.

The district court finalized Aaron's adoption in January 1986.¹⁹⁷ At no time prior to the adoption did the State disclose the records to the Jacksons.¹⁹⁸

By December 1987, Aaron had already begun to exhibit behavioral problems.¹⁹⁹ The Jacksons admitted Aaron to the Child Study Center in Montana where he was evaluated by Dr. Paul R. Crellin.²⁰⁰ Dr. Crellin concluded that Aaron suffered from significant hyperactive attention deficit disorder, noting that it was impossible to attribute the disorder to either a genetic trait or to the substance abuse in which Aaron's biological mother engaged during her pregnancy.²⁰¹

After Dr. Crellin's evaluation, Aaron had a "continuing history of psychological and emotional problems."²⁰² Clinical psychologists who evaluated Aaron in the years following Dr. Crellin's report at the Child Study Center diagnosed Aaron with various psychological problems.²⁰³ Such diagnoses included attention deficit disorder with hyperactivity and without hyperactivity in 1989, psychotic disorder in 1991 after hospitalization in a youth psychiatric hospital, and pervasive developmental and learning disorders in 1994.²⁰⁴ Aaron was also

197. *See id.* The court noted that the Jacksons visited Aaron numerous times and, in March 1985, entered into an adoptive placement agreement with the State. However, the court did not indicate who was caring for Aaron at this time or what contact the Jacksons had with Aaron between the time they entered into the adoptive placement agreement in 1985 and the time the District Court finalized Aaron's adoption in 1986. *See id.*

198. *See id.*

199. *See id.*

200. *See Jackson*, 956 P.2d at 40. The court indicated that Dr. Crellin performed a pediatric neurological evaluation. *See id.*

201. *See id.*

202. *Id.* at 41.

203. *See id.*

204. *See Jackson*, 956 P.2d at 41.

Attention deficit hyperactivity disorder (ADHD) is a nervous disorder that usually affects children. The condition is characterized by very high levels of physical activity, consistently impulsive and immature behavior, and an extremely short attention span ... Although ADHD does no physical damage to the body, it can trigger long-lasting social, emotional, and educational problems ... [affected children] often appear to be immature, uncoordinated ... Some children may have attention deficit without hyperactivity. These children are more difficult to recognize ... however, emotional problems can still develop ... The cause of ADHD is not known, but several theories have been proposed ... The condition may be the result of a [nervous system

208 GOLDEN GATE UNIVERSITY LAW REVIEW[Vol. 29:181

rehospitalized at the psychiatric hospital twice in 1992 and, as of the time the court heard the case, had since been under the continuous care of a child psychiatrist and a clinical psychologist.²⁰⁵

In late 1992, the Jacksons asked the State for assistance subsidies to care for Aaron.²⁰⁶ They claimed that as a result of Aaron's severe psychological problems, they were "devastated financially and physically and emotionally exhausted."²⁰⁷ On behalf of the Jacksons, Petek requested that the State provide them maximum support.²⁰⁸ In her request, Petek wrote that "the current information available indicated that [Aaron is] suffering from conditions that are directly related to [his] biological family history. In researching the file, it appears that given the information then available it was, at best, naïve on our part in failing to assist these families."²⁰⁹ Subsequently, in 1995, a neuropsychological evaluation found that Aaron exhibited schizophrenic characteristics and that heredity was a significant factor in this diagnosis.²¹⁰

IV. PROCEDURAL HISTORY

In April 1994, the Jacksons filed a negligence action in the Thirteenth Judicial District Court against the State of Mon-

malfunction, damage to the fetus during pregnancy, complications in childbirth, or inheritance] ... ADHD appears to occur more commonly in children of mothers who drank excessively or used cocaine during pregnancy.

FAMILY MEDICAL HEALTH GUIDE, 513-514 (1996).

205. See *Jackson*, 956 P.2d at 41.

206. See Brief for Appellant, *supra* note 180, at 25.

207. *Id.* at 25.

208. See *id.*

209. *Id.*

210. Brief for Appellant, *supra* note 180, at 23. Dr. Joseph K. McElhinny, the neuropsychologist, also concluded that "long term, outside-the-home placement in a residential child care facility may have to be considered for Aaron in the future. He will remain a difficult child to care for. His management may become impossible as he becomes older and larger." *Id.* Aaron was also seen for a genetic consultation with Dr. John Johnson and Dr. Jeff Shaw at the Department of Medical Genetics. They concluded that "Aaron appears to have an organic psychiatric disorder, which will likely evolve into schizophrenia. His behavior patterns fit many diagnoses ... it is likely that he will have a life long disability related to his borderline psychosis and intellectual functioning and this may well become a more obvious problem as he gets older." *Id.* at 24.

tana, the Department of Family Services, and employees of the Department of Family Services.²¹¹ The Jacksons claimed that the State was in breach of contract²¹² and that it was liable for negligent misrepresentation, negligent disclosure, and negligent supervision for its misrepresentations and omissions regarding Aaron's familial background.²¹³

In August 1995, the State filed a motion for summary judgment, alleging that the Jacksons failed to demonstrate a genuine issue of material fact as to each count of their complaint.²¹⁴ In November 1995, the Jacksons amended their complaint, dropping the breach of contract claim²¹⁵ and adding another cause of action for "negligence based upon the doctrine of informed consent."²¹⁶ The Jacksons brought suit as individuals

211. *Jackson v. Montana*, 956 P.2d 35, 41 (Mont. 1998).

212. *See id.* A breach of contract is defined as "a failure to perform any promise which forms the whole or part of a contract." Marci J. Blank, *Adoption Nightmares Prompt Judicial Recognition of the Tort of Wrongful Adoption: Will New York Follow Suit?*, 15 CORDOZO L. REV. 1687, 1691, n.19 (1994). Here, neither the court nor the Jacksons' brief indicated what the breach of contract claim entailed or how the State allegedly breached a contract with the Jacksons.

213. *See Jackson*, 956 P.2d at 41. *See also* KEETON, *supra* note 27, § 33, at 205-207:

Liability in negligence sometimes rests upon some form of misrepresentation on the part of the defendant, by which the plaintiff, or some third person, has been misled to the plaintiff's damage ... In all cases of negligent misrepresentation, however, the circumstances must be such that the defendant is under a duty to the plaintiff to exercise reasonable care in giving the information, and that reliance upon what he says, with resulting danger, is reasonably to be expected.

Id.

In many situations, a failure to disclose the existence of a known danger may be the equivalent of misrepresentation, where it is to be expected that another will rely upon the appearance of safety ... the person who promises and then fails to pass on information important to another's welfare ... may be held liable to the person with whom he deals, or to others to whom harm is to be expected through that person's reliance.

Id., § 33, at 207-208. Here, the Jacksons alleged that the State was negligent in its disclosures and representations regarding Aaron's background and in its supervision over the adoption proceeding. *See Jackson*, 956 P.2d at 41. *See also* Brief for Appellant, *supra* note 180, at 2.

214. *See Jackson*, 956 P.2d at 41.

