

**Wrongful adoption:
a legal remedy for adoptive parents**

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In December 2002, a UK court recognised for the first time the right of adoptive parents to recover damages from an adoption agency that failed to inform them of their child's background prior to the adoption. The court found that the agency had failed to alert the adoptive parents to the child's history of 'uncontrollable and vicious' behaviour that the court characterised as 'beyond the wildest imagination' of inexperienced adoptive parents. After the adoption, the child engaged in violent behaviour, injuring his mother in one incident and attacking other children at a birthday party in another. He was later diagnosed as suffering from attention deficit hyperactivity disorder and placed on medication. By awarding damages (the amount to be determined at a later date), the court made clear that adoption agencies have a duty to provide the fullest possible background information to prospective adoptive parents and that courts will hold agencies accountable if they fail to do so.

Although a new development in UK law, the tort of 'wrongful adoption' has been recognised in the United States for more than 15 years. Lawsuits have been filed in more than 20 States alleging that agencies failed to provide prospective adopters with material health and other background information on the children whom they were considering for adoption. These claims – many of which have been successful – have had a significant impact on adoption practice in the US and have laid a foundation for other legal claims that could potentially be brought against agencies for failure to provide services that meet the prevailing standard of care.

WRONGFUL ADOPTION IN THE US

'Wrongful adoption' was first recognised in the US in 1986 in *Burr v Stark County Board of Commissioners*¹, when an adoptive family brought suit against an adoption agency in the State of Ohio after learning that the background of the child whom they adopted had been almost entirely misrepresented. The family was told that the child was 'a nice, healthy baby boy' and that the mother had voluntarily placed the child for adoption when her parents refused to help her with his care and she needed to leave the State for employment. The family relied on the information that the agency provided and adopted the 17-month-old infant. Over the ensuing years, the child developed physical problems, was classified as 'educable, mentally retarded' by his school, and was diagnosed as having Huntington's Disease. During the child's treatment for the disease, the parents obtained a court order to examine the agency's records and discovered that the agency's statements to them about his background were almost all entirely false. In reality, the boy's mother was a 31-year-old patient in a state mental hospital, the baby had been born in the facility and his birth father was presumed to be a mental patient as well. It was also determined that prior to placement, the agency had performed a series of psychological assessments on the child that revealed his intellectual functioning was below normal. The agency knew that the child's family background and medical profile put him at risk for Huntington's Disease. The only accurate information the couple received concerning the child was his age and gender. The *Burr* court had no difficulty finding that the agency had committed fraud by deliberately misrepresenting material information about the child's background: information on which the adoptive parents had relied in deciding to adopt. The misrepresentation had caused the adoptive family to suffer significant financial and emotional harm. The court awarded the family \$125,000 in damages.

DEVELOPMENT OF WRONGFUL ADOPTION

From this first case in which 'wrongful adoption' was recognised as a cause of action, courts across the US have found different bases on which adoptive parents can successfully sue adoption agencies. Cases brought by adoptive parents have involved not only intentional misrepresentation as in *Burr*, but also:

- deliberate concealment (in which adoption agencies intentionally withheld important health and other background information from prospective adopters);
- negligent disclosure (in which adoption agencies failed to use due care in providing correct background information to prospective adopters); and

- negligent failure to provide information (in which adoption agencies did not use due care to ensure that the background information was fully provided to prospective adopters).

As the tort of 'wrongful adoption' has evolved in the US, it has come to be characterised by certain features:

1. The adoptive parents claim that at the time they were considering a particular child for adoption, the adoption agency failed to provide them with material information about the child's health or other background.

The essence of wrongful adoption is that the adoption agency failed to provide a prospective adopter with information about a child's health, social or other background that was known to the agency. Often, the information that has not been provided to prospective adopters relates to the child's medical or psychiatrically diagnosed condition(s), genetic pre-dispositions and conditions that place the child at high risk of serious illness (such as Huntington's Disease), a social history with medical implications (such as incest), and/or the child's pre-adoption history (often involving serious physical and/or sexual abuse and multiple placements while in foster care).

