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TORT LAW: Tort Liability when Fraudulent Misrepresentation Regarding Birth Control Results in the Birth of a Healthy Child—*Wallis v. Smith*

BRENDA SAIZ*

I. INTRODUCTION

In *Wallis v. Smith*,¹ the New Mexico Court of Appeals upheld the trial court's determination that claims based on intentional misrepresentation regarding the use of birth control in personal relationships do not give rise to legally-enforceable rights. The court held that all children, whether or not their conception "violated a promise between the parents," should benefit from child support.² Additionally, the court stated that an individual's "sphere of privacy" included one's choice whether to use or not to use contraceptives, and the courts should not interfere in this area.³ This Note describes the policy concerns that led to barring such claims and explores the potential impact this holding has for future claims regarding the right to privacy, as well as child support laws, including the Uniform Parentage Act⁴ (UPA).

II. STATEMENT OF THE CASE

Plaintiff Peter Wallis sued the defendant, Kellie Rae Smith, after Smith allegedly misrepresented that she was practicing birth control, and Wallis, relying on that representation, unintentionally fathered her daughter.⁵ Wallis and Smith became involved in an intimate sexual relationship.⁶ The parties agreed to continue their relationship as long as Smith remained on some type of birth control, because Wallis was adamant about not wanting to father a child. Wallis, however, took no precautions himself. He merely relied on Smith's word that she was taking birth control pills.⁷ Smith ceased taking the pills, without informing Wallis, but continued the intimate relationship with him. Smith became pregnant and gave birth to a healthy baby girl on November 27, 1998.⁸

Faced with the legal obligation to pay support for the unwanted child, Wallis sued Smith for fraud, breach of contract, conversion, and *prima facie* tort.⁹ The Bernalillo County State District Court dismissed the action for failure to state a claim upon which relief could be granted and Wallis appealed.¹⁰ The Court of Appeals held that, "under these facts, the causes of action are not cognizable in New Mexico because

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1. 2001-NMCA-017, 130 N.M. 214, 22 P.3d 682, *cert. denied*, 130 N.M. 254, 23 P.3d 929 (2001).

2. *Id.* ¶ 13, 130 N.M. at 217, 22 P.3d at 685.

3. *Id.*

4. See UNIF. PARENTAGE ACT §§ 1-30, 9B U.L.A. 287 (1987).

5. *Wallis*, 2001-NMCA-017 ¶ 1, 130 N.M. at 214-15, 22 P.3d at 682-83.

6. *Id.* ¶ 3, 130 N.M. at 215, 22 P.3d at 683.

7. *Id.*

8. *Id.* ¶ 4, 130 N.M. at 215, 22 P.3d at 683.

9. *Id.* ¶ 1, 130 N.M. at 215, 22 P.3d at 683.

10. *Id.*

they contravene the public policy of this state.”¹¹ The court stated that New Mexico laws require Wallis to pay for child support until the child reaches the age of eighteen.¹² Children have “the same needs regardless of whether their conception violated a promise between the parents.”¹³ The court went on to state that “the moral responsibility for creating a human life is not voidable as if sex were a simple contractual relationship.”¹⁴ A parent, whether a mother or father, who is sued for causing the conception and birth of a child is not an ordinary tortfeasor; thus, a custodial parent is legally entitled to collect financial support on behalf of the child.¹⁵ Since Wallis was seeking compensatory damages measured by his “out-of-pocket-loss,” as opposed to punitive damages,¹⁶ the court focused on whether public policy would compel Smith to indemnify Wallis for child support based on her fraudulent misrepresentation.¹⁷ The court held that allowing recovery would not be sound public policy and denied Wallis’s claim.¹⁸ Certiorari was denied by the New Mexico Supreme Court on April 19, 2001.¹⁹

III. HISTORICAL BACKGROUND

Cases of sexual deceit resulting in an unwanted pregnancy have not received sympathetic treatment in the courtrooms. While New Mexico has no earlier cases on point, several other states have addressed this issue and have unanimously rejected these claims. Those rulings involving individuals who fraudulently or negligently misrepresent whether the individual is using birth control are premised on two overriding policy concerns. First, there is a concern that such suits should be denied by courts to ensure the health and welfare of the child born under such circumstances.²⁰ This position often finds support in the Uniform Parentage Act,²¹ as well as precedent.²² Second, the courts have tried to “reconcile the right to privacy of each individual with various public policy concerns militating against governmental intrusion into intimate areas such as [when a person fraudulently or negligently misrepresents to his or her sexual partner facts concerning sterility or use of birth control]....”²³ Both the constitutional right to privacy and the policy concerns focusing on the child’s welfare were persuasive and influenced the

11. *Id.*

12. *Id.* ¶ 5, 130 N.M. at 215, 22 P.3d at 683 (citing N.M. STAT. ANN. § 40-11-15 (1997)).

13. *Id.* ¶ 13, 130 N.M. at 217, 22 P.3d at 685.

14. *Id.* (quoting *Moorman v. Walker*, 773 P.2d 887, 889 (Wash. Ct. App. 1989)).

15. *Wallis*, 2001-NMCA-017 ¶ 13, 130 N.M. at 217, 22 P.3d at 685.

16. *Id.*

17. *Id.* ¶ 8, 130 N.M. at 216, 22 P.3d at 684.

18. See *id.* ¶¶ 9-16, 130 N.M. at 216-18, 22 P.3d at 684-86.

19. *Wallis v. Smith*, 130 N.M. 254, 23 P.3d 929 (2001).

20. See Paula C. Murray & Brenda J. Winslett, Article: *The Constitutional Right to Privacy and Emerging Tort Liability for Deceit in Interpersonal Relationships*, 1986 U. ILL. L. REV. 779, 824.

21. UNIF. PARENTAGE ACT, N.M. STAT. ANN. §§ 40-11-1 to -23 (1999, Supp. 2001); §§ 1-30, 9B U.L.A. 287 §§ 1-30 (1987).

22. See *Steven K. v. Roni L.*, 164 Cal. Rptr. 618 (Ct. App. 1980); see also *Douglas R. v. Suzanne M.*, 487 N.Y.S.2d 244 (Sup. Ct. 1985); *Welzenbach v. Powers*, 660 A.2d 1133 (N.H. 1995); *Barbara J. v. John G.*, 193 Cal. Rptr. 422 (Ct. App. 1983).

