Wrongful Adoption: Monetary Damages as a Superior Remedy to Annulment for Adoptive Parents Victimized by Adoption Fraud

I. Introduction

Most adoption disputes involve four general classes of persons: the adopted child, the natural parents, prospective heirs of the adoptive parents, and the adoptive parents themselves. The rights of the first three groups have received regular attention from the state legislatures, courts, and commentators; the adoptive parents' rights, however, remain somewhat uncertain despite their central role in the adoption process.[1] An important issue which remains unresolved is what avenues of recourse are available to the adoptive parents when they have been fraudulently induced into the adoption by the party placing the child.

One means of redress which has been available in some jurisdictions is annulment of the adoption.[2] This remedy, however, is severely limited by short statutes of limitations[3] and is generally frowned upon by the courts.[4] One of the primary reasons this remedy is disfavored is that it breaks up the newly created family unit and forces the child to undergo once again a dramatic change in his or her environment.[5] As in all adoption matters, "the primary concern of the courts is the welfare of the child."[6] Courts are hesitant to annul a completed adoption that was

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[1]In the last fifty years, only a few law review articles have focused on the rights of adoptive parents. *See* Note, *Adoption—Abrogation of Adoption*, 16 B.U.L. Rev. 700 (1936); Note, *Abrogation of Adoption by Adoptive Parents*, 19 Fam. L.Q. 155 (Summer 1985); Note, *Annulment of Adoption Decrees on Petition of Adoptive Parents*, 22 J. Fam. L. 549 (1983-84) [hereinafter Note, *Annulment of Adoption*]; Note, *Adoption: Annulment of Status*, 29 Notre Dame Law. 68 (1953-54). State legislatures have given very little attention to the rights of adoptive parents.

[2]*See, e.g.*, Note, *Annulment of Adoption*, *supra* note 1; Annotation, *Annulment or Vacation of Adoption Decree by Adopting Parent or Natural Parent Consenting to Adoption*, 2 A.L.R.2d 887 (1948).

[3]The majority of jurisdictions have limitation periods of one year or less. *See* Note, *Annulment of Adoption, supra* note 1, at 553 app. A.

[4]"Courts have generally recognized or at least assumed that an adoption decree may be annulled at the instance of the adopting parents but indicate reluctance to disturb the status of an adopted child unless the vacating of the decree would clearly be for its best interest." Pierce v. Pierce, 522 S.W.2d 435, 436 (Ky. 1975) (citing Annotation, *supra* note 2, at 887).

[5]The Supreme Court of Minnesota recently wrote, "It is simply not in the best interests of a child for the parent-child relationship to be continually altered. . . . Some serious and compelling reason must exist in order to once again uproot the child and dramatically change his living environment." *In re* Welfare of K.T., 327 N.W.2d 13, 18 (Minn. 1982).

[6]County Dep't of Pub. Welfare v. Morningstar, 128 Ind. App. 688, 697-98, 151 N.E.2d 150, 156 (1958) (en banc).

previously found, through formal adjudication, to be in the best interests of the adopted child.[7]

Recently, however, the Ohio Supreme Court decided a novel case which could pave the way for an alternative remedy in cases where adoptive parents are fraudulently induced into an adoption. In *Burr v. Board of County Commissioners*,[8] the court affirmed an award of $125,000 in compensatory damages to the victims of a "wrongful adoption."[9] The evidence showed that an adoption agency had fraudulently misrepresented the health and background of the prospective adoptee and his natural parents to the prospective adoptive parents, Mr. and Mrs. Burr.[10] Relying on this erroneous information, the couple adopted what they believed to be "a nice big, healthy, baby boy."[11] During the ensuing years, however, their son "suffered from a myriad of physical and mental problems," and developed a genetically transmitted fatal disease.[12] The Burrs eventually learned of the fraud that had been practiced on them, but only after they had incurred tremendous medical expenses for their son.[13] The adoptive parents successfully proved their "wrongful adoption" tort claim, received monetary damages, and the family unit remained intact.[14]

The tort of wrongful adoption, as first advanced in the *Burr* case, provides for compensatory damages for adoptive parents who are fraudulently induced into an adoption. Because the wrongful adoption theory does not alter the family unit, it may be a more suitable remedy

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[7]In dismissing a petition for abrogation of adoption, a New York court wrote:

> The order of adoption and the papers upon which it was granted are in all respects proper and the statutory requirements fully satisfied. The court, at that time, determined on all the facts then before it, that the adoption was for the best moral and temporal interests of the child. There is no justification to now upset this formal adjudication based upon an alleged failure of the natural father, at the time of the adoption, to delineate the alleged mental aberrations of his family.

In re Anonymous, 29 Misc. 2d 580, 582, 213 N.Y.S.2d 10, 13 (1961).

[8]23 Ohio St. 3d 69, 491 N.E.2d 1101 (1986).

[9]*Id.* The term "wrongful adoption" has not been previously used by any appellate court in the nation. To the best of their knowledge, co-counsel for the Burrs were the first to use the term when they labeled their initial pleading as a "Complaint in Fraud and Reimbursement of Expenses for Wrongful Adoption." Telephone interview with Wylan Witte, Esq. (Dec. 8, 1986); Telephone interview with Kenneth Cardinal, Esq. (Feb. 6, 1987). The theory has some similarities to the "wrongful birth" cause of action which has been the subject of much litigation and debate in recent years. The two tort causes of action, however, must be distinguished in that wrongful birth usually involves negligence, whereas wrongful adoption, as used in the *Burr* case and this Note, contemplates the tort of fraud.

[10]*Burr*, 23 Ohio St. 3d at 69, 70, 491 N.E.2d at 1101, 1103.

[11]*Id.* at 70, 491 N.E.2d at 1103.

[12]*Id.*

[13]*Id.* at 71-72, 491 N.E.2d at 1103-04.

[14]*Id.* According to co-counsel for the Burrs, the child is presently receiving extensive treatment at a private nursing home where his parents visit him frequently. Telephone interview with Kenneth Cardinal, Esq. (Feb. 6, 1987).

than annulment in many cases where the adoptive parents are the victims of fraud.[15] In some jurisdictions, it may be the only available remedy where the fraud goes unnoticed for a substantial period of time, because annulment may be barred by a short statute of limitations.[16] The wrongful adoption theory serves a dual purpose in that the rights of the adoptive parents are recognized without infringing upon the best interests of the child. Future acts of adoption fraud are also more likely to be deterred under the wrongful adoption theory because the wrongdoers will be subject to monetary liability for the damages they inflict.

This Note will first discuss the realities of adoption fraud in the United States. It will then examine the differences between annulment and money damages as remedies in these settings; it will discuss when money damages should be available and what interests are promoted by such an award; and it will analyze what the actual measure of damages should be. It will also examine some recent legislative enactments which, because of their potential to deter adoption fraud in the future, should be considered by other jurisdictions. It is the central thesis of this Note that the wrongful adoption theory is a viable cause of action which affords a superior remedy to annulment by protecting the best interests of the child while preserving the heretofore unrecognized rights of the adoptive parents.

II. Fraud in the Adoption Setting

Instances of adoptive parents being fraudulently induced into an adoption are not new in the United States. There have been a number of reported cases at the appellate level involving basically two distinct fact situations.[17] The first line of cases involves fraud between related parties.[18] An example of such a case is *In re Welfare of Alle*,[19] where a stepfather alleged that his wife, the natural mother of the children, fraudulently induced him into formally adopting the children.[20] The evidence showed that while the adoption proceeding was pending, the natural mother was planning to separate from the stepfather and desired the adoption only for financial expediency.[21] Her scheme was apparently to have formal

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[15]There is, of course, nothing to prevent a party from seeking both remedies concurrently if annulment is available in the given jurisdiction. In most cases, however, it would seem that the adoptive parents would tend to choose only one of the two remedies.

[16]For a discussion of limitation periods, see *infra* notes 40-62 and accompanying text.

[17]It is, of course, impossible to determine the number of similar cases that have not left the trial court level. According to Kenneth Cardinal, co-counsel for the Burrs, there are at least two other wrongful adoption cases pending in Ohio trial courts alone. Telephone interview with Kenneth Cardinal, Esq. (Feb. 6, 1987).

[18]This type of adoption is generally referred to as "related adoption" and will be so labeled throughout this Note.

[19]304 Minn. 254, 230 N.W.2d 574 (1975).

