

# Inconsistency in Illinois Adoption Law: Adoption Agencies' Uncertain Duty to Disclose, Investigate, and Inquire

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## I. INTRODUCTION

Adoption agencies in Illinois have many responsibilities, not only to the children waiting to be adopted but also legal duties to adoptive parents.<sup>1</sup> Agencies must provide prospective adoptive parents with pertinent medical and mental health information in the agency's possession concerning the adopted child.<sup>2</sup> When prospective adoptive

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\* J.D. expected May, 2009. This article is dedicated to Paula D. Mulligan. I can't put into words what a wonderful mother I have. Thank you for everything, Mom.

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1. See ILL. ADMIN. CODE tit. 89, § 401.500 (2006) available at [http://dcfswebresource.prairienet.org/rules/rules\\_401/](http://dcfswebresource.prairienet.org/rules/rules_401/) (defining the responsibilities of child welfare agencies).

In addition to assuring that "placements of children for adoption are made in the best interests of the children and are selected to meet the needs of the child at the time of the placement and as the child grows and develops," Illinois adoption agencies must:

- a) Establish written guidelines and eligibility criteria for the selection and evaluation of adoptive home applicants;
- b) Provide pre-placement services that include the assessment and preparation of the potential adoptive family as well as the child in need of an adoptive home;
- c) Ensure that the legal rights of all parties, including the birth parents, the child, and the adoptive parent are protected throughout the adoption process;
- d) Comply with all State and federal laws and the requirements of [89 ILL. ADM. CODE tit. 89, § 333] (Inter-country Adoption Services) when the adoptive placement involves a child from a foreign country;
- e) Prohibit discrimination against any child, birth parent, foster parent or prospective adoptive parent on the basis of race, religion, gender, or ethnicity.

*Id*; see also *infra* Part III (examining adoption agencies duties in Illinois).

2. 750 ILL. COMP. STAT. 50/18.4a (2006); see also *infra* Part III.A (describing adoption agencies' statutory duties in Illinois).

parents ask questions about the child, the agency has a duty to answer those inquiries honestly and thoroughly, and can be held liable if it fails to do so.<sup>3</sup>

Not all of the duties held by adoption agencies, however, are clearly established.<sup>4</sup> The extent to which adoption agencies must independently investigate, research, and understand adoptees' medical and background information is largely undefined in Illinois.<sup>5</sup> Nevertheless, adoptive parents have alleged that Illinois adoption agencies breached a legal duty when they:

Failed to order proper and essential psychological and neuropsychological testing on [the adopted child] before placing him in the Plaintiff's home.<sup>6</sup>

Failed to recognize and appreciate the medical significance of tremors of [the adopted child] . . . .

Failed to learn and determine the specific prescription anti-depressant medication [the birth mother] was taking prior to and at the time of the adoption . . . .

Failed to secure the medical records of [the birth mother] in order to completely and properly understand her mental health history.

Failed to consult with any treating psychiatrist caring for [the birth mother] . . . .

Failed to secure and review the Social Security disability file of [the birth mother] to determine and learn the specific reasons and bases for her disability.<sup>7</sup>

Based on such allegations, this Comment will examine whether and to what extent the Illinois legislature and courts have imposed a legal

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3. *Roe v. Catholic Charities of the Diocese of Springfield, Ill.*, 588 N.E.2d 354, 365 (Ill. App. Ct. 1992) ("We find specifically that a duty was owed . . . of an honest and complete response to plaintiffs' specific request concerning the characteristics of the potentially adoptable child . . . ."); see also *infra* Part III.B (discussing tort duties imposed by Illinois courts).

4. See *infra* Part IV (examining inconsistencies in Illinois mandatory disclosure and wrongful adoption law).

5. See *infra* Part IV (analyzing the ambiguity in adoption agencies' duty to investigate).

6. Motion to Dismiss for Defendants at 3, *Julia J. v. Bethany Christian Servs.*, No. 05 C 1952, (N.D. Ill. Apr. 12, 2005), 2005 WL 1252101 [hereinafter Motion to Dismiss for Bethany Christian Servs.]. This case did not result in a published opinion.

