

Oklahoma Law Review

Volume 44 | Number 2

1-1-1991

Family Law: Wrongful Adoption in Oklahoma: An Examination of Issues of Adoption Agency Liability

Kathleen R. Parker

Follow this and additional works at: <https://digitalcommons.law.ou.edu/olr>



Part of the [Family Law Commons](#)

Recommended Citation

Kathleen R. Parker, *Family Law: Wrongful Adoption in Oklahoma: An Examination of Issues of Adoption Agency Liability*, 44 OKLA. L. REV. 365 (1991),
<https://digitalcommons.law.ou.edu/olr/vol44/iss2/8>

This Note is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oklahoma Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.

Family Law: Wrongful Adoption in Oklahoma: An Examination of Issues of Adoption Agency Liability

I. Introduction

Our society created adoption to give capable and loving legal parents to parentless children. The state's goal is to create stable and happy families, but many legal land mines line the path to this objective. The most recent land mine to appear in the adoption area is the cause of action for wrongful adoption.

Adoption is a statutory phenomenon.¹ Massachusetts enacted this country's first adoption statute in 1851.² All fifty states now authorize adoption by statute and license state agencies for child placement.³ Although these statutes simply state that an adopted child is in the same legal position as a "natural child" with regard to the adoptive parents,⁴ in reality adoption is much more complex. Adoption is replete with legal and social problems.⁵ Adoption affects the legal rights of natural parents, adopted children, the adoptive parents and their issue. Consequently, there are many conflicting legal interests in the adoption process.⁶

When interpreting laws authorizing the release of an adopted child's emotional, hereditary and medical history, courts and legislatures struggle to balance the best interests and legal rights of natural parents, adoption-eligible children and adoptive parents.⁷ The arguments set forth by each of these parties are compelling. Adoptive parents wish to gain information so that they can anticipate the emotional and physical needs of their adopted children as they grow and mature.⁸ Adopted children desire knowledge about their biological origins and may have concerns about passing on unknown genetic traits to their offspring.⁹ Natural parents are often concerned with maintaining their anonymity.¹⁰ The current trend is for agencies to release pertinent familial information while protecting the identity of natural parents.¹¹

1. Note, *Annulment of Adoption Decrees on Petition of Adoptive Parents*, 22 J. FAM. L. 549 (1983-84).

2. Kawashima, *Adoption in Early America*, 20 J. FAM. L. 677, 677-78 (1982).

3. Tegeler, *Advertising for Adoption Placement: Gray Market Activities in a Gray Area of Constitutional Protection*, 25 DUQ. L. REV. 129, 130 (1986).

4. 10 OKLA. STAT. § 60.16(A) (Supp. 1990).

5. Note, *supra* note 1, at 549.

6. *Id.*

7. Poulin, *The Open Adoption Records Movement: Constitutional Cases and Legislative Compromise*, 26 J. FAM. L. 395 (1987-88).

8. Michael J. v. County of Los Angeles, Dep't of Adoptions, 201 Cal. App. 3d 859, 247 Cal. Rptr. 504, 513 (1988).

9. Poulin, *supra* note 7, at 399.

10. *Id.* at 398.

11. OKLAHOMA DEP'T OF HUMAN SERVS., DIV. OF CHILDREN AND YOUTH SERVS., POLICY MANUAL § 3896.2 (1990) [hereinafter POLICY MANUAL].

In the past, when an adopted child evidenced unexpected serious emotional or physical problems, the adoptive parents' only remedy was to annul the adoption and return the child to the state.¹² Recently, adoptive parents are bringing court actions for damages against adoption agencies when adopted children evidence problems either previously known or foreseeable to the agencies.¹³

These parents wish to be compensated for the expense and psychological pain they incur raising a child with serious medical or psychological problems. Legal actions are brought against adoption agencies for negligence,¹⁴ fraud,¹⁵ breach of contract,¹⁶ and negligent infliction of emotional distress.¹⁷ Adoptive parents also bring suit when bureaucratic errors cause the removal of children from their adoptive homes.¹⁸

When an adoption agency has knowledge of a child's physical or mental defects, courts may be willing to impose upon the agency a legal duty to disclose this information to prospective parents.¹⁹ The agency that affirmatively represents a child as healthy may be held liable when the child later evidences foreseeable physical or mental problems.²⁰ Modern courts analyze the laws of contract and tort to resolve issues which arise in these situations. Courts, in balancing the needs of the adoptive parents, the children, and the duties of adoption agencies have fashioned a new remedy: wrongful adoption.²¹

This note discusses adoption agency liability and wrongful adoption initially by focusing on two recent cases, *Engstrom v. State of Iowa*²² and *Allen v. Children's Services*.²³ Next, this note examines what courts are holding regarding agencies' legal duties to adoption-available children and

12. Note, *supra* note 1, at 553.

13. One of the first cases appearing in the appellate courts was *In re McDuffee*, 352 S.W.2d 23 (Mo. 1961). In *McDuffee*, adoptive parents attempted to have the adoption annulled after they learned their adopted child was mentally disturbed. Although it appeared the child was in need of institutional care, the court stated that natural parents who find themselves in a similar circumstance must seek to find treatment for their child and that adoptive parents must do the same. *Id.* at 28. The court held that it was not in the best interests of the child for the adoptive parent to be allowed to abandon her. *Id.* The court suggested the parents seek public aid, if needed, to assist them in coping with the child. *Id.*

14. See *Petrowsky v. Family Serv. of Decatur, Inc.*, 165 Ill. App. 3d 32, 518 N.E.2d 664 (1987), *appeal denied*, 119 Ill. 2d 574, 522 N.E.2d 1256 (1988).

15. See *Michael J. v. County of Los Angeles, Dep't of Adoptions*, 201 Cal. App. 3d 859, 247 Cal. Rptr. 504 (1988).

16. *Petrowsky*, 518 N.E.2d at 667-68.

17. See *Meracle v. Children's Serv. Soc'y of Wis.*, 149 Wis. 2d 19, 437 N.W.2d 532 (1989).

18. This article will be discussing *Engstrom v. State*, 461 N.W.2d 309 (Iowa 1990), and "Legal Risk" children in the Oklahoma child welfare system.

19. *Michael J.*, 247 Cal. Rptr. at 513.

20. *Id.*

21. LeMay, *The Emergence of Wrongful Adoption as a Cause of Action*, 27 J. FAM. L. 475 (1988-89); see also *Burr v. Board of County Comm'rs of Stark City*, 23 Ohio St. 3d 69, 491 N.E.2d 1101 (1986).

22. 461 N.W.2d 309 (Iowa 1990).

23. 58 Ohio App. 3d 41, 567 N.E.2d 1346 (1990).

prospective parents.²⁴ Finally, this note examines Oklahoma adoption law and the basis for adoption agency liability in Oklahoma.

II. Adoption in Oklahoma

Oklahoma is one of six states that have patterned their adoption legislation after the Uniform Adoption Act (the Act).²⁵ The original Act,²⁶ which Oklahoma substantially adopted in 1957,²⁷ contained an annulment provision.²⁸ This provision allowed adoptive parents a remedy by providing that an adoption could be annulled within two years if an adopted child developed any unforeseen serious physical or mental illness as a result of preexisting conditions.²⁹

The current annulment provision of the Act provides that after one year, and subject to disposition of an appeal, an adoption decree cannot be questioned for any reason, including fraud, misrepresentation and lack of notice.³⁰ In Oklahoma, however, this annulment provision has been deleted, and the applicable section provides only that any aggrieved person may appeal an adoption decree.³¹ Appeals must be taken directly to the Oklahoma Supreme Court.³²

24. Although children may be placed in adoptive homes by private agencies or independent parties, this discussion will be limited to state agency adoption. See Comment, *Best Interests of Children and the Interests of Adoptive Parents: Isn't It Time for Comprehensive Reform?*, 21 GONZ. L. REV. 749, 752-53 (1985-86).