[20]*Id.*

[21]*Id.* at 256, 230 N.W.2d at 576.

parental rights established with the stepfather so that she could secure custody payments from him upon separation. The court, in remanding the case for further findings on the issues of fraud and the interests of the children, held that the adoption decree could be set aside if it was found to have been obtained by fraud.[22]

The second line of cases, and the seemingly more tragic of the two, involves fraud between unrelated parties.[23] In this situation, the adoptive parents actively seek to adopt a child from a public or private agency or through an independent intermediary such as a doctor, lawyer, or social worker.[24] The fraud involved usually centers on the health or background of the prospective adoptee.[25] The National Committee for Adoption has

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[22]*Id.* at 257, 230 N.W.2d at 577. For other examples of this type of fraud between related parties, see *In re* Adoption of Hadtrath, 121 Ariz. 606, 592 P.2d 1262 (1979) (en banc); Pierce v. Pierce, 522 S.W.2d 435 (Ky. 1975).

[23]Unrelated adoptions inherently involve greater uncertainty because the adopting parent does not know the health or background of the child as he or she would in a related adoption. Because the potential for fraud and the resultant damage is greater in unrelated adoptions, this Note will be primarily concerned with this situation. The same principles would, to some degree, seem to apply to a wrongful adoption action involving related parties.

[24]"There are a number of ways in which children may be placed in adoptive homes. Three of these placement methods are through a private or public agency, by private arrangement, and through the black market." S. GREEN & J. LONG, MARRIAGE AND FAMILY LAW AGREEMENTS § 5.39 (1984). This Note will be primarily concerned with public and private agency placements as well as independent private placements. Agency placements are everywhere permitted and, as in all adoption matters, are governed by state law. Independent adoptions, also known as private placements or the "gray market," usually involve an intermediary such as a doctor, lawyer, or social worker. *Id.* § 5.41. Independent adoptions may provide the only opportunity for adoption for couples who do not meet agency guidelines.

Although independent adoptions have lately been the subject of much debate and criticism, *see, e.g.*, Note, *Babes and Barristers: Legal Ethics and Lawyer Facilitated Independent Adoptions*, 12 HOFSTRA L. REV. 933 (1984); Note, *Independent Adoption: Regulating the Middleman*, 24 WASHBURN L.J. 327 (1985); *Baby Brokers—How Far Can a Lawyer Go?*, Nat'l L.J., Feb. 9, 1987, at 1, col. 1, this method of adoption is still on the rise and today accounts for nearly one-third of all unrelated adoptions. NATIONAL COMMITTEE FOR ADOPTION, ADOPTION FACTBOOK, UNITED STATES DATA, ISSUES, REGULATIONS AND RESOURCES 13 (Nov. 1985) [hereinafter ADOPTION FACTBOOK]. The statutes of each jurisdiction must be examined to determine which types of placement are available.

"Due to the shortage in the number of adoptable infants and the delays associated with agency adoptions, some couples have turned to the black market for a child." S. GREEN & J. LONG, *supra*, § 5.42. Black market adoptions, which are illegal in all states, present unique problems beyond the scope of this note. For a discussion of this type of placement, see Turano, *Black-Market Adoptions*, 22 CATH. LAW. 48 (1976).

[25]*See, e.g.*, County Dep't of Pub. Welfare v. Morningstar, 128 Ind. App. 688, 151 N.E.2d 150 (1958) (en banc) (misrepresentation of both health and background by an agency); Burr v. Board of County Comm'rs, 23 Ohio St. 3d 69, 491 N.E.2d 1101 (1986) (misrepresentation of both the child's health and background by an agency); Allen v. Allen, 214 Or. 664, 330 P.2d 151 (1958) (allegation of fraud centering on agency's failure to inform of child's mental deficiencies).

noted the risks in this area, writing: "The adoptive parents may not receive full and accurate information about the health issues of the child. Frequently, problems are covered up or not mentioned in the hope that bonding or finalization will take place and the adoptive parents will have no recourse."[26]

Although the instances of fraud in the placement setting are the exception rather than the rule, and although the great majority of public and private placements are successful,[27] there are certain factors present in today's society that make the likelihood of fraud greater than in past times. Adoption as a means of creating a family is once again on the rise in the United States.[28] It is estimated that the number of adoptions in the U.S. in 1982 alone totaled 141,861, of which more than 50,000 were unrelated adoptions.[29] These figures represent a substantial increase from the mid 1970's.[30] The reasons for this increase involve a number of factors such as the large number of couples unable to bear children on their own,[31] as well as the growing number of women who, because of career demands, are unable or unwilling to devote the time required for pregnancy and childbirth. The resultant increased demand for prospective children has led to a growing vulnerability for the adoptive parents who are so anxious to perfect an adoption. It is also noteworthy that independent adoptions, which are considered by many to be more risky to the adoptive parent than agency adoptions,[32] now constitute one-third of all unrelated adoptions.[33] Thus, one would expect that the potential for fraud in today's society is significant for the adopting parent.

Indeed, the presence of fraud in the field of adoption led Senators Jake Garn, Orrin Hatch, and Roger Jepsen to sponsor drastic legislation which was introduced in the United States Senate in 1984 calling for civil and criminal penalties for perpetrators of adoption fraud.[34] The bill, the

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[26]ADOPTION FACTBOOK, *supra* note 24, at 48.

[27]The *Burr* court, noting that there are "many fine adoption programs," directed its opinion to the "rare and fraudulent abuse" of the adoption process. 23 Ohio St. 3d at 69, 78, 491 N.E.2d at 1101, 1109.

[28]Note, *Annulment of Adoption*, *supra* note 1, at 13.

[29]*Id.*

[30]*Id.*

[31]It is estimated that up to fifteen percent of American couples are unable to have children. U.S. NEWS & WORLD REP. Jan. 19, 1987, at 15.

[32]*See* S. GREEN & J. LONG, *supra* note 24, § 5.41; ADOPTION FACTBOOK, *supra* note 24, at 47-48. *But see* Shovers, *Non-Contested Adoptions: Policy, Law, Procedure* 6 (Indiana Continuing Legal Education Forum 1985), where one commentator wrote: "One reason that natural and adoptive parents choose private adoption over state or nonprofit agency adoptions is the degree of control provided by a private adoption. Private adoption offers the opportunity for a complete investigation and recording of medical histories of the child and his natural parents."

[33]ADOPTION FACTBOOK, *supra* note 24, at 13.

[34]The legislation was also supported by Senators Grassley, Denton, Bentsen, Domenici,

Anti-Fraudulent Adoption Practices Act of 1984,[35] was aimed at providing legal protection to adoptive parents and natural mothers who are victimized by fraudulent adoption practices.[36] It called for criminal penalties of up to five years imprisonment and $10,000 for anyone who knowingly and willfully made "any statement" or used "any document known to be false" or who "conceal[ed] or misrepresent[ed] any material fact" in connection with an adoption.[37] In addition, any person harmed by such conduct could bring an action in federal district court for civil damages.[38] Although the bill did not become law,[39] the serious debate and scrutiny it produced demonstrates the potential for fraud that has become an unfortunate reality in adoption proceedings. Because this evil will remain a part of American society for the foreseeable future, it is necessary to analyze the remedies available to the victims of such fraud and to determine which remedy best supports the public interest.

III. Annulment as a Remedy

Instances in which adoptive parents seek to annul an adoption decree are usually infrequent because the relationship is entered into voluntarily and with foresight of potential consequences.[40] Where fraud is used to induce adoptive parents into the relationship, however, the process loses its voluntary nature in that the adoptive parents would probably not be willing to proceed if they were aware of the likelihood of future physical, mental, or emotional problems with the child. Because adoption is "a statutory process with restrictions and requirements that vary from state to state,"[41] the statutes of the jurisdiction involved must first be examined

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Kasten, and Huddleston. It was introduced in the House by Congressmen Jack Brooks and Pat Roberts. *The Anti-Fraudulent Adoption Practices Act of 1984: Hearings on S. 2299 Before the Subcomm. on Courts of the Sen. Comm. on the Judiciary*, 98th Cong., 2d Sess. 72 (1984) [hereinafter *Senate Hearing*].

[35]S. 2299, 98th Cong. 2d Sess. (1984).

[36]Senator Roger Jepsen stated, "This act would provide legal protection to adoptive parents and mothers who have been victimized by fraudulent adoption practices." *Senate Hearing*, *supra* note 34, at 3 (statement of Sen. Roger Jepsen). Senator Grassley noted, "As the number of available children for adoption drop, anxious families become the easy prey of scam operations. The legislation before us would impose the appropriate sanctions in cases of adoption fraud." *Id.* at 26 (statement of Sen. Charles Grassley).

[37]S. 2299, 98th Cong., 2d Sess. (1984).