215. *See id.* In its Motion for Summary Judgment, the State requested a dismissal of the Jacksons' breach of contract claim "on the grounds that Montana law [did] not recognize a cause of action for breach of contract in the adoption context ... The Jacksons voluntarily conceded to" this motion. *See* Brief for Appellant, *supra* note 180, at 2-3.

216. *Jackson*, 956 P.2d at 41. The Jacksons alleged that as potential adoptive parents "they were not given full and accurate non-identifying information on [Aaron] as mandated by common law and statutory law, thus, denying them the opportunity to

210 GOLDEN GATE UNIVERSITY LAW REVIEW[Vol. 29:181

and as “parents and next of friends of Aaron Jon Jackson.”²¹⁷ The State renewed its motion for summary judgment in April 1996 and filed a supplemental motion for summary judgment, alleging that: (1) the Jacksons “failed to state a claim upon which relief can be granted on behalf of Aaron”; (2) the State did not have a duty to disclose all information regarding Aaron’s background; and (3) the failure to disclose the information did not cause the Jacksons’ injuries.²¹⁸

In November 1996, the district court granted the State’s motions for summary judgment on the grounds that the Jacksons proved neither that the State had a duty to disclose nor that, even if a duty existed, the State’s breach caused their injuries.²¹⁹ In granting summary judgment to the State, court concluded that the Jacksons did not prove that the State had a common law or statutory duty to fully disclose Aaron’s psychological and medical background to them, and thus was not liable for negligent nondisclosure.²²⁰ With regard to the Jacksons’ negligent misrepresentation claim, the district court held that the Jacksons could not meet their burden of proving that the State had a duty to disclose Aaron’s background to them.²²¹ The court reasoned that the Jacksons “failed to demonstrate the requisite element of foreseeability.”²²² The district court further reasoned that the Jacksons failed to show that the State “knew or should have known” that withholding Aaron’s psychological and medical background from the Jacksons would result in injury.²²³ Thus, the district court concluded the Jacksons did not fulfill their burden of establishing that the State

make an informed decision about the adoption.” Brief for Appellant, *supra* note 180, at 4.

217. *Jackson*, 956 P.2d at 41.

218. Brief for Appellant, *supra* note 180, at 4. The State also alleged that the Jacksons’ claims were barred by the three year statute of limitations imposed on tort claims. The district court entered an order determining that there existed “a genuine issue of material fact of when the Jacksons discovered or should have discovered the cause of the injury which they claim they suffered and whether the withholding of the information prevented them from discovering the cause of injury.” *Id.* at 4-5.

219. *See id.* at 5.

220. *See Jackson*, 956 P.2d. at 43.

221. *See id.* at 47.

222. *Id.*

223. *See id.*

had a duty to inform them of Aaron's familial or medical history.²²⁴

The Jacksons appealed this decision directly to the Montana Supreme Court.²²⁵ The Montana Supreme Court granted review to determine whether the district court erred in its conclusions that: (1) the State did not have a common law or statutory duty to disclose information regarding Aaron's background to the Jacksons; and (2) no genuine issue of material fact existed "regarding a causal connection between the State's allegedly negligent conduct and the Jacksons' injuries."²²⁶

V. THE SUPREME COURT'S ANALYSIS

On appeal, the Jacksons claimed that the district court erred in determining that the State did not have a common law or statutory duty to fully and accurately disclose all non-identifying background information about Aaron that would have assisted them in their decision to adopt him.²²⁷ The Jacksons also claimed that the district court erred in determining that they failed to establish that the State's alleged negligent breach was causally connected to Aaron's mental condition.²²⁸

The *Jackson* court began its analysis by questioning whether Montana should recognize a negligence-based cause of action for wrongful adoption.²²⁹ Following *Gibbs v. Ernst* and *Mallette v. Children's Friend and Service*, the court first required a determination as to whether traditional common law causes of action such as negligence should be applied to adoption cases.²³⁰ After finding that foreseeability requirements and public policy interests imposed a common law duty upon the State to refrain from negligently misrepresenting Aaron's background, the court turned to Montana's disclosure statutes

224. See *Jackson*, 956 P.2d at 47.

225. See *id.* at 41. In Montana, final judgments from the District Court are appealed to the Montana Supreme Court. See MONT. CODE ANN. § 26-20-72 (1997).

226. *Jackson*, 956 P.2d. at 38.

227. See Brief for Appellant, *supra* note 180, at 1.

228. See *id.*

229. *Jackson v. Montana*, 956 P.2d 35, 43 (Mont. 1998).

230. See *id.* at 42 (citing *Gibbs v. Ernst*, 647 A.2d 882, 886 (Pa. 1994)).

212 GOLDEN GATE UNIVERSITY LAW REVIEW[Vol. 29:181

to determine whether the State also had an independent statutory duty to disclose certain information to the Jacksons.²³¹ The court decided that Montana's disclosure statutes and the State's own policy manual together imposed a statutory duty upon the State to fully and accurately disclose any information that it had regarding Aaron's background.²³² Finally, the court discussed the causal connection between the State's alleged negligence and the injuries sustained by the Jacksons, holding that the State did not demonstrate a lack of causal connection.²³³

A. THE RECOGNITION OF NEGLIGENCE-BASED WRONGFUL ADOPTION

The primary issue addressed by the Montana Supreme Court in *Jackson* was whether Montana law should recognize wrongful adoption claims.²³⁴ The court reviewed the holdings of other state courts that found wrongful adoption claims to be mere extensions of common law actions of fraud and negligence.²³⁵ It then decided that determining whether Montana should recognize the tort of wrongful adoption rested on whether an adoption agency had a common law duty to refrain from negligent misrepresentation or a statutory duty to fully disclose a child's background to adoptive parents.²³⁶

Since the Jacksons' complaint was negligence-based, the court first addressed whether the State had a legal duty to the Jacksons.²³⁷ The State contended that it did not have a common law duty to refrain from misrepresenting Aaron's background because it did not mislead the Jacksons.²³⁸ The State further argued that imposition of any duty to disclose, whether

231. See *Jackson*, 956 P.2d at 49.

232. See *id.* at 50-51.

233. See *id.* at 51-53.

234. See *id.* at 42.

235. See *Jackson*, 956 P.2d at 42. See also discussion *supra* part II.

236. See *id.* at 42-43.

237. See *id.* In order to establish a negligence claim, a plaintiff must prove that a duty existed, the duty was breached, the breach caused injury, and the plaintiff sustained damages. See *id.*

238. See *id.* at 43.

common law or statutory, would conflict with Montana's statutory duty to keep the biological parents' medical records confidential.²³⁹ As a result, the Montana Supreme Court discussed an adoption agency's duty to disclose under common law and statutory law separately.²⁴⁰ The court began its analysis by inquiring whether the State, having in its possession information regarding Aaron's medical and familial background, had a common law duty to avoid negligently misrepresenting Aaron's background to the Jacksons during the adoption process.²⁴¹ The court then addressed whether Montana's disclosure statutes mandated that the State fully and accurately disclose to the Jacksons all it knew of Aaron's background.²⁴²

1. *Common Law Duty To Refrain From Negligent Misrepresentation*

In determining whether the State had a common law duty to refrain from negligently misrepresenting Aaron's background to the Jacksons, the court noted that Montana had "long recognized the common law tort of negligent misrepresentation."²⁴³ To prevail on a negligent misrepresentation claim, the Jacksons were not required to show fraud or intent to misrepresent on the part of the State.²⁴⁴ Instead, the Jacksons only had to show that the State failed to use reasonable care in its representations regarding Aaron's background.²⁴⁵ The court emphasized that a duty to use reasonable care was a required element in all actions for negligent misrepresentation.²⁴⁶ The existence of this duty was based on both the foreseeability that Aaron would develop emotional or psychological problems and the underlying policy concerns regarding the State's liability.²⁴⁷

239. *See Jackson*, 956 P.2d at 43.