25. See 10 OKLA. STAT. §§ 60.1-60.23 (1981). The other five states are Alaska, Arkansas, Montana, North Dakota, and Ohio. *Id.*

26. The Uniform Adoption Act was approved in 1953 by the National Conference of Commissioners on Uniform State Laws and the American Bar Association. Note, *supra* note 1, at 553. It went through various revisions in 1969 and 1971. *Id.* The most recent revision of the Act occurred in 1984. Revised Uniform Adoption Act, [Reference File] Fam. L. Rep. (BNA) 201:0013 (Mar. 13, 1984).

27. 1957 Okla. Sess. Laws § 1, at 22.

28. Note, *supra* note 1, at 553.

29. *Id.* at 553 n.16 (citing Uniform Adoption Act, § 17, 9 U.L.A. 11, 14 (1979)). The annulment section provided: "[I]f within two years after the adoption[,] a child develops any serious and permanent physical or mental malady or incapacity as a result of conditions existing prior to the adoption and of which the adopting parents had no knowledge or notice . . . [the adoption may be annulled]." *Id.*

30. The current provision of the Uniform Adoption Act concerning annulment provides:

Subject to the disposition of an appeal, upon the expiration of (one) year after an adoption decree is issued[,] the decree cannot be questioned by any person including the petitioner, in any manner upon any ground, including fraud, misrepresentation, failure to give any required notice, or lack of jurisdiction of the parties or the subject matter, unless, in the case of the adoption of a minor the petitioner has not taken custody of the minor, or in the case of the adoption of an adult, the adult had no knowledge of the decree within the (one) year period.

UNIFORM ADOPTION ACT § 15(b) (1984).

31. 10 OKLA. STAT. § 60.19 (1981). The pertinent section provides only that "[a]n appeal may be taken from any final order, judgment or decree rendered hereunder to the Supreme Court by any person aggrieved thereby, in the manner provided for appeals from said court in civil matters.

32. *Id.*; see *In re Adoption of Lewis*, 380 P.2d 697 (Okla. 1963).

As an alternative to court action, relief is available through federal and state agencies. Adoption is a social welfare issue.³³ Federal legislation which applies to adoption is found in subchapter II of the Child Abuse Prevention and Treatment and Adoption Reform Act.³⁴ The Department of Health and Human Services administers the program.³⁵ The federal program focuses mainly on increasing adoption opportunities for school age,³⁶ handicapped³⁷ or minority children.³⁸ The federal government provides states with funding to further this goal.³⁹

In Oklahoma, the Department of Human Services, Division of Children and Youth Services, Child Welfare Service (CWS) administers the adoption program.⁴⁰ The goal of CWS is to bring together a family and a child for the purpose of establishing a legal parent-child relationship.⁴¹ CWS recruits suitable adoptive homes for needy children, conducts prospective home studies, and receives and places children in adoptive homes.⁴²

The Oklahoma Legislature recently passed legislation authorizing CWS to disclose the medical history of a child and his natural family to prospective parents.⁴³ The policy of CWS is to provide as much information as possible on a child's medical and social background in order to aid the child's transition into the new home.⁴⁴ All information concerning the identity of the natural parents remains confidential, however, unless the child and the natural parents, at a future date, express a wish to find each other.⁴⁵

Although legal authorization to disclose a child's social and medical background would appear to be beneficial to both the parents and the child, the legislation may expose CWS to liability. The agency may become liable for failing to disclose information relevant to a physical or emotional problem an adopted child develops years after the adoption.

CWS has an adoption subsidy program which provides families financial support when a child experiences severe medical or psychiatric problems from preexisting conditions.⁴⁶ When parents discover their adopted child has a serious condition of which they were not aware, however, a subsidy may not be sufficient compensation. In many cases, adoptive parents feel unable to cope, either emotionally or financially, with a child they believe

33. Comment, *supra* note 24, at 752.

34. 42 U.S.C. §§ 5111-5113 (1988).

35. *Id.* § 5113.

36. *Id.* § 5111.

37. *Id.*

38. *Id.* § 5113.

39. *Id.* § 5115.

40. POLICY MANUAL, *supra* note 11.

41. *Id.* § 3891.

42. *Id.* § 3892.

43. 1990 Okla. Sess. Laws ch. 27, § 57(D).

44. POLICY MANUAL, *supra* note 11, § 3896.24.

45. *Id.* § 3895.1(D).

46. *Id.* § 3896.7.

was intentionally thrust upon them without proper disclosure.⁴⁷ When agency relief is inadequate, these parents may choose to bring legal actions for wrongful adoption.

Oklahoma courts could prove amenable to wrongful adoption claims. Because agencies are now authorized to disclose children's medical and social backgrounds, Oklahoma courts could hold that agencies have a legal duty to do so. This new legal duty could be the basis for either a negligence claim or an action based on breach of implied terms in the adoption contract.

Oklahoma statutory provisions for annulment have been deleted,⁴⁸ and consequently, annulment is governed by common law.⁴⁹ Because Oklahoma courts have long recognized that certain adoptions may be annulled on the basis of fraud,⁵⁰ adoptive parents may also find courts receptive to wrongful adoption actions based on fraud or misrepresentation.⁵¹ Thus, in Oklahoma a legal basis exists for court recognition of wrongful adoption claims based on negligence, fraud or breach of the adoption contract.

III. *Wrongful Adoption and Adoption Agency Liability: Prior Case Law*

The term "wrongful adoption" first appeared in *Burr v. Board of County Commissioners of Stark County*.⁵² In *Burr*, adoptive parents brought action against the local county welfare department, alleging the department intentionally misrepresented the health of their adopted baby boy. The court found that the County had represented the child as a "nice, big, healthy baby."⁵³ The court also noted, however, that the County possessed medical records which indicated the child was of low intelligence and at risk of developing Huntington's disease.⁵⁴ Finding all the elements of fraud present,⁵⁵ the court affirmed the lower court's judgment and award of damages in favor of the Burrs.⁵⁶

47. See *M.L.B. v. Department of Health & Rehab. Serv.*, 559 So. 2d 87 (Fla. Dist. Ct. App. 1990).

48. 10 OKLA. STAT. § 60.19 (Supp. 1990).

49. See generally *Wade v. Geren*, 743 P.2d 1070 (Okla. 1987).

50. *In re Adoption of Lori Gay W.*, 589 P.2d 217, 222 (1979). Typically the natural parents attempt to annul an adoption by alleging fraud. Adoptive parents, however, also may attempt to annul adoptions on the basis of fraud when they find an agency has misrepresented material information concerning the child's condition. See *M.L.B. v. Department of Health & Rehab. Serv.*, 559 So. 2d 87, 88 (Fla. Dist. Ct. App. 1990).

51. *Richard P. v. Vista Del Mar Child Care Serv.*, 106 Cal. App. 3d 860, 165 Cal. Rptr. 370, 373 (1980).

52. *Burr v. Board of County Comm'rs of Stark City*, 23 Ohio St. 3d 69, 491 N.E.2d 1101, 1103 (1986).

53. *Id.*, 491 N.E.2d at 1105. The court found that the department had told the Burrs that the child's natural mother was eighteen years old and lived with her parents. *Id.* When the child's records were disclosed, however, they revealed that the natural mother was actually a thirty-one-year-old mental patient. *Id.*, 491 N.E.2d at 1104.