[38]*Id.*

[39]The bill was criticized by the Justice Department on a number of grounds. The Department asserted that existing criminal statutes adequately provided an avenue for prosecution for adoption fraud, that the bill would prove difficult to enforce, and that "the section would punish the knowing use of false, non-material information as severely as the concealment of a material fact," which would be a "marked departure from the language of other false statement statutes . . . ." *Senate Hearing supra* note 34, at 48-54.

[40]Note, *Annulment of Adoption*, *supra* note 1, at 549.

[41]S. Green & J. Long, *supra* note 24, § 5.39.

to see if they provide adoptive parents with the right to petition for annulment.[42]

The recent trend in state legislatures, as a result of the policy of stability in the family relationship[43] and the emphasis on the welfare of the child,[44] is to make no provision for annulment of the adoption.[45] In states that do specifically provide for this remedy, the action may generally be brought only within a relatively short period of time following entry of the final decree.[46]

Today, only New York[47] and Hawaii[48] specifically provide for annulment in their adoption statutes in cases of fraud involving adoption. These states are in the minority in that they do not contain limitation periods on such an action.[49] The majority of jurisdictions impose a short limitation period ranging from twenty days[50] to two years[51] on an action to set aside an adoption for any reason including fraud.[52] Moreover, today only California provides for annulment of adoption decrees on the separate ground of discovery of certain illnesses arising from conditions that existed prior to the adoption;[53] all other statutes that allowed annulment on these grounds have been repealed.[54] Thus, the availability of annulment to the adoptive parent is severely limited by statute in the overwhelming majority of jurisdictions.

In the absence of explicit statutory grounds or in cases in which the statute of limitations has expired, annulment may be available in some jurisdictions by invoking the inherent power of a court to set aside its own decree. In Indiana, for instance, the adoption statutes do not ad-

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[42]*See* Note, *Annulment of Adoption*, *supra* note 1, at 550 app. A.

[43]"[T]he overall implication of [a survey of the states' adoption statutes] is widespread recognition of the necessity of finalizing the familial status created by an adoption decree." *Id.* at 563.

[44]"The best interests of the child are of primary concern in the adoption process." S. GREEN & J. LONG, *supra* note 24, § 5.39. "[T]he law must make the child's needs paramount [in adoption]." J. GOLDSTEIN, A. FREUD & A. SOLNIT, BEYOND THE BEST INTERESTS OF THE CHILD 7 (1979). Most state adoption statutes mandate that the best interests of the child be considered first and foremost in all adoption matters. For instance, Indiana's adoption statue provides that a petition for adoption shall not be granted unless the court finds that "the adoption prayed for is for the best interest of the child." IND. CODE § 31-3-1-8(a) (1982).

[45]S. GREEN & J. LONG, *supra* note 24, § 5.44; *see also* Note, *Annulment of Adoption*, *supra* note 1, at app. A.

[46]M. LEAVY & R. WEINBERG, LAW OF ADOPTION 63 (1979).

[47]N.Y. DOM. REL. LAW § 114 (McKinney 1977).

[48]HAWAII REV. STAT. § 578-12 (1976).

[49]*See* HAWAII REV. STAT. § 578-12 (1976); N.Y. DOM. REL. LAW § 114 (McKinney 1977).

[50]*See* MICH. COMP. LAWS. ANN. § 710.64(1) (West Supp. 1986).

[51]*See* NEB. REV. STAT. § 43-116 (1984).

[52]*See* Note, *Annulment of Adoption*, *supra* note 1, at app. A.

[53]CAL. CIV. CODE § 227b (West 1982).

[54]Note, *Annulment of Adoption*, *supra* note 1, at 554.

dress the manner or availability of annulment.[55] Indiana courts, however, have recognized that "[a] decree of adoption may be vacated upon such grounds as would entitle the court to vacate any other order or decree."[56] "[A] decree of adoption may be vacated by a petition to the court which entered it [where] fraud [is used] in obtaining [the decree]."[57]

A number of jurisdictions, however, hold that the right to set aside an adoption decree must be legislatively provided.[58] For example, in *Allen v. Allen*,[59] the Oregon Supreme Court held that absent statutory authority on the subject, the adoptive parents have no right to set aside adoptions, even in cases of fraud.[60] The court cited with approval the rule set forth in an earlier Tennessee case:[61]

> Where one voluntarily assumes the relationship of parent to a child by formal adoption, it cannot be lightly cast aside. The relationship involves duties of care, maintenance and education with rights of custody, control and service of the child. Society has an interest in this relationship, and we think the Legislature alone should supply the procedure to be followed, as well as define the cause, if any, whereby the relationship may be dissolved. In the absence of such a statute the courts will not assume jurisdiction to annul a decree of adoption at the instance of the adopting parent and cast the child adrift to again become a public charge.[62]

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[55]Indiana's adoption statute, found at IND. CODE § 31-3-1-1 (Supp. 1986), is silent on annulment.

[56]State v. Probate Court, 225 Ind. 268, 274, 73 N.E.2d 769, 772 (1947); *see also* County Dep't of Pub. Welfare v. Morningstar, 128 Ind. App. 688, 151 N.E.2d 150 (1958) (en banc).

[57]State v. Probate Court, 225 Ind. at 274, 73 N.E.2d at 772 (quoting 1 AM. JUR. *Adoption of Children* § 72 (1936)). "Although the action is a rare one, there is nothing to prevent a court of competent jurisdiction from directly vacating an order of adoption under proper circumstances, as where entry of the decree was brought about by fraud, misrepresentation, or undue influence." *In re* Welfare of Alle, 304 Minn. 254, 257, 230 N.W.2d 574, 577 (1975).

[58]*See* Note, *Annulment of Adoption*, *supra* note 1, at 550.

[59]214 Or. 664, 330 P.2d 151 (1958). The *Allen* case is unique in that it is the only reported case other than *Burr* in which monetary damages were sought for the fraud allegedly practiced upon the adoptive parents by the home that placed the child. *Id.* at 667, 330 P.2d at 154. The adoptive parents in *Allen* were unsuccessful in their claim for annulment and money damages on both jurisdictional and substantive grounds. *Id.*

[60]*Id.* In dicta the court seemed to indicate that equity would allow annulment if the best interests of the child were at stake. The court noted, "It is recognized that a court of general equity jurisdiction may set aside a decree of adoption. . . . It is to be carefully noted . . . that equity will assert this authority only to protect the *best interest and welfare of the child.* In this case there is no allegation that the best interests or welfare of the child . . . is at stake." *Id.* at 667, 330 P.2d at 154. (emphasis in original, citation omitted).

[61]Coonradt v. Sailors, 186 Tenn. 294, 209 S.W.2d 859 (1948).

[62]*Id.* at 296, 209 S.W.2d at 861.

More recently, the Arizona Supreme Court decided *In re Adoption of Hadtrath*,[63] holding that although rule 60(c)(3) of Arizona's Rules of Civil Procedure[64] allows relief from judgment on grounds of fraud, such relief is available only when a timely motion has been made.[65] The court noted that "an allegation of fraud does not attack the court's jurisdiction to decide a case. Consequently a judgment obtained by fraud is not void but merely voidable. For this reason timeliness becomes an important concern."[66] Since the motion for relief in the *Hadtrath* case was filed after the six-month time limit of rule 60(c)(3), the court upheld the dismissal of the motion as untimely.[67]

These and other cases[68] illustrate the disfavor accorded actions to annul adoption decrees. Annulment is a drastic measure which breaks up the family unit and severs the child's ties with the only parents he has. The majority of criticisms leveled at this remedy have focused on the harsh effects it has on the adopted child.[69]

There are, however, other faults of annulment which are important. This remedy, where available, is restricted by short limitation periods in the majority of jurisdictions.[70] Yet where fraud is involved, it is very likely that the adoptive parents will not learn of the misrepresentations until well after the time for annulment has passed.[71] One court recently described this problem:

> By its nature, fraud involves deception, which may not come to light during the year following entry of the decree. Duress and undue influence, however, do not depend on deception, but rather on the overcoming of one's free will. In our view, it is likely

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[63]121 Ariz. 606, 592 P.2d 1262 (1979) (en banc).

[64]Ariz. R. Civ. P. 60(c)(3).

[65]121 Ariz. at 610, 592 P.2d at 1266.

[66]*Id.* at 610, 592 P.2d at 1265-66.

[67]*Id.*

[68]*See, e.g., In re* Adoption of Hobson, 8 Kan. App. 2d 772, 777, 667 P.2d 911, 915 (1983) ("Courts should now allow abrogation of an adoption if it is premised on the desire of adoptive parents to rid themselves of a bad bargain, or because of a mere change in attitude or regret."); *In re* Anonymous, 29 Misc. 2d 580, 582, 213 N.Y.S.2d 10, 14 (1961) ("[T]he fraud which will suffice to vacate an order or judgment [of adoption] must be fraud in the very means by which the judgment was procured.").

