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Whose Baby Are You Adopting a Critique of the Massachusetts Adoption Laws

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WHOSE BABY ARE YOU ADOPTING? A CRITIQUE OF THE MASSACHUSETTS ADOPTION LAWS

I. INTRODUCTION

In August 1976, Hazel and Theodore Mohr adopted Elizabeth, an eight year-old child in the custody of the Massachusetts Department of Social Services (DSS).¹ The social worker assigned to handle Elizabeth's adoption told the Mohrs that Elizabeth was small for her age due to malnutrition.² She also informed them that Elizabeth's mother "had blond hair, blue eyes . . . was 5 foot, 1 inch tall, and 130 pounds"³ At probate court, the social worker filed a petition stating that the mother was in good health, but unable to take care of Elizabeth.⁴

When Elizabeth turned sixteen, her adoptive parents brought her to a neurologist with hope of understanding her strange, schizophrenic-like

¹ *Mohr v. Commonwealth*, 421 Mass. 147, 152, 653 N.E.2d 1104, 1107 (1995). The Mohrs contacted the Department of Social Services approximately five years prior to adopting Elizabeth. *Mohr*, 421 Mass. at 150, 653 N.E.2d at 1107. In the adoption application, the Mohrs specified that they were willing to consider a child with an "emotional problem" or a "correctable medical problem," but not a child with "special needs." *Id.* at 151 n.5, 653 N.E.2d at 1107 n.5. The Department made the Mohrs aware of the adoption subsidy available to adoptive parents of 'special needs' children, but the Mohrs still declined. *Id.*; see MASS. REGS. CODE tit. 110, § 7.209 (1993) (describing the criteria and requirements of financial assistance for adoptive families of "special needs" children). As a side note, the Mohrs sued the Commonwealth instead of the Department because the Department constitutes an agency of the Commonwealth. MASS. GEN. L. ch. 258, § 10(b) (1994).

² *Mohr*, 421 Mass. at 151, 653 N.E.2d at 1107. The social worker, Pamela Tompkins, also told the Mohrs that the Department of Social Services had no information about the biological father. *Id.* at 151, 653 N.E.2d at 1107. She explained that Elizabeth had lived with a foster family for several years, but alleged abuse prompted the Department of Social Services to remove her. *Id.*

³ *Mohr*, 421 Mass. at 151, 653 N.E.2d at 1107. No other information was given to the Mohrs about the biological mother. *Id.* The social worker indicated that the Department of Social Services did not have any medical information about the child. *Id.*

⁴ *Mohr*, 421 Mass. at 154, 653 N.E.2d at 1108. The petition also stated that Elizabeth "was developing below average due to environmental deprivation, but had potential for further development." *Id.*

behavior.⁵ To complete the proper tests, the neurologist needed a copy of Elizabeth's immunization records, which were on file with her pediatrician.⁶ This file included all the information known to DSS at the time of Elizabeth's adoption.⁷ In the course of transferring these records, the Mohrs read the file and, inadvertently, discovered that Elizabeth's biological mother was committed to Worcester State Hospital for schizophrenic.⁸ Further, they learned that neurologists at Springfield Hospital had performed four evaluations on Elizabeth and diagnosed her with moderate cerebral atrophy and mental retardation.⁹ Lastly, the Mohrs learned that Elizabeth's physician strongly advised against her adoption until he could further evaluate and diagnose her mental and physical disabilities.¹⁰ The social worker and DSS possessed this vital information at the time of Elizabeth's adoption but chose not to reveal it to the Mohrs.¹¹ The Mohrs

⁵ *Mohr*, 421 Mass. at 152, 653 N.E.2d at 1107. Elizabeth displayed strange, schizophrenic-like behavior her entire life. *Id.* It is important to note that the Mohrs were aware that Elizabeth was about two years developmentally delayed and of low intelligence because they took her to a pediatrician before finalizing the adoption. *Id.* That examination, however, did not explain Elizabeth's strange behavior. *Id.*

⁶ *Mohr v. Commonwealth*, 421 Mass 147, 152, 653 N.E.2d 1104, 1107 (1995).

⁷ *Mohr*, 421 Mass. at 152-53, 653 N.E.2d at 1107-08.

⁸ *Mohr*, 421 Mass. at 153, 653 N.E.2d at 1108. The biological mother had a below average IQ score of 83. *Id.* At trial, an expert testified that the children of schizophrenic parents are fifteen times more likely to develop schizophrenia than the children of non-schizophrenic parents. *Id.* He also stated that this fact is commonly known among practitioners in the field of mental retardation and mental illness. *Id.*

⁹ *Mohr*, 421 Mass. at 154, 653 N.E.2d at 1108. After the first evaluation, at eighteen weeks, the doctor concluded that development was not satisfactory. *Id.* at 153, 653 N.E.2d at 1108. The second evaluation, at thirty-nine weeks, revealed that her general developmental level equaled twenty-four weeks. *Id.* After ten months, a neurologist stated that Elizabeth "show[ed] definite evidence of retarded growth and development of an unknown etiology." *Id.* at 154, 654 N.E.2d at 1108. At the age of one year, neurological tests indicated that Elizabeth had moderate cerebral atrophy. *Id.*

¹⁰ *Mohr*, 421 Mass. at 154, 653 N.E.2d at 1108. The Department of Social Services did not heed the doctor's recommendation and sent Elizabeth to the Nazareth Child Care Center to prepare for adoption. *Id.* at 150, 154, 654 N.E.2d at 1107, 1108. She arrived at the Center with the diagnosis of "failure to thrive . . . due to environmental deprivation." *Id.* at 150, 653 N.E.2d at 1106-07. The Mohrs did not know about this diagnosis prior to adoption. *Id.* at 153, 653 N.E.2d at 1108.

¹¹ *Mohr*, 421 Mass. at 154, 653 N.E.2d at 1108. At trial, the defendants explained the non-disclosure decision as being in accordance with Massachusetts' child adoption procedure. *Id.* at 165, 653 N.E.2d at 1114. The Massachusetts legislature mandates the DSS to release "relevant information about the child to enable [the] adoptive parent to knowledgeably determine whether to accept the child for adoption." MASS. REGS. CODE tit. 110, § 7.213 (1993). Furthermore, the corresponding statute allows the adoption

sued DSS in Superior Court for negligent misrepresentation hoping to recover enough money to finance Elizabeth's care.¹²

At trial, the Mohrs admitted they would not have adopted Elizabeth had DSS fully disclosed the known medical information about Elizabeth and her mother.¹³ The jury returned a verdict for the Mohrs and awarded them \$3.8 million, which the Superior Court later reduced to \$200,000.¹⁴ The Supreme Judicial Court affirmed the Superior Court's decision, officially recognizing 'wrongful adoption' in Massachusetts.¹⁵ As a result of *Mohr v.*

agencies to release information concerning the medical, ethnic, socioeconomic, and educational circumstances of the biological parents, as long as the information does not identify the biological parents. MASS. GEN. L. ch. 210, §5 D (1995). Nothing in the statute specifically states that the agency must disclose the results of the mental evaluation performed on Elizabeth. *Id.*

¹² *Mohr*, 421 Mass. at 155, 653 N.E.2d at 1109. At the time of trial, Elizabeth was nineteen years old and unable to take care of herself. *Id.* at 155, 653 N.E.2d at 1108. In defense of the claim of fraud, the defendants attempted to characterize the decision not to disclose a "discretionary act" which is shielded by the Massachusetts Torts Claims Act. MASS. GEN. L. ch. 258, § 10 (b); *Mohr*, 421 Mass. at 165, 653 N.E.2d at 1114. This section of the Massachusetts Tort claims Act exempts from liability the actions of state employees which require "a high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning." *Mohr*, 421 Mass. at 165, 653 N.E.2d at 1114 (quoting *Whitney v. Worcester*, 373 Mass. 208, 218, 366 N.E.2d 1210, 1216 (1977)). The court disagreed with this argument, holding the social worker's actions were not protected acts since they did not require "a high degree of discretion" and did not effect "public policy and planning." *Id.*

¹³ *Mohr*, 421 Mass. at 155, 653 N.E.2d at 1108. At trial, an expert witness established that the Mohrs could have determined that Elizabeth would never reach "normal cognitive development . . . [or] normal emotional status" at the time of the adoption. *Id.* at 153 n.6, 653 N.E.2d at 1108 n.6. The court refused to impose an affirmative duty on the adoptive parents to investigate the mental and emotional health of the child and her biological parents. *Id.* at 163 n.12, 653 N.E.2d at 1112 n.12. In the eyes of the Supreme Judicial Court, this information should be gathered and disseminated by the adoption agency. *Id.* at 162, 653 N.E.2d at 1112.