240. *See* discussion *infra* part V.B for the court's analysis regarding an adoption agency's common law duty to refrain from negligent misrepresentation. *See* discussion *infra* part V.C for the court's analysis regarding an adoption agency's statutory duty to disclose.

241. *See Jackson*, 956 P.2d at 42.

242. *See id.* at 51.

243. *Id.* at 43.

244. *See id.*

245. *See Jackson*, 956 P.2d at 43.

246. *See id.*

247. *See id.* at 44-48.

214 GOLDEN GATE UNIVERSITY LAW REVIEW[Vol. 29:181

Accordingly, the court examined each of these factors separately.

a. Foreseeability

In determining whether the State could have foreseen that Aaron would eventually develop emotional and psychological problems, the court relied on the holding in *Gibbs* that an adoption agency could only be liable for conditions that the agency could have reasonably predicted at the time of adoption.²⁴⁸ In accordance with *Gibbs*, the Montana Supreme Court held that the State could only be found to have a duty of due care to the Jacksons if it was reasonably foreseeable that Aaron was at risk of developing mental health problems based on his familial history.²⁴⁹ However, the court made it clear that the Jacksons only had to show that it was reasonably foreseeable that a genetic link existed between Aaron's health problems and those of his biological parents.²⁵⁰ They did not have to prove the presence of a genetic link with "absolute scientific and medical certainty."²⁵¹ The court noted that the State's own witness, Dr. John Talbot Blodgett, testified in a deposition that there was enough medical knowledge in the early 1980s to understand the biological risks to Aaron.²⁵² The court held that, based on what the State knew about Aaron's background at the time of the adoption, it could have reasonably foreseen that Aaron might eventually develop psychological and emotional problems.²⁵³

b. Public Policy

The court next addressed whether public policy required that a duty be imposed upon the State to refrain from negli-

248. See *id.* at 47 (citing *Gibbs v. Ernst*, 647 A.2d 882 (Pa. 1994)).

249. See *Jackson*, 956 P.2d at 48.

250. See *id.*

251. *Id.*

252. See *id.* Dr. Blodgett testified that "given the diagnoses of the mother and the putative father ... that even by 1980, '82, '83 standards, that there was enough known of familial patterns that we understood that there were significant biological risks to people who were first degree relatives to people with those diagnoses." *Id.*

253. See *Jackson*, 956 P.2d at 48.

gently misrepresenting Aaron's background to the Jacksons.²⁵⁴ The Montana courts had not yet considered the public policy considerations regarding the State's duty to use due care in adoption disclosures.²⁵⁵ In addressing the issue, the court relied on *Gibbs* and *Mallette*, both of which recognized negligent misrepresentation claims in adoption situations.²⁵⁶ These jurisdictions found that the adoption agency had a duty to use due care in disclosing a child's medical and familial history to potential adoptive parents.²⁵⁷ The Montana Supreme Court noted that, in recognizing that such a duty exists, the decisions of other jurisdictions rested heavily on whether the adoption agency had voluntarily begun to disclose information regarding the child's health to the potential adoptive parents.²⁵⁸ Once the adoption agency began to disclose, it then had a duty to use due care so as not to misrepresent facts regarding the child's background.²⁵⁹ The Montana Supreme Court also recognized that virtually all of the courts that addressed wrongful adoption discussed whether the adoption agency's duty to use due care existed under common law.²⁶⁰ To do this, other jurisdictions balanced various conflicting policy concerns.²⁶¹

The Montana Supreme Court followed the reasoning in *Gibbs*, highlighting the Pennsylvania Supreme Court's considerations regarding public policy.²⁶² The court concluded that the imposition of a duty to use due care in disclosing a child's background would ensure that adoptive parents are financially and emotionally able to raise the child, thereby preventing failed adoptions resulting from placement of special needs chil-

254. *See id.* at 44.

255. *See id.*

256. *See id.* *See also* *Mallette v. Children's Friend and Serv.*, 661 A.2d 67 (R.I. 1992); *Gibbs v. Ernst*, 647 A.2d 882 (Pa. 1994).

257. *See Jackson*, 956 P.2d at 44.

258. *See id.*

259. *See id.*

260. *See id.*

261. *See Jackson*, 956 P.2d at 44.

262. *See id.* at 44-45. The court analyzed the facts and rationale of the Supreme Court of Pennsylvania in *Gibbs v. Ernst*, 647 A.2d 882 (Pa. 1994). *See also* discussion *supra* Part III.

216 GOLDEN GATE UNIVERSITY LAW REVIEW[Vol. 29:181

dren with families unable to cope with them.²⁶³ The court further relied on *Mallette*, reasoning that an adoption agency must only refrain from volunteering any representations at all to avoid liability or, at the very least, to make representations non-negligently.²⁶⁴

In the instant case, the State conceded that the Jacksons were warned of possible drug or alcohol use by Aaron's biological mother at the onset of her pregnancy, that she was unable to care for him, and that she had caused him to be hospitalized for aspiration when he was an infant.²⁶⁵ The Jacksons were further told that Aaron's biological mother was from a welfare family, but that she was physically healthy.²⁶⁶ Joining the majority of courts that considered the issue of negligent misrepresentation in wrongful adoption cases at the time of its decision,²⁶⁷ the Montana Supreme Court concluded that recognizing a cause of action for negligent misrepresentation would promote the desirable public policy of allowing adoptive parents to be fully aware of the potential future needs of the child.²⁶⁸ Agreeing with the conclusions of other courts that the determination hinged on the adoption agency's voluntary offering of information,²⁶⁹ the court further concluded that once the State began volunteering information to the Jacksons, it "assumed a

263. See *Jackson*, 956 P.2d at 45 (citing *Gibbs*, 647 A.2d at 887). The court did not go into any more detail regarding this issue. However, the portion of *Gibbs* that the court cites stated that "ignorance of medical or psychological history can prevent the adopting parents and their doctors from providing effective treatment, or any treatment at all." *Gibbs*, 647 A.2d at 886-887.

264. See *Jackson*, 956 P.2d at 45-46. Here, the court analyzed the facts and decision of *Mallette v. Children's Friend & Serv.*, 661 A.2d 67 (R.I. 1995).