[69]"It is not uncommon for courts to deny an annulment, even when there is evidence supporting a valid ground for annulment, if the annulment would not serve the best interest of the child." Note, *Annulment of Adoption*, *supra* note 1, at 562.

[70]*See supra* text accompanying notes 3 and 4.

[71]For instance, in Burr v. Board of County Commissioners, 23 Ohio St. 3d 69, 491 N.E.2d 1101 (1986), the adoptive parents did not learn of the fraud for some eighteen years. Similarly, in County Department of Public Welfare v. Morningstar, 128 Ind. App. 688, 151 N.E.2d 150 (1958) (en banc), the adoptive parents did not learn of the fraud practiced on them by the county agency for two years.

> that the victims of duress or undue influence will become aware of their victimization within a year, if ever. *A victim of fraud, however, might not.*[72]

Still another downfall of the remedy is its inherent lack of deterrent value against future fraudulent practices. If, for instance, an adoption home misrepresents a child's background as occurred in *Burr*, an annulment proceeding merely requires the home to take over the care of the child until another adoption is perfected. Although this may inconvenience the home and force it to incur additional expense and paperwork, it is unlikely that it will bring about increased scrutiny of potential future abuses.[73]

Thus, annulment as a remedy for adoptive parents is available in many jurisdictions, but only to a limited degree. It has been and will remain an unpopular remedy because of its harsh effects on the child, its limited availability to adoptive parents where they are fortunate enough to discover the fraud in time, and its inherent lack of deterrent value against future misrepresentation. Because of these drawbacks, the alternative remedy of awarding compensatory damages through the wrongful adoption theory requires serious consideration and evaluation.

IV. Wrongful Adoption—*Burr v. Board of County Commissioners*

In the first reported case of its kind, the Supreme Court of Ohio, in *Burr v. Board of County Commissioners*,[74] affirmed an award of money damages to adoptive parents who were fraudulently induced into an adoption.[75] In 1964, Russell and Betty Burr contacted the Stark County Welfare

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[72]*In re* Adoption of Male Minor Child, 619 P.2d 1092, 1097 (Haw. Ct. App. 1980) (emphasis added).

[73]In annulments of independent adoptions, it is not entirely clear what would become of the child. It seems likely that the child would become a ward of the state until another placement was perfected.

[74]23 Ohio St. 3d 69, 491 N.E.2d 1101 (1986).

[75]*Id. Burr* is unique in that it is the first reported award of monetary damages to adoptive parents who were victims of fraud. Two earlier cases had strikingly similar fact patterns, but did not involve an award of compensatory damages. In County Department of Public Welfare v. Morningstar, 128 Ind. App. 688, 151 N.E.2d 150 (1958) (en banc), the county agency falsely represented to the adoptive parents that the prospective child was of good physical and mental health and that the natural parents were of good health and character. Several years after the adoption was perfected, the young child began to display severe problems, including violent tantrums and serious sexual abnormalities. An annulment of the adoption decree was permitted when it was learned that the agency had misrepresented the fact that the natural father was an immoral man who had committed incest with his daughters. It was also learned that the natural mother had lived a life of sexual promiscuity, one of the older sisters had lived an immoral life for several years, and another sister was feeble-minded. The court allowed annulment on the grounds that a "tragic fraud" had been perpetrated on the adoptive parents. *Id.*

Similarly, in Allen v. Allen, 214 Or. 664, 330 P.2d 151 (1958), the adoptive parents

Department expressing their desire to adopt a child. The Burrs were initially informed that such a placement could take over a year to complete, but were subsequently told by an employee of the department that a seventeen-month-old boy was available for adoption. The Burrs met the county case-worker and were informed that

> the infant was borne by an eighteen-year-old mother, that the mother was living with her parents, that the mother was trying to take care of the child and trying to work during the day, that the grandparents were mean to the child, that the mother was going to Texas for better employment, and that she had surrendered the child to [the department] for adoption.[76]

Russell Burr testified that the case-worker represented to them that the child "was a nice big, healthy, baby boy" who had been born at the Massillon City Hospital.[77] The Burrs proceeded with the adoption unaware of any risks, and the child, Patrick, became a legal member of the family.

During the ensuing years, however, "Patrick suffered from a myriad of physical and mental problems,"[78] including "[p]hysical twitching, speech impediment, poor motor skills, and learning disabilities"[79] which eventually led him to be classified as E.M.R. (educable mentally retarded) during primary school. Despite special education classes and special care by the Burrs, Patrick's condition degenerated over the following years. By high school, he was observed to suffer from hallucinations and was admitted to several hospitals for diagnosis and treatment.

Eventually Patrick was diagnosed as suffering from Huntington's disease, a genetically inherited fatal disease which attacks the central nervous system.[80] The Burrs incurred medical expenses in excess of $80,000 for treatment of this disease alone. During the course of treatment for this disease, the Burrs obtained a court order opening the sealed records

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alleged that a private placement agency had misrepresented the child's mental deficiencies, which became apparent as the child developed. The adoptive parents sought annulment of the decree as well as monetary damages for expenses incurred in the treatment of their child. The court ruled that annulment was not possible due to lack of jurisdiction and also noted that a case for fraud had not been proven. One justice dissented, noting that the private agency's conduct constituted fraud. The dissent, however, did not comment on whether compensatory damages would have been available. *Id.*

[76] *Burr*, 23 Ohio St. 3d at 70, 491 N.E.2d at 1103.

[77] *Id.*

[78] *Id.*

[79] *Id.*

[80] *Id.* Huntington's disease is "a rare hereditary disease characterized by chronic progressive chorea (ceaseless involuntary movements) and mental deterioration terminating in dementia; the age of onset is variable but usually occurs in the fourth decade of life. Death usually follows within fifteen years. It is transmitted as an autosomal dominant trait." DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 264 (26th ed. 1985).

concerning his background prior to adoption in order to learn whether Patrick's problems might have been hereditary.[81]

From these records, the Burrs first learned in 1982 that the county case-worker had egregiously misrepresented the health and background of the child. The court summarized the extent of the fraud, writing:

> These previously sealed records revealed that Patrick's mother was actually a thirty-one-year old mental patient at the Massillon State Hospital. Patrick had not been born at Massillon City Hospital, but rather was delivered at the state mental institution. The father's identity was unknown, but he was presumed to also have been a mental patient. Patrick's biological mother shared his low intellectual level and also had a speech impediment. She was diagnosed as having a 'mild mental deficiency, idiopathic,[82] with psychotic reactions . . . . The records also showed that Patrick suffered a fever at birth, and was known by appellants to be developing slowly. A series of psychological assessments was conducted by [the department] prior to adoption, some of which . . . indicated that the boy was functioning at a lower intellectual level than his chronological age.[83]

In affirming the trial court's award of $125,000 in compensatory damages to the Burrs, the court held that the essential elements of fraud had been established by the adoptive parents in their wrongful adoption case.[84] The court noted that the Burrs justifiably relied on the misrepresen-

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[81] *Burr*, 23 Ohio St. 3d at 71, 491 N.E.2d at 1104. "Practically all states now provide for making adoption proceeding records secret and available for inspection only by court order." M. LEAVY & R. WEINBERG, *supra* note 46, at 64. "The majority of states require a showing of good cause before access is granted. Examples of good cause include an adoptee's need for medical information or an adoptee's desire to claim an inheritance. Some states allow disclosure only if it will promote or protect the welfare of the adoptee, while other states have no disclosure requirements other than a court order. Some state statutes provide an adoptee with an absolute right to inspect adoption records." S. GREEN & J. LONG, *supra* note 24, § 5.49. In the instant case, the Burrs were required under Ohio law to get court permission to inspect the sealed records. *See* OHIO REV. CODE ANN. § 3107.17 (Page 1980).

The sealed record controversy has been the subject of a wealth of commentary. *See generally* Glosband, *The Rights of Adopted Children*, 17 TRIAL 42 (1981); Levin, *The Adoption Trilemma: The Adult Adoptee's Emerging Search for His Ancestral Identity*, 8 U. BALT. L. REV. 496 (1979); Note, *Sealed Adoption Records and the Constitutional Right of Privacy of the Natural Parent*, 34 RUTGERS L. REV. 451 (1982).

[82] "The term 'idiopathic' denotes 'a disease of unknown cause.'" *Burr*, 23 Ohio St. 3d at 71 n.1, 491 N.E.2d at 1104 n.1 (citation omitted).