23. Anne M. Payne, J.D., Annotation, *Sexual Partner’s Tort Liability to Other Partner for Fraudulent Misrepresentation Regarding Sterility or Use of Birth Control Resulting in Pregnancy*, 2 A.L.R. 5th 301, § 2(a) (1992).

decision in *Wallis v. Smith*,²⁴ as they have in numerous cases in other jurisdictions.²⁵ A third issue focusing on a different policy was whether tortious liability should ever be attached to the birth of a healthy child.²⁶

A. A Child's Welfare—Uniform Parentage Act

The New Mexico State Legislature, in order to protect the welfare of children, has established economic consequences for sexual relationships that produce children.²⁷ The overriding policy to protect each and every child is reflected in the state's child support laws.²⁸ In 1986, the New Mexico legislature adopted, with very few revisions, the Uniform Parentage Act,²⁹ which defined and outlined the legal procedure to establish a parent-child relationship, as well as the rules governing child support.³⁰ The UPA "imposes a form of strict liability for child support, without regard to which parent bears the greater responsibility for the child's being."³¹ By making both parents responsible for the conception, birth, and overall well-being of the child, the act elucidates the prevailing public policy that makes vital the interests of the child.³²

*Gomez v. Perez*³³ presented the issue of whether the laws of Texas could constitutionally grant legitimate children a judicially enforceable right to child support from their fathers, and yet deny that right to illegitimate children.³⁴ The Supreme Court of the United States held that "there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother."³⁵ Similarly, in *Stringer v. Dudoich*,³⁶ the Supreme Court of New Mexico held that both legitimate and illegitimate children are entitled to support from their parents.³⁷ In other words, both parents are "jointly and severally liable for the support of the child until he reaches the age of majority."³⁸

Finally, the Supreme Court of New York, in *Douglas R. v. Suzanne M.*,³⁹ held that the fraud and deceit of one parent was irrelevant to the issue of assuring necessary child support and dismissed the father's claim seeking damages from the mother.⁴⁰

24. 2001-NMCA-017, 130 N.M. 214, 22 P.3d 682, *cert. denied*, 130 N.M. 254, 23 P.3d 929 (2001).

25. See *Steven K. v. Roni L.*, 164 Cal. Rptr. 618 (Ct. App. 1980); see also *Douglas R. v. Suzanne M.*, 487 N.Y.S.2d 244 (Sup. Ct. 1985); *Welzenbach v. Powers*, 660 A.2d 1133 (N.H. 1995); *Barbara J. v. John G.*, 193 Cal. Rptr. 422 (Ct. App. 1983).

26. See *Steven K.*, 164 Cal. Rptr. at 620.

27. *Wallis*, 2001-NMCA-017, ¶ 9, 130 N.M. at 216, 22 P.3d at 685. (citing N.M. STAT. ANN. §§ 40-11-1 to -23 (1986 as amended through 1997)).

28. *Id.* ¶ 9, 130 N.M. at 216, 22 P.3d at 684.

29. UNIF. PARENTAGE ACT, §§ 1-30, 9B U.L.A. 287 (1987); N.M. STAT. ANN. §§ 40-11-1 to -23 (1999, Supp. 2001).

30. *Wallis*, 2001-NMCA-017 ¶ 9, 130 N.M. at 217, 22 P.3d at 685 (citing UNIF. PARENTAGE ACT §§ 1-30, 9B U.L.A. 287(1987)).

31. *Id.* ¶ 9, 130 N.M. at 217, 22 P.3d at 685 (citing UNIF. PARENTAGE ACT, § 15, 9B U.L.A. at 301-02).

32. *Id.* ¶ 10, 130 N.M. at 216, 22 P.3d at 684.

33. 409 U.S. 535 (1973).

34. *Id.*

35. *Id.* at 538.

36. 92 N.M. 98, 583 P.2d 462 (1978).

37. *Id.*

38. *Id.* at 99, 583 P.2d at 463.

39. 487 N.Y.S.2d 244 (Sup. Ct. 1985).

40. *Id.*

The court reasoned that the obligation parents have to a child born out of wedlock is imposed by law, independent of any intent or fault with respect to the resulting pregnancy.⁴¹

Courts have been more inclined to put the child's welfare above claims based on problems between the parents. The goal has been to assure that parental support obligations are in place, regardless of how the child is conceived and whether the conception was the choice of both parents or only one.⁴² The majority of courts favor supporting a policy that promotes the general welfare of all children, and the Uniform Parentage Act and precedent reflects that policy.⁴³

The majority of courts have not applied traditional tort principles to broken agreements to use contraception.⁴⁴ To date, every court that has encountered issues of sexual deceit resulting in the birth of a healthy child has denied liability under traditional tort theories.⁴⁵ For example, in *Welzenbach v. Powers*,⁴⁶ the father initiated an action in tort against the mother for intentional misrepresentation, negligence, and other claims.⁴⁷ The Supreme Court of New Hampshire affirmed the trial court's ruling dismissing all of the causes of actions.⁴⁸ The court noted that false representation claims, regardless of which individual is at fault, have been rejected.⁴⁹ Public policy does not discriminate between mothers and fathers. The *Welzenbach* court stated, "Attempts to recover compensatory or punitive damages from the father for falsely representing that he had a vasectomy have been equally fruitless."⁵⁰ The court noted that some personal situations exist that do not have available a legal remedy.⁵¹

Public policy has frequently protected the misrepresentor from liability to the defrauded partner in a tort action for damages when the result is a healthy, normal child.⁵² Courts have refused "to brand a normal, healthy child as a 'damage' to its parents or to otherwise allow a claim for 'wrongful life' of a normal healthy baby, [] because to conclude otherwise and allow such a claim might suggest a duty under [traditional tort theories]."⁵³

In all of these cases, the courts have held that a tort remedy for a sexual partner's fraudulent misrepresentation of sterility or use of birth control was precluded by privacy concerns, as well as child support laws.⁵⁴ In *Stephen K. v. Roni L.*,⁵⁵ the

41. *Id.* at 245.

42. See *Steven K. v. Roni L.*, 164 Cal. Rptr. 618 (Ct. App. 1980); see also *Douglas R. v. Suzanne M.*, 487 N.Y.S.2d 244 (Sup. Ct. 1985); *Welzenbach v. Powers*, 660 A.2d 1133 (N.H. 1995); *Barbara J. v. John G.*, 193 Cal. Rptr. 422 (Ct. App. 1983).

43. *Id.*

44. See *Murray and Winslett*, *supra* note 20, at 834.

45. *See id.*

46. 660 A.2d 1133 (N.H. 1995).

47. *Id.* at 1134.

48. *Id.*

49. *Id.* at 1136.

50. *Id.*

51. *Id.*

52. See *Murray and Winslett*, *supra* note 20, at 824.

53. Anne M. Payne, *Sexual Partner's Tort Liability to Other Partner for Fraudulent Misrepresentation Regarding Sterility or Use of Birth Control Resulting in Pregnancy*, 2 A.L.R.5th 301, at *2(a) (2001).