265. See *Jackson*, 956 P.2d at 46.

266. See *id.*

267. See discussion *supra* Part II.

268. See *Jackson*, 956 P.2d at 46.

269. See *id.* The court wrote:

This court has similarly recognized the fundamental principle that, where a person undertakes to do an act or discharge a duty by which the conduct of another may be properly regulated and governed, he is bound to perform it in such a manner that those who are rightfully led to a course of conduct or action on the faith that the act or duty will be duly and properly performed shall not suffer loss or injury by reason of negligent failure so to perform it.

Id. (quoting *Stewart v. Standard Publ'g Co.*, 55 P.2d 694, 696 (Mont. 1936)).

duty to do so with due care.”²⁷⁰ Although the court recognized that its decision placed a higher burden on the State, it felt that this burden was justified by the need for adoptive parents like the Jacksons to receive as much information regarding a child’s medical and familial history as the adoption agency has available.²⁷¹ The court noted that as a result of holding adoption agencies to a higher standard of care, public trust in State agencies and public confidence in the adoption process would inevitably increase.²⁷² The court concluded that “public policy considerations justify the imposition of a duty upon the State in the present case.”²⁷³

Consequently, the court held that once the State began volunteering information regarding Aaron’s medical and familial history, it assumed a duty to use due care in its representations to the Jacksons.²⁷⁴ Thus, the State had a duty to abstain from negligently misrepresenting Aaron’s background.²⁷⁵ Further, the court found that whether or not the State breached that duty by negligently misrepresenting Aaron’s background was a genuine issue of material fact and, as such, reversed the district court’s grant of the State’s motion for summary judgment.²⁷⁶ Accordingly, the court recognized the common law cause of action of negligent misrepresentation as a viable claim in a wrongful adoption case.²⁷⁷

2. *The Statutory Duty To Refrain From Negligent Non-Disclosure*

After finding that an adoption agency had a common law duty to refrain from negligent misrepresentation, the court next addressed whether the State had a statutory duty to fully

270. *Id.* at 46. “... to require anything less from the State than the exercise of due care in the dissemination of information in its possession to prospective adoptive parents would be simply unacceptable.” *Id.*

271. *See id.* at 47.

272. *See Jackson*, 956 P.2d at 47.

273. *Id.*

274. *See id.* at 48-49.

275. *See id.* at 49.

276. *See Jackson*, 956 P.2d at 49.

277. *See id.*

218 GOLDEN GATE UNIVERSITY LAW REVIEW[Vol. 29:181

disclose Aaron's medical and familial history to the Jacksons.²⁷⁸ The Jacksons claimed that such a duty existed pursuant to the Uniform Adoption Act of Montana, which required the State to disclose "all available non-identifying information" regarding a child's familial background.²⁷⁹ The State, on the other hand, argued that it fulfilled its limited duty of disclosure under Montana Code Annotated (MCA) section 40-8-122(1)(c), which did not mandate that any parental history be disclosed to adoptive parents, but merely required that the medical and social history of the child be provided.²⁸⁰ The State contended that since Montana statutory law prevented it from disclosing psychological reports of Aaron's biological parents, it satisfied its statutory duty when it disclosed general information about Aaron's background to the Jacksons.²⁸¹

The court conceded that MCA section 40-8-122(1) did not specifically set out criteria regarding what information an adoption agency had to include in the medical and social histories it provided to potential parents.²⁸² However, the court rejected the State's argument, finding that the State's own policies and procedures manual filled in the gap.²⁸³ The manual

278. *See id.*

279. *Id.* The court did not explain which provision of the Uniform Adoption Act of Montana the Jacksons claimed to be applicable, nor did it go into further detail about the Act.

280. *See Jackson*, 956 P.2d at 49. Section 40-8-122 of the Montana Code provided that:

(1) Upon the filing of a petition for adoption the court shall order an investigation to be made by the [State] or by a licensed child-placing agency or other person named by the court ... The report of investigation shall be filed with the court by the investigator at the time the petition is filed or within 30 days from the issuance of the order for investigation, unless the time therefor is extended by the court. The report of the investigation shall state: ... (c) that medical and social histories have been provided to the adoptive parent.

Id. In 1997, the adoption statutes applicable at the time *Jackson* was decided were repealed and replaced by the Montana Adoption Act. *See* MONT. CODE ANN. § 42-1-101 - 42-1-111 (1997).

281. *See Jackson*, 956 P.2d at 49.

282. *See id.* at 50.

283. *See id.*

The Department of Social and Rehabilitation Services Policies and Procedures Manual § CSD-SS 602-1 specifically provide[d] that: Preparation for adoptive placement is a team process involving the child with his social worker, foster parents, birth parents, adoptive parents, and resource worker. The child's social worker is the primary person in the process ... The child and his adoptive family need to have all available information on the child and his

specifically acknowledged the need for adoptive families to have any information available to the adoption agency regarding a child and his biological background.²⁸⁴ Further, MCA section 40-8-122(1)(c) mandated that adoption agencies provide adoptive parents with the child's "medical and social histories."²⁸⁵ The court found that, together, these two provisions created a statutory duty upon the State to "fully and accurately disclose all relevant information, including psychological reports, regarding an adoptee and his or her [biological] family."²⁸⁶

The State further argued that the version of MCA section 41-3-205 in effect at the time of Aaron's adoption precluded it from disclosing information regarding child protection services files without a court order authorizing it.²⁸⁷ The court found this argument lacked merit.²⁸⁸ Instead, the court concluded that two options were available to the State.²⁸⁹ First, the State could have tried to obtain a court order, thus allowing it to comply with MCA section 41-3-205, as well as its own policies.²⁹⁰ Doing so would have allowed the State to disclose information contained in Aaron's child protection services files, which included his biological mother's psychological evaluations, to the Jacksons.²⁹¹ Alternatively, if the State had been denied an order, it could have informed the Jacksons that due to their concerns regarding Aaron's medical background they

birth family. This information shall include: (1) Background information on biological parents ...; (2) Daily schedules ...; (3) Child's Social Study with identifying information removed; (4) Current child's medical record ...; (5) Life story book; (6) Psychological evaluation; (7) School records; and (8) Social Security number.

Id.

284. *See Jackson*, 956 P.2d at 50 (quoting The Department of Social and Rehabilitation Services Policies and Procedures Manual § CSD-SS 602-1).

285. *Jackson*, 956 P.2d at 50. This version of section 40-8-122(1)(c) of the Montana Code was in effect at the time of Aaron's adoption. *See supra* note 280.

286. *Id.*

287. *See id.* (citing MONT. CODE ANN. § 41-3-205 (1985)). This section of the Montana code was also repealed and replaced by the Montana Adoption Act. *See supra* note 280.

288. *See id.*

289. *See Jackson*, 956 P.2d at 50.