54. *Id.*, 491 N.E.2d at 1104.

55. *Id.*, 491 N.E.2d at 1105-07.

56. *Id.*, 491 N.E.2d at 1109. The Burrs were awarded \$125,000 in damages. *Id.*, 491

Burr represents a new trend in adoption law. Although occasional legal actions were brought by dissatisfied adoptive parents,⁵⁷ historically these actions were usually for annulment of the adoption rather than for damages.⁵⁸ Previous courts had not proved amenable to actions for damages brought against adoption agencies.⁵⁹ The courts reasoned that adoption agencies should not be guarantors of a child's future health or well-being.⁶⁰

Since *Burr*, adoptive parents have been increasingly successful in actions for damages brought against adoption agencies on a variety of theories, especially when agencies have misrepresented children's medical conditions or backgrounds. A California Court of Appeals allowed adoptive parents to bring an action for damages against a state agency for intentional misrepresentation and fraudulent concealment in *Michael J. v. County of Los Angeles, Department of Adoptions*.⁶¹

Michael J. reexamined the public policy concerns previously voiced in *Richard P. v. Vista Del Mar Child Care Service*,⁶² and held that although an agency should not be made the guarantor of a child's health, an agency does have a legal duty to make "good faith full disclosure" concerning a

56. *Id.*, 491 N.E.2d at 1109. The Burrs were awarded \$125,000 in damages. *Id.*, 491 N.E.2d at 1104.

57. For example, in *In re McDuffe*, parents attempted to have an adoption annulled alleging their adopted daughter was mentally disturbed and needed to be institutionalized. The court held that since natural parents, confronted with similar circumstances, could not relieve themselves of their child, the adopted parents should not be allowed to do so. *In re McDuffe*, 352 S.W.2d 23, 28 (Mo. 1961). The court held the best interests of the child mandated that the adoptive parents remain responsible. *Id.*

One could argue that if the parents were so eager to relieve themselves of the responsibility of the child, that they were probably no longer able to act in the child's best interests. However the *McDuffee* court seemed to feel that *any* parents were better than *no* parents.

58. *Id.*

59. In the case of *Richard P. v. Vista Del Mar Child Serv.*, 106 Cal. App. 3d 860, 165 Cal. Rptr. 370 (1980), adoptive parents brought action against an agency alleging their child was suffering from "extreme emotional and adjustment problems." *Id.*, 165 Cal. Rptr. at 371. The parent brought action based on intentional or negligent misrepresentation or failure to warn, claiming the agency had not advised them that the child's premature birth could lead to future health problems. *Id.*

The court held that public policy mandated that no action be allowed against an adoption agency on these grounds. *Id.* The court stated to allow these claims would "impede the proper functioning of adoption agencies." *Id.*, 165 Cal. Rptr. at 374.

60. *Id.*, 165 Cal. Rptr. at 374.

61. 201 Cal. App. 3d 859, 247 Cal. Rptr. 504 (1988). In *Michael J.*, a male child was placed with adoptive parents in 1970. He had a port wine stain on his upper body and face. The court noted that the adoptive mother had inquired about the stain, and evidence existed which showed the agency had lead her to believe the stain was only a birthmark. *Id.*, 247 Cal. Rptr. at 513. When the child suffered an epileptic seizure in 1981, the adoptive mother learned the child had Sturge-Weber Syndrome. Expert testimony at trial revealed that the syndrome was congenital and should have been diagnosed at birth. *Id.*, 247 Cal. Rptr. at 506.

62. *Id.*, 247 Cal. Rptr. at 511. In *Richard P.*, the court had affirmed a dismissal of a case brought by dissatisfied adoptive parents on grounds of intentional or negligent misrepresentation, stating that to impose such liability on agencies would essentially make the agencies guarantors of a child's health. *Richard P.*, 165 Cal. Rptr. at 374. The court noted that natural parents have no legal recourse. *Id.*

child's medical history.⁶³ An agency has an obligation to do a competent investigation of a child's medical background before placing the child in an adoptive home.⁶⁴ Furthermore, although adoption agencies should not be liable for negligent failure to recognize and inform prospective parents of a child's medical condition,⁶⁵ adoption agencies should be liable for affirmative misrepresentations.⁶⁶

Similarly, the Wisconsin Supreme Court allowed an action to be brought for damages against an adoption agency for affirmative misrepresentation of a child's health. In *Meracle v. Children's Service Society of Wisconsin*,⁶⁷ adoptive parents who discovered that their daughter had Huntington's disease sued the adoption agency for medical expenses and emotional distress. The court found that the agency may have misrepresented the child's chances of inheriting the disease.⁶⁸ Agreeing with *Richard P. and Michael J.*, the court held that, even though it would not recognize a cause of action for agency negligence, the court would allow the parents to bring a cause of action for misrepresentation.⁶⁹

At least one court has recognized a cause of action for breach of the adoption contract. Adoptive parents brought action against an adoption agency based on negligence, breach of an adoption agreement, adoption agency malpractice and emotional distress in *Petrowsky v. Family Service of Decatur, Inc.*⁷⁰ The adoptive parents sued the private agency, alleging the agency had failed to investigate properly the child's paternity. The parents were damaged by the legal confusion that transpired when the biological father suddenly claimed paternity.

The *Petrowsky* court would not recognize a cause of action for agency malpractice.⁷¹ The court found that the "outrageous conduct" required for an intentional infliction of emotional distress claim had not been met,⁷² but allowed the parent's contract action.⁷³

The court held that an adoption agreement contains an "implied duty of good faith."⁷⁴ Thus, an agency might be held liable for damages resulting from a breach of that duty and the foreseeable emotional trauma suffered by the adoptive parents as a result of that breach.⁷⁵ *Petrowsky* demonstrates that, in those states which consider the adoption agreement a contract, terms may be implied by law, and parents may recover for the breach of those implied terms.

63. *Michael J.*, 247 Cal. Rptr. at 513.

64. *Id.*

65. *Id.*

66. *Id.*

67. 149 Wis. 2d 19, 437 N.W.2d 532 (1989).

68. *Id.*, 437 N.W.2d at 537.

69. *Id.*

70. 165 Ill. App. 3d 32, 518 N.E.2d 664 (1987), *appeal denied*, 119 Ill. 2d 574, 522 N.E.2d 1256 (1988).

71. *Id.*, 518 N.E.2d at 665.

72. *Id.*, 518 N.E.2d at 669.

73. *Id.*, 518 N.E.2d at 667.

74. *Id.*

75. *Id.*, 518 N.E.2d at 668.

An unusual twist to the problem of adoption agency liability was presented in *Olsen v. Children's Home Society of California*.⁷⁶ In *Olsen*, the natural parents of a child sued the adoption agency for failing to inform them that their child, given up for adoption at birth, had evidenced a genetic disease. The mother was a carrier of the genetic trait. The parents later had another child which inherited the same disorder and died.

The parents alleged that the agency had a duty to inform them that they were at risk of conceiving a child with an inheritable disorder. The trial court sustained the adoption agency's demurrer.⁷⁷

On appeal, the court affirmed the trial court's judgment and held that an adoption agency has no legal duty to inform a natural mother that she carries a genetic disorder.⁷⁸ The court held that no "special relationship" exists between natural parents and an adoption agency.⁷⁹ Thus, no legal duty is imposed upon an agency to inform natural mothers of the health of children after placement in adoptive homes.⁸⁰ In addition, no justifiable reliance or dependency on the part of the natural mother exists to impose an obligation upon the agency to protect the natural mother's health.⁸¹

The following is a discussion of two recent cases, *Engstrom v. State*⁸² and *Allen v. Children's Services*,⁸³ involving actions brought by adoptive parents against adoption agencies for negligence, breach of contract, and agency malpractice or "wrongful adoption." In these cases, the courts examine the legal issues involved and discuss the appropriateness of various legal theories. The opinions help define the legal duties of adoption agencies and the public policy considerations involved when adoptive parents sue adoption agencies.