54. See *Steven K. v. Roni L.*, 164 Cal. Rptr. 618 (Ct. App. 1980); see also *Douglas R. v. Suzanne M.*, 487 N.Y.S.2d 244 (Sup. Ct. 1985); *Welzenbach v. Powers*, 660 A.2d 1133 (N.H. 1995); *Barbara J. v. John G.*, 193 Cal.

court ruled that between two consenting sexual partners, the father could not hold the mother liable in tort for the birth of a healthy child when he relied on false representations made by the mother that some sort of contraceptive was being used.⁵⁶ In short, the court was not willing to attach tort liability to the "natural results of consensual sexual intercourse."⁵⁷ Although the father's claim was for a tortious act, the California Court of Appeals stated that what was really being asked was for the court to supervise the promises made between two consenting adults.⁵⁸

A slightly different situation was addressed in *Barbara A. v. John G.*⁵⁹ when the court held that a woman was not barred from recovering tort damages resulting from physical injuries sustained as a result of her sexual partner's misrepresentation. The court concluded, however, that tort claims by either parent for the "wrongful birth" of a child based on misrepresentations of sterility went against public policy.⁶⁰

This wrongful birth theory was again presented in *C.A.M. v. R.A.W.*⁶¹ where a man misrepresented his sterility to his partner; she later became pregnant and then had a healthy baby.⁶² The court held that public policy precluded tort actions for misrepresentations regarding birth control, and the birth of a normal, healthy child as a "consequence of a sexual relationship between consenting adults precluded inquiry by the courts...."⁶³

B. The Constitutional Right to Privacy

The Supreme Court of the United States has recognized the right to privacy even though it is not specifically mentioned in the Constitution.⁶⁴ In the past, the right to privacy has been held to reside within the Equal Protection Clause of the Fifth and Fourteenth Amendments to the Constitution.⁶⁵ In *Einstadt v. Baird*,⁶⁶ the court permitted access to contraceptives to all individuals, both married and unmarried.⁶⁷ The Court stated, "If the right of privacy means anything, it is the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."⁶⁸ The following year, *Roe v. Wade*⁶⁹ upheld a woman's right to privacy and declared unconstitutional a Texas statute that prohibited abortion.⁷⁰ The

54. Rptr. 422 (Ct. App. 1983).

55. 164 Cal. Rptr. 618 (Ct. App. 1980).

56. *Id.*

57. *Id.* at 619.

58. *Id.* at 620.

59. 193 Cal. Rptr. 422 (Ct. App. 1983).

60. *Id.*

61. 568 A.2d 556 (N.J. Super. Ct. App. Div. 1990).

62. *Id.*

63. *Id.* at 561.

64. See *Roe v. Wade*, 410 U.S. 113 (1973).

65. See *Murray and Winslett, supra* note 20, at 790.

66. 405 U.S. 438 (1972) (holding that a Massachusetts statute that prohibited the sales and distribution of contraceptives to non-married individuals was a violation of the Equal Protection Clause to the Fourteenth Amendment).

67. See *id.*

68. *Id.* at 453.

69. 410 U.S. 113 (1973).

70. See *id.*

court reasoned that it was for a woman to decide whether she wanted to have children.⁷¹

In 1980, in *Stephen K. v. Roni L.*,⁷² the California Court of Appeals had to determine whether the constitutional right to privacy extinguished the claim of misrepresentation concerning contraceptive use between two consensual partners that resulted in the birth of a child.⁷³ The father alleged that the mother had falsely misrepresented to him that she was taking birth control pills.⁷⁴ In reliance on her statement, the father engaged in a relationship with her that later produced a child.⁷⁵ The father claimed that he was not obligated to support the child as a result of her deceit and had suffered "mental agony and distress."⁷⁶ He sought to recover general and punitive damages from the mother for the alleged wrongful birth of their child.⁷⁷ The trial court and the California Court of Appeals held that due to overriding public policy reasons, primarily the right to privacy, the court should not interfere.⁷⁸

The California Court of Appeals further stated that because of the circumstances of the case and the intimate nature of the relationship, courts should not attempt to regulate sexual conduct between two individuals.⁷⁹ While the presentation of such an intimate matter as a legal issue is somewhat unusual, the prevailing social conditions have existed since the "advent of mankind."⁸⁰ Essentially, in cases such as this one, the "state has minimal if any interest in this otherwise entirely private matter,"⁸¹ and the right to privacy destroys the claim.⁸²

IV. RATIONALE

No case has found liability for false representation regarding the use of contraceptives under traditional tort theories. Wallis's claim was almost identical to the claims raised in similar cases in other states: he brought an action for *prima facie* tort and fraud and requested compensatory damages for the "economic injury" of supporting a healthy child based on Smith's representation that she was practicing birth control when, allegedly, she was not.⁸³ The court determined that an individual's right to privacy, the welfare of the child, and traditional tort theories required rejection of such a claim.

The separate opinions of Judge Bosson and Judge Alarid in *Wallis* reflected two different policy approaches that ultimately reached the same result: the policy of

71. *See id.*

72. 164 Cal. Rptr. 618 (Ct. App. 1980).

73. *Id.* at 618-20.

74. *Id.*

75. *Id.*

76. *Id.* at 619.

77. *Id.*

78. *Id.*

79. *Id.* at 620.

80. *Id.* at 619.

81. *Id.*

82. *Id.*

83. *Wallis v. Smith*, 2001-NMCA-017, 130 N.M. 214, 22 P.3d 682, *cert denied*, 130 N.M. 254, 23 P.3d 929 (2001).

support owed by parents to their children⁸⁴ and the constitutional right to privacy.⁸⁵ Both agreed that the plaintiff, Wallis, had set forth a legitimate policy argument that fraud should be deterred and punished but ruled that other overriding policy concerns trumped any such claim.⁸⁶ While Judge Bosson, who wrote the opinion of the court, focused primarily on a strong policy compelling payment of child support, as well as the right for all children to receive support regardless of whether conceived in or out of wedlock, Judge Alarid placed greater emphasis on the right to privacy.⁸⁷

Judge Bosson reasoned that this case could be distinguished factually from a handful of other lawsuits. This case, the court argued, was not about sexually transmitted diseases,⁸⁸ and it was not about damages that were a result of an abortion from an unwanted pregnancy.⁸⁹ It also did not address a situation in which an unwanted pregnancy resulted in medical complications.⁹⁰ This case, Judge Bosson stated, was not even about attempting to recover the expenses associated with childbirth.⁹¹ Here, the complaint was limited to compensatory damages for the "economic injury" of supporting a healthy child.⁹² The court's majority opinion would not attach a monetary award to such a claim based on its overriding policy concerns with child support.