290. *See id.*

291. *See id.*

220 GOLDEN GATE UNIVERSITY LAW REVIEW[Vol. 29:181

might want to consider adopting another child.²⁹² Had the State engaged in such a procedure, it would have maintained confidentiality while at the same time notifying the Jacksons that Aaron's medical and familial background increased his risk of developing psychological problems.²⁹³ The court thus concluded that the State had a statutorily imposed duty to disclose to the Jacksons all relevant factors regarding Aaron's history.²⁹⁴ Since the allegation that the State breached a duty to the Jacksons constituted an issue of material fact, the court reversed the district court's grant of the State's motion for summary judgment.²⁹⁵

B. CAUSATION

After finding that the State had a common law duty to refrain from negligent misrepresentation and a statutory duty to "fully and accurately disclose" information regarding Aaron's background, the court next addressed the issue of causation.²⁹⁶ The district court held that the Jacksons did not establish that "the State's conduct helped 'produce the injury complained of' because [they] failed to adequately demonstrate that 'the information allegedly withheld by the [State] relative to the child and his heredity [was] causally connected to the child's current medical condition.'"²⁹⁷ Specifically, the Supreme Court questioned whether the district court erred in concluding that the Jacksons failed to prove that the State's conduct in withholding

292. *See id.*

293. *See Jackson*, 956 P.2d at 50.

294. *See id.* at 51.

295. *See id.* Before turning to causation, the court briefly discussed rules concerning motions for summary judgment. *See id.* The court noted that since the State was the party moving for summary judgment, it had the initial burden of proving that the Jacksons had not demonstrated that a genuine issue of material fact existed. *See id.* Only after the State satisfied its burden would the burden shift to the Jacksons to show that "by more than mere denial and speculation" a genuine issue of material fact did exist. *Id.*

296. *Id.* In order for a plaintiff to recover for the negligence of another party, the plaintiff must not only demonstrate that the defendant breached a duty to the plaintiff, but also that there exists "some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered." KEETON, *supra* note 27, § 41, at 263.

297. *Jackson*, 956 P.2d at 51.

or misrepresenting information contributed to the Jacksons' injuries.²⁹⁸

The State argued that in order to prove causation, the Jacksons had to prove that the information allegedly withheld "relative to [Aaron] and his heredity" helped produce Aaron's condition.²⁹⁹ The Jacksons, on the other hand, contended that they only needed to satisfy the traditional "but for" test.³⁰⁰ This test required the Jacksons to establish that, but for the State's misrepresentation of Aaron's psychological and familial background, "the Jacksons would not have adopted Aaron and, consequently, would have suffered no injuries."³⁰¹ Based on Montana case law, the court agreed with the Jacksons' contention that in order to prove causation, they only had to satisfy the "but for" test by establishing that the State's conduct helped produce their injuries and that they would not have suffered injuries at all but for that conduct.³⁰²

In order to complete its causation analysis, the court next identified the Jacksons' injuries.³⁰³ In their amended complaint, the Jacksons sought compensatory damages for the severe emotional and financial injuries they suffered as a result

298. *See id.*

299. *Id.*

300. *See id.* The "but for" test is used to determine tort liability by ascertaining whether "the event would not have occurred but for [the defendant's] conduct; conversely, the defendant's conduct is not the cause of the event, if the event would have occurred without it." KEETON, *supra* note 27, § 41, at 266.

301. *Jackson*, 956 P.2d at 51.

302. *See id.* at 52. The court discussed its decision in *Busta v. Columbus Hospital Corp.*, 916 P.2d 122, 139 (Mont. 1996), in which it decided that it would "no longer consider foreseeability as an element of causation." *Busta*, 916 P.2d at 139. Instead, the court in *Busta* held that "in those cases which do not involve issues of intervening cause, proof of causation is satisfied by proof that a party's conduct was a cause-in-fact of the damage alleged." *Id.* As stated in KEETON, *supra* note 27, § 41, at 266, a party's conduct "is a cause-in-fact of an event if the event would not have occurred but for that conduct; conversely, the defendant's conduct is not a cause of the event, if the event would have occurred without it." *Id.* The court went on to note that in *Busta*, the court decided that "the appropriate causation instruction is as follows: 'The defendant's conduct is a cause of injury if it helped produce it and if the injury would not have occurred without it.'" *Jackson*, 956 P.2d at 51-52 (quoting *Busta*, 916 P.2d at 139).

303. *See Jackson*, 956 P.2d at 52.

222 GOLDEN GATE UNIVERSITY LAW REVIEW[Vol. 29:181

of the adoption.³⁰⁴ In its decision, the district court defined the Jacksons' injuries solely as "the emotional distress and financial responsibility for medical attention."³⁰⁵ However, the Supreme Court found this description inaccurate, explaining that the district court's interpretation of injuries was not what the Jacksons claimed.³⁰⁶ Rather, the Jacksons' general claim was that, as a consequence of the adoption, they suffered emotional and financial damages.³⁰⁷ These damages, they argued, were due to the State's misrepresentation and withholding of information regarding Aaron's background.³⁰⁸ As a result of the State's negligent conduct, the State prevented the Jacksons from making an informed decision, thereby causing them to adopt a child that they would not have otherwise adopted.³⁰⁹

In response, the State argued that whether or not the Jacksons would have continued with the adoption had they known of Aaron's background was not the issue.³¹⁰ However, the court disagreed, noting that decisions from several other jurisdictions, including the courts in *Burr* and *Mallette*, also considered whether the adoptive parents would have adopted the child despite the adoption agency's misrepresentations.³¹¹ If proven, the court concluded that any emotional or financial hardships the Jacksons suffered necessarily resulted from the State's negligence.³¹²

Having concluded that the element of causation rested on whether the Jacksons would not have adopted Aaron but for the State's misrepresentations and withholding of information, the court acknowledged that the State would not be held liable

304. See Plaintiffs' First Amended Complaint to the District Court at 7-8, *Jackson v. Montana*, (No. DV 94-372 (1995)).

305. *Jackson*, 956 P.2d at 52.

306. See *id.*

307. See *id.* The court did not specify what the emotional and financial damages were.

308. See *id.*

309. See *Jackson*, 956 P.2d at 52.

310. See *id.*

311. See *id.* at 52-53. The court acknowledged that many of the courts in jurisdictions that addressed wrongful adoption did not discuss the issue of causation. See *id.*

312. See *Jackson*, 956 P.2d at 53.

for future medical conditions that it in no way could predict.³¹³ It further cautioned against holding any adoption agency responsible for guaranteeing a child's future health.³¹⁴ The court noted that the foreseeability requirement demanded by an adoption agency's common law and statutory duties precluded imposition of such liability.³¹⁵ Thus, the court held that the district court relied on an incorrect causation standard, having focused on foreseeability.³¹⁶ As a result, the court concluded there remained an issue of material fact as to whether the Jacksons would have adopted Aaron had the State refrained from allegedly withholding or misrepresenting Aaron's background.³¹⁷

C. THE COURT'S CONCLUSION

The Montana Supreme Court joined the majority of jurisdictions in recognizing the negligence-based tort of wrongful adoption, finding that both common law and Montana statutory law imposed duties upon the State.³¹⁸ First, the court held that foreseeability and public policy requirements imposed a common law duty upon the State to refrain from negligently misrepresenting Aaron's background to the Jacksons.³¹⁹ Based on what the State knew about Aaron's background, it could have reasonably foreseen that Aaron would eventually develop emotional and psychological problems.³²⁰ Further, public policy required that once the State began to divulge information to the Jacksons, it assumed a duty to use due care in its representations.³²¹ Second, the court found that Montana's disclosure

313. *See id.* at 52. The court used the development of diabetes as an example of a future medical condition that an adoption agency could not predict. *See id.*

314. *See id.*

315. *See id.* *See discussion supra* V.B.1.