¹⁴ *Mohr*, 421 Mass. at 149 n.4, 653 N.E.2d at 1106 n.4. The court granted the Commonwealth's motion to decrease the judgment to \$100,000 per plaintiff, in reliance on the Massachusetts Tort Claims Act. *Id.* The Tort Claims Act states, in relevant part:

Public employers shall be liable for injury . . . caused by the negligent or wrongful act or omission of any public employee while acting within the scope of his . . . employment . . . in the same manner and to the same extent as a private individual under like circumstances, except that public employers . . . shall not be liable . . . for any amount in excess of one hundred thousand dollars.

MASS. GEN. L. ch. 258, § 2 (1988).

¹⁵ 421 Mass. 147, 653 N.E.2d 1104 (1995).

Commonwealth,¹⁶ all adoption agencies in Massachusetts must disclose all 'nonidentifying' information about the child and the child's biological parents, or risk liability for negligent and intentional misrepresentation.¹⁷ In the opinion, Chief Justice Liacos explained that wrongful adoption does not create a new cause of action, rather it extends common law fraud to include these cases.¹⁸

II. HISTORY OF WRONGFUL ADOPTION

Massachusetts follows eight other states in holding adoption agencies liable for misrepresenting information regarding the adoptee or the child's biological parents.¹⁹ In 1986, the Supreme Court of Ohio in *Burr v. Board of County*

¹⁶ 421 Mass. 147, 653 N.E.2d 104 (1995).

¹⁷ *Id.* at 162-63, 653 N.E.2d at 1112-13; see *supra* text accompanying note 11, (outlining the Code of Massachusetts Regulations governing DSS). The Supreme Judicial Court of Massachusetts agreed with the Ohio Supreme Court's decision in *Burr v. Board of County Comm'rs*, which held that it "would be a travesty of justice and distortion of the truth to conclude that deceitful placement of this infant . . . was not actionable when the tragic but hidden realities of the child's infirmities finally came to light." 23 Ohio St. 3d 69, 75, 491 N.E.2d 1101, 1107 (1986); see also *Roe v. Catholic Charities*, 225 Ill. App. 3d 519, 524, 588 N.E.2d 354, 357 (1992) (stating wrongful adoption as an "extension of common law fraud" and fulfills the needs of society).

¹⁸ *Mohr*, 421 Mass. at 161, 653 N.E.2d at 1112. According to the Restatement of Torts, misrepresentation is fraudulent if the source: "(a) knows or believes that the matter is not as he represents it to be, (b) does not have the confidence in the accuracy of this representation that he states or implies, or (c) knows that he does not have the basis for his representation that he states or implies." RESTATEMENT (SECOND) OF TORTS § 526 (1977). Accordingly, "the standard of conduct to which . . . [an adoption agency] must conform to avoid being negligent is that of a reasonable . . . [adoption agency] under like circumstances." Restatement (Second) of Torts § 283 (1965).

¹⁹ *Mohr*, 421 Mass. at 161, 652 N.E.2d at 1112 (1995), the eight states that Massachusetts follows are as follows, California, Illinois, New York, Oregon, Pennsylvania, New Mexico, Rhode Island, Wisconsin; see *Michael J. v. County of Los Angeles, Dep't of Adoptions*, 201 Cal. App. 3d 859, 875, 247 Cal. Rptr. 514, 513 (1988) (holding the agency liable for not disclosing information about a degenerative nerve disorder); *Roe*, 225 Ill. App. 3d at 519, 588 N.E.2d at 357 (finding the agency liable for not revealing details of the children's psychotic behavior); *M.H. and J.L.H v. Caritas Family Servs.*, 488 N.W.2d 282, 288 (1992) (holding the agency liable for not clarifying that the adoptee's parents were siblings); *Juman v. Louise Wise Servs.*, 620 N.Y.S. 2d 371, 372 (1995) (determining that the agency was liable for not explaining the adoptee's severe psychiatric history); *Burr*, 23 Ohio St. 3d at 75, 491 N.E.2d at 1107 (establishing agency liability for not divulging information about the adoptee's premature birth); *Gibbs v. Ernst*, 150 Pa. Commw. 154, 160, 615 A.2d 851, 854 (1992) (holding the agency liable for withholding information about adoptee's ten prior foster care placements); *Malette v. Children's Friend and Servs.*, 61 A.2d 67, 71 (1995) (finding the agency liable for not indicating the child's mental handicap to the adoptive parents); *Meracle v. Children's Serv. Soc'y*, 149 Wis. 2d 19, 32,

Commissioners,²⁰ became the first state supreme court to acknowledge that adoption agencies owe a duty to disclose certain information to adoptive parents.²¹ The Supreme Court of Ohio ruled that adoption agencies were only liable for intentional, fraudulent statements about the adoptive child and biological parents.²² Under *Burr*, an adoption agency's negligent misrepresentations would not create a liability.²³

In the years following the *Burr* decision, six states acknowledged 'wrongful

437 N.W.2d 532, 537 (1989) (finding the agency liable after it misrepresented the adoptive child's potential to contract Huntington's disease).

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

²¹ *Burr*, 23 Ohio St. 3d at 75, 491 N.E.2d at 1107. This was not the first time adoptive parents sued an adoption agency for misrepresentation, but the first time a court allowed recovery. See *Richard P. v. Vista Del Mar Child Care Serv.*, 106 Cal. App. 3d 860, 866, 165 Cal. Rptr. 370, 371 (1980) (judgment entered for adoption agency). In *Richard P.*, the adoptive parents unsuccessfully sued the adoption agency for breach of contract and breach of warranty when they realized the agency informed them that their adopted son was "in excellent health," when actually he was born prematurely. *Id.* at 866, 165 Cal. Rptr. at 373. The court refrained from holding the agency liable, stating that it did not intend to make the "adoption agency a guarantor of the infant's future good health." *Id.* at 867, 165 Cal. Rptr. at 374. The *Richard P.* court found liability unreasonable because natural parents have no guarantee for the physical and emotional health of their children. *Id.*

²² *Burr*, 23 Ohio St. 3d at 75, 491 N.E.2d at 1107. In *Burr*, the employee of the Stark County Welfare Department told the Russell and Betty Burr that their adopted son was born to an eighteen-year old unwed mother and the maternal grandparents were mean to the child. *Id.* at 70, 491 N.E.2d at 1103. The Burrs adopted Patrick and eventually discovered that Patrick's biological mother was a committed mental patient. *Id.* at 71, 491 N.E.2d at 1104. The Welfare Department fabricated every detail about Patrick. *Id.* at 71, 491 N.E.2d at 1103-04; see also Claire Grandpre' Combs, Note, *Wrongful Adoption: Adoption Agency Held Liable for Fraudulent Representations: Burr v. Stark County Board of Commissioners*, 56 U. CIN. L. REV. 343, 352 (1986) (analyzing first successful wrongful adoption decision in the United States).