In the past, New Mexico courts have specifically focused on an individual's right to privacy when confronted with causes of action associated with intimate interpersonal behavior.⁹³ Judge Alarid focused on a desire to deter future litigation for claims regarding unwanted pregnancies and founded his view on the right to privacy.

While both Judge Bosson and Judge Alarid arrived at the same conclusion, each based his analysis on different policies. Ultimately, however, the court held that they would not "re-enter the jurisprudence of illegitimacy by allowing a parent to opt out of the financial consequences of his or her sexual relationships just because they were unintended."⁹⁴

84. UNIF. PARENTAGE ACT, §§ 1-30, 9B U.L.A. 287 (1997).

85. See U.S. CONST. amend. V and XIV.

86. *Wallis*, 2001-NMCA-017 ¶ 12, 130 N.M. at 217, 22 P.3d at 685.

87. *Id.* Judge Alarid, in his concurring opinion, arrived at the same conclusion that such a claim could not have any merit in the courtroom. His conclusion, however, was primarily based on the fact that such a claim intruded greatly on fundamental privacy issues.

88. See *McPherson v. McPherson*, 712 A.2d 1043 (Md. 1998).

89. See *Alice D. v. William M.*, 450 N.Y.S.2d 350 (Civ. Ct. 1982).

90. See *Barbara A. v. John G.*, 193 Cal. Rptr. 422 (Ct. App. 1983).

91. See *Chrystal R.M. v. Charlie A.L.*, 459 S.E.2d 415 (W.Va. 1995).

92. *Wallis*, 2001-NMCA-017 ¶ 7, 130 N.M. at 215, 22 P.3d 682, 683.

93. See *Padwa v. Hadley*, 127 N.M. 416, 981 P.2d 1234 (Ct. App. 1999) (declining to recognize cause of action based on defendant's pattern of seducing plaintiff's previous sexual partners); *Hakkila v. Hakkila*, 112 N.M. 172, 812 P.2d 1320 (Ct. App. 1991) (reversing damages to divorcing spouse for intentional infliction of emotional distress); see also *Vigil v. Haber*, 119 N.M. 9, 888 P.2d 155 (1994) (commenting on spectacle created when parties reveal highly personal information to show fault of other); *Thompson v. Chapman*, 93 N.M. 356, 600 P.2d 302 (Ct. App. 1979) (urging abolishment of the tort of alienation of affections).

94. *Wallis*, 2001-NMCA-017 ¶ 13, 130 N.M. at 217, 22 P.3d at 685.

A. A Child's Rights

Judge Bosson's primary policy concern was focused on a child's right to support, although he also took into account the right to privacy.⁹⁵ While Wallis insisted he was not trying to circumvent his child support obligations, the court did not agree.⁹⁶ Essentially, the court viewed his claim as an attempt to recover "for the very financial loss caused him by the statutory obligation to pay child support."⁹⁷ Since his claim was limited to compensatory damages and his "out of pocket" loss, the court focused on whether sound policy permitted or required Smith to indemnify Wallis for child support.⁹⁸ The court looked to New Mexico child support laws,⁹⁹ which were enacted by the legislature to ensure that all children, regardless of whether their conception was within the bounds of a marital relationship, received the financial benefits of both parents. Additionally, in 1986, with the adoption of the Uniform Parentage Act,¹⁰⁰ New Mexico outlined the obligation of child support for both the mother and the father. The UPA imposed a policy of "strict-liability" that disregarded which parent had the greater responsibility for the birth of the child.¹⁰¹

New Mexico favors the public policy that makes each parent financially responsible for the birth of a child in order to foster the well-being of the child. Judge Bosson's opinion relies primarily on this public policy of child support. New Mexico jurisprudence has abandoned the idea that a father of an illegitimate child has the choice of whether he would like to accept and provide child support.¹⁰² The State has put the best interests of the child first and, thus, has established an "adequate standard of support."¹⁰³

Additionally, the court reasoned that placing the financial burden on the parents diminished the possibility that the state may have to assume that responsibility.¹⁰⁴ The court adopted the U.S. Supreme Court's view in *Gomez v. Perez*¹⁰⁵ that under the Equal Protection Clause of the Fourteenth Amendment, children born out of wedlock are entitled to the same benefits as those born within marriage. Ultimately, the N.M. Court of Appeals could not reconcile the legislative intent to protect all children with Wallis's attempt to avoid his parental obligations and shift all financial responsibility onto the mother. Accordingly, the court held that the child support obligation defeated the claim.¹⁰⁶

95. See *id.* ¶¶ 1-15, 130 N.M. at 214-18, 22 P.3d at 684-86.

96. *Id.*

97. *Id.* ¶ 8, 130 N.M. at 215-16, 22 P.3d at 684.

98. *Id.*

99. See N.M. STAT. ANN. §§ 40-11-1 to -23 (1999, Cum. Supp. 2001).

100. See UNIF. PARENTAGE ACT, §§ 1-30, 9B U.L.A. 287 §§ 1-30 (1987); N.M. STAT. ANN. §§ 40-11-1 to -23 (1999, Supp. 2001).

101. *Wallis*, 2001-NMCA-017 ¶ 9, 130 N.M. at 216, 22 P.3d at 684.

102. *Id.* ¶ 10, 130 N.M. at 216, 22 P.3d at 684.

103. *Id.* (citing N.M. STAT. ANN. § 40-4-11.1(B)(1)(1995)).

104. *See id.*

105. 409 U.S. 535 (1973); see also *Stringer v. Dudoich*, 92 N.M. 98, 583 P.2d 462 (1978) (holding all children were entitled to child support from both parents); see also *Wallace v. Blanchard*, 26 N.M. 181, 190 P. 1020 (1920) (citing an earlier New Mexico decision permitting a father to escape financial responsibility if the child was born out of wedlock).

106. *Wallis*, 2001-NMCA-017 ¶¶ 10-13, 130 N.M. at 216-17, 22 P.3d at 684-86.