316. *See Jackson*, 956 P.2d at 53.

317. *See id.* The court did not address the issue of proximate cause. The court probably did not address the issue because foreseeability, which is often used to determine proximate cause, is no longer recognized as an element of causation in Montana. *See Busta v. Columbus Hosp. Corp.*, 916 P.2d 122 (Mont. 1996). *See also KEETON, supra* note 27, § 42, at 273-274.

318. *Jackson*, 956 P.2d at 48-49, 51.

319. *See id.* at 47-48.

320. *See id.* at 48.

321. *See id.* at 47.

224 GOLDEN GATE UNIVERSITY LAW REVIEW[Vol. 29:181

statute, in conjunction with the State's adoption policy manual, imposed a duty to fully and adequately disclose what it knew regarding Aaron's background to the Jacksons.³²² Finally, the court held that the Jacksons could prove that the State's alleged withholding of information and misrepresentations were causally connected to their emotional and financial injuries by demonstrating that they would have elected not to adopt Aaron had the State adequately disclosed his biological history to them.³²³ Thus, the Montana Supreme Court reversed the district court's decision, finding that the Jacksons established a viable cause of action for negligence-based wrongful adoption, and remanded the case for further proceedings.³²⁴

IV. CRITIQUE: MONTANA CORRECTLY RECOGNIZED NEGLIGENCE-BASED WRONGFUL ADOPTION BUT DID NOT EXPAND AN ADOPTION AGENCY'S LIABILITY FAR ENOUGH

Although all states have enacted disclosure statutes, most only require minimum disclosure by adoption agencies.³²⁵ Montana's disclosure statute is no exception. Although the Montana Supreme Court concluded that the State had a duty to refrain from negligent misrepresentations in the adoption context, it did nothing more than leave minimum disclosure re-

322. See *Jackson*, 956 P.2d at 51.

323. See *id.* at 53.

324. See *id.* at 53. (Trieweiler, J., concurring). Justice Trieweiler agreed with the result, but disagreed with the court's analysis. He concluded that once the court determined that the State had a statutory duty to disclose Aaron's background, it was unnecessary to decide whether such a duty existed at common law. Such a determination would encourage trial courts to analyze on a case by case basis whether a causal connection exists between the information an agency withheld and the illnesses that a child develops "when, in fact, such an analysis is irrelevant to the establishment of a duty imposed by statute in Montana." *Id.* at 53-54. Justice Trieweiler also stated:

We have previously held that statutes establish a duty. It is assumed that when the Legislature enacts statutes, or administrative agencies enact rules, they do so because of the foreseeability of harm if the statute or rule is not followed. It is also assumed that statutes, and administrative rules which are consistent with those statutes, are a reflection of public policy in Montana.

Id.

325. For example, California's disclosure statute requires only that an adoption agency "effectuate the effective and discrete transmission to adoptees or prospective adoptive parents of pertinent medical information" CAL. FAM. CODE § 8608 (West 1984).

quirements intact. As the court noted, the disclosure statute in effect at the time it decided *Jackson* required an adoption agency to investigate and provide adoptive parents with a child's medical and social histories.³²⁶ However, the State pointed out that Montana's disclosure statute did not specify what information or documents an adoption agency was required to include in the medical and social histories that it was to provide.³²⁷ Further, Montana's disclosure statute did not require an adoption agency to disclose a child's familial psychological background.³²⁸

In analyzing an adoption agency's duty to disclose under Montana statutory law, the court did not go far enough. Instead of taking advantage of the opportunity to interpret Montana's disclosure statute broadly, the court chose to rely on the State's policy manual in conjunction with the plain language of the statute.³²⁹ The plain language of the statute alone, mandating that adoption agencies provide adoptive parents with a child's medical and social histories,³³⁰ provided the court with ample opportunity to broadly expand statutory adoption agency liability.

326. The disclosure statute in effect at the time *Jackson v. Montana* was decided read:

(1) Upon the filing of a petition for adoption the court shall order an investigation to be made by the [State] or by a licensed child-placing agency or other person named by the court ... The report of investigation shall be filed with the court by the investigator at the time the petition is filed or within 30 days from the issuance of the order for investigation, unless the time therefor is extended by the court. The report of the investigation shall state: ... (c) that medical and social histories have been provided to the adoptive parent ...

See *Jackson v. Montana*, 956 P.2d 35, 49 (Mont. 1998). Montana's current disclosure statute reads: (1) "the [agency] shall provide a prospective adoptive parent with social and medical histories of the birth families; (2) in direct parental placement adoption, the birth family social and medical histories must be completed on a form" MONT. CODE ANN. § 42-3-101 (1997).

327. See *Jackson*, 956 P.2d at 49.

328. See *id.*

329. See *id.* at 50.

330. See *id.*

226 GOLDEN GATE UNIVERSITY LAW REVIEW[Vol. 29:181

A. INTERPRETING DISCLOSURE STATUTES TO REQUIRE DISCLOSURE OF ALL AVAILABLE INFORMATION

The Montana Supreme Court should have interpreted the disclosure statute broadly by increasing disclosure requirements, demanding nothing less than disclosure of all available information concerning the child's background. Extensive disclosure is necessary to allow adoptive parents to consider all factors before making a life-long commitment to care for a child.³³¹ Such disclosures should include specific and detailed information regarding the physical and mental health history of the child and his extended biological family.³³² Since many illnesses skip generations or lie dormant, specific disclosures would educate adoptive parents about the potential needs of their child, allowing them to better prepare for the child's future.³³³ Additionally, such disclosures would ensure that a child, when grown, would know his biological history.³³⁴ Even though non-adoptive birth parents do not receive a disclosure statement in the delivery room, most know, or at least have the opportunity to find out, the physical and mental histories of their extended families. Adoptive parents should be afforded the same opportunity.

B. EXPANDING ADOPTION AGENCY LIABILITY TO INCLUDE A DUTY TO INVESTIGATE AND A DUTY TO WARN

Although Montana's disclosure statute required adoption agencies to perform an investigation regarding a child's medical and social histories, the Montana Supreme Court did not define what that investigation should entail or what informa-

331. See James, *supra* note 11, at 744 (recommending that state legislatures create broader disclosure statutes).

332. See *id.* at 724 (recommending mandatory background reports).

333. See Dickson, *supra* note 22, at 945. For example, a child born to an HIV-positive mother may test positive for HIV antibodies for up to 15 months after birth regardless of whether he actually carries the virus. On the other hand, children who test negative for HIV may simply be in the early stages of the virus' development. Further, Fetal Alcohol Syndrome may or may not manifest in children born to alcoholic mothers. See *id.* at 963 n.246.