Courts have imposed on agencies a duty to disclose 'material' information, that is, information that would be important to the prospective adopter in making the decision whether to adopt the child. Courts in the US require that agencies disclose information that is known to them. Courts have not imposed a duty that requires an agency to discover health and other background information that is not provided by birth parents or is not readily obtainable through medical and other records.

2. The adoptive parent relied on the agency's representations and adopted the child.

Courts in the US have consistently emphasised that prospective adopters depend upon the agency for the information that they need to make an informed decision regarding whether to adopt a particular child. Prospective adopters have no other sources of information about the child whom they are considering for adoption. This necessary reliance is the basis for the duty that courts have placed on adoption agencies to disclose known, material information about the child's background.

3. The adoptive parent would not have adopted the child had the information been provided.

In order to establish that the adoption agency's fraud or negligence caused the harm suffered, adoptive parents claiming wrongful adoption must assert that they would not have gone forward with the adoption had the background information that was known to the agency been fully and accurately shared with them.

4. Because of the wrongful act of the adoption agency, the adoptive parent was harmed.

In most cases in the US, adoptive parents suing for wrongful adoption do not seek to terminate the adoption, but instead seek to be financially compensated for the harm that they have experienced. Harm takes the form of financial loss, emotional injury and, in some cases, physical injury. Adoptive parents usually seek financial compensation for out-of-pocket expenses related to medical, psychiatric and developmental services that their children require – expenses that are typically substantial and for which the adoptive parents were not prepared because they had not been put on notice of their children's histories, medical or psychiatric diagnoses, or other significant needs. Past and future treatment expenses are usually sought. In many cases, emotional harm to the adoptive parents is alleged, often attributed to the anxiety associated with frustrating efforts to determine the exact nature of their child's problems and the difficulties in coping with these problems or the child's behaviour. In some cases, adoptive families seek compensation for physical injuries that the adopted child inflicted on parents and siblings. Courts typically have awarded damages, the level of the awards increasing significantly as this cause of action has become more recognised.

Wrongful adoption litigation in the US – which has resulted in published legal opinions in approximately 20 States – has prompted changes in both law and practice.

CHANGES IN THE LAW

Unlike in most European countries, adoption law in the US operates principally at the level of each individual State and not nationally. In the wake of wrongful adoption lawsuits, most States have enacted statutes that address pre-adoption information disclosure. The requirements of those statutes vary, however, from state to state. Some statutes are highly specific, while others are more general. One area in which there is considerable variation is the nature of the information that must be disclosed to prospective adopters. Statutes may require the disclosure of the child's medical history, the medical and genetic history of the child's birth parents and/or members of the extended birth family, the child's social and educational history, and the birth parents' social and educational history.

Just as courts have not imposed a duty to investigate a child's background, State statutes have not imposed an absolute duty in this regard. Some State laws simply provide that the adoption agency must disclose all 'available' information. Other States, however, place a duty on adoption agencies to make 'reasonable' efforts to obtain health and other background information on children who are placed with adoptive families.

CHANGES IN ADOPTION PRACTICE

In response to wrongful adoption lawsuits and changes in State law that require the disclosure of health and other background information to prospective adopters, adoption agencies in the US have implemented changes in five areas.

1. Obtaining material health and other background information.

Adoption agencies have attempted to improve their collection of material health information on children who are to be placed for adoption through a range of activities, including the use of birth parent medical questionnaires, obtaining and carefully reviewing hospital and other health care records, and ensuring that children have physical examinations prior to placement. Agencies have also focused more fully on the collection of as much social and family background information as possible – information that may be important to prospective adopters in making a decision to adopt a particular child.

2. Educating prospective adopters about the limits on information.

One key aspect of adoption practice is to make it clear to prospective adopters that, in virtually every case, there is information that the agency will not know and that, for a variety of reasons, the information that is obtained may be less than comprehensive and/or accurate. Adoption agencies place greater emphasis on explaining to prospective adopters that birth parents may have limited information about their own health histories or may be reluctant to share family medical or mental health history information.