²³ *Burr*, 23 Ohio St. 3d at 76-77, 491 N.E.2d at 1108. Recovery for the adoptive parents depends on whether the adoptive parents can prove fraud, as set out in *Cohen v. Lamko, Inc.* 10 Ohio St. 3d 167, 169, 462 N.E.2d 407, 409 (1984). According to *Cohen*, the elements of fraud are:

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

Cohen, 10 Ohio St. 3d at 169, 462 N.E.2d at 409 (citing *Friedland v. Lipman*, 68 Ohio App. 2d 255, 259, 429 N.E.2d 456, 459 (1980)).

adoption' as a cause of action.²⁴ In 1988, the Second District Court of Appeals for California expanded the rights of the adoptive parents by requiring a good faith, full disclosure of the adopted child's medical history.²⁵ The California court, however, followed the *Burr* decision in refusing to impose liability for negligent misrepresentation.²⁶

In 1989, the Supreme Court of Wisconsin, in *Meracle v. Children's Service Society*,²⁷ ratified an adoption agency's liability for intentional misrepresentation of the adopted child's background.²⁸ The *Meracle* court also established that adoption agencies could avoid liability by not making *any* affirmative representations regarding the child or the biological parents.²⁹ The *Meracle* decision, unlike the *Burr* decision, discouraged communication between adoptive parents and adoption agencies.³⁰ After *Meracle*, Wisconsin adoption

²⁴ *Michael J. v. County of Los Angeles, Dep't of Adoption*, 201 Cal. App. 3d 859, 872, 247 Cal. Rptr. 504, 512 (1988); *Roe v. Catholic Charities*, 225 Ill. App. 3d 519, 524, 588 N.E.2d 354, 357 (1986); *Juman v. Louise Wise Servs.*, 620 N.Y.S. 2d 282, 372 (1992); *Gibbs v. Ernst*, 150 Pa. Commw. 154 160, 615 A.2d 851, 854 (1992); *M.H. and J.L.H. v. Caritas Family Servs.*, 488 N.W.2d 282, 288 (1992); *Mallette, v. Children's Friend and Serv.*, 661 A.2d 67, 71 (1989); *Meracle v. Children's Serv. Soc'y*, 149 Wis. 2d 19, 32, 437 N.W.2d 532, 537 (1989).

²⁵ *Michael J.*, 201 Cal. App. 3d at 875, 247 Cal. Rptr. at 513. The adoptive parents sued a private adoption agency for failing to disclose that their adopted son had a congenital degenerative nerve disorder at the time of the adoption. *Id.* at 863-64, 247 Cal. Rptr. at 505. The court imposed liability because the California Legislature recognized that "adopting parent[s] need complete medical background information on both the adoptee and the adoptee's birth parents." *Id.* at 872, 247 Cal. Rptr. at 511; CAL. [FAMILY] CODE § 9202 (West 1994).

²⁶ *Michael J.*, 210 Cal. App. 3d at 874-75, 247 Cal. Rptr. at 513. The court made clear that liability for negligence would "impede the proper functioning of adoption agencies." *Id.* at 873, 247 Cal. Rptr. at 512 (quoting *Smith v. Alameda County Social Serv. Agency*, 90 Cal. App. 3d 929, 938, 153 Cal. Rptr. 712, 716 (1979)).

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

²⁸ *Id.* at 32, 437 N.W.2d at 537.

²⁹ *Id.* The *Meracle* court established that if the agency releases any information about the child or the biological parents, it must assure a complete, and accurate disclosure. *Id.* In this case, the adoption agency told Quentin and Nancy Meracle that Erin, the child they wanted to adopt, had a history of Huntington's Disease in her family. *Id.* at 23, 437 N.W.2d at 533. The Meracles were notified that her father had tested negatively for this disease, giving Erin no greater than normal chance of developing Huntington's Disease. *Id.* Several years after the adoption, the parents realized that Erin had Huntington's Disease and that no test existed to diagnosis this illness. *Meracle*, 149 Wis. at 23, 437 N.W.2d at 533.

³⁰ *Burr v. Board of Comm'rs*, 23 Ohio St. 3d 69, 76-77, 491 N.E.2d 1104, 1108 (1986).

agencies have no duty to disclose health information to potential adoptive parents.³¹ Proponents of the *Meracle* decision believe this ruling would give adoptive parents more confidence in the adoption process because liability will attach if a court finds error in any of the agency's assertions about the child.³²

In 1992, the Appellate Court of Illinois expanded the parameters of 'wrongful adoption' by allowing adoptive parents to recover damages after an adoption agency negligently misrepresented the history of several adopted children.³³ The Illinois court explained that adoption agencies owe adoptive parents and children a duty of care because the agency is the only party in the transaction able to accurately collect and convey information about the child.³⁴

III. WRONGFUL ADOPTION IN MASSACHUSETTS

Although other states since Illinois have recognized wrongful adoption, no decision has expanded the liability for wrongful adoption as far as *Mohr v. Commonwealth*.³⁵ In *Mohr*, the Supreme Judicial Court of Massachusetts established that all adoption agencies have an affirmative duty to disclose all 'nonidentifying' information to the adoptive parents.³⁶ Additionally, the court held that adoptive parents do not have a duty to investigate the child's

³¹ *Meracle v. Children's Serv. Soc'y*, 149 Wis. 2d 19, 32, 437 N.W.2d 532, 537 (1989).

³² *Meracle*, 149 Wis. 2d at 32, 437 N.W.2d at 537. Accordingly, the court suggested that encouraging silence would not result in greater instances of fraud on the part of the adoption agencies. *Id.*; see also *Foster v. Bass*, 575 So. 2d 967, 981 (1980).

³³ *Roe v. Catholic Charities*, 225 Ill. App. 3d 519, 538, 588 N.E.2d 354, 366 (1992). The court stated this rule would further strengthen and preserve the families. *Id.* at 537, 588 N.E.2d at 365. In this case, the adoption agency told three different families that the potentially adoptive children were normal, but "needed lots of love." *Id.* at 523, 588 N.E.2d at 356. All three sets of adoptive parents incurred high medical bills for psychiatric treatment for these children who displayed violent and bizarre behavior, such as cutting the whiskers off of the family cat, flattening the tires of the parent's car, and exposing themselves to the neighbors. *Id.* The adoption agency admitted that, at the time of the adoptions, they knew that all three children had received treatment for psychological and emotional problems. *Id.*

³⁴ *Roe*, 225 Ill. App. at 537, 588 N.E.2d at 365.

³⁵ *Mohr*, 421 Mass. 147, 161, 653 N.E.2d 1104, 1112; see *Malette v. Children's Friend and Serv.*, 661 A. 2d 67, 73 (1995) (holding that adoption agencies must make representations about children in a "nonnegligent manner"); *M.H. and J.L.H. v. Caritas Family Serv.*, 488 N.W.2d 282, 288 (1992) (declining to hold an adoption agency liable intentional misrepresentation).

³⁶ *Mohr v. Commonwealth*, 421 Mass. 147, 161, 653 N.E.2d 1104, 1112 (1995).

background.³⁷

Prior to the *Mohr*'s lawsuit, no other adoptive family had successfully contested the fraudulent behavior of a Massachusetts adoption agency.³⁸ Interestingly, before the *Mohr* decision, the Massachusetts judiciary provided redress to families harmed by the negligent conduct of other family planning professionals.³⁹ For example, in *Burke v. Rivo*⁴⁰ the court allowed the parents of a healthy child to recover from a physician who negligently performed a sterilization procedure resulting in an unwanted pregnancy.⁴¹ The *Burke* court determined damages by adding the costs associated with recovering from an unsuccessful medical procedure with the cost of giving birth and raising the child.⁴² The court then subtracted a dollar amount which represented the benefit the plaintiffs would receive by having the child as part of their family.⁴³

In the same year as the *Burke* decision, the Supreme Judicial Court of Massachusetts allowed the parents of a severely disabled child to recover from a physician who gave negligent preconception genetic counseling.⁴⁴ In *Viccaro*

³⁷ *Id.*, at 162, 653 N.E.2d at 1112. The holding of a lack of duty on the part of the parents prevents adoption agencies from using comparative negligence as a defense. *Id.* At trial, the Commonwealth unsuccessfully counterclaimed comparative negligence because the *Mohrs* failed to discover Elizabeth's disability independently. *Id.*

³⁸ *Id.*, at 161, 653 N.E.2d at 1112. The court, however, acknowledges the "necessity to approaching slowly any attempt to make an adoption agency liable" for the health of adopted children. *Mohr*, 421 Mass. at 162, 653 N.E.2d at 1112 (quoting *Foster v. Bass*, 575 So. 2d 967, 981 (1980)).

³⁹ *Viccaro v. Milunsky*, 406 Mass. 777, 781-82, 551 N.E.2d 8, 11 (1990) (allowing recovery from a negligent surgeon); *Burke v. Rivo*, 406 Mass. 764, 768-69, 551 N.E.2d 1, 4-5 (1990) (awarding damages caused by the advice of a negligent doctor).

⁴⁰ 406 Mass. 764, 551 N.E.2d 1 (1990).