B. The Right to Privacy

Many courts have dismissed contraceptive fraud cases on the ground that they impermissibly interfere with an individual's privacy interests.¹⁰⁷ New Mexico has agreed that the sphere of privacy includes these claims and that it would be a constitutional violation to interfere in this area.¹⁰⁸ By focusing on privacy rights, Judge Alarid's special concurrence emphasizes rights of constitutional magnitude.¹⁰⁹ A woman's right not to use contraceptives fits into this sphere.¹¹⁰ The court reasoned that there were serious privacy concerns "implicated and threatened by the underlying lawsuit."¹¹¹

Judge Alarid emphasized his concern that the causes of action presented by Wallis intruded and invaded fundamental privacy interests.¹¹² He noted that recently New Mexico has confronted similar claims regarding intimate interpersonal relationships.¹¹³ In *Padwa v. Hadley*,¹¹⁴ for example, the court's concern was based on a public policy against undue interference in consensual sexual relationships between adults.¹¹⁵ There, the plaintiff presented a claim of intentional infliction of emotional distress; he was seeking compensatory damages from the defendant because the defendant engaged in consensual sex with the plaintiff's wife.¹¹⁶ The court elected not to extend the tort of outrage to cases that involved the pursuit of sexual relations between two consenting adults on the grounds that this was a private affair.¹¹⁷ Additionally, Judge Alarid cited New Mexico opinions¹¹⁸ that demonstrate that New Mexico disfavors causes of action that "purport to regulate interpersonal relationships."¹¹⁹ He declared that the State's authority to interfere with a person's right to privacy must be "supported by compelling countervailing considerations."¹²⁰

Furthermore, Judge Alarid argued that if intentional misrepresentation claims were recognized in New Mexico under these circumstances, the State would embark on a road to establishing the appropriate conduct in a reproductive relationship—one of the most private areas that exist between two individuals.¹²¹ Rather, he adamantly argued that the values between two people should remain between those individuals, and not in a court of law: it is "impossible to afford a lawsuit for every deed of

107. *Wallis*, 2001-NMCA-017 ¶ 12, 130 N.M. at 217, 22 P.3d at 685.

108. *Id.*

109. *See id.* ¶¶ 24-25, 130 N.M. at 219-20, 22 P.3d at 687-88 (Alarid, J., specially concurring).

110. *Id.* ¶ 12, 130 N.M. at 217, 22 P.3d at 685.

111. *Id.*

112. *Id.* ¶ 24, 130 N.M. at 219, 22 P.3d at 687 (Alarid, J., specially concurring).

113. *See Padwa v. Hadley*, 127 N.M. 416, 981 P.2d 1234 (Ct. App. 1999).

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.* at 424, 981 P.2d at 1242.

118. *See Hakkila v. Hakkila*, 112 N.M. 172, 812 P.2d 1320 (Ct. App. 1979) (reversing damages given to divorcing spouse for husband's intentional infliction of emotional distress); *see also Vigil v. Haber*, 119 N.M. 9, 888 P.2d 455 (1994) (rejecting claim that commented on unseemly spectacle in which parties reveal extremely personal information in an effort to show fault); *Thompson v. Chapman*, 93 N.M. 356, 600 P.2d 302 (Ct. App. 1979) (urging court to abolish the tort of alienation of affections).

119. *Wallis*, 2001-NMCA-017 ¶ 25, 130 N.M. at 219-20, 22 P.3d at 688 (Alarid, J., specially concurring).

120. *Id.*

121. *Id.* ¶ 26, 130 N.M. at 220, 22 P.3d at 688 (Alarid, J. specially concurring).

unkindness and betrayal, and there is much evil in this world which must necessarily be left to other agencies of social control.”¹²²

C. Tort Liability for Misrepresentation of Contraceptive Use

The New Mexico Court of Appeals was unwilling to apply traditional tort and contract principles to a contraceptive use agreement between two consenting adults involved in a consensual sexual relationship.¹²³ The contract analogy was examined because two adults had verbally agreed to the use of contraceptives in order to avoid pregnancy, thus forming an unwritten “contract.”¹²⁴ The plaintiff’s contract analogy failed, however, because “the persons for whose benefit child support guidelines are enacted have the same needs regardless of whether their conception violated a promise between the parents.”¹²⁵

Neither would the court attach tort liability to plaintiff’s claim.¹²⁶ The court noted that New Mexico does not provide a remedy for all misrepresentations.¹²⁷ Moreover, the court held that it would be impossible to calculate damages without taking into consideration the birth of a healthy child.¹²⁸ Since the legislature had already set standards that govern the financial support of children,¹²⁹ any claim that undermined the legislative intent, whether it be in the form of tort or contract, could not be supported. The court relied on *Solon v. WEK Drilling Co.*,¹³⁰ which held that common law actions brought by the parents of a deceased child for economic damages were barred as a matter of public policy.¹³¹

The plaintiff’s tort theory was further diminished because the court found that “a parent being sued for causing the conception and birth of a child is no ordinary tortfeasor; a defendant under these circumstances is legally entitled to collect financial support on behalf of the child.”¹³² The court refused to allow a parent to avoid financial responsibility just because the conception was unintended.¹³³ Additionally, the court reasoned that if Wallis did not want children, he could have used contraception without relying solely on Smith’s representations.¹³⁴

Finally, Wallis argued that some decisions in New Mexico have recognized tort claims that measure damages by the economic injury of supporting an unwanted child.¹³⁵ He cited *Lovelace Medical Center v. Mendez*.¹³⁶ In that case, the New Mexico Supreme Court held that a doctor had a duty to inform a patient that a surgical procedure intended to sterilize one individual was not successful, and the

122. *Id.* (citing W. PAGE KEETON, ET AL., PROSSER AND KEETON ON TORTS § 4, at 22 (5th ed. 1984)).

123. See *Wallis*, 2001-NMCA-017 ¶ 13, 130 N.M. at 217, 22 P.3d 685.

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.* ¶ 14, 130 N.M. at 217, 22 P.2d at 685.

128. *Id.*

129. UNIF. PARENTAGE ACT §§ 1-30, 9B U.L.A. 287 (1987).

130. 113 N.M. 566, 829 P.2d 645 (1992).

131. *Id.*

132. *Wallis*, 2001-NMCA-017 ¶ 13, 130 N.M. at 217, 22 P.3d at 685.

133. *Id.*

134. *Id.*

135. *Id.* ¶ 15, 130 N.M. at 218, 22 P.3d at 686.