334. This author concedes that some tests may not accurately predict an illness nor can it be guaranteed that a child will develop an illness at all. See James, *supra* note 11, at 723.

tion it should produce. The increasing number of wrongful adoption claims in recent years suggests that state disclosure statutes alone are inadequately protecting adoptive parents and their children.³³⁵ As part of the adoption process, adoption agencies should be required to make reasonable investigations into the backgrounds of all children put up for adoption and should have a mandatory duty to warn prospective parents of the risks inherent in adopting a special needs child.

1. *Duty to Investigate*

The Montana Supreme Court should have imposed upon adoption agencies a specific duty to conduct a reasonable investigation of a child's background. Admittedly, the determination of what and how much investigation constitutes a reasonable investigation under the circumstances can ultimately result in subjective analyses by state courts since there is no bright line rule.³³⁶ However, courts have often been faced with standards that lack a bright line rule, as is the case with any negligence standard.³³⁷ Despite the absence of a bright line rule, courts can decide which factors should be considered when determining if the adoption agency's investigation was reasonable.³³⁸ Such factors should include, but of course are not limited to, practicality of birth parent interviews, release of records concerning previous state intervention, and opportunities for doctor's examinations, medical tests, and psychological evaluations.³³⁹

The Montana Supreme Court was not the first court to avoid the issue of an adoption agency's duty to investigate. To date, all state courts that have addressed wrongful adoption

335. A Berkeley Study indicated that, as of 1991, one-half of the parents who adopted sexually abused children, one-third of the parents who adopted physically abused children, and one-third of the parents who adopted children with learning disabilities were not informed of their child's condition by the adoption agency at the time of the adoption. See Dickson, *supra* note 22, at 946.

336. See *When Love Is Not Enough*, *supra* note 18, at 1773.

337. See *id.* (acknowledging that adoption investigations of abandoned children will ultimately produce less, if any, information than will an investigation of a child whose custody has been awarded to the state years before his adoption).

338. See *id.*

339. See *id.* at 1773-1774.

228 GOLDEN GATE UNIVERSITY LAW REVIEW[Vol. 29:181

have been reluctant to impose a duty to investigate upon adoption agencies.³⁴⁰ The court in *Gibbs* explicitly declined to impose such a duty, choosing instead to rely on the Pennsylvania statute's implication that a good faith effort to obtain a child's medical record was sufficient.³⁴¹ The *Gibbs* court suggested that a duty to investigate would impose an undue burden on adoption agencies, strain resources, and reduce the number of successful adoptions.³⁴²

Imposition of a duty to perform a reasonable investigation in good faith, however, would not unduly burden adoption agencies. First, the increased burden imposed upon adoption agencies is outweighed by the burden that adoptive parents unknowingly assume when they adopt a special needs child.³⁴³ Second, although adoption agencies will have a duty to investigate, such a duty would not require any more than a reasonable inquiry into the child's background.³⁴⁴ For example, a reasonable investigation might include the child's genetic background as well as doctor evaluations based on a standard physical and psychological examinations.³⁴⁵ Accordingly, adoption agencies could protect their interests while at the same time providing complete and accurate information to adoptive parents by issuing a disclaimer of any information that was not included in the investigation or any tests that were not performed.³⁴⁶ As a result, adoptive parents would be able to make an informed decision regarding the adoption and might be more likely to adopt knowing that they are educated about the financial and emotional risks involved in adopting the child.³⁴⁷

340. See Robert J. Baker, *Gibbs v. Ernst: Pennsylvania Recognizes Negligent Nondisclosure In Wrongful Adoption Cases*, 31 TORT & INS. L. J. 103, 109 (1995).

341. See *Gibbs v. Ernst*, 647 A.2d 882, 894 (Pa. 1994).

342. See *id.*

343. See Kelly Bennison, *No Deposit No Return: The Adoption Dilemma*, 16 NOVA L. REV. 909, 923 (1992) (noting that "the denial of the opportunity to make an informed decision is the essence of the tort of wrongful adoption").

344. See Dickson, *supra* note 18, at 964.

345. See *id.*

346. See *id.*

347. See *id.* Dickson writes:

This system would give adopters the means to weigh the risks in the same manner as biological parents yet would insulate agencies from liability except where they had failed to carry out their responsibilities or purposely misled

In addition, a duty to investigate a child's background would not burden adoption agencies any more than the thorough investigations of potential adoptive parents that adoption agencies already undertake.³⁴⁸ Often, adoption agencies develop methods to screen potential adoptive parents.³⁴⁹ These methods include psychological and social criteria that significantly limit the type of people that can successfully apply for adoption.³⁵⁰ If adoption agencies are already engaging in such thorough investigations to select potential adoptive parents, they can clearly perform similar investigations to ensure that the people who survive the strict acceptance process are adequately able and prepared to care for a special needs child.³⁵¹ Although such investigations can be expensive, many states require that expenses, even those incurred while investigating the adoptive parents, are paid by the adoptive parents themselves.³⁵² Thus, a reasonable investigation into a child's background would cost the adoption agency little, if anything at all.³⁵³

2. *Duty to Warn*

Although the Montana Supreme Court did not address whether an adoption agency has a duty to warn adoptive parents of a child's background, state courts should impose such a duty. Had the Jacksons been warned of Aaron's risk of developing a mental illness, they might have chosen not to adopt a special needs child, thereby avoiding severe financial and emotional damages.³⁵⁴ As with the duty to investigate, courts have

adopters. Such policies would not make agencies guarantors of a child's future good health; rather, they would encourage candid disclosure and adequate assessments of children.

Id.

348. See Dickson, *supra* note 18, at 954 (noting that such tests include "evaluations of their ability to parent, personality tests, a required medical examination, a criminal records check, and fingerprinting").

349. See *id.* (citing Katz, *Community Decision-Makers and the Promotion of Values in the Adoption of Children*, 4 J. FAM. L. 7, 21-22 (1964)).

350. See Dickson, *supra* note 18, at 954.

351. See *id.*

352. See ARIZ. REV. STAT. § 8-129(c), which states that "the actual and reasonable cost of providing information pursuant to this section shall be paid by the person requesting the information."

353. See Dickson, *supra* note 18, at 955.

354. See *Jackson*, 956 P.2d at 35.

230 GOLDEN GATE UNIVERSITY LAW REVIEW[Vol. 29:181

been reluctant to hold adoption agencies liable for failing to warn adoptive parents of future potential health problems of their children.³⁵⁵ However, imposition of a duty to accurately relay information is not a new concept in tort law and is required in many situations.³⁵⁶

For example, courts have repeatedly held that physicians have a duty to warn patients if they learn of dangerous side effects after prescribing medication.³⁵⁷ Courts have similarly held that psychotherapists have a duty to warn third parties if a patient threatens to kill a specific person.³⁵⁸ In a remarkable decision in New Jersey, an appellate court held that a physician had a duty to warn his patient's daughter that she had an increased risk of developing cancer, concluding that "a duty to warn of avertible risk from genetic causes, by definition a matter of familial concern, is sufficiently narrow to serve the interests of justice."³⁵⁹ The court went on to say that the duty to warn is not only owed to the patient, but also to any of the patient's immediate family members who might suffer as a result of a physician's breach.³⁶⁰ Likewise, in the adoption context, the duty to warn should not only be owed to the child to ensure his adequate care, but also to the adoptive parents who will inevitably suffer as a result of the adoption agency's failure to warn.