Engstrom and *Allen* will be discussed separately. The two cases will then be analyzed together with prior wrongful adoption case law to demonstrate current legal trends in adoption agency liability. Finally, Oklahoma law will be examined in the areas of adoption, contract, negligence and fraud. *Allen* and *Engstrom* will be applied to current Oklahoma law to ascertain which causes of action might be viable "wrongful adoption" claims in this state.

IV. *Engstrom v. State*

In 1981, the Engstroms received a child from a state agency for the purpose of pre-adoption placement. The couple was informed that the child's mother was in a women's reformatory and that the child's father

76. 204 Cal. App. 3d 1362, 252 Cal. Rptr. 11 (1988).

77. *Id.*, 252 Cal. Rptr. at 12.

78. *Id.*, 252 Cal. Rptr. at 13.

79. *Id.*

80. *Id.*

81. *Id.*

82. 461 N.W.2d 309 (Iowa 1990).

83. 58 Ohio App. 3d 41, 567 N.E.2d 1346 (1990).

was deceased. At a court hearing terminating the natural mother's rights, a social worker for the state testified that the father was dead.

Five years after the Engstroms took the child into their home, the natural father appeared and asserted his parental rights. After the state was unsuccessful in an attempt to terminate the father's rights, the agency converted the child's status with the Engstroms from pre-adoption to foster care. When the child expressed a desire to live with her natural father, the state transferred custody to him.

The Engstroms sued the state agency,⁸⁴ alleging negligence, wrongful adoption, social worker malpractice, intentional infliction of emotional distress, violation of due process,⁸⁵ and breach of contract.⁸⁶ The trial court dismissed the action, holding that the basis for all the claims was the agency's misrepresentation of the father's status.⁸⁷ The agency was protected from liability by the state Tort Claims Act which provided immunity for misrepresentation.⁸⁸

The Iowa Supreme Court examined all of the Engstroms' claims and affirmed the trial court's grant of summary judgment in favor of the state.⁸⁹ The court first addressed the breach of contract claim.⁹⁰ The Engstroms argued that a breach of an adoption contract is actionable. The Engstroms relied on *Petrowsky v. Family Service of Decatur, Inc.*⁹¹ and argued that a legal duty to carry out the terms of the adoption agreement in "good faith" and with reasonable care should be implied by law.⁹²

The court began its analysis by noting that the adoption agreement at issue contained no express provisions detailing the agency's obligations to the adoptive parents.⁹³ The court then examined whether there was precedent for implying a duty of investigation or "good faith" into the adoption agreement.⁹⁴ The court noted that a duty of "good faith" is imposed in employment-at-will contracts and in insurance contracts.⁹⁵

Referring to section 205 of the *Restatement (Second) of Contracts*, the court found that the obligation of "good faith" refers only to "perform-

84. *Engstrom*, 461 N.W.2d at 309.

85. This note will not discuss due process issues in adoption procedures. For a comprehensive examination of these issues, see Poulin, *The Open Adoption Records Movement: Constitutional Cases and Legislative Compromise*, 26 J. FAM. L. 395 (1987-88); Garrison, *Child Welfare Decisionmaking: In Search of the Least Drastic Alternative*, 75 GEO. L. J. 1745 (1987); McCarthy, *The Confused Constitutional Status and Meaning of Parental Rights*, 22 GA. L. REV. 975 (1988); Atwater, *A Modern-Day Solomon's Dilemma: What of the Unwed Father's Rights?*, 66 U. DET. L. REV. 267 (1989).

86. *Engstrom*, 461 N.W.2d at 312.

87. *Id.*

88. *Id.*

89. *Id.* at 320.

90. *Id.* at 313.

91. 165 Ill. App. 3d 32, 37-38, 518 N.E.2d 664, 667-68 (1987).

92. *Engstrom*, 461 N.W.2d at 313.

93. *Id.*

94. *Id.* at 314.

95. *Id.*

ance and enforcement of the contract.⁹⁶ Evidence at trial indicated that the agency had been told by the natural mother that the father was deceased and that the agency had therefore not intentionally misrepresented the father's status.⁹⁷ The agency therefore owed the Engstroms no implied duty of good faith to establish properly the father's true status before entering into the adoption contract.⁹⁸ An adoption agency has no legal obligation to investigate the veracity of a natural mother's information concerning a child's background.⁹⁹

The court then considered the Engstroms' allegations that the agency was negligent. The Engstroms argued that the agency had two duties: first, the statutory duty to terminate properly the natural parents' legal rights;¹⁰⁰ and second, the duty to conform to acceptable standards of the profession when investigating the child's background.¹⁰¹

The court noted that the first issue in a negligence action is whether the wrongdoer owes a legal duty to the injured party.¹⁰² Consequently, the primary issue in *Engstrom* was whether the statutory provisions which outline parental termination proceedings imply that a social worker has a legal duty to investigate fully a child's background in order to protect adoptive parents.¹⁰³

Comparing the duties of a social worker in an adoption proceeding to the duties of a social worker in a child abuse case,¹⁰⁴ the court noted that in the past, the state's child abuse statutes had been held not to imply that a social worker has a legal duty to rescue an abused child.¹⁰⁵ Thus, the court was reluctant to imply a legal duty of care in the adoption situation without an express mandate from the legislature.¹⁰⁶

The intent of the legislature concerning the social worker's legal duty was not expressed in the parental termination statutes and administrative regulations. Therefore, the court used a four-factor test to determine whether a legal duty should exist.¹⁰⁷ The first factor determined¹⁰⁸ whether

96. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 205 (1981)).

97. *Id.* at 312.

98. *Id.* at 314.

99. *Id.*

100. *Id.* at 314.

101. *Id.* at 315.

102. *Id.* at 315.

103. *Id.* at 315, 316.

104. *Id.* at 315.

105. *Id.*

106. *Id.*

107. *Engstrom v. State*, 461 N.W.2d 309, 316 (Iowa 1990). The court used the four factor test it had described in *Seeman v. Liberty Mut. Ins. Co.*, 322 N.W.2d 35, 40-41 (Iowa 1982). The four factors are: (1) whether the party is a member of the class the statute was designed to protect; (2) whether it was the express or implied intent of the legislature to create a legal duty; (3) whether it is consistent with the purposes of the statute to imply that persons may have such a remedy; and (4) whether allowing a private cause of action will intrude on the jurisdiction of a federal or another state agency.

108. *Engstrom*, 461 N.W.2d at 316.

the adoptive parents were members of the class the statutes were designed to protect.¹⁰⁹ Because the statutes are primarily designed to protect the child and the natural parents,¹¹⁰ adoptive parents are only a secondary consideration.¹¹¹ The court held that since the statutes were not enacted to protect the adoptive parents as a class, a legal duty to use reasonable care can not be implied from the terms of the statutes and regulations.¹¹²

Public policy considerations were also addressed.¹¹³ The court stated that the purpose of the pre-adoption period is to allow the parties to work out potential problems.¹¹⁴ While the placement of a child in a home may cause high expectations, the situation calls for cautious optimism; "the placement of a child does not insure success."¹¹⁵ An agency should incur no liability absent fraud, willful intent to harm or personal injury to the parties to the adoption.¹¹⁶ Public policy considerations therefore preclude adoptive parents from successfully asserting a social worker or adoption agency malpractice claim.¹¹⁷

V. *Allen v. Children's Services*

In September of 1977, Allen and Children's Services, a state-certified adoption service, entered into an agreement for the adoption of a ten-month-old baby girl.¹¹⁸ The service made no express promise to investigate the child's health or background. All parties thought the child was healthy. The child had been medically examined prior to placement, but two months later it was discovered that the child suffered from profound hearing loss.