[83] *Id.* at 71, 491 N.E.2d at 1104.

[84] *Id.* at 73, 491 N.E.2d at 1105. The court listed the elements of fraud as:

(a) a representation or, where there is a duty to disclose, concealment of a fact,
(b) which is material to the transaction at hand,
(c) made falsely, with knowledge of its falsity, or with such utter disregard and

tations made to them, and wrote that "[i]t would be a travesty of justice and a distortion of the 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 finally came to light."[85]

Burr is novel in that it is the first reported case of its kind involving compensatory damages rather than annulment of the adoption in a fraud setting. The fact that the Burrs did not discover the fraud until eighteen years after the decree barred any action for annulment because Ohio does not allow an adoption to be set aside after one year for any grounds including fraud.[86] Fortunately for the Burrs, however, Ohio's four-year statute of limitations for fraud tort suits does not begin to run until the date the fraud is discovered.[87] Had the same case arisen in a state such as Indiana where the period runs from the date the fraud was committed,[88] the wrongful adoption suit would have been time barred. Despite the thorough treatment given by the court to this and the other issues it faced, there remain a number of unanswered questions regarding the wrongful adoption tort theory.

V. Standards for Recovery in Wrongful Adoption—Would Mere Nondisclosure Be Actionable?

The *Burr* court, while allowing recovery for wrongful adoption, emphasized that the basis of its decision was the deliberate and active fraud practiced upon the adoptive parents.[89] The question arises, then, whether a wrongful adoption suit could lie where the party placing the child merely withheld such vital information without actively misrepresenting any facts. At first reading, the *Burr* opinion seems to indicate that mere nondisclosure would not have been sufficient for recovery. The court stated:

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recklessness as to whether it is true or false that knowledge may be inferred,
(d) with the intent of misleading another into relying upon it,
(e) justifiable reliance upon the representation or concealment, and
(f) a resulting injury proximately caused by the reliance.

Id. (quoting Cohen v. Lamko, Inc., 10 Ohio St. 3d 167, 169, 462 N.E.2d 407, 409 (1984) (quoting Friedland v. Lipman, 68 Ohio App. 2d 255, 429 N.E.2d 456 (1980)), paragraph one of the syllabus).

[85] *Id.* at 73, 491 N.E.2d at 1107.

[86] Ohio Rev. Code Ann. § 3107.16(B) (Page 1980).

[87] *Id.* § 2305.09. The statute specifically provides that the four-year period for fraud "shall not accrue . . . until the fraud is discovered." *Id.*

[88] Ind. Code § 34-1-2-1 (1982) provides that actions for relief against fraud "shall be commenced within six years after the cause of action has accrued, and not afterwards." Indiana courts have held that a cause of action accrues and the statute of limitations begins to run on the date the fraud is perpetrated. *See, e.g.*, Estate of Ballard v. Ballard, 434 N.E.2d 136 (Ind. Ct. App. 1982); Forth v. Forth, 409 N.E.2d 641 (Ind. Ct. App. 1980).

[89] 23 Ohio St. 3d at 76, 77-78, 491 N.E.2d at 1108, 1109.

> We believe it appropriate to comment briefly concerning the breadth of today's decision. In no way do we imply that adoption agencies are the guarantors of their placements. Such a view would be tantamount to imposing an untenable contract of insurance that each child adopted would mature to be healthy and happy. Such matters are solely in the hands of a higher authority. It is not the mere failure to disclose the risks inherent in this child's background which we hold to be 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.[90]

From this language, then, it initially appears that the Burrs' claim could not have been maintained had the agency merely failed to disclose the background of the child.

A closer reading of the case, however, and a study of the law relating to the duty of disclosure, raises some doubts on this issue. What the court actually seemed to hold is that sovereign immunity might have barred an action against the state agency if the action had been premised on the department's policy of silence, not that such an action for nondisclosure could not lie in any scenario.

Apparently the state agency had a policy in effect in 1964 not to share personal histories of the children with the adoptive parents.[91] The agency argued that this policy decision not to disclose histories was the type of decision protected by the doctrine of sovereign immunity.[92] In rejecting this argument, the court wrote:

> We find that sovereign immunity does not preclude this cause of action. *The suit is premised not on injuries resulting from [the agency's] official policy of silence, but rather on [the agency's] active and knowing misrepresentation of fact.* . . . [W]e conclude in this case that the doctrine of sovereign immunity does not shield a political subdivision from responsibility for the fraudulent acts and misrepresentations of its employees . . . .[93]

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[90]*Id.* at 77-78, 491 N.E.2d at 1109.

[91]In its special verdict, the jury in the *Burr* case specifically found that the department had a policy "not to disclose to adoptive parents the family history of children being adopted." *Id.* at 77 n.5, 491 N.E.2d at 1108 n.5.

[92]The county welfare department's argument went as follows:

> The policy decision of the adoption division . . . that family history of children being placed for adoption not be disclosed to adoptive parents is the type of policy decision that provides sovereign immunity protection from claims by adoptive parents for damages . . . alleged to result from the failure of personnel . . . to disclose the family history . . . in the absence of an allegation and in the absence of proof of negligence in the manner which the policy was implemented.

Brief for Defendant-Appellants at 15, *Burr*, 23 Ohio St. 3d 69, 491 N.E.2d 1101.

[93]*Burr*, 23 Ohio St. 3d at 77, 491 N.E.2d at 1108 (emphasis added).

Thus, the court's words that "it is not the mere failure to disclose . . . which we hold to be actionable"[94] may well be dicta since the adoptive parents' suit was premised on active misrepresentation rather than on the policy of silence.[95]

Support for this interpretation and the proposition that a mere failure to disclose such information might be actionable is found earlier in the opinion where the court listed the first of the four elements of fraud as "a representation or, *where there is a duty to disclose, concealment of a fact.*"[96] Indeed, it has long been recognized that actual fraud is committed if "either party to a transaction conceals some fact which is material, which is within his own knowledge, *and which it is his duty to disclose* . . . ."[97] This rule is firmly entrenched today in case law[98] and has been embraced by the drafters of the *Restatement (Second) of Torts.*[99] Nondisclosure, then, is clearly actionable if a duty to disclose exists. The central question, then, is whether such a duty arises in connection with the placement of a prospective adoptee.

Whether such a duty exists has been regarded as a question of law for the courts rather than for the jury.[100] As early as 1882, one authority had delineated the circumstances in which this duty arises into three distinct classes.[101] The first group "includes all those instances in which . . . there is a previous, existing, definite fiduciary obligation between the parties; so that the obligation of perfect good faith and of complete disclosure always arises from the existing relations of trust and confidence . . . ."[102]

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[94]*Id.* at 78, 491 N.E.2d at 1109.

[95]*Id.* at 76-77, 491 N.E.2d at 1108.

[96]*Id.* at 73, 491 N.E.2d at 1105 (emphasis added).

[97]11 J. POMEROY, EQUITY JURISPRUDENCE 389 (1882) (emphasis in original).

[98]*See, e.g.*, McMahon v. Meredith Corp., 595 F.2d 433, 438 (8th Cir. 1979) ("A failure to disclose a material fact can be considered to be an implicit representation of the nonexistence of such fact on which a party may rely, but only if the alleged fraud-feasor has a duty to speak."); Citizens State Bank, Moundridge v. Gilmore, 226 Kan. 662, 666, 603 P.2d 605, 610 (1979) ("[I]t should be pointed out that fraudulent misrepresentation not only includes affirmative acts and misstatements of fact but also the concealment of acts and/or facts which legally or equitably should be revealed."); Miles v. McSwegin, 58 Ohio St. 2d 97, 99, 388 N.E.2d 1367, 1369 (1979) ("It is well established that an action for fraud and deceit is maintainable not only as a result of affirmative misrepresentations, but also for negative ones, such as the failure of a party to a transaction to fully disclose facts of a material nature where there exists a duty to speak."); *In re* Greene, 290 Or. 291, 294, 620 P.2d 1379, 1383 (1980) ("A half-truth or silence can be as much a misrepresentation as a lie.").

[99]*See* RESTATEMENT (SECOND) OF TORTS §§ 550, 551 (1980).

[100]W. KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 739 (5th ed. 1984) [hereinafter PROSSER AND KEETON].

[101]J. POMEROY, *supra* note 97, at 391. These classes remain valid today, although the recent trend has been more towards finding such a duty to exist. *See* Note, *Misrepresentation—Part II*, 37 MD. L. REV. 523-27 (1978).