⁴¹ *Burke*, 406 Mass. at 764, 551 N.E.2d at 3. The court allowed the couple to recover the cost of the unsuccessful sterilization procedure and the costs directly attributable to the pregnancy. *Id.* The defendant unsuccessfully appealed the trial court's measure of damages, which entailed subtracting the benefit the family would gain by having the child from the amount the family spent on having the child, and will spend raising the child. *Id.* at 772, 551 N.E.2d at 6.

⁴² *Burke*, 406 Mass. at 764, 551 N.E.2d at 3.

⁴³ *Burke*, 421 Mass. at 772, 551 N.E.2d at 6. The dissenting justices in *Burke*, criticized this process of measuring damages. *Id.* at 773-74, 551 N.E.2d 6-7 (O'Connor, J., dissenting with whom Justices Nolan and Lynch join). The Justices inquired into the value of a child to his parents is "inconsistent with the dignity that the Commonwealth, including its courts, must accord to every human life, and it should not be permitted." *Id.* at 774, 551 N.E.2d at 7 (O'Connor, J., dissenting).

⁴⁴ *Viccaro*, 406 Mass. at 781-82, 551 N.E.2d at 11-12. As in *Burke*, the plaintiffs in *Viccaro*, recovered costs associated with raising a physically and mentally disabled child, including damages from emotional distress, offset by the benefit the family will have by the

v. *Milunsky*, the plaintiffs consulted the physician to determine the chance of having a handicapped child because a rare genetic disease ran in their family.⁴⁵ The Viccaros followed the advise of the physician and gave birth to a handicapped child.⁴⁶ Although other states label such claims ‘wrongful birth’⁴⁷ or ‘wrongful life,’⁴⁸ the Supreme Judicial Court of Massachusetts finds nothing wrong with the birth or the life of a child and refrains from using these labels.⁴⁹

In determining the award the Viccaro’s would receive, the court engaged in an analysis similar to that of *Burke* and focused on the “physical, emotional and financial well-being” of the parents instead of the poor health of the child.⁵⁰ As in *Burke*, the plaintiffs in *Viccaro* recovered costs associated with raising a physically and mentally disabled child, including damages for emotional distress, offset by an amount representing the benefit the plaintiffs would receive by

existence of the child. *Id.*

⁴⁵ *Viccaro*, 406 Mass at 781-82, 551 N.E.2d at 11-12.

⁴⁶ *Id.* at 781-82, 551 N.E.2d at 11-12.

⁴⁷ *Lininger v. Eisenbaum*, 764 P.2d 1202, 1204 (Colo. 1988) (declaring a ‘wrongful birth’ claim valid cause of action). In that case, the court found the physician negligent by not warning plaintiffs of the chances of having a handicapped child. *Id.* The term ‘wrongful birth’ describes a medical malpractice claim brought by parents of a child with an impairment or a birth defect caused by the negligence of the physician. *Id.*

⁴⁸ *Lininger*, 764 P.2d at 1204. ‘Wrongful life’ refers to a medical malpractice claim in which a child claims that but for the negligence of the physician he would not have to suffer through life because he was born with an impairment. *Id.* The *Lininger* opinion claimed that the analysis and introspection required to answer the question “what is the value of non-existence?” is “too metaphysical to be understood within the confines of the law.” *Id.* at 1210. The court also explained that both ‘wrongful life’ and ‘wrongful birth’ are not torts on their own, but actually claims of negligence. *Lininger*, 764 P.2d at 1205. In the dissent on the wrongful life discussion in *Lininger*, the judge complained that the term “wrongful birth is a misnomer” because it does not describe the tort, only the result. *Id.* at 1213 (Erickson, J., concurring and dissenting).

Contrary to Massachusetts, many states decline to recognize the tort of ‘wrongful life’ because it requires a judge or a jury to determine the value of the disabled child’s life and compare that amount with the value to the child of not being born. *Id.* at 1210; *see, e.g.*, *Elliot v. Brown*, 361 So. 2d 546, 548 (Ala. 1978) (holding that there is no legal right not to be born); *Moores v. Lucas*, 405 So. 2d 1022, 1024-25 (Fla. App. 1981) (holding that there is no cause of action for wrongful life for a child born with a genetic defect because a physician failed to diagnose a disease); *Siemieniec v. Lutheran General Hospital*, 117 Ill. 2d 230, 232, 512 N.E.2d 691, 695 (1987) (rejecting a wrongful life claim made by child born with hemophilia).

⁴⁹ *See Vicarro v. Milunsky*, 406 Mass. 777, 778 n.3, 551 N.E.2d 1, 8 n.3 (stating that the court only perceived the wrongfulness in “the negligence of the physician”).

⁵⁰ *See supra* notes 41, 44 and accompanying text.

having the child as part of their family.⁵¹ The *Mohr* court employed analogous reasoning in awarding damages to the Mohrs to help them afford the expensive medical and education services that Elizabeth requires.⁵² The *Mohr* court, however, did not condone the ‘offset method’ in determining the damage award in wrongful adoption cases.

IV. PRESENT ADOPTION GUIDELINES IN MASSACHUSETTS

Massachusetts statutes and regulations regarding adoption govern private and public adoption proceedings in Massachusetts, regardless of where the child resides prior to the adoption.⁵³ Massachusetts General Laws, chapter 210 and the *Mohr* decision govern the Commonwealth’s private adoption agencies.⁵⁴ The Department of Social Services (DSS), the Commonwealth’s public adoption agency, has the same restraints as private adoption agencies. DSS, however, must also adhere to guidelines set forth in the Code of Massachusetts Regulations (the Code).⁵⁵ The Code’s provisions do not substantially alter the legislative expectations of public agencies.⁵⁶ For example, under the General Laws, information which will not identify the biological parents may be disclosed to the adoptive parents upon their request.⁵⁷ The Code similarly requires the adoption agency to provide “relevant information” to the adoptive

⁵¹ *Viccaro*, 406 Mass. at 781-82, 551 N.E.2d at 11-12.

⁵² *Mohr v. Commonwealth*, 421 Mass. 147, 155, 653 N.E.2d 1104 1109 (1995). See also Deborah Miller, *Are You Adopting a Child or a Heartache? Adoption Agencies may have to Disclose or Face a Claim of Wrongful Adoption*, 26 NEW ENG. L. REV. 1145, 1170 (1992) (“[because] the courts of Massachusetts are willing to grant recovery for the extraordinary costs associated with raising an unwanted healthy child, then recovery for the ordinary costs associated with raising an unhealthy desired child, naturally follows.”)

⁵³ MASS. GEN. L. ch. 210, § 1-14; MASS. REGS. CODE tit. 110, § 7.200-7.214 (1993).

⁵⁴ MASS. GEN. L. ch. 210, § 1-14; MASS. REGS. CODE tit. 110, § 7.200-7.12; *Mohr*, 421 Mass. at 147, 653 N.E.2d. at 1104 (1995).

⁵⁵ See MASS. GEN. L. ch. 210, § 1-14; MASS. REGS. CODE tit. 110, § 7.200-7.12.; *Mohr*, 421 Mass. at 147, 653 N.E.2d. at 1104 (1995).

⁵⁶ Both MASS. GEN. L. ch. 210, § 1-14; MASS. REGS. CODE tit. 110, § 7.200-7.214 (1993) require the adoption agencies to disclose identical information.

⁵⁷ MASS. GEN. L. ch. 210, § 5D(a)(3) (1994). This statute defines nonidentifying information as “medical, ethnic, socio-economic and educational circumstances.” *Id.* This information may only be released to the adoptive parents if the adopted person is under the age of eighteen years. *Id.* If the adoptee is over the age of eighteen years, the adoption agency may disclose the information only to the adoptee upon his or her written request. MASS. GEN. L. ch. 210, § 5D(a)(1) (1994).

parents.⁵⁸ The General Laws and the Code leave the dissemination of information to the discretion of the agency.⁵⁹

The major difference between private and public adoption agencies does not lie in the respective disclosure requirements, but in the potential liability for nondisclosure of information. The damage award in *Mohr* demonstrates that public adoption agencies in Massachusetts are only liable up to \$100,000 for negligent misrepresentation of the adoptee's history.⁶⁰ The *Mohr* opinion notes that had DSS intentionally misrepresented information about Elizabeth, the damage award would have been different.⁶¹ The court clarified that discrepancies in damage awards depend on whether the agency is public or private, and whether the employee acted negligently or intentionally.⁶² Although the court did not speculate on damage awards for wrongful adoption cases involving private agencies, a court resolving a wrongful adoption case in the future may hand down a damage award which more accurately reflects the foreseeable costs of child care.