In 1985, Allen brought an action against the agency, alleging fraud, negligence, and breach of contract. The case was tried solely on the breach of contract theory. The jury awarded Allen \$17,000 in damages.

Children's Services appealed. The issues on appeal were: first, whether the action was barred by the statute of limitations; second, whether adoption agreements can be actionable as contracts; and third, whether an adoption

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*, 461 N.W.2d at 317.

118. *Allen v. Children's Servs.*, 58 Ohio App. 3d 41, 567 N.E.2d 1346, 1347 (1990). The terms of the agreement provided:

Children's Services hereby agrees to place BABY GIRL with MISS GERALDINE ALLEN, adoptive parents, in contemplation of adoption during which time the child is under the supervision of the Adoption Service of Children's Services and subject to its rules and regulations. The adoptive parents hereby agree to assume full financial responsibility for support, maintenance, medical and surgical care, and all incidental expenses of said child during such placement.

Id.

agency becomes the guarantor of a child's health when it represents the child as healthy.¹¹⁹ The Ohio Court of Appeals held that the action was time barred but nevertheless discussed the second and third issues.¹²⁰

Citing the holding in *Burr v. Board of County Commissioners of Stark County*,¹²¹ the court held that the only viable cause of action against agencies by adoptive parents is on the basis of fraud.¹²² In order to prove wrongful adoption, the adoptive parents must prove all the elements of fraud.¹²³ Thus, Ohio does not recognize a cause of action by adoptive parents against an adoption agency based on breach of the adoption agreement.¹²⁴

The court agreed with the agency's proposition that to consider an adoption agreement "a bargained-for exchange with respect to the life of a child is repugnant."¹²⁵ The court noted the language in *Burr* that said adoption agreements should not be considered contracts of insurance that a child will grow to be healthy and happy.¹²⁶

The court stated that adoptive parents should bear the same risks as natural parents with regard to their children's future.¹²⁷ When considering adoption, prospective parents should intelligently weigh the benefits and responsibilities, realizing the uncertainties in the decision-making process.¹²⁸ Because an agency's deliberate act of misinforming parents interferes with the couple's ability to make an intelligent choice, only intentional misrepresentations should lead to compensable injuries.¹²⁹ *Allen* concluded that an adoption agreement is not an enforceable contract.¹³⁰

VI. *Wrongful Adoption After Engstrom and Allen: Choosing a Proper Cause of Action*

An examination of this country's case law on the issue of adoption agency liability demonstrates three possible legal theories on which adoptive parents

119. *Id.*, N.E.2d at 1348.

120. *Id.*

121. 23 Ohio St. 3d 69, 491 N.E.2d 1101 (1986).

122. *Allen*, 567 N.E.2d at 1349.

123. *Id.* In *Burr* these elements were stated to be:

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

Burr, 491 N.E.2d at 1105 (quoting *Cohen v. Lamko, Inc.*, 10 Ohio St. 3d 167, 169, 462 N.E.2d 407 (1984)).

124. *Allen*, 567 N.E.2d at 1348.

125. *Id.*, 567 N.E.2d at 1349.

126. *Id.* (citing *Burr*, 491 N.E.2d at 1109).

127. *Id.* (quoting *Burr*, 491 N.E.2d at 1109).

128. *Id.*

129. *Id.*

130. *Id.*

could sue for damages. First, adoptive parents may sue on the basis of agency fraud or misrepresentation.¹³¹ These theories have a sound historical basis in adoption law because adoption annulments are allowed on these grounds. Second, adoptive parents may attempt to sue on the basis of negligence.¹³² An agency should have a legal duty to use reasonable care and disclose a child's known physical or emotional defects.

Finally, parents may use the adoption agreement as a basis for a breach of contract action.¹³³ There are two ways liability could be found. The contract for adoption may expressly state that a child's background has been sufficiently investigated and problems disclosed.¹³⁴ Alternatively, a court may find that "good faith" investigation and disclosure are implied from the contract terms and the relationship of the parties.¹³⁵

Two primary issues arise when adoptive parents feel they have been injured by the wrongful acts of an adoption agency. The first issue is what kind of action should be recognized by courts in order to balance properly the needs of the child, the adoptive parents, and the adoption agency. It would be unfortunate if adoption agencies were held responsible for every instance where an adopted child did not mature quite as the adoptive parents had foreseen. The child's growth and maturation process may very well be unpredictable. Courts have prudently decided that agencies should not be forced to bear the limitless liability that would result from warranting the future emotional and physical health of placed children. The courts' opinions in *Engstrom* and *Allen* reflect this view.

Although the plaintiffs were successful in *Burr* and *Petrowsky*, the plaintiffs in *Allen* and *Engstrom* were not compensated. In *Burr*, the adoption agency had deliberately misinformed the parents concerning the child's origins and his physical health.¹³⁶ The parents relied on the information when they decided to adopt the child.¹³⁷ The adoption agencies in *Burr* and *Petrowsky* had taken affirmative actions which had directly harmed the adoptive parents.

In *Engstrom* and *Allen* the adoption agencies were unaware that the information they supplied to the parents was incorrect. Because the agencies did not act intentionally, the issue for the courts was whether the agencies owed a legal duty to the adoptive parents either on a negligence or contract theory.¹³⁸ *Engstrom* held that a legal duty could arise either expressly from

131. *Michael J. v. County of Los Angeles, Dep't of Adoptions*, 201 Cal. App. 3d 859, 247 Cal. Rptr. 504, 513 (1988).

132. *Richard P. v. Vista Del Mar Child Care Serv.*, 106 Cal. App. 3d 860, 165 Cal. Rptr. 370, 373 (1980).

133. *Petrowsky v. Family Serv. of Decatur*, 165 Ill. App. 3d 32, 518 N.E.2d 664, 667 (1987).

134. *Id.*, 518 N.E.2d at 668.

135. *Id.*

136. *Burr v. Board of County Comm'rs of Stark County*, 23 Ohio St. 3d 69, 491 N.E.2d 1101, 1109 (1986).

137. *Id.*, 491 N.E.2d at 1109.

138. *Engstrom v. State*, 461 N.W.2d 309, 315-16 (Iowa 1990); *Allen v. Children's Servs.*, 58 Ohio App. 3d 41, 567 N.E.2d 1346, 1349 (1990).

statute or from the relationship of the parties.¹³⁹ The *Engstrom* court decided that the future health of a child is simply too unpredictable, and liability too burdensome, to justify imposing a legal duty upon agencies to warrant health, absent express legislation.¹⁴⁰ *Allen* assures that adoption agencies do not become the guarantors of the children they place by limiting agency liability to intentional wrongful acts.¹⁴¹

Engstrom and *Allen* fail to address the central issue. The primary issue is not whether an adoption agency should be expected to warrant the future success of the adoption arrangement or whether adoptive parents should face similar risks as natural parents. Clearly, no child should be placed in an adoptive home with a "money-back guarantee," and all parents should realize that the maturation process is an uncertain venture.

The central question in these cases has nothing to do with compensation for natural risks of the kind taken by any couple which decides to have a child. Adoption is a man-made process in which human mistakes are inherent. The primary issue the courts *should* have addressed is whether adoption agency personnel or state social workers owe a legal duty to adoptive parents and children to act with reasonable care, in conformity with standards of the reasonable professional, during that "manmade" process.