[102]J. POMEROY, *supra* note 97, at 391-92. More recently, the United States Supreme Court succinctly stated that "the duty to disclose arises when one party has information

Familiar examples [of this first group] are contracts and other transactions between a principal and agent, a client and attorney, a beneficiary and trustee, a ward and guardian, and the like."[103] In most situations, the party placing the child would not seem to stand in a fiduciary relationship to the prospective parents;[104] thus, the duty to disclose must originate elsewhere.

Such a duty, however, may be found under the second and third groups of cases. The second class embraces

> those instances in which there is no special fiduciary relation between the parties, and the transaction is not in its essential nature fiduciary, but it appears that either one or each of the parties . . . *expressly* reposes a trust and confidence in the other; or else from the circumstances of the case, the nature of their dealings, or their position towards each other, such a trust and confidence in the particular case is *necessarily* implied. The third class includes those instances where there is no existing fiduciary relation . . . and no *special* confidence reposed . . . , but the very . . . transaction itself, in its essential nature, is intrinsically fiduciary, and necessarily calls for perfect and full disclosure.[105]

In cases such as *Burr*, there can be little doubt that the adoptive parents repose a trust and confidence in the party placing the child because that party, in most situations, has superior knowledge of the child's condition and background.[106] This is necessarily so in many cases because before the adoption the natural parents' and child's records are in the possession and control of the party placing the child, and the records are then sealed by court order upon entry of a final decree.[107] In cases such as this where "one party has superior knowledge not within the fair and reasonable reach of the other party,"[108] a duty to disclose should be found.[109]

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that the other party is entitled to because of a fiduciary or other similar relation of trust and confidence between them." Chiarella v. United States, 445 U.S. 222, 228 (1980).

[103]J. POMEROY, *supra* note 97, at 392.

[104]Attorneys or other intermediaries in an independent placement, however, may find such a fiduciary duty imposed upon them. It is often unclear in these cases who the intermediary is actually representing. *See* Note, *Babes and Barristers: Legal Ethics and Lawyer-Facilitated Independent Adoptions*, 12 HOFSTRA L. REV. 933 (1984).

[105]J. POMEROY, *supra* note 97, at 389 (emphasis in the original).

[106]"The classic illustration of fraud is where one party having superior knowledge intentionally fails to disclose a material fact . . . which is not discoverable by ordinary observation . . . ." Nessim v. DeLoache, 384 So. 2d 1341, 1344 (Fla. Dist. Ct. App. 1980) (citations omitted).

[107]*See supra* note 81 for discussion of sealed records.

[108]McMahon v. Meredith Corp., 595 F.2d 433, 439 (8th Cir. 1979).

[109]It is perhaps because of this superior knowledge that a few states have recently enacted

Beyond this, the late Dean Prosser noted that "there has been a rather amorphous tendency on the part of most courts in recent years to find a duty of disclosure when the circumstances are such that the failure to disclose something would violate a standard requiring conformity to what the ordinary ethical person would have disclosed."[110] The argument can certainly be made that a party failing to inform adoptive parents about known risks of a prospective adoptive placement violates standards to which the orginary ethical person would conform. Moreover, the welfare of the child, which is the paramount concern in any adoption issue,[111] would seem to be best served where the adoptive parents are fully apprised of known risks about the child. Cognizant of such risks, the adoptive parents would be more able to deal with the emotional hardships which might result when the risks become reality.[112] Thus, a strong argument exists for finding a duty to disclose and allowing recovery in wrongful adoption cases where the party placing the child fails to disclose known risks and injury results.

Allowing recovery in such situations will not make agencies or others who place children through independent channels the "guarantors of their placements."[113] Adoptive parents will be able to recover only when they can prove actual fraud or a failure to disclose known material facts. The *Burr* court's warnings that the child's future health and happiness are "in the hands of a higher authority"[114] are well taken. An illustration of this point is found in *In re Adoption of G*,[115] where the prospective adoptive parents sought to adopt a baby girl who appeared to be in good condition prior to the adoption. The placement agency had a pediatrician and a psychologist conduct several examinations of the child, and no problems were apparent at that time. Some time after the adoption, however, the child began to show signs of slow development, and the adoptive parents, upon taking her to a specialist in pediatric neurology, discovered that the baby was retarded to such a degree that she would eventually require commitment to an institution.

The adoptive parents' petition to vacate the adoption was denied on the grounds that "the law recognizes no distinction between an adoptive

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statutes requiring full disclosure of medical histories to prospective adoptive parents. *See infra* text accompanying notes 142-54 for a discussion of mandatory disclosure laws.

[110]PROSSER AND KEETON, *supra* note 100, at 739.

[111]*See supra* note 44 for a discussion of concern for the child's best interests.

[112]As noted by one commentator, "[C]omplete investigation and recording of medical histories of the child and his natural parents . . . allows the adoptive parents to prepare for any special needs the child may develop." Shovers, *Non-Contested Adoptions: Policy, Law, Procedure* 6 (Indiana Continuing Legal Education Forum 1985).

[113]*Burr*, 23 Ohio St. 3d at 77, 491 N.E.2d at 1109.

[114]*Id.*

[115]89 N.J. Super. 276, 214 A.2d 549 (1965).

parent and child and a child's relationship to its natural parents."[116] The adoptive parents, like many natural parents, were simply not as fortunate as other parents who are blessed with children having no physical or developmental deficiencies. The agency in *Adoption of G* did not actively misrepresent or fail to disclose any material facts concerning the child; thus, a wrongful adoption tort action would have failed. In short, the fact that the adoptive parents' child turned out to be mentally retarded was something beyond human control.

Such a case illustrates well the principle that recognition of the wrongful adoption theory will not serve to make those placing children guarantors of their placements. Just as there are risks and benefits inherent in becoming natural parents, so too are there risks and benefits present in the adoption process. It is only when those placing the child are cognizant of material facts about the child or her background, when such facts are concealed or misrepresented to the adoptive parents, and when the adoptive parents' detrimental reliance is justified, that an action for wrongful adoption will lie. Any further extension of the doctrine would indeed have an "adverse effect on the [states'] many fine adoption programs."[117]

VI. The Appropriate Measure of Damages

In affirming the trial court's damage award, the *Burr* court noted that the "judgment and award ($125,000) were appropriate in light of the evidence presented to the jury, medical bills ($81,000), other expenses, and [the adoptive parents'] claimed emotional damages."[118] Beyond this brief statement, the opinion does not indicate how the jury computed the damages it awarded. Apparently the agency failed to argue for an offset of the damages in an amount equal to the benefits conferred on the parents through the loving relationship they developed with Patrick despite his problems.[119] The relatively small size of the verdict in consideration of the amount of special damages and claimed emotional damages, however, indicates that the jury may well have taken such benefits into account in its verdict without being instructed to do so.[120]

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[116]*Id.* at 277, 214 A.2d at 550.

[117]*Burr*, 23 Ohio St. 3d at 78, 491 N.E.2d at 1109.

[118]*Id.* at 77, 491 N.E.2d at 1108.

[119]Counsel for the adoptive parents indicated that both parents openly expressed their love for their child in their court testimony, but noted that the defense attempted to use such testimony to its advantage for only a brief period of examination during the trial. Telephone interview with Wylan Witte, Esq. (Dec. 8, 1986); Telephone interview with Ken Cardinal, Esq. (Feb. 6, 1987).

[120]Counsel for the Burrs polled the jurors after the trial and learned that the jury had initially talked of awarding a substantially larger sum. The exact reasons for the smaller,

Such an offset, it could be argued, might fall into the auspices of the "benefit rule" of section 920 of the Restatement (Second) of Torts, which provides:

> When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.[121]

This principle has recently been a subject of intense litigation in the growing number of "wrongful birth" or "wrongful conception" cases.[122] These cases typically involve negligent sterilizations or vasectomies which result in unwanted pregnancy and eventual birth.[123] One of the controversial issues in these cases is the proper measure of damages for the parents who have been wrongfully blessed with an unplanned child.[124] "While the courts are now in general agreement that the costs, expenses and pain directly attributable to the pregnancy and childbirth should be recoverable, the question of whether to allow child-rearing expenses remains an issue of fertile debate."[125]

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modest award are not entirely clear. Telephone interview with Wylan Witte, Esq. (Dec. 8, 1986).

[121]RESTATEMENT (SECOND) OF TORTS § 920 (1980).