V. POSSIBLE AVENUES OF RECOVERY FOR WRONGFUL ADOPTION IN MASSACHUSETTS

Massachusetts courts will probably follow the precedent set by Illinois, New York, and Ohio and only allow recovery for 'wrongful adoption' based on the theory of common law fraud or negligent misrepresentation.⁶³ In the past,

⁵⁸ MASS. REGS. CODE tit. 110, § 7.213(3) (1993).

⁵⁹ MASS. GEN. L. ch. 210, § 5D(3) (stating that the "agency, in its discretion shall release information surrounding the circumstances under which the adopted person became available for adoption"). Under this section of the Code, the public adoption agency gets to label information "relevant" in aiding the adoptive parents in determining whether or not to adopt a particular child. MASS. REGS. CODE tit. 110, § 7.213(3) (1993).

⁶⁰ See *Mohr v. Commonwealth*, 421 Mass. 147, 149, 653 N.E.2d 1104, 1106 (1995); MASS. GEN. L. ch. 258, § 2 (1994). See *Mohr*, 421 Mass. at 155, 653 N.E.2d at 1109.

⁶¹ MASS. GEN. L. ch. 258, § 10(c) (1994); *Mohr*, 421 Mass. at 164, 653 N.E.2d at 1113. The Massachusetts Tort Claims Act exempts public employees from liability except where the employee's negligence harms a member of the public. MASS. GEN. L. ch. 258, § 2 (1994). The Tort Claims Act caps liability at \$100,000. MASS. GEN. L. ch. 258, § 2 (1994).

⁶² *Mohr*, 421 Mass. at 164, 653 N.E.2d at 1113.

⁶³ See, e.g., *Roe v. Catholic Charities*, 225 Ill. App. 3d 519, 527, 588 N.E.2d 354, 359 (1992) (explaining that to be successful, adoptive parents must satisfy their burden of proof on all the elements of fraud); *Juman v. Louise Wise Servs.*, 620 N.Y.S.2d 371, 372 (1995) (describing wrongful death as "an extension of common law fraud to the adoption setting"); *Burr v. Board of County Comm'rs*, 23 Ohio St. 3d 69, 72, 491 N.E.2d 1101, 1105 (1986) (listing elements of common law fraud in describing wrongful adoption).

dissatisfied adoptive parents in other states have unsuccessfully sued adoption agencies under the premise of breach of contract.⁶⁴ To date, however, courts have yet to equate adoption with a contract because adoption lacks elements of contract formation.⁶⁵ Other adoptive parents have attempted to recover from adoption agencies under a due process claim.⁶⁶ In these cases, the adoptive parents have also been denied relief because the courts have not equated misrepresentation of the child's background with a deprivation of a recognized liberty or property right.⁶⁷

Although adoptive parents may seek compensation by establishing a prima facie case of common law fraud and misrepresentation, at least one proponent of 'wrongful adoption' suggests that adoptive parents may also seek recovery under statutory consumer protection laws.⁶⁸ Under Massachusetts General Law, chapter 93A (93A), plaintiffs can recover damages from parties conducting fraudulent trade practices.⁶⁹ To utilize 93A, future courts must consider the

⁶⁴ See, e.g., *Richard P. v. Vista Del Mar Child Care Serv.*, 106 Cal. App. 3d 860, 867-68, 165 Cal. Rptr. 370, 374 (1980) (dismissing breach of contract claim because a physician cannot guarantee the child's future health at the time of the adoption); *Roe*, 225 Ill. App. 3d at 538, 588 N.E.2d at 366 (denying recovery on breach of contract claim because complaint did not clearly indicate that adoption entailed an offer, acceptance, and consideration); *Allen v. Children's Servs.*, 58 Ohio App. 3d 41, 44, 567 N.E.2d 1346, 1349 (1990) (rejecting breach of contract claim because equating the adoption of a child to a "bargained for exchange is repugnant" (quoting *A.L. v. P.A.*, 213 N.J. Super. 391, 394, 517 A.2d 494, 497 (1988))).

⁶⁵ *Roe*, 225 Ill. App. 3d at 538, 588 N.E.2d at 366, (stating that "facts sufficient to indicate offer, acceptance and consideration" must precipitate contract damages quoting *Latex Glove Co. v. Gruen*, 146 Ill. App. 3d 868, 873, 497 N.E.2d 466, 469 (1986))).

⁶⁶ *Engstrom v. State*, 461 N.W.2d 309, 312 (Iowa 1990) (attempting to hinge liability on a due process violation among other complaints). Howard and Dorothy Engstrom, pre-adoptive parents, claimed that the adoption agency deprived them of a liberty interest in "personal and family integrity" by not realizing the child's biological father was alive at the time the child was placed in the pre-adoptive home. *Engstrom*, 461 N.W.2d at 318.

⁶⁷ *Engstrom*, 461 N.W.2d at 318-19. The court followed the Fifth Circuit which held that adoptive parents do not have a 'liberty' interest in learning information about their adopted child. *Id.* at 319 (citing *Griffith v. Johnson*, 899 F.2d 1427, 1432 (5th Cir. 1990)). The Engstroms also complained that the adoption agency deprived them of a property interest, specifically the money they spent on the child before the State returned her to her father. *Id.* at 319. The court again patterned the holding on the Fifth Circuit's reasoning and found the claim 'tenuous' because the state did not force the pre-adoptive couple to spend money on the child. *Id.*

⁶⁸ See *Miller*, *supra* note 52, at 1164 (arguing that the permanent placement of a child should strictly be protected and regulated by the state).

⁶⁹ MASS. GEN. L. ch. 93A, § 1(b) (1994). In pertinent part, the statute applies to the "sale . . . of . . . any services . . . and shall include any trade or commerce directly or indirectly affecting the people of this commonwealth." *Id.* One could argue that the

service surrounding the adoption procedure a trade or commerce, or the agency itself a commercial entity. Only then would aggrieved adoptive parents fall under the statutory protection of 93A, and qualify for double or treble the amount of actual damages.⁷⁰ Under 93A, Massachusetts courts may find parties liable if their conduct is “undertaken . . . to destroy the rights of another”⁷¹ Certainly some of the examples of the deceitful behavior of agencies in wrongful adoption claims meet this standard.

Even though a successful 93A claim may provide money to care for the child, it is doubtful that the Massachusetts legislature, or the courts, will expand the protection to include adoptive parents. As it stands today, the Massachusetts courts and legislature give more protection to purchasers of automobiles and appliances than to people adopting a child.⁷²

VI. MAKING MASSACHUSETTS A FORUM FOR HONEST ADOPTIONS

Present statutory regulations of adoptions attempt to serve the interests of

service, especially through private adoption agencies, of arranging child adoption falls under the purview of 93A because it “directly . . . affect[s] the people of the Commonwealth.” *Id.* The court in *Riseman v. Orion Research, Inc.* held that the “definition of ‘trade’ and ‘commerce’ in G.L. c. 93A §1 (b) . . . is open-ended to a considerable degree because, although it states certain activities that are included, it does not exclude other activities.” 394 Mass. 311, 313, 475 N.E.2d 398, 399 (1985).

⁷⁰ MASS. GEN. L. ch. 93A, § 9(3A) (1994); *Riseman*, 394 Mass. at 313, 475 N.E.2d at 399.

⁷¹ *Massachusetts Employers Ins. Exch. v. Propac-Mass. Inc.*, 420 Mass. 39, 43, 648 N.E.2d 435, 438 (1995). In its discussion of the standard of deceptive or unfair conduct, the court found phrases such as “level of rascality” and “rancid flavor” unhelpful in determining the “nature, purpose and effect of the conduct.” *Massachusetts Employer’s*, 420 Mass. at 42, 648 N.E.2d at 438 (citing *Levings v. Forbes & Wallace, Inc.*, 8 Mass. App. Ct. 498, 504, 396 N.E.2d 149, 153 (1979) and *Atkinson v. Rosenthal*, 33 Mass.App.Ct. 219, 226, 598 N.E.2d 666, 670 (1992)); see also *Brennan v. Carvel Corp.*, 929 F.2d 801, 813 (1st Cir. 1991) (adding requirement that defendant’s actions were “immoral, unethical, oppressive or unscrupulous” for a finding of a 93A violation, and referring to *Quaker State Oil Refining Corp v. Garrity Oil Co.*, 884 F.2d 1510, 1513 (1st Cir. 1989)).