Neither *Engstrom* nor *Allen* fully discuss why it would be more burdensome for adoption agencies and their employees to demonstrate that reasonable care has been taken during the adoption process than any other professional agency defending against a negligence action. No satisfactory rationale was given for affording adoption agencies special immunity from liability when agency employees fail to conform to reasonable standards.

Given the relationship of the parties, it is extremely foreseeable that the negligent acts of agency employees might profoundly affect both adopted children and their parents. In any event, absent a court holding of foreseeability of harm sufficient to impose a legal duty, state legislation and adoption agreements¹⁴² may impose a legal duty upon agencies to act with reasonable care toward adoptive parents.¹⁴³

In *Petrowsky*, the court was willing to impose an implied duty to act in "good faith" into the adoption agreement.¹⁴⁴ Under Illinois law, the court interpreted the adoption agreement like any other contract. The *Allen* court was unwilling to find that adoption agreements are enforceable contracts.¹⁴⁵ The *Engstrom* court balked at holding that adoption agencies must exercise good faith in the negotiation of adoption contracts.¹⁴⁶

The *Engstrom* and *Allen* decisions are unfortunate because they so drastically limit causes of action for adoptive parents. There are very few

139. *Engstrom*, 461 N.W.2d at 315-16.

140. *Id.*

141. *Allen*, 567 N.E.2d at 1349.

142. *Engstrom*, 461 N.W.2d at 315-16.

143. *Petrowsky v. Family Serv. of Decatur*, 165 Ill. App. 3d 32, 518 N.E.2d 664, 667 (1987).

144. *Id.*

145. *Allen*, 567 N.E.2d at 1349.

146. *Engstrom*, 461 N.W.2d at 314.

agreements which carry the serious, long-term and personal consequences which commonly result from adoption. Prospective parents should be able to expect, at the very least, that agencies are dealing with them honestly and in good faith when they supply them with information about a child. Courts should not be reluctant to imply and enforce good faith terms in an adoption agreement.

The line of liability currently seems to be drawn at the point where agencies have acted intentionally or extremely recklessly. An agency will not be held liable for a failure to sufficiently investigate a child, but will be held legally responsible for misrepresenting a child's condition.¹⁴⁷ Because some courts consider "contracting for a child" a socially repugnant concept, courts may be more amenable to fraud and misrepresentation actions than to breach of contract actions.

The second important issue in wrongful adoption involves which remedies should be available in court actions. There are two basic choices for dissatisfied parents: either sue for damages and hope for monetary compensation, or annul the adoption and return the child to the state. Some parents may avoid legal action by applying for state and federal subsidies.¹⁴⁸ For the remaining parents, however, there are some legal land mines to avoid and some difficult choices to make.

Adoptive parents have the option of asking the court to annul the adoption. A strong legal history exists for granting annulments on the basis of fraud,¹⁴⁹ but commentators have noted that annulment has fallen into disfavor as a remedy for dissatisfied adoptive parents.¹⁵⁰ Rarely are the child's interests served if the child is surrendered to the state.¹⁵¹ Children who have been abandoned once by their natural parents should not have to suffer that pain again at the discretion of their adoptive parents.¹⁵²

For a parent who has grown to love a child, annulment is not a reasonable alternative.¹⁵³ Many parents would rather seek compensation for the unexpected medical expenses and emotional trauma to their families than send a child from their home.¹⁵⁴ Compensation will help parents provide for their adopted children and maintain the family unit. Courts should view compensation as a preferable alternative to annulment when adoptive parents have proven that they have been unjustly burdened with high medical expenses resulting from a child's undisclosed illness.¹⁵⁵

147. *Michael J. v. County of Los Angeles, Dep't of Adoptions*, 201 Cal. App. 3d 859, 247 Cal. Rptr. 504, 513 (1988).

148. Comment, *supra* note 24, at 758.

149. LeMay, *supra* note 21, at 481.

150. Note, *supra* note 1, at 560.

151. LeMay, *supra* note 21, at 482-83.

152. *In re McDuffee*, 352 S.W.2d 23, 28 (Mo. 1961).

153. *Allen v. Children's Servs.*, 58 Ohio App. 3d 41, 567 N.E.2d 1346, 1348 (1990).

154. In *Burr*, for example, the court found that the award of \$125,000 was reasonable in light of the evidence that the medical expenses of the child alone had amounted to \$81,000. *Burr v. Board of County Comm'rs of Stark County*, 23 Ohio St. 3d 69, 491 N.E.2d 1101, 1108 (1986).

155. *Id.*, 491 N.E.2d at 1109.

In *Allen*, for example, the most equitable result would have been for the state to assist the parent with the unexpected medical and educational expenses associated with the care of a deaf child. The *Allen* case was complicated by the lengthy period of time between the mother's discovery of the child's condition and the law suit filing.¹⁵⁶ Although the statute of limitations precluded the mother's lawsuit in *Allen*, the court should have been more receptive to the other legal arguments presented.

VII. Legal Basis for Wrongful Adoption in Oklahoma

A. Liability of State Adoption Agencies Under the Governmental Tort Claims Act

In 1985, the Oklahoma Legislature enacted the Governmental Tort Claims Act (GTCA).¹⁵⁷ The GTCA defines the possible liability a state agency¹⁵⁸ may incur as a result of an employee's¹⁵⁹ legal wrong.¹⁶⁰ Liability under the GTCA is limited to torts committed within the scope of employment in situations where private persons or entities would be liable under Oklahoma laws.¹⁶¹ A state employee, acting within the scope of employment, cannot be held personally liable for torts, but may only be sued under the provisions of the GTCA.¹⁶² The GTCA does not, however, protect agencies or employees from personal liability for wanton, reckless or intentional acts.¹⁶³

The GTCA contains thirty enumerated exemptions from liability.¹⁶⁴ Two of the exemptions apply to wrongful adoption claims. The GTCA excludes an employee's unintentional misrepresentations as a basis for state liability.¹⁶⁵ The state also gives immunity from liability for "an act or omission of an employee in the placement of children."¹⁶⁶ State adoption agencies are therefore expressly exempt from liability incurred as a result of negligence

156. *Allen*, 567 N.E.2d at 1348.

157. 51 OKLA. STAT. §§ 151-171 (1981).

158. 51 OKLA. STAT. § 152.2 (Supp. 1990). "Agency" is defined as "any board, commission, committee, department or other instrumentality or entity designated to act in behalf of the state or a political subdivision." *Id.*

159. *Id.* § 152.5. An "employee" is "any person who is authorized to act in behalf of a political subdivision or the state . . ." The term includes all elected and appointed officers and members of governing bodies. *Id.*

160. *Id.* § 152.11. A "tort" is "a legal wrong, independent of contract, involving violation of a duty imposed by general law or otherwise, resulting in a loss to any person, association or corporation as the proximate result of an act or omission of a political subdivision or the state or an employee acting within the scope of employment." *Id.*

161. *Nguyen v. State*, 788 P.2d 962, 964 (Okla. 1990).

162. 51 OKLA. STAT. § 153 (1981).

163. In *Fox v. Oklahoma Memorial Hosp.*, 774 P.2d 459, 461 (Okla. 1989), the court said, "In order to avoid undue deterrence and intimidation, government employees are afforded a reasonable degree of protection for acts undertaken in their official capacities. However, the protection afforded does not extend to acts of willful or wanton conduct amounting to gross negligence."

164. 51 OKLA. STAT. § 155 (1988).

165. *Id.* § 155.17.