355. See 2 AM. JUR. 2d *Adoption* § 163 (1994).

356. See Wanda M. Temm, *Out Of Sight, Out Of Mind, But Not Out Of Duty: Adoption Agency's Duty To Disclose Medical Information To Birth Parents Post-Relinquishment*, 63 U.M.K.C. L. REV. 359, 363 (1995).

357. See, e.g., *Tresemmer v. Barke*, 150 Cal. Rptr. 384 (Cal. Ct. App. 1978) (doctor's failure to warn of dangerous side effects of the Dalkon Shield was a negligent breach of duty to warn).

358. See e.g., *Tarasoff v. Regents of the Univ. of Cal.*, 131 Cal. Rptr. 14 (Cal. 1976) (upon determination that patient presents a danger of violence to a third party, psychotherapist has a duty to use reasonable care to protect the intended victim).

359. *Safer v. Pack*, 677 A.2d 1188, 1192 (N.J. Super. Ct. App. Div. 1996).

360. See *id.* The court wrote:

We need not decide, in the present posture of this case, how, precisely, that duty is to be discharged, especially with respect to young children who may be at risk, except to require that reasonable steps be taken to assure that the information reaches those likely to be affected or is made available for their benefit.

Id.

Similarly, the duty to warn has been extended in wrongful birth claims to physicians who failed to adequately inform parents of any pregnancy risks.³⁶¹ Most courts that have heard wrongful birth claims have upheld their validity under the notion that there is no justification for a system that deprives parents of the opportunity to know of the risks inherent in their pregnancy while at the same time forbidding them from recovering the cost of treating and caring for the ill child that is born.³⁶² The heart of the wrongful birth tort is the denial of a parent's opportunity to make an informed decision regarding the termination of her pregnancy.³⁶³ The heart of the wrongful adoption tort is the same; adoptive parents should also be allowed to make intelligent decisions regarding their ability to care for a child whom they wish to adopt.³⁶⁴ As in wrongful birth claims, there is no justification for a system that deprives potential adoptive parents of the opportunity to know of the risks inherent in an adoption while at the same time forbidding them to recover the cost of treating and caring for the ill child that is adopted. Had the Jacksons been warned of Aaron's risk of developing a mental illness, they might have chosen not to adopt a special needs child, thereby avoiding severe financial and emotional damages.³⁶⁵

VII. CONCLUSION

Following the decisions of other jurisdictions, the court in *Jackson v. Montana* recognized the negligence-based tort of wrongful adoption, finding that both common law and Montana statutory law imposed a duty upon adoption agencies to accurately represent and disclose information regarding a child's background to adoptive parents.³⁶⁶ First, the court held that foreseeability and public policy interests mandated a common law duty upon adoption agencies to refrain from negligently

361. See Susan Kempf LeMay, *The Emergence Of Wrongful Adoption As A Cause Of Action*, 27 J. FAM. L. 475, 486 (1989).

362. See *id.* at 487.

363. See *id.*

364. See *id.*

365. See *Jackson*, 956 P.2d at 53.

366. See *Jackson v. Montana*, 956 P.2d 35, 48-49, 51 (Mont. 1998).

232 GOLDEN GATE UNIVERSITY LAW REVIEW[Vol. 29:181

misrepresenting a child's background to adoptive parents.³⁶⁷ Second, the court found that adoption agencies had a statutory duty to disclose a child's background to adoptive parents.³⁶⁸ Finally, the court held that adoptive parents can recover for emotional and financial damages by demonstrating that they would not have adopted the child had they known of his background.³⁶⁹

Although the Montana Supreme Court recognized an adoptive parent's right to be informed of a child's background before committing to an adoption, it did not extend an adoption agency's liability far enough. Rather than address the extent to which an adoption agency may be held liable to adoptive parents under Montana's disclosure statutes, the court elected to rely on the State's adoption policy manual to fill in the gaps.³⁷⁰ The court was presented with the opportunity to mandate that adoption agencies disclose all available information about a child's background, but chose instead to leave Montana's minimum disclosure requirements intact.³⁷¹ The court declined to impose more stringent requirements upon adoption agencies, including a duty to conduct a reasonable investigation into a child's background or a duty to warn adoptive parents of possible illnesses to which a child might be susceptible.

Acceptance of wrongful adoption claims has finally provided recourse to unwitting adoptive parents faced with having to care for physically and psychologically disabled children due to the negligence of adoption agencies. Adoptive parents are no longer forced to decide whether to annul the adoption or to incur the substantial costs of caring for a special needs child. Hopefully, as more state courts accept wrongful adoption as a viable claim for adoptive parents, they will begin to impose more responsibility upon adoption agencies by increasing their liability to adoptive parents. Determining the extent of an adoption agency's future liability will become crucial as the

367. *See id.* at 47-48.

368. *See id.* at 51.

369. *See Jackson*, 956 P.2d at 53.

370. *See id.* at 50-51.

371. *See id.*

numbers of adopted children born to drug-addicted or HIV-positive mothers continues to increase.³⁷² Courts must lead the way by imposing increased responsibility upon adoption agencies. It is crucial for them to remember that an adoption agency's "denial of [an adoptive parent's] opportunity to make an informed decision is the essence of the tort of wrongful adoption."³⁷³

*Jennifer Emmaneel**

372. See Gibeaut, *supra* note 21, at 34.

373. Bennison, *supra* note 343, at 923. For a decision after *Jackson*, see *Wolford v. Children's Home Soc'y*, 17 F. Supp. 2d 577 (S.D.W. Va. 1998). There, the court applied the wrongful adoption analysis to an agency that allegedly failed to disclose that the adopted child had Fetal Alcohol Syndrome. *See id.* In finding that the adoptive parents had a viable claim for fraudulent and negligent misrepresentation, the court noted its dissatisfaction with the term *wrongful adoption*. *See id.* Rather, the court found that the term *wronged adoption* better illustrated the focus on agency misconduct. *See id.*

* Golden Gate University School of Law, J.D. Candidate, Class of 2000; B.A. (*cum laude*) Political Science, California State University, Chico. I would like to thank my editors, Steve Rosenberg and Christine Gregson, and my advisors, Professors Leslie Minkus and Roberta Simon for their support and patience throughout this process. I would also like to express my gratitude to Vanessa Lawton and Kim Harvey whose blue-booking and cite-checking saved my life! Further, I would like to thank Jennifer DeWitt for listening to me rant and rave as we wrote our articles side by side. Finally, I would like to thank all of my parents for believing in me and for supporting me throughout the trials and tribulations of writing this article. In memory of Roberto Lucca.