136. 805 111 N.M. 336, P.2d 603 (1991).

court attached tort liability for a breach of that duty, even though a healthy child resulted.¹³⁷ The *Wallis* court reasoned that since *Lovelace* did not "speak to the issue of inter-parental liability, which [was] the crux of Wallis's appeal, it has no bearing on [the court's] decision."¹³⁸ Judge Alarid added that the cause of action in *Lovelace* did not "depend on the establishment of standards of conduct governing freely-made sexual decisions between adults," but rather, focused on the breach of a physician's duty to a patient.¹³⁹ The concurring opinion went on to establish the principle that contraception is a non-delegable duty in New Mexico and applied that principle to the case to bar all future claims of this nature.¹⁴⁰

V. ANALYSIS OF THE DECISION

A. Policy Concerns

Wallis is representative of the manner in which other courts nationwide have ruled on similar claims regarding fraudulent misrepresentation of the use of birth control. The case focused on whether good public policy would permit indemnification to a parent from the other parent for child support.¹⁴¹ The court rested its analysis on various factors, but primarily determined that, in consensual adult sexual relationships, it is the responsibility of both individuals to ensure proper birth control.¹⁴² Additionally, the court was reluctant to interfere with such privacy interests concerning consensual sexual conduct.¹⁴³ Finally, the court determined that a parent could not be relieved of their financial duty to support a child under traditional tort theories.¹⁴⁴

The decision in *Wallis* was logically consistent with various other decisions that have addressed the constitutional right to privacy. The reasoning in *Wallis* is analogous to the case of *Stephen K. v. Roni L.*¹⁴⁵ where the right to privacy was the overriding policy concern addressed by the California court. There, the court held that such claims should be barred, if nothing else, to ensure the right to privacy.¹⁴⁶ The court stated that it was being asked to attach tortious liability to the natural results of consensual intercourse.¹⁴⁷ The court reasoned that if this relief were granted, the social damage could greatly outweigh any benefit that might result.¹⁴⁸ Furthermore, the court stated, "procedurally and technically [the natural result of sexual intercourse] is separate and apart from any issue of either parent's obligation to raise and support the child."¹⁴⁹

137. *Id.* at 342, 336 P.2d at 609.

138. *Wallis*, 2001-NMCA-017 ¶ 15, 130 N.M. at 218, 22 P.3d at 686.

139. *Id.* ¶ 27, 130 N.M. at 220, 22 P.3d at 688 (Alarid, J., specially concurring).

140. *Id.*

141. *Id.* ¶¶ 10-12, 130 N.M. at 216-17, 22 P.3d 684.

142. *See id.*

143. *See id.* ¶¶ 12, 24-25, 130 N.M. at 217, 219-20, 22 P.3d at 685 (Alarid, J., specially concurring).

144. *Id.* ¶ 15, 130 N.M. at 218, 22 P.3d at 686.

145. 164 Cal. Rptr. 618 (Ct. App. 1980).

146. *Id.*

147. *Id.* at 619.

148. *See id.*

149. *Id.*

There were two very different overriding policy concerns addressed in *Wallis*. The opinion of the court focused on the child's rights, while Judge Alarid's special concurring opinion focused primarily on the parents' constitutional right to privacy. Each of these concerns, alone and especially combined, mandate the conclusion that such claims cannot withstand judicial scrutiny.

B. The Father's Argument

There is an alternative argument for the father in this case that could have potentially enhanced the merits of his claim. As discussed by Paula Murray and Brenda Winslett in their article, *The Constitutional Right to Privacy and Emerging Tort Liability for Deceit in Interpersonal Relationships*,¹⁵⁰ this perspective is not currently the majority view. Murray and Winslett stated that there were numerous court decisions that have found liability in similar cases of sexual deceit.¹⁵¹ They argued that while the consideration of the child's interest is essential, and that it must and should be protected, there should not be a total denial of liability.¹⁵² The authors further stated that the remedy available should be limited rather than completely unavailable. State interference, according to these authors, should be directed at prohibiting fraudulent acts and not at "limiting the freedom of constitutionally protected choice."¹⁵³ The authors acknowledge, however, that to date courts have denied liability in any and all cases of sexual deceit resulting in an unplanned and unwanted pregnancy and the birth of a child.¹⁵⁴

1. Elements of Fraud

The plaintiff in *Wallis v. Smith* advanced similar arguments that, while persuasive, did not convince the court. First, Wallis's brief outlined the elements of fraud and demonstrated that each element was essentially satisfied.¹⁵⁵ He argued that Smith intentionally deceived him into believing she was taking birth control and that she had an ongoing duty to inform him of her failure to do so.¹⁵⁶ Wallis relied on *R.A. Peck, Inc. v. Liberty Federal Savings Bank*,¹⁵⁷ which held that an individual may be liable for fraud if one is under a duty to speak but chooses to remain silent and fails to disclose a material fact.¹⁵⁸ There, the court went on to state that a duty exists when one party has some type of special knowledge of material facts to which the other party does not have access.¹⁵⁹ Here, it was argued that Smith was the only person who would have access to that information, and the failure to take

150. *Supra* note 20.

151. *Id.*

152. *Id.*

153. *Id.* at 790.

154. *Id.*

155. Appellant's Brief-in-Chief at 4; *Wallis v. Smith*, 2001-NMCA-017, 130 N.M. 214, 22 P.3d 682 (No. 20,272).

156. *Id.*

157. 108 N.M. 84, 766 P.2d 928 (Ct. App. 1988).

158. *Id.*

159. Appellant's Brief at 4-5.

contraceptive measures was a "material fact" that she should have disclosed.¹⁶⁰ These false representations ultimately resulted in the unwanted pregnancy.

2. A Compensable Injury

The appellant's second argument was that the cost of raising a child should be compensable as a remedial financial damage.¹⁶¹ Wallis's reliance on *Lovelace Medical Center v. Mendez*¹⁶² was misplaced, according to the New Mexico Court of Appeals, even though the court had held that a financial injury to the parent resulting from an unwanted pregnancy was a compensable injury.¹⁶³ The father's argument failed to mention significant factors that clearly distinguished *Lovelace* from the case at bar. In that case, the compensatory damages were awarded to make an injured party whole, a party that had financial losses caused by the negligence of a doctor.¹⁶⁴ In *Lovelace*, the mother of a child underwent a tubal ligation that she alleged was negligently performed by a physician employed at Lovelace Medical Center. The doctor's negligence, she argued, had resulted in an unwanted pregnancy.¹⁶⁵ While the *Lovelace* court's rationale conceded that the majority of courts would not allow parents to be compensated for the birth of a normal, healthy child, the court held that requiring Lovelace to indemnify the plaintiffs against the expense of raising the child was the more appropriate and logical policy.¹⁶⁶ The term "injury" in tort law as seen in *Lovelace* referred to a wrongful act or a tort itself, which was not present in *Wallis v. Smith*.