166. *Id.* § 155.27.

or unintentional misrepresentation during the adoption process.¹⁶⁷ The GTCA does not, however, apply to actions brought against state agencies based on breach of the adoption contract¹⁶⁸ or fraud.¹⁶⁹

Thus, under current Oklahoma sovereign immunity law, a legal action can be brought against a state adoption agency either for breach of the adoption contract or for fraud. An action can also be brought against an adoption agency worker personally if evidence indicates that the employee's actions were wanton, reckless or intentional.¹⁷⁰

B. Breach of the Adoption Contract

In Oklahoma an adoption agreement is considered a "contract" which needs consent of a judicial officer before consummation.¹⁷¹ Thus, one viable option for adoptive parents is to bring actions against state agencies for breach of express or implied obligations under the terms of their adoption agreements.

In *Engstrom*, the adoptive parents alleged the agency breached implied terms in the adoption agreement by failing to act in good faith and failing to investigate the child's background. The parents relied on *Petrowsky* and argued that adoption contracts contain implied terms which require adoption agencies to investigate properly a child's background and act in good faith.¹⁷²

The *Engstrom* court distinguished *Petrowsky* by noting that the adoption at issue before it was in the pre-adoption phase.¹⁷³ The court stated that the implied duty of good faith applies only to enforcement and performance of the contract.¹⁷⁴ There is no implied duty of good faith in adoption placement agreements.¹⁷⁵ Consequently, the court felt the proper remedy for an adoption agreement negotiated in bad faith is through such actions as fraud or duress.¹⁷⁶

The *Engstrom* court's interpretation of the legal duties implicit in adoption agreement negotiations should not be adopted by Oklahoma courts. There are very few circumstances in which a duty to act in good faith is more

167. See generally *Fuller v. Odom*, 741 P.2d 449 (Okla. 1987); *Nguyen v. State*, 788 P.2d 962 (Okla. 1990).

168. The Oklahoma Supreme Court overruled state immunity from contractual liability in *State Bd. of Pub. Affairs v. Principal Funding Corp.*, 542 P.2d 503, 505-06 (Okla. 1975). For a comprehensive history of sovereign immunity in Oklahoma prior to the passage of the Governmental Tort Claims Act see Spector, *State Sovereign Immunity in Tort: Oklahoma's Long and Tortuous Road*, 34 OKLA. L. REV. 526 (1981).

169. 51 OKLA. STAT. § 152.11 (Supp. 1990); *Matlock v. Town of Harrah*, 719 F. Supp. 1523 (W.D. Okla. 1989).

170. *Fox v. Oklahoma Memorial Hosp.*, 774 P.2d 459, 461 (Okla. 1989).

171. See, e.g., *In re Hughes*, 213 P. 79, 80 (Okla. 1923); *Hicks v. Simmons*, 271 F.2d 875, 878 (10th Cir. 1959); *In re Adoption of Graves*, 481 P.2d 136, 137 (Okla. 1971); *Laffoon v. Hayden* 337 P.2d 736, 739 (Okla. 1959).

172. *Engstrom v. State*, 461 N.W.2d 309, 313 (Iowa 1990).

173. *Id.*

174. *Id.* at 314.

175. *Id.*

176. *Id.*

appropriate than in the adoption process. Adoption is neither an adversarial proceeding nor a competitive bargaining situation. Adoption agencies should have a legal duty to be honest and open with prospective parents during the entire adoption process.

Furthermore, limiting actions to those based on fraud unduly burdens adoptive parents. In Oklahoma, fraud must be proved by clear and convincing evidence.¹⁷⁷ This high burden of proof puts adoptive parents at a distinct disadvantage because parents have extremely limited access to adoption records. Moreover, a clear and convincing evidence standard is inappropriate in situations where parents seek compensation rather than adoption annulment.

In *Allen*, the court refused to hold that an adoption agreement is an enforceable contract because the court felt that to insert principles of "bargained-for exchange" in adoption proceedings is "repugnant."¹⁷⁸ The *Allen* court focused on the "bargaining for a good deal" atmosphere of a commercial transaction and failed to take note of the parents' need to know the risks associated with taking a particular child into their home. Oklahoma courts should not make this same mistake if a similar case arises in this state. Contract principles can be applied to the adoption process, for the benefit of adoptive parents and children, without giving the process a commercial atmosphere.

Oklahoma adoption legislation and contract law provide a fairly strong basis for a contract-based wrongful adoption action when compared to *Engstrom* and *Allen*. First, unlike *Allen*, the Oklahoma Supreme Court has repeatedly held that an adoption agreement is a contract.¹⁷⁹ Second, there is a legal basis for implied-in-law terms to an adoption contract in Oklahoma that did not exist in *Engstrom*.¹⁸⁰ Agreements between parties that are necessary to make a contract reasonable or to allow the agreement to conform with customary standards will be implied by law in Oklahoma.¹⁸¹ Necessary preconditions to a contract's fulfillment will also be implied.¹⁸²

As a result of new adoption legislation, there is also a legal basis for the inference that agencies have a legal duty to investigate properly a child's medical and emotional history and make appropriate disclosures to adoptive parents.¹⁸³ This inference is supported by CWS's express official policy to make such disclosure.¹⁸⁴ Although there are no express guaranties in the CWS forms¹⁸⁵ concerning proper investigation, it is reasonable for adoptive

177. *Tice v. Tice*, 672 P.2d 1168, 1171 (Okla. 1983).

178. *Allen v. Children's Servs.*, 58 Ohio App. 3d 41, 567 N.E.2d 1346, 1349 (1990).

179. *See, e.g., In re Hughes*, 213 P. 79, 80 (Okla. 1923); *Laffoon v. Hayden* 337 P.2d 736, 739 (Okla. 1959); *In re Graves*, 481 P.2d 136, 137 (Okla. 1971).

180. *See Tice v. Tice* 672 P.2d 1168, 1171 (Okla. 1983) (a duty to perform with "care, skill, reasonable expediency and faithfulness" is implied in every contract).

181. 15 OKLA. STAT. § 171 (1981).

182. *Id.* § 172.

183. 1990 Okla. Sess. Laws, ch. 27, § 1(D).

184. POLICY MANUAL, *supra* note 11, § 3896.24.

185. State of Oklahoma Department of Human Services adoption forms provided by Children's Welfare Services.

parents to assume that proper investigation has been done and that they have been fully informed about a child before they decide to accept the child into their home.

Arguably, the new legislation and policies are designed to protect adoptive parents as a class from exactly the kind of harm that occurs when there is a problem with a child that proper investigation into the child's background or disclosure would have prevented.¹⁸⁶ The duty to investigate properly a child's background should be implied by law in all adoption agreements. Adoptive parents, damaged by an agency's failure to inform them properly about an adopted child's medical or psychological history, should have the proper framework under Oklahoma law to bring an action for breach of the adoption agreement.

C. Actions Against Agencies for Fraud and Negligence

In Oklahoma a state adoption agency will not be liable for simple social worker negligence in placing a child in an adoptive home.¹⁸⁷ The GTCA expressly exempts agencies from this kind of liability.¹⁸⁸ The laws of other states support the position that a state agency should not have to bear the burden of ascertaining what future conditions may arise in any particular case in order for parents to be informed adequately of the risks.¹⁸⁹

With a fact pattern that demonstrates evidence of fraud, however, the policy changes. Courts hold that an adoption agency should not misrepresent a child's condition to prospective adoptive parents.¹⁹⁰ A California Court of Appeals summarized the public policy distinctions between negligence and fraud actions.¹⁹¹ The court made the point that by limiting agency liability to actions based on fraud, courts refrain from imposing a duty upon agencies to predict the future of an adoptee.¹⁹² Adoption agencies are only held liable in cases of intentional wrongdoing.¹⁹³ Limiting liability to cases of intentional nondisclosure and misrepresentation promotes the policy of permitting parents to make fully informed choices, while preserving a certain amount of agency immunity.¹⁹⁴

In Oklahoma the chance for success of a wrongful adoption action based on fraud depends primarily on interpretation of the GTCA. Section 155.17

186. In order for a statute to confer a legal duty to protect particular plaintiffs, the plaintiffs must show that they belong to a class of persons the statute was intended to protect and that the harm which occurred was intended to be prevented by the statute. W. KEETON, D. DOBBS, R. KEATON & D. OWEN, *PROSSER AND KEETON ON TORTS* 220-33 (5th ed. 1984).