[122]The amount of litigation and commentary in this area has increased dramatically since the landmark "wrongful birth" case of Custodio v. Bauer, 251 Cal. App. 2d 303, 59 Cal. Rptr. 463 (1967). The term "wrongful birth" is generally used to refer to a negligence action "brought by a member of the infant's family on allegations attributing the infant's unplanned or unwanted birth to the tortfeasor's misfeasance." Annotation, *Tort Liability for Wrongfully Causing One to Be Born*, 83 A.L.R.3d 15, 19 n.4 (1978). This should be distinguished from the term "wrongful life," which is typically used to refer to the infant's own action for being wrongfully brought into the world. *Id.* at 19 n.3. Wrongful birth actions are increasingly recognized as a valid cause of action, whereas wrongful life actions are typically rejected on the basis that it is illogical for a being to argue that his or her own birth has harmed him. *Id.*

For various discussions of this interesting and rapidly developing area of the law, see Kashi, *The Case of the Unwanted Blessing: Wrongful Life*, 31 U. MIAMI L. REV. 1409 (1977); Note, *Wrongful Birth, A Child of Tort Comes of Age*, 50 U. CIN. L. REV. 65 (1981); Comment, *Liability for Failure of Birth Control Methods*, 76 COLUM. L. REV. 1187 (1976); Comment, *Recovery of Childbearing Expenses in Wrongful Birth Cases: A Motivational Analysis*, 32 EMORY L.J. 1167 (1983).

[123]*See, e.g.*, Ochs v. Borrelli, 187 Conn. 253, 445 A.2d 883 (1982) (negligent sterilization); Weintraub v. Brown, 93 A.D.2d 339, 470 N.Y.S.2d 634 (1983) (negligent vasectomy). Other cases have involved negligent misfilling of prescriptions for birth control tablets or a failure to diagnose a woman's pregnancy. *See generally* Annotation, *supra* note 122.

[124]The late Dean Prosser noted, with a likely pun intended, that "the question of how the parent's damages should be determined has become pregnant with controversy." PROSSER AND KEETON, *supra* note 100, at 372.

[125]*Id.*

Although many courts refuse to allow any damages for the costs of raising the child,[126] a growing number of jurisdictions permit such a recovery but require it to be reduced by the accompanying benefits which may be expected to accrue to the parents in raising the child.[127] Typical of cases adopting this view is *Jones v. Malinowski*,[128] where the Maryland Supreme Court stated:

> By allowing the jury to consider the future costs, both pecuniary and non-pecuniary, of rearing and educating the child, we permit it to consider all the elements of damage on which the parents may present evidence. By permitting the jury to consider the reason for the procedure and to assess and offset the pecuniary and non-pecuniary benefits which will inure to the parents by reason of their relationship to the child, we allow the jury to discount those damages, thus reducing speculation and permitting the verdict to be based upon the facts as they actually exist in each of the unforeseeable variety of situations which may come before the court.[129]

Relying on this line of reasoning, it would not be untenable for a defendant in a wrongful adoption case similarly to assert that damages should be reduced by any benefits conferred on the adoptive parents.

Such an argument, however, overlooks the major premise upon which the benefit rule has been implemented in wrongful birth cases. The fundamental distinction is that any benefits conferred on the wrongful adoption victims would have likely accrued to them regardless of the tortfeasor's actions since they were interested in adopting a child. The victims of wrongful birth, on the other hand, would not have received a new family member but for the tortious conduct. The authors of the Restatement benefit rule of section 920 specifically addressed this problem in their official comments, writing, "Under the rule stated in this Section to justify a diminution of damages the benefit must result from the tortious conduct . . . . The rules of causation applicable to the creation and extent of liability . . . apply to the diminution of damages."[130]

More simply put, the prospective parents seeking to adopt would likely have adopted a child and enjoyed the benefits of a loving relationship

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[126]*Id.*; *see also* Wilbur v. Kerr, 275 Ark. 239, 628 S.W.2d 568 (1982); Schork v. Huber, 648 S.W.2d 861 (Ky. 1983).

[127]PROSSER AND KEETON, *supra* note 100, at 372; *see also* Ochs v. Borelli, 187 Conn. 253, 445 A.2d 883 (1982); Troppi v. Scarf, 31 Mich. App. 240, 187 N.W.2d 511 (1971).

[128]299 Md. 257, 473 A.2d 429 (1984).

[129]*Id.* at 264, 473 A.2d at 437 (quoting University of Arizona v. Superior Court, 136 Ariz. 579, 586, 667 P.2d 1294, 1301 (1983)).

[130]RESTATEMENT (SECOND) OF TORTS § 920 comment (d) (1980).

with or without the tortious conduct of the party placing the child.[131] Neither the "but-for" test of causation nor the "substantial factor" causation test would be met in such a case. In wrongful adoption cases, therefore, the amount of damages awarded to the adoptive parents should not be offset because any benefits which accrued were not caused by the defendant.[132]

VII. Wrongful Adoption as a Superior Cause of Action to Annulment

With the basic workings of the wrongful adoption theory outlined, the pros and cons of this new cause of action require evaluation. One of the main beneficiaries of this theory is the adoptive parents whose rights have heretofore received sparse attention.[133] While the best interests of the child must take precedence, "the protection of . . . the adopting parents should [also] be considered along with that of the child."[134] The wrongful adoption theory recognizes for the first time that "just as couples must weigh the risks of becoming natural parents, taking into consideration a host of factors, so too should adoptive parents be allowed to make their decision in an intelligent manner."[135] By allowing adoptive parents to seek compensatory damages in these situations, they are able to keep their family unit intact while receiving redress for their injuries. In this way their right to be free from being victimized by fraud is recognized without forcing them to end their relationship with the child they have come to know as their own.

The adopted child would also seem to benefit from the wrongful adoption remedy in most cases. In the drastic annulment setting, the child is suddenly uprooted once again to join the ranks of the parentless. While annulment may be appropriate in cases where the fraud is immediately discovered before significant bonds are formed, it is contrary to the "great

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[131]In some cases the evidence might show, for whatever reasons, that the adoptive parents would not have adopted another child. In such situations the plaintiffs might argue that public policy should not allow a set off because the tort of fraud involved in wrongful adoptions is much more culpable than the negligence present in wrongful birth actions. In this scenario, the law of the jurisdiction should be examined to determine how the courts have dealt with set off in wrongful birth cases.

[132]Thus, total damages should include all direct and consequential damages caused by the tortious conduct. Prosser and Keeton, *supra* note 100, at 766. In some states, attorneys' fees may be available by statute, and punitive damages may be appropriate if the conduct meets the state's requirements for such an award.

[133]*See supra* note 1.

[134]*In re* Adoption of Children by O, 141 N.J. Super. 586, 589, 359 A.2d 513, 514 (1976).

[135]Burr v. Board of County Comm'rs, 23 Ohio St. 3d 69, 78, 491 N.E.2d 1101, 1109 (1986).

policy concern in making adoptions conclusive and final."[136] In cases such as *Burr*, however, the child will remain a part of an established family.

The only conceivable disadvantage to the child is the possible adverse psychological effect that may result where the child learns that he or she was the subject of a lawsuit. This same concern has been raised in a few wrongful birth cases where the child might similarly learn of the litigation that focused upon him. In *Boone v. Mullendore*,[137] for instance, the Alabama Supreme Court stated:

> Another problem is the possible harm that can be caused to the unwanted child who will one day learn that he not only was not wanted by his or her parents, but was reared by funds supplied by another person. Some authors have referred to such a child as an 'emotional bastard' in a realistic, but harsh, attempt to describe the stigma that will attach to him once he learns the true circumstances of his upbringing.[138]

Only a few jurisdictions, however, have found this concern significant enough to deny recovery for rearing costs in wrongful birth cases.[139] No case, however, has disallowed recovery for the other damages claimed in the wrongful birth setting for this reason.[140] While this concern certainly merits attention in wrongful adoption, it should not become so large as to bar the action itself. The adopted child would seem to be better off with her adoptive parents, even where she learns of the action, than if she were to be uprooted from her only family; in fact, the knowledge that her parents chose to seek monetary damages rather than annulment may serve to cement her relationship to the family. Any potential harmful effects that might flow to the adoptee are better left for counsel to discuss with the adoptive parents, taking into consideration the unique circumstances of their case, prior to initiation of a wrongful adoption tort suit.[141]

An additional potential windfall of the wrongful adoption theory is that by requiring perpetrators of adoption fraud to answer in civil damages, the action will serve to deter others from such tortious conduct in the future. While the main purpose of compensatory damages is to redress

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[136]*In re* Welfare of Alle, 304 Minn. 254, 257, 230 N.W.2d 574, 577 (1975).

[137]416 So. 2d 718 (Ala. 1982).

[138]*Id.* at 722.

[139]*See, e.g.*, *Boone*, 416 So. 2d 718; Wilbur v. Kerr, 275 Ark. 239, 628 S.W.2d 568 (1982).