3. Heightening prospective adopters' awareness of their own responsibilities.

Adoption agencies now provide counselling to prospective adopters, covering the risks associated with adoption, as with any form of parenting, and their responsibilities in the adoption process. The responsibilities of prospective adopters include asking for all available information concerning a child's background and pursuing with the agency and other professionals any information that indicates a medical, mental health, or developmental problem or signals that the child may be at risk of developing such a problem. Adoption agencies are advised to refrain from interpreting medical and mental health information and, instead, to encourage prospective adopters to seek information and guidance from medical experts and the adoptive parents of similarly situated children. Social workers rarely have the requisite expertise to appropriately and accurately interpret such information and may expose themselves to legal liability if they convey inaccurate information.

4. Providing adoptive parents with material health and other background information and documenting the provision of this information.

It is critically important that adoption agencies share with prospective adopters all known material background information on children. The concept of materiality, which is used by courts in the US as the standard for the information that is to be disclosed, refers to information that would be important if a prospective adopter is to make an informed decision regarding the adoption of a particular child.

In order to prove that information has been shared with prospective adopters, most adoption agencies now provide this information in writing and request a signed acknowledgment that the information has been received. Adoption agencies are advised to provide copies of reports, assessments, or other documentation to prospective adopters rather than summarising material (which can introduce errors). Included in the written documentation that many adoption agencies provide are:

- explanations regarding the extent to which the agency can provide information;
- statements that the agency is able to provide only the information that is made known to the agency;
- statements that an adopted child may have physical or mental health problems or developmental issues, which may or may not have been diagnosed; and
- a statement that the agency cannot guarantee the present or future health or development of the child.

5. Staff training.

Adoption agencies have placed greater emphasis on staff training to ensure that social workers both understand the importance of obtaining and disclosing health and other background information and have the skills to obtain and communicate that information as fully and accurately as possible. Training also incorporates documentation requirements so that prospective adopters have a written source of information available to them, and the agency has a record of providing information to the family.

OTHER LEGAL CLAIMS

Since the mid-1990s, adoption agencies in the US have reported that cases have been filed against them by adopted adults alleging 'wrongful placement'. In these cases, adopted adults have asserted that the adoption agency should not have placed them with their adoptive families because the agency knew, or should have known, of such problems as mental illness or alcohol or drug use on the part of the adoptive parent(s). In these cases, the adoptee has alleged that the agency failed to investigate properly the backgrounds of the prospective adopters, or had information that should have put the agency on notice that the family was not suitable to adopt. In a number of the cases, the adopted adult has asserted physical and/or sexual abuse or extreme negligence at the hands of the adopters. As in wrongful adoption cases, the remedy takes the form of damages to compensate the adopted adult for pain and suffering and the costs of psychological and other services that were necessary because of these experiences. Most of the 'wrongful placement' cases have been settled out of court and, as a result, the case law in this area has not developed in the way that wrongful adoption as a tort has developed. Given the legal principles that have supported the development of the tort of wrongful adoption, it can be expected that courts in the US would, however, recognise the tort of wrongful placement.

CONCLUSION

Although a recent legal development in the UK, wrongful adoption is a well-established cause of action in the US. Adoptive parents have successfully sued adoption agencies for failing to provide them with known, material health and other background information about the children whom they are considering for adoption. In the wake of wrongful adoption lawsuits and changes in State law regarding the disclosure of children's background information to adoptive families, adoption agencies have made a number of changes in practice – in the collection and disclosure of information, the counselling of prospective adopters, and documentation of information disclosure. Wrongful adoption provides a foundation for other legal actions in the US, most notably 'wrongful placement' lawsuits by adopted persons alleging agency

negligence in placing them with unsuitable adoptive families. Although these legal developments may not occur in the UK, the changes in adoption practice that agencies in the US have made in response to wrongful adoption lawsuits may offer some guidance to agencies in the UK as they assess the impact of similar litigation.

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FOOTNOTE

1 23 Ohio St. 3d 69; 491 N.E. 2d 1101 (1986).