⁷² See *Miller*, *supra* note 52, at 1164 (explaining the judicial interpretation of trade or commerce). Interestingly, Massachusetts courts measure the business conduct in question with that of “the commercial market place,” not “an overly precious standard of ethical or moral behavior.” See *Brennan v. Carvel Corp.* 929 F.2d at 812-13 (*quoting* *US Corp. v. Arthur D. Little Soys. Inc.*, 28 Mass.App.Ct. 672, 679, 546 N.E.2d 888, 897 (1989)).

biological parents, adoptive children, and adoptive families.⁷³ Upon comparison with the guidelines of other states, the Massachusetts adoption practice falls short of providing the best system in several ways. First, the adoption laws of Massachusetts lack explicit guidelines to ensure that adoptive parents obtain full disclosure prior to the adoption.⁷⁴ Second, the Commonwealth does not provide appropriate remedies for families who adopt a child without knowledge of his or her serious physical, mental, or emotional problems, and are unable to adequately care for that child.⁷⁵ This article suggests that fraudulent activity involved in child adoptions would decrease if the Massachusetts legislature demanded specific disclosures and offered appropriate remedies.

Honest communication between the adoptive parents and the adoption agency has become increasingly more important for several reasons. First, the number of healthy babies up for adoption has declined over the past twenty years, forcing adoption agencies to push adoption of physically and mentally handicapped children.⁷⁶ Second, the number of children born addicted to illegal substances or with Fetal Alcohol Syndrome has increased.⁷⁷ Third, more readily available abortions leave fewer healthy, desirable babies for adoption.⁷⁸ The fourth, and most important reason to mandate disclosure is that many of the adopted babies do not show signs of a handicap until late childhood and

⁷³ See generally MASS. GEN. L. ch. 210 (1994) (repeating that the agency and court consider childrens' best interests); 110 MASS. REG. CODE tit. § 7.205 (explaining the stringent requirements to become an adoptive parent).

⁷⁴ MASS. GEN. L. ch. 210, § 5D (outlining the lack of specificity the legislature requires of the adoption agencies).

⁷⁵ MASS. GEN. L. ch. 210, §1-14 (1994). Other states allow parents to annul the adoption of a child when they no longer can parent their child. See *infra* note 99-101 (citing statutes on annulment of adoptions); Anne Harlan Howard, Note, *Annulment of Adoption Decrees on Petition of Adoptive Parents*, 22 J. FAM. L. 519, 565 (1984) (listing grounds and procedural requirements of states which allow annulment of adoption decrees).

⁷⁶ See Daniel Golden, *When Adoption Doesn't Work*, Boston Globe, June 11, 1989, (Magazine) at 16 (tracing the trauma of several families in states that allow annulment after discovering that their adopted child had a mental or physical illness). "The more physically or emotionally disabled the child, the more likely is the adoption to fall apart . . . [S]ome children are adopted twice or even three times . . . [which] still may be preferable to living in an institution, but it's . . . far . . . from the government's hope of permanency." *Id.*

⁷⁷ See Janet Hopkins Dickson, *The Emerging Rights of Adoptive Parents: Substances or Specter?*, 38 UCLA L. REV. 917, 918, 944 (1991) (reporting on the increased infertility rates among Americans and infants born with health problems due to inappropriate or harmful neonatal care); see also Golden, *supra* note 76 (explaining the rise in adoptions of "hard to adopt" older children due to abusive birth parents, foster parents and extended stays at state-run institutions).

⁷⁸ Dickson, *supra* note 77, at 918.

adolescence.⁷⁹ Full disclosure would allow the adoptive parents to provide special medical treatment or education which could lessen the effect of the child's handicap or even dissuade parents incapable of caring for such children from pursuing the adoption.⁸⁰

VII. STATUTORY REFORM

There are four areas of the Massachusetts adoption statute in need of amendment. First, Massachusetts should rewrite its statute and follow states such as Iowa, Pennsylvania, and Tennessee which emphasize their intent to protect the welfare of the child during the adoption process.⁸¹ Massachusetts ensures that the adoptive parents will be able to provide for the child, but unlike the analogous provisions of Iowa, Pennsylvania, and Tennessee, the Massachusetts statute lacks language emphasizing the agencies' intent to "provid[e] . . . a loving home," or insure the adoptees' interests remain "paramount."⁸² Similarly, the Code fails to direct the public adoption agencies to focus on the welfare of the child.⁸³ The official comment to the Massachusetts public adoption regulation states, however, that the "primary responsibility of the Department . . . [is] . . . to find families for children, rather than to find children for families."⁸⁴ The legislature should amend the statute and mandate that the child's needs and future care are of primary importance. This would send a message to adoption agencies that they need not push children through the adoption system, but work to create families which will remain intact.

A second fault with the Massachusetts statute lies in its permissive and

⁷⁹ See *supra* note 19 (listing cases where adoptive parents were not initially aware of adoptees illnesses or handicaps.)

⁸⁰ M.H. and J.H. v. Caritas, 488 N.W.2d 282, 287 (1992) (highlighting the importance of securing timely and appropriate medical care for the child as a reason for full disclosure). Furthermore, adoptive parents should have the ability to control whether they wish to accept responsibility for children that have been injured through poor neonatal care, substance abuse, and hereditary diseases. Dickson, *supra*, note 77, at 943-44.

⁸¹ See IOWA CODE ANN. § 600.1 (West 1996) (interest of the adoptive child is the most important aspect of the adoption process); 23 PA. CONS. STAT. § 2902 (a) (1991) (adoption decree will enter only if best interest of child satisfied); TENN. CODE ANN. § 36-1-101 (1991) (purpose of adoption is to protect and foster the well being of the child).

⁸² See IOWA CODE ANN. § 600.1 (1996); MASS. GEN. L. ch. 210, § 6 (1994); TENN. CODE ANN. § 36-1-101 (West 1996).

⁸³ MASS. REGS. CODE tit. 110, § 7.205 (1993).

⁸⁴ *Id.* This comment implies that Massachusetts aims to place the needs of the children before the preferences of the adopting parents, but does not ensure the goal of keeping the child's interests of primary importance.

ambiguous wording. Unlike other states, Massachusetts ambiguously describes what information the agency *may* disclose to the parent.⁸⁵ No where does the statute *mandate* disclosure of any information.⁸⁶ Since the judiciary has imposed an “affirmative duty” on adoption agencies to disclose information to adoptive parents, the legislature should now specify exactly the information private and public agencies must divulge.⁸⁷ Exact disclosure requirements would benefit the adoptive parents by informing them of every detail the agency knows, and it would also help the parents realize that the agency does not know everything about the child.

To ameliorate the ambiguity of the statute, Massachusetts should mirror the Texas statute, which requires specific information to be passed on to the parents, but also will not allow a court to grant an adoption decree unless the court has notice that the adoptive parents have a copy of a comprehensive medical report.⁸⁸ In contrast, Massachusetts adoption agencies may release “medical information,” but potential adoptive parents do not have rights to all medical history.⁸⁹

Other states, such as New York, mandate the disclosure of hereditary conditions, diseases, and information about drugs or medication taken by the mother during pregnancy.⁹⁰ Similarly, Texas and Oregon require adoption agencies to disclose a detailed medical history, a full description of the parents’ physical characteristics and “[a]ny other useful or unusual biological

⁸⁵ *Supra* note 11, Mass. Gen. L. ch. 210, § 5D (1994); *see* MASS. REGS CODE tit. 110, § 7.213 (1993) (stating adoption agency may release “information . . . concerning the medical, ethnic, socio-economic and educational” circumstances of the child); *cf.* TEX. FAM. CODE ANN. § 16.032 (a)-(l) (West 1996). The Texas statute explicitly requires disclosure of medical, psychological, psychiatric, and dental histories, a record of immunization, and the available results of the medical, psychological, psychiatric and, dental examinations of the child. TEX. FAM. CODE ANN. § 16.032(b) (West 1996). This statute also requires disclosure of information about the nuclear and extended family. TEX. FAM. CODE ANN. § 16.032(c) (West 1996). Moreover, the duty to disclose information about the child does not end with the finalization of the adoption because the statute requires the adoption agency to disclose supplemental information to the adoption parents if it becomes available. TEX. FAM. CODE ANN. § 16.032(l) (West 1996).