[140]*See, e.g.*, *Boone*, 416 So. 2d 718; *Wilbur*, 275 Ark. 239, 628 S.W.2d 568.

[141]For instance, after the *Burr* case was concluded, attorney Kenneth Cardinal, who had been co-counsel for the Burrs, turned down another wrongful adoption case because, among other reasons, the adopted child, now a teen-ager, would have been fully cognizant of the litigation. Telephone interview with Kenneth Cardinal, Esq. (Feb. 6, 1987).

the victim's injuries, it cannot be denied that these damages have also served the secondary purpose of reducing future conduct that would warrant such damages. Because annulment does not afford this additional benefit, the wrongful adoption theory is even more appealing.

VIII. Mandatory Disclosure Laws—Legislative Proposals That Could Reduce Adoption Fraud

One factor that may contribute to adoption fraud is that in most states, the records of the adoptee's medical and family background are sealed after the adoption is perfected, and can be seen by the adoptive parents only by court order.[142] These sealed record statutes may give the individuals placing the child a false sense of security that their fraud will never be discovered.[143] The rationale behind keeping these records confidential has been succinctly expressed by New York's highest court:

> This confidentiality serves several purposes. It shields the adopted child from possibly disturbing facts surrounding his or her birth and parentage, it permits the adoptive parents to develop a close relationship with the child free from interference or distraction, and it provides the natural parents with an anonymity that they may consider vital.[144]

These concerns are certainly valid and continue to be a strong rationale for maintaining confidentiality in the adoption process. The sealed record statutes, however, have the inherent quality of allowing vital information about the prospective adoptee to be kept from the adoptive parents.

Recently, though, a few state legislatures have enacted statutes that provide the prospective parents with access to vital medical records without interfering with the natural parents' desires to remain anonymous.[145] For instance, New York's statute, which was adopted in 1983, provides that

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[142]*See supra* note 81 for a discussion of sealed records. It is, of course, difficult to pinpoint the actual motives behind adoption fraud, particularly when many states and the federal government have statutes that give financial assistance to "special needs" placements. *See, e.g.*, Va. Code Ann. §§ 63.1-238.1 to -238.4 (Supp. 1986); Note, *Federal Adoption Assistance for Children with Special Needs*, 19 Clearinghouse Rev. 586 (Oct. 1985).

[143]Kenneth Cardinal, counsel for plaintiffs in the *Burr* case, believes that fraud was committed in that case simply to avoid the expense and additional paperwork which would have been required had the child been placed through the special needs program. He feels that the social worker in that case definitely felt secure because of the sealed records statute. Telephone interview with Kenneth Cardinal, Esq. (Feb. 6, 1987).

[144]Linda F.M. v. Department of Health, 52 N.Y.2d 236, 237, 418 N.E.2d 1302, 1303 (1981).

[145]*See, e.g.*, Ill. Rev. Stat. ch. 40, para. 1522.4 (Supp. 1986) (requiring, among other things, that a detailed health history of the biological parents be given to the adoptive parents; no sanctions included in the statute for failure to disclose); Kan. Prob. Code Ann. § 59-2278a

> [n]otwithstanding any other provision of law to the contrary, to the extent they are available, the medical histories of a child legally freed for adoption and of his or her natural parents, with information identifying such natural parents eliminated, *shall be provided* by an authorized agency to such child's prospective adoptive parent and upon request to the adoptive parent when such child has been adopted . . . .[146]

This provision also specifically defines what records must be disclosed to the adoptive parents:

> Such medical histories shall include all available information setting forth conditions or diseases believed to be hereditary, any drugs or medication taken during pregnancy by the child's natural mother and any other information, including any psychological information . . . which may be a factor influencing the child's present or future health.[147]

This provision places an affirmative duty on the agency to disclose this vital information to prospective parents before the adoption is perfected without infringing upon confidentiality.[148]

Indiana's statute, which became effective in 1986, similarly provides for disclosure of this important information:

> Accompanying the petition . . . [which must be filed with the appropriate court to perfect the adoption] . . . shall be a medical report of the health status and medical history of the adoptee and the adoptee's birth parents, including neonatal, psychological, physiological, and medical care history on forms prescribed by the state registrar (*a copy of this report shall be sent to the person identified as the state registrar in IC 31-3-4 and to the adoptive parents*). This subsection does not authorize the release of medical information that would result in the identification of a person.[149]

(Vernon Supp. 1987) (requiring genetic, medical, and social history of child to be filed with the petition for adoption; no sanctions included for failure fully to disclose); ME. REV. STAT. ANN. tit. 19, § 533 (Supp. 1986) (requiring available medical or genetic information to be supplied to the adoptive parents; no sanctions for nondisclosure included); TEX. FAMILY CODE ANN. § 16.032 (Vernon 1986) (expansive health history report to be provided to adoptive parents; no adoption may be granted until such report has been so provided and filed in the record of the proceedings).

[146]N.Y. SOC. SERV. LAW § 373a (McKinney Supp. 1986) (emphasis added).

[147]*Id.*

[148]Although this statute has not yet been the subject of litigation, the New York Court of Appeals has noted in dicta that by enacting this statute, the "legislature provided that adoptive parents *must* be furnished a medical history of the natural parents . . . after identifying information [is] removed. . . ." *In re* Estate of Walker, 64 N.Y.2d 354, 357, 486 N.Y.S.2d 899, 903, 476 N.E.2d 298, 302 (1985) (emphasis added).

[149]IND. CODE § 31-3-1-2(b) (Supp. 1986) (emphasis added).

The last sentence of this provision is thus broader than the New York statute in that it could be read to allow entire documents concerning the natural parents' health to be withheld on the grounds that disclosure "would result in the identification of a person." New York's statute is more specific in that it calls for the medical histories to be disclosed "with information identifying such natural parents eliminated."[150] The Indiana legislature and other states considering such legislation should consider adopting the New York language to eliminate this potential defect.

Although Indiana's statute provides criminal sanctions for anyone who "[k]nowingly supplies false information to a medical history,"[151] neither Indiana's nor any other state's provisions contain sanctions for failure to disclose this vital information. Certainly in most cases it can be presumed that counsel for the adoptive parents would be aware of the disclosure requirements and would insist upon compliance. To ensure that this information is provided, however, the legislatures of Indiana, New York, and other states with disclosure laws, as well as those of other jurisdictions that consider such enactments in the future, should provide some type of sanction for failure to disclose this information.

Despite these minor shortcomings, the mandatory disclosure laws are beneficial to all parties involved in the adoption process. The natural parents' confidentiality is protected[152] while the adoptive parents, who are more fully aware of the risks involved, are "allowed to make their decision in an intelligent manner."[153] As this information will more readily allow them "to prepare for any special needs the child may develop,"[154] the child's best interests are served because the parents will be better able to accept any potential risks that become realities. Even those placing children for adoption would seem to benefit if full disclosure is made because they would then not have to fear future wrongful adoption suits against them.

Although such laws cannot prevent those bent on adoption fraud from future misrepresentation,[155] these measures at least remove the sense of security which the sealed record statutes have provided in the past. Such mandatory disclosure laws are likely to be effective in deterring at least a small portion of adoption fraud and should therefore be embraced by all state legislatures.

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[150]N.Y. Soc. Serv. Law § 373a (McKinney Supp. 1986).

[151]Ind. Code § 31-3-4-19(1) (Supp. 1986).

[152]For instance, Indiana's statute provides criminal sanctions for anyone who unlawfully discloses or seeks to disclose any confidential information. *Id.* § 31-3-4-19(2).

[153]Burr v. Board of County Comm'rs, 23 Ohio St. 3d 69, 78, 491 N.E.2d 1101, 1109 (1986).

[154]*Id.*

[155]This is true in part because the statutes have no teeth, but it can also be attributed to the very nature of the adoption process wherein the anxious prospective parents are extremely vulnerable.

IX. Conclusion

Although mandatory disclosure laws will help deter adoption fraud, it is unlikely that this abuse of the adoption process will disappear in the foreseeable future. Rather, current trends in today's society indicate that instances of fraud in the adoption process may well be on the rise. Wrongful adoption is a viable cause of action for adoptive parents who are victimized by such adoption fraud.

This remedy is superior to annulment because it recognizes the rights of the adoptive parents, protects and promotes the best interests of the adopted child, and serves to deter future instances of adoption fraud. Wrongful adoption actions should lie for active fraud as well as non-disclosure where the party placing the child is in a position to control the adoptive parents' access to material information. A practitioner faced with a case of fraud practiced upon adoptive parents should seriously consider this theory as a possible remedy.

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