187. 51 OKLA. STAT. § 155.27 (Supp. 1988).

188. *Id.*

189. *Burr v. Board of County Comm'rs of Stark County*, 23 Ohio St. 3d 69, 491 N.E.2d 1101, 1109 (1986).

190. *Allen v. Children's Servs.*, 58 Ohio App. 3d 41, 567 N.E.2d 1346, 1348 (1990); *Burr*, 491 N.E.2d at 1109; *Michael J. v. County of Los Angeles, Dep't of Adoptions*, 201 Cal. App. 3d 859, 247 Cal. Rptr. 504, 505, 513 (1988).

191. *Michael J.*, 247 Cal. Rptr. at 513.

192. *Id.*

193. *Id.*

194. *Id.*

of GTCA exempts the state from liability for *unintentional* misrepresentation.¹⁹⁵ Actions brought against state agencies for *intentional* fraud should not be included under this exemption.

The GTCA exempts the state from liability for "any act or omission of an employee in the placement of children."¹⁹⁶ Intentional fraud, however, is not included in the GTCA's definition of "tort."¹⁹⁷ A legal wrong must contain the concept of "duty" as an element in order for it to fall within the scope of the GTCA's provisions.¹⁹⁸ Because duty is not an element of actual fraud under Oklahoma law, state adoption agencies and employees should not be immune from suit for actual fraud.¹⁹⁹

The GTCA therefore should be construed to limit the state's immunity to actions brought against state adoption agencies and employees based on simple negligence.²⁰⁰ Agency employees should likewise not be exempt from personal liability for actual fraud.

There is a sound legal basis for recognizing a cause of action for damages for fraud in the adoption process. Oklahoma has long recognized fraud as appropriate grounds for adoption annulment.²⁰¹ Because annulment is not generally in the best interests of the child, compensation is appropriate.²⁰² Oklahoma courts should recognize wrongful adoption claims based on actual fraud.

VIII. Recommendations for Oklahoma: Keeping the Legal Land Mines in Perspective

When natural parents decide to have children, they accept the risk that their children will not grow to be healthy or happy. For this risk they have no remedy at law. Public policy dictates that adoptive parents should not

195. 51 OKLA. STAT. § 155.17 (Supp. 1988).

196. *Id.* § 155.27.

197. *Id.* § 152.11.

198. *Id.*

199. *Ramsey v. Fowler*, 308 P.2d 654, 656 (Okla. 1957). In Oklahoma the elements of fraud are:

- 1) That defendant made a material representation;
- 2) that it was false;
- 3) that he made it recklessly, without any knowledge of its truth and as a positive assertion;
- 4) that he made it with the intention that it should be acted upon by the plaintiff;
- 5) that plaintiff acted in reliance upon it;
- 6) that he thereby suffered injury and
- 7) that all these facts must be proven with a reasonable degree of certainty, and all of them must be found to exist; the absence of any of them would be fatal to recovery.

Id. (quoting *Tyler v. Hartford Accident & Indem. Co.*, 195 Okla. 523, 159 P.2d 722, 745 (1945)). See also 15 OKLA. STAT. § 58 (1981).

200. *Id.*

201. *In re Graves*, 481 P.2d 136, 138 (Okla. 1971); *In re Lori Gay W.*, 589 P.2d 217, 220-21 (Okla. 1979); *Wade v. Geren*, 743 P.2d 1070, 1075 (Okla. 1987).

202. Note, *supra* note 1, at 562-64.

expect agencies to provide adoption eligible children with a money-back guarantee.²⁰³ An adoptive parent should not be put in a more advantageous position than a natural parent as a result of having access to a state or a private agency's "deep pocket."

On the other hand, an adoptive parent who feels either wronged by the system or that the adopted child is "defective" may not be able to act in the best interest of the child. In the adoption process the interests of the child should be the paramount concern. In the case of a severely dissatisfied or incompetent adoptive parent, annulment is appropriate, even beyond the normal statute of limitations period.

When an adoption agency is found to have knowingly misrepresented the health or background of a child, the situation is different. A parent may simply be unable to provide financially for the child's special needs. When a child who needs special medical or psychological care is intentionally placed by a state agency with an unknowing family, it is fair and reasonable for the state to assist the family financially.

Although Oklahoma provides financial assistance for families who adopt children with special medical needs, these programs may not adequately compensate parents who are unknowingly given children who have special needs. Money damages to compensate the parents for the financial burden placed upon them as a result of a fraudulent adoption process are appropriate.

Parents who lose an adopted child because of a procedural error are also damaged financially and emotionally. These parents should be compensated when evidence indicates that an adoption agency's wrongful act deprived them of the child they have financially and emotionally supported.

Courts currently disfavor negligence actions brought against adoption agencies. However, when an adoption agency has not reasonably investigated a child's background, or has unreasonably failed to inform prospective parents of a foreseeable medical or psychological problem in a child, parents should be permitted to bring a negligence action against the responsible agency or employee.

The adoption process has a tremendous effect on the lives of parents and children. Courts should impose a legal duty upon adoption agencies to act with reasonable care in the investigation and adoption process. This duty to act with reasonable care should extend not only to prospective parents, but also to the adopted child. Agencies should owe a legal duty to adoption eligible children to investigate properly prospective parents to safeguard children from placement in abusive homes.

Oklahoma adoption laws which authorize disclosure of an adopted child's family and medical background, while protecting the identities of blood relatives, are in the best interests of both parents and adopted children. The information may be utilized to ensure that these children receive proper medical attention throughout their lives.

203. *Engstrom v. State*, 461 N.W.2d 309, 315-16 (Iowa 1990).

Courts should interpret this statutory law to place a legal duty upon adoption agencies to insure that prospective parents are reasonably informed about a child's background. This duty will not make agencies the guarantors of children, but will merely allow parents to make informed decisions concerning whether to adopt a child and how best to care for that child. The adoption process creates the most important relationships that persons will have in their lives — the relationships of mother, father, daughter, or son. Agencies must have a legal duty to act with reasonable care when they undertake the creation of families.

Prospective parents and adoption eligible children deserve to enter into family relationships fully informed. Parents and children are exposed to many risks in the adoption process even when the agency is acting in good faith and with reasonable care. To permit adoption agencies to perform their functions with no legal duty to act with reasonable care is simply to invite disaster into a situation which should be a source of great joy and fulfillment for parents and children.

IX. Conclusion

The provisions of the Oklahoma Governmental Tort Claims Act should be amended to allow a cause of action for adoption agency or social worker negligence in child placement. Oklahoma courts should treat the wrongful adoption actions brought before them in the same manner as actions brought against any other professional party or organization. Courts should not only impose liability upon adoption agencies for their employee's intentional torts but also for their negligent acts. Adoption agencies should be held to a standard of reasonable care in the adoption process. Legislation passed with concern for the needs of adoptive parents, coupled with family-oriented court interpretations, should help disarm adoption's legal land mines.

Kathleen R. Parker