3. Contraceptive Fraud Claims Acknowledged

Next, the father argued that there are cases that have allowed contraceptive fraud claims. Wallis relied on two cases, the first of which did not end with the birth of a healthy child, but instead ended with an abortion.¹⁶⁷ In *Alice D. v. William M.*, a man misrepresented his sterility to his partner, the woman became pregnant, and she later elected to have an abortion.¹⁶⁸ That case, however, involved the plaintiff's pain and suffering, as well as medical costs, incurred as a result of the abortion,¹⁶⁹ which are not applicable in the case of *Wallis v. Smith*. While the court in *Alice D.* held that the defendant's representation to the claimant that he was sterile was a material misrepresentation of fact,¹⁷⁰ in *Wallis*, the result was not an abortion but a normal, healthy child, and the father was seeking damages rather than the mother.

The second case that appellant relied on was *Henson v. Sorrell*,¹⁷¹ an unpublished opinion from the Tennessee Court of Appeals that had similar facts to *Wallis*. There,

160. *Id.* at 5.

161. *Id.*

162. 111 N.M. 336, 805 P.2d 603 (1991).

163. *Id.* at 348-51, 805 P.2d at 615-18.

164. *Id.* at 349, 805 P.2d at 616.

165. *Id.* at 337, 805 P.2d at 604.

166. *Id.* at 350-51, 805 P.2d at 617-18.

167. See *Alice D. v. William M.*, 450 N.Y.S.2d 350 (Civ. Ct. 1982).

168. *Id.*

169. *Id.*

170. See *id.* at 354.

171. No. 02A01-9711-CV-00291, 1999 WL 5630 (Tenn. Ct. App. 1999).

a mother misrepresented that she was using birth control when she was not, and the father sued under a theory of fraud and other causes of action.¹⁷² The jury returned a verdict in favor of the defendant, and on appeal, the decision was affirmed; the court ruled that contraceptive fraud claims should be permitted, but found that there was not enough evidence to support the claim.¹⁷³

Dicta in that opinion stated that the conduct of the defendant was culpable and similar to doctors in medical malpractice cases in which a wrongful pregnancy resulted.¹⁷⁴ Wallis argued that the reasoning of the court of appeals in *Henson* should apply to his case because it recognized that there are many private affairs that ultimately result in litigation if there is a fraudulent misrepresentation.¹⁷⁵ Ultimately, the court in *Henson* concluded, "In a wrongful pregnancy action the law relieves these defendants [mother and father] of liability for the otherwise foreseeable consequences of the failed pregnancy avoidance technique to the extent that the obligation to support minor children clearly rests upon the parents."¹⁷⁶ The court also held that under the circumstances of the case, the mother's negligence could not be considered the "legal or proximate cause" of damages incurred by the father for the support of a healthy child.¹⁷⁷

4. Father's Policy Reasons Dismissed

Smith's argument rested on several policy arguments that have prevailed in the majority of courts, including the right to privacy.¹⁷⁸ Wallis, on the other hand, argued unsuccessfully that a "tortfeasor should not be able to use a right of privacy to protect himself from liability for his tortious and wrongful conduct."¹⁷⁹ Wallis relied on *McPherson v. McPherson*,¹⁸⁰ which allowed a person to sue for negligent transmission of a sexually transmitted disease,¹⁸¹ and *Doe v. Roe*,¹⁸² which held that the right of privacy did not bar a claim for negligent transmission of a sexually transmitted disease.¹⁸³ Both cases were grounded in policy; however, these cases were distinguished by the New Mexico Court of Appeals because they did not involve the birth of a healthy child.

Second, Wallis argued that the suit was not being filed in an effort to avoid or evade child support obligations.¹⁸⁴ He asserted that if a party commits contraceptive

172. Appellant's Brief-in-Chief at 6-7, *Wallis v. Smith*, 2001-NMCA-017, 130 N.M. 214, 22 P.3d 682 (No. 20,272).

173. *Id.* at 7.

174. *Id.*

175. *Id.*

176. *Henson v. Sorrell*, No. 02A01-9711-CV-00291, 1999 WL 5630, at *6 (Tenn. Ct. App. 1999).

177. *Id.*

178. See *Moorman v. Walker*, 773 P.2d 887 (Wash. App. 1989); see also *Welzenbach v. Powers*, 600 A.2d 1133 (N.H. 1995); *Stephen K. v. Roni L.*, 164 Cal. Rptr. 618 (Ct. App. 1980); *Douglas R. v. Suzanne M.*, 487 N.Y.S.2d 244 (N.Y. Sup. Ct. 1985).

179. Appellant's Brief-in-Chief, at 8-9.

180. 712 A.2d 1043 (Me. 1998).

181. *Id.*

182. 267 Cal. Rptr. 564 (Ct. App. 1990); see also *Kathleen K. v. Robert B.*, 198 Cal. Rptr. 273 (Ct. App. 1984).

183. *Id.*

184. Appellant's Brief-in-Chief, at 11.

fraud, that party should be entirely responsible for the costs of raising that child.¹⁸⁵ He noted that if Smith had wanted to have a child, she could have visited a "sperm bank" instead of tricking Wallis into getting her pregnant.¹⁸⁶ If that had been the case, he argued, she would have been entirely responsible for the financial needs of the child.¹⁸⁷ The court of appeals found this argument to be without merit because Wallis willingly engaged in a sexual relationship with Smith and refused to attach tort liability to this claim, instead focusing entirely on the well being of the child.¹⁸⁸

VI. IMPLICATIONS

This was a case of first impression in New Mexico. In the majority opinion, the New Mexico Court of Appeals specifically pointed out that it is important to "distinguish the factual allegations of this case from other kinds of related lawsuits, and thus underscore the limited reach of this opinion."¹⁸⁹ This language suggests that there may be a slightly open door for plaintiffs with distinguishing claims, but they will be decided individually.

The court pointed out that *Wallis v. Smith* was not like *McPherson v. McPherson*,¹⁹⁰ which involved a sexually transmitted disease, nor did it concern the damages arising from an unwanted pregnancy that resulted in an abortion.¹⁹¹ Neither of these scenarios involved the birth of a healthy child. This case also did not address the issue in *Barbara A. v. John G.*,¹⁹² which addressed an unwanted pregnancy that resulted in serious medical complications.¹⁹³ The *Wallis* court went on to point out that unlike *Barbara A.*, this case was not brought to recover the cost of hospital bills involved in giving birth.¹⁹⁴ *Wallis* was factually distinguishable from all of these cases and, thus, can be differentiated from the reasoning of those cases involving some actual injury. The result means that those factual situations will not necessarily be controlled by the *Wallis* opinion.

Moreover, *Wallis* relied heavily on cases such as *Lovelace Medical Center v. Mendez*¹⁹⁵ and *Henson v. Sorrell*,¹⁹⁶ which were distinguished by the court of appeals from the present case. *Lovelace* was a malpractice action involving a doctor where the birth of the child was a result of the doctor's negligence, as opposed to a "fraudulent" act between partners, as seen in *Wallis*.¹⁹⁷ There, the court held that there was a duty owed to the patient by the doctor, and his duty was breached when that patient became pregnant after sterilization surgery.¹⁹⁸ The parents in *Lovelace*

185. *Id.* at 12.