⁸⁶ *See supra* note 11, Mass. Gen. L. ch. 210, § 5D (1994).

⁸⁷ *Mohr v. Commonwealth*, 421 Mass. 147, 161, 653 N.E.2d 1104, 1112 (1995).

⁸⁸ TEX. FAM. CODE ANN. § 16.032 (a)-(e), (h) (West 1996). *But cf.* MASS. GEN. L. ch. 210 § 5D(3) (requiring parents to request information about their adoptive child in writing).

⁸⁹ MASS. GEN. L. ch. 210, § 5D (1994). *But cf.* OR. REV. STAT. § 109.342(2)(e) (1993) (requiring disclosure of specific medical information and also “any other useful or unusual . . . information” provided by the biological parents).

⁹⁰ N.Y. SOC. SERV. LAW § 373-a (McKinney 1992).

information.”⁹¹ While these examples of stringent legislation do not guarantee perfect adoptions, these laws effectively put the adoptive parents on notice of possible medical, physical, or emotional problems.⁹²

The third problem with the Massachusetts statute is that it gives adoption agencies full discretion in deciding what information to pass on to the adoptive parents.⁹³ This policy harms adoptive children and their parents in three ways. First, the adoption agency needs to spend resources deciding what information should be disclosed when the resources could be better spent preparing both the child and parent for the adoption.⁹⁴ Second, this policy forces the adoption agency to screen information and decide which details merit disclosure.⁹⁵ Massachusetts lawmakers should again look to the Texas regulation which allows “editing” for the purposes of protecting the confidentiality of the biological parents, but gives the agency little discretion in deciding what to disclose.⁹⁶

The third problem surfaces after the finalization of the adoption, because the adoption agencies in Massachusetts have no commitment to the newly formed family. The relationship between the state, or the private agency, and the family terminates.⁹⁷ Other states require the agency to update the family with

⁹¹ See OR. REV. STAT. § 109.342(2) (1993); TEX. FAM. CODE ANN. § 16.032 (a)-(e) (West 1996).

⁹² See Michael J. v. County of Los Angeles, Dep’t of Adoptions, 201 Cal. App. 3d 859, 875, 247 Cal. Rptr. 504, 513 (1988) (emphasizing that adoption agencies are only liable for fraudulent misrepresentation and cannot be considered as a guarantor of the child’s future good health); Richard P. v. Vista Del Mar Child Care Service, 106 Cal. App. 3d 860, 866, 165 Cal. Rptr. 370, 373 (1980) (holding that imposing liability for negligence or intentional misrepresentation would effectively make an adoption agency a guarantor of the child’s future good health); N.Y. SOC. SERV. LAW § 373-a (McKinney 1992); OR. REV. STAT. § 109.342(2) (1993); TEX. FAM. CODE ANN. § 16.032 (a)-(1) (West 1996); see also D. Marianne Brower Blair, *Getting the Whole Truth and Nothing But the Truth: The Limits of Liability For Wrongful Adoption*, 67 NOTRE DAME L. REV. 851, 877 (1992) (discussing the benefits of a strict disclosure rule).

⁹³ MASS. GEN. L. ch. 210, § 5D (1994); cf. S.C. CODE ANN. § 20-7-1780 (D) (Law. Co-op. Supp. 1994) (stating the executive officer of the adoption agency has sole discretion to determine information adopting parents learn of adoptive child’s background).

⁹⁴ See Fred S. Wilson, *Wrongful Adoption: A Guide to Impending Tort Litigation in Texas*, 24 ST. MARY’S L. J. 273, 291 (1992) (emphasizing potential dangers of making adoption agency discern information for adoptive parents).

⁹⁵ *Id.*

⁹⁶ TEX. FAM. CODE ANN. § 16.032 (f) (West 1996).

⁹⁷ MASS. GEN. L. ch. 210, § 6A (1995). There is no mandate to update the adoptive family with new information they may discover. *Id.*

any new information it learns about the child or biological parents.⁹⁸ This requirement would insure the adoptive parents that they have complete knowledge of all information known about their adopted child's physical and mental health.

VIII. APPROPRIATE REMEDIES

Providing appropriate remedies for successful wrongful adoption complainants would encourage open communication between adoption agencies and adoptive parents. One possible remedy is to allow courts to annul or abrogate the adoption decree. If the court annulled the adoption, the child would presumably return to the agency which would be left to arrange appropriate care for the child. Another possible remedy is to increase the amount of money that the parents can collect from adoption agencies. Even though these remedies force adoptive parents into litigation, both remedies work in the best interest of the child by providing funding for necessary medical treatment and educational services. Furthermore, these remedies act as a deterrent since agencies found to have intentionally or negligently misrepresented information would have to fund the services the child requires.

A. Annulment as a Remedy

Massachusetts, like many other states, has no annulment statute. The courts have implied power to grant annulments if necessary.⁹⁹ Other states allow

⁹⁸ TEX. FAM. CODE ANN. § 16.032 (l) (West 1996). Both state and private agencies must supplement their own files with new information and disclose new information to the adoptive family. *Id.* The statute imposes this relationship for ninety nine years. TEX. FAM. CODE ANN. § 16.032(h) (West 1996).

⁹⁹ MASS. GEN. L. ch. 210, § 6 (1994); *Petition For Revocation of a Judgment For Adoption of A Minor*, 393 Mass. 556, 562-63, 471 N.E.2d 1348, 1353 (1984) (stating that Massachusetts probate courts look to the best interest of the child in deciding whether or not to vacate an adoption decree). The following statutes do not specifically allow annulment, but give courts implied power to annul adoptions: CONN. GEN. STAT. ANN. § 46b-102, 46b-121 (West 1995); GA. CODE ANN. § 19-8-14 (1983); IDAHO CODE § 15-1605 (Supp. 1984); ILL. ANN. STAT. ch. 40, § 1517 (Smith-Hurd Supp. 1984-85); IND. CODE ANN. § 31-3-1-8 (West 1980); IOWA CODE ANN. § 600.12, § 600.13 (West 1996); KAN. STAT. ANN. § 59-2213 (1995); LA. REV. STAT. ANN. § 9:438 (West 1991); MICH. COMP. LAWS ANN. § 710.64 (West 1993); MINN. STAT. ANN. § 259.28 (West Supp. 1985); MO. ANN. STAT. § 453.080 (Vernon 1986); MONT. CODE ANN. § 40-8-127 (1995); NEV. REV. STAT. § 127.180 (1993); N.J. STAT. ANN. § 9:3-56 (West 1993); N.M. STAT. ANN. § 40-7A-7 (Michie 1994); N.Y. DOM. REL. LAW § 114 (McKinney 1979); OKLA. STAT. ANN. tit. 10, § 60.19 (West 1987); OR. REV. STAT. § 109.381 (1993); 23 PA. CONS. STAT. ANN. § 2102 (Purdon Supp. 1991); R.I. GEN. LAWS § 9-21-1 (1985); S.D. CODIFIED LAWS ANN. § 25-6-6 (1992); UTAH CODE ANN. § 78-30-9 (1992); WASH. REV. CODE ANN. § 26.33.240

annulments for two reasons, either jurisdictional or procedural defects,¹⁰⁰ or failure of the agency to disclose a mental or physical handicap at the time of the adoption.¹⁰¹ States which allow annulments due to procedural defects appear to enforce seemingly strict time limitations, but often grant annulments petitioned for after the statutory time limit expired.¹⁰² The states which allow annulments based on the fraudulent behavior of the adoption agency usually have a time restriction, but allow annulments if the manifested disability resulted from a pre-adoption condition not revealed to the parents.¹⁰³ This type of statute best serves the interests of children.

While critics of these statutes complain that they encourage dismantling families, annulment provisions ensure of the truthfulness of an agency's statements and also deter agencies from falsifying information about the child.¹⁰⁴ The Massachusetts legislature should take the advantages of these statutes into consideration if it reforms the Commonwealth's adoptions regulations. If it decides to implement an annulment provision, it should specify strict time limitations and only allow for annulment in cases of fraud or misrepresentation, not for divorce or separation of the adoptive parents.