186. *Id.*

187. *Id.*

188. *Wallis v. Smith*, 2001-NMCA-017, 130 N.M. 214, 22 P.3d 682, *cert. denied*, 130 N.M. 254, 23 P.3d 929 (2001).

189. See *id.* ¶ 7, 130 N.M. at 215, 22 P.3d at 683.

190. 712 A.2d 1043 (Me. 1998).

191. See *Alice D. v. William M.*, 450 N.Y.S.2d 350 (Civ. Ct. 1982).

192. 193 Cal. Rptr. 369 (Ct. App. 1983).

193. *Id.*

194. See *Chrystal R.M. v. Charlie A.L.*, 459 S.E.2d 415 (W.Va. 1995).

195. 111 N.M. 336, 805 P.2d 603 (1991).

196. No. 02A01-9711-CV-00291, 1999 WL 5630 (Tenn. Ct. App. 1999).

197. See *Lovelace Med. Ctr. v. Mendez*, 111 N.M. 336, 805 P.2d 603 (1991).

198. See *id.*

were faced with the cost of raising another child they would not have had but for the doctor's negligence.¹⁹⁹ In *Wallis*, the plaintiff wanted to eliminate his own duty to support his child. There was no third party involved. Hence, the ruling in *Wallis* does not undermine the reasoning in *Lovelace*.

Finally, while the facts in *Henson v. Sorrell*²⁰⁰ were analogous to those in *Wallis*, the New Mexico Court of Appeals did not assign any weight to the holding in *Henson*. Although, the court in *Henson* did state that the common law rights that resulted from fraudulent misrepresentation should not be eradicated in an appropriate case where legal causation can, indeed, be shown,²⁰¹ that was not the case in *Wallis*. Ultimately, the ruling in *Henson* was in favor of the defendant, and the court noted, "as ninth grade biology teaches us, intercourse everyday, coupled with a lack of birth control measures, can cause pregnancy."²⁰²

A. Policy Implications and Effects

The overriding policy concerns that have addressed a child's welfare, along with the constitutional right to privacy, will not enable a plaintiff in a claim for contraceptive fraud to succeed in New Mexico. Under the *Wallis* holding, a plaintiff will have to go beyond traditional tort theories. For example, one instance where a claim such as this might be entertained may be a situation in which the mother has significantly more assets than the father. In that case, the "injured" party could potentially be indigent and making child support payments while the recipient, who might be entitled to that child support, might not be in need of the money. If that were the case, it is possible that such a claim could be justified, and damages assessed if the child support rationale of Judge Bosson is used, but not if Judge Alarid's privacy rationale is applied. It is clear, however, that the words "contraceptive fraud" will not find a place in courtrooms in New Mexico, and claims such as these will not be rewarded.

As Judge Alarid noted, "If we recognize a claim based on intentional misrepresentation, we have started down the road towards establishing standards of conduct in reproductive relationships—one of the most important and private forms of interpersonal relationships."²⁰³ He added,

In the absence of a clear balance favoring the imposition of legal duties of disclosure in reproductive relations between competent adult sex partners, candor in reproductive matters should be left to the ethics of the participants. There are still many immoral acts that do not amount to torts, and the law has not yet enacted the golden rule. It is impossible to afford a lawsuit for every deed of unkindness or betrayal, and there is much evil in the world which must necessarily be left to other agents of social control.²⁰⁴

199. *See id.*

200. 1999 WL 5630, at *6.

201. *Id.*

202. *Id.*

203. *Wallis v. Smith*, 2001-NMCA-017 ¶ 26, 130 N.M. 214, 22 P.3d 682 (Alarid, J., specially concurring), *cert. denied*, 130 N.M. 254, 23 P.3d 929 (N.M. 2001).

204. *Id.*

Both policy concerns yielded the conclusion that this claim could not be supported, and both policies will undoubtedly be revisited in future claims of this kind. It is clear from both Judge Bosson and Judge Alarid, however, that in cases with identical facts such as in *Wallis*, precedent cannot overcome a child's right to support or an individual's right to privacy. Because New Mexico is not the first court to address such an issue, and because there has yet to be a successful claim under a similar fact pattern in any court nationwide, there is little support for extending the law in this area.

B. Statutory Obstacles and the Interest of the Child

Courts have put the interests of the child first and foremost when deciding to bar fraudulent contraception claims. In *Wallis*, the court focused primarily on a child's rights. Because the majority of states have child-protection laws enacted to protect the interests of the child, regardless of how they are conceived, courts are either unwilling or not required to assign fault amounting to tort liability to either parent when the result is a normal, healthy child. This concern is well-founded, and to do otherwise would defeat the purpose of these statutes.²⁰⁵ Furthermore, many of the statutes do not permit the court to consider "fault" or take into account wrongful conduct of one of the parents involved in the child's conception.²⁰⁶ As a matter of public policy, fault must not and should not have any bearing on the decision of the court regarding child support. In *Douglas R. v. Suzanne M.*, the court agreed with the *Wallis* court's rationale that there are some wrongs that the legal system just cannot address, which includes claims that potentially endanger the well being of a child.

VII. CONCLUSION

Regardless of whether the mother or the father brings suit for the fraudulent or intentional misrepresentation regarding the use of birth control, the child should not be the victim. New Mexico courts, and other states, have upheld the right to privacy and the rights of the child in reaching decisions barring actions for contraceptive fraud. These decisions are justified in order to guarantee that children do not become victims of their parent's indiscretions.

While the constitutional right to privacy is not absolute, the state would prefer not to interfere with such personal matters. It is clear that the majority of courts do not want to tread on an area of law that involves two consenting adults involved in a sexual relationship. It is both the duty of the man and the woman to take the necessary precautions to ensure that the unexpected does not happen when they become involved in a sexual relationship. The courts are simply unwilling to assign fault in such cases.

The two opinions in *Wallis v. Smith* asserted both the overriding interests of the child and the right to privacy. These interests have properly prevailed here. *Wallis v. Smith* stands as a strong and powerful deterrent against future claims seeking to avoid child support because of misrepresentations concerning the use of birth

205. See UNIF. PARENTAGE ACT §§ 1-30, 9B U.L.A. 287 (1987).

206. See Murray and Winslett, *supra* note 20, at 829.

control. The court was unwilling to label the birth of a healthy, normal child, a "damage," and in the future, such claims will not be afforded a remedy.