(West 1996); WIS. STAT. ANN. § 48. 911 (West 1979); WYO. STAT. § 1-22-101-116 (1995).

¹⁰⁰ ALA. CODE § 26-10A-26 (1992); ARIZ. REV. STAT. ANN. § 8-123 (1974); COLO. REV. STAT. § 19-5-214 (1995); DEL. CODE ANN. tit. 13, § 918 (1993); D.C. CODE ANN. § 16-310 (1989); FLA. STAT. ANN. § 63.182 (West 1985); MD. CODE ANN., [FAMILY] § 330 (1991); MISS. CODE ANN. § 93-17-15, 17 (1994); N.C. GEN. STAT. § 48-2-607 (1995); TENN. CODE ANN. § 36-1-127 (1984).

¹⁰¹ ALASKA STAT. § 25.23.140 (1995); ARK. CODE ANN. § 9-9-216 (Michie 1993); CAL. [FAMILY] CODE § 9100 (West 1994); HAW. REV. STAT. § 578-12 (1993); KY. REV. STAT. § 199.540 (Michie 1995); ME. REV. STAT. ANN. tit. 19, § 43-1136 (West 1995); N.H. REV. STAT. ANN. § 170-B: 17 (1994); N.D. CENT. CODE § 14-15-15 (1991); OHIO REV. CODE ANN. § 3107.17 (Anderson 1989); TEX. FAM. CODE ANN. § 162.012 (West 1991); VT. STAT. ANN. tit. 15, § 454 (1974); VA. CODE ANN. § 63.1-237 (Michie 1995); W. VA. CODE § 48-4-12 (Supp. 1995).

¹⁰² See generally *supra* note 100 (state statutes which allow annulment for jurisdictional or procedural defect).

¹⁰³ See generally *supra* note 101 (state statutes which allow annulment of adoption if the adoption agency does not disclose information about a child's mental and physical health).

¹⁰⁴ See Elizabeth N. Carrol, *Abrogation of Adoption by Adoptive Parents*, 19 FAM. L.Q. 155, 169 (1985). Most statutes provide that if the parent proves fraud or misrepresentation occurred within a definite amount of time, the state can annul the adoption. See generally CAL. [FAMILY] CODE § 9100 (West 1994). The California statute allowing for annulment has come under fire because it requires the adoptive parents to prove the child's unadaptable status. CAL. [FAMILY] CODE § 9100(a) (West 1994). Proof of fraud does not necessarily help the child because the child may be stigmatized 'handicapped' and less attractive to other adoptive parents. *Id.*

The cases in which the Supreme Judicial Court allowed annulment involve a situation where one of the adoptive parents unduly influenced the other to adopt a child.¹⁰⁵ The other annulment petitions involve situations in which the natural parents or guardians decide to keep the child after finalization of the adoption decree.¹⁰⁶ In these cases, the court determined whether or not to annul the adoption by looking at the best interests of the child.¹⁰⁷

In contrast, states such as California permit the annulment adoption decrees if the agency fails to inform the parents about a mental or emotional disability prior to the adoption.¹⁰⁸ In these cases, the child returns to the adoption agency, which becomes financially responsible for the treatment and education of the child or tries place the child with another adoptive family.¹⁰⁹ While this remedy breaks a family apart, it serves one of the child's interests by providing a source of appropriate medical treatment and education. The Massachusetts adoption regulations do not outright forbid annulments in these circumstances, courts may grant annulments more readily if the legislature specifically provided this option.

B. Higher Damage Awards

The other possible remedy, forcing the fraudulent adoption agency to pay for the child's medical and education expenses while the child remains with the adoptive parents, remains speculative. The only successful wrongful adoption case in Massachusetts involved a public agency, which receives protection from exorbitantly high damage awards by the Massachusetts Tort Claims Act.¹¹⁰ If

¹⁰⁵ *Phillips v. Chase*, 203 Mass. 556, 566, 89 N.E. 1049, 1053 (1909) (decree of adoption set aside because it was granted in a scheme to inherit property). As part of the holding, the *Phillips* court stated that "a wrongdoer will not be allowed to profit by his own fraud . . ." *Phillips*, 203 Mass. at 556, 89 N.E. at 1053.

¹⁰⁶ *Revocation of a Judgment For Adoption of A Minor*, 393 Mass. 556, 562-63, 471 N.E.2d 1348, 1353 (1984); *see also Adoption of a Minor*, 350 Mass. 302, 304, 214 N.E.2d 281, 282 (adoptive parent unsuccessfully attempts to annul adoption after their adopted daughter is raped).

¹⁰⁷ *See Revocation of a Judgment For Adoption of A Minor*, 393 Mass. at 563, 471 N.E.2d. at 1353 (deciding that even though the maternal grandmother had no notice of the adoption the best interest of the child did not warrant the adoption annulment).

¹⁰⁸ CAL. [FAMILY] CODE § 9100 (West 1994). The California statute states that the child must be rendered "unadaptable" due to mental or emotional disabilities. *Id.* The California legislature only grants a five-year statute of limitations. CAL. [FAMILY] CODE § 9100(b) (West 1994).

¹⁰⁹ CAL. [FAMILY] CODE § 9100(b) (West 1994).

¹¹⁰ *Mohr v. Commonwealth*, 421 Mass. 147, 164, 653 N.E.2d 1104, 1113. One of the issues on appeal in *Cohen* was the high damage amount rendered by the Bristol County Superior Court. *Id.*

a lawsuit involving a private agency arose, however, a Massachusetts trial court may assess the damages using the standards of *Viccaro* and *Burke*.¹¹¹ The trial courts resolving those cases based the damages on the actual amount needed to cover the high medical and education costs the parents would incur in raising their children.¹¹² Additionally, the plaintiffs in these cases recovered damages for the emotional stress resulting from the negligence of the defendants.¹¹³

Massachusetts law makes parents responsible for the support of an adult child if he or she suffers an impairment and cannot live independently.¹¹⁴ With this in mind, adoptive parents should be able to pass the costs associated with raising disabled children to the adoption agency if the agency fraudulently induced the adoption. Another related possibility is to amend the Massachusetts Tort Claims Act and exempt DSS from protection in high damage awards resulting from wrongful adoption lawsuits. Again, without the protection of the Massachusetts Tort Claims Act, the damage award would reflect the true costs of maintaining the wrongfully adopted child.

IX. CONCLUSION

In light of the Mohr's plight and the rise of both hard to adopt and disabled children in the custody of DSS, the Massachusetts legislature should amend the Commonwealth's adoption regulations. By forcing adoption agencies to truthfully disclose all the information known to them about children they place, adoptive families will more likely stay intact, and children will have a better chance of being adopted. If a sense of helping children does not sway the

¹¹¹ See *Viccaro v. Milunsky*, 406 Mass. 777, 781-82, 551 N.E.2d 8, 11-12 (1990) (damages represented the estimated amount of money the parents would spend on the child's medical care and education); *Burke v. Rivo*, 406 Mass. 764, 768, 551 N.E.2d 1, 5 (1990) (determining damage award by assessing costs the court considers "reasonably foreseeable" in raising a particular child).

¹¹² *Viccaro*, 406 Mass. at 781-82, 551 N.E.2d at 8; *Burke*, 406 Mass. at 768, 551 N.E.2d at 5. In *Burke*, the court allowed the couple to recover all costs "directly flowing" from the pregnancy and birth such as the wife's lost salary and earning capacity, the cost of delivery and care following the birth, day care for the other children while the mother was in the hospital, and the second sterilization. *Id.* The court did not object to adding on damages for the wife's pain and suffering connected with the pregnancy, delivery and sterilization procedure. *Id.* Additionally, the court awarded the couple damages for the emotional distress caused by the unwanted pregnancy. *Id.*

¹¹³ *Viccaro*, 406 Mass. at 781-82, 551 N.E.2d at 8 (1990); *Burke*, 406 Mass. at 768, 551 N.E.2d at 5.

¹¹⁴ *Feinberg v. Diamant*, 378 Mass. 131, 133, 389 N.E.2d 998, 1000 (1979) (explaining the denial of a petition by parents to revoke order to support a mentally handicapped son).

legislature, perhaps a financial argument would convince the government to tighten the adoption laws in Massachusetts. Requiring disclosure would save resources previously spent in litigation and many children would receive needed medical and educational services much earlier.

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