7. Plaintiff's Response to Defendant's Motion for Summary Judgment, *Nihill v. Cradle Soc'y*, No. 99 L 132 (Ill. Ct. Cl.). This case did not result in a published opinion.

duty on adoption agencies to perform these types of investigations into the health and background of adoptees and their birth families.<sup>8</sup>

First, Part II of this Comment will examine the evolution of adoption law in the United States, highlighting the recognition among adoption professionals of adoptive parents' need to be fully informed.<sup>9</sup> It will then discuss the legal development of adoption agencies' duty to disclose such information to adoptive parents.<sup>10</sup> Part III will examine the scope of this legal duty in Illinois, detailing the statutes and court holdings that define it.<sup>11</sup> Next, Part IV will describe the inconsistencies among the Illinois statutes that define adoption agencies' duties.<sup>12</sup> Part IV will also predict how an Illinois court, under current law, would decide a claim against an adoption agency for failure to investigate.<sup>13</sup>

Lastly, Part V will recommend that the legislature remove inconsistencies in Illinois adoption legislation by streamlining the Illinois Adoption Act, the Child Care Act of 1969, and the administrative regulations governing those statutes.<sup>14</sup> It will recommend that the adoption legislation and regulations impose a uniform standard for these investigations, requiring agencies to make "reasonable efforts" to obtain health and background information.<sup>15</sup> This Comment will conclude that, although Illinois adoption law has improved dramatically over the last century, several changes are needed to eliminate inconsistencies and provide clear directives.<sup>16</sup>

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8. See *infra* Parts II–VI (examining adoption agencies' duties in Illinois).

9. See *infra* Parts II.A–B (examining the development of adoption law in America and the changing philosophies informing the law).

10. See *infra* Part II.C (describing the beginnings of adoption agencies' duty to adoptive parents).

11. See *infra* Part III (analyzing adoption agencies' duties under Illinois statutory and case law).

12. See *infra* Part IV.A (scrutinizing Illinois adoption legislation and regulations).

13. See *infra* Part IV.B (predicting an Illinois' courts analysis of a claim for failure to investigate).

14. See *infra* Part V.A (recommending changes to create consistency in adoption regulations in Illinois).

15. See *infra* Parts V.B–C (proposing that Illinois adoption legislation and regulations include a "reasonable efforts" standard).

16. See *infra* Part VI (concluding that Illinois adoption legislation requires small improvements).

## II. BACKGROUND

Although the practice of adoption has its roots in antiquity,<sup>17</sup> its objectives have evolved and changed dramatically over time to reflect the culture and times in which it was practiced.<sup>18</sup> This Part will first examine the history of adoption in the United States and the underlying philosophies that have informed its policies.<sup>19</sup> It will discuss the effects of the philosophy of rebirth, which defined American adoption policy for much of the twentieth century.<sup>20</sup> Then, this Part will describe courts' and legislatures' efforts in the 1980s and 1990s to prevent and redress the damages caused by the rebirth philosophy through mandatory disclosure statutes and wrongful adoption claims.<sup>21</sup>

### A. Early Adoption and the Philosophy of Rebirth

Despite adoption's ancient groundings, the common law did not recognize adoption or establish rules governing its procedure.<sup>22</sup> As a result, adoption developed primarily as a statutory phenomenon in the United States.<sup>23</sup> In 1851, Massachusetts enacted the first modern

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17. See Ruth-Arlene W. Howe, *Adoption Practice, Issues, and Laws 1958–1983*, 17 FAM. L.Q. 173, 173–74 (1983) (discussing the early history of adoption). Adoption was referenced in the Babylonian codes of Hammurabi and Hindu Sanskrit texts, and its procedures were regulated in ancient Greece, Egypt, and Rome. *Id.* The story of an Egyptian princess' discovery and adoption of Moses is one of the oldest and most popular adoption tales. Kelly Allen Sifferman, *THE LAYMAN'S LAW GUIDE TO ADOPTION: A LEGAL GUIDE FOR BIRTH AND ADOPTIVE PARENTS* 2 (2d ed. 1994).

18. See Howe, *supra* note 17, at 173–74 (discussing the objectives of adoption throughout history). In ancient Greece and Rome, its primary purpose was to perpetuate the male's family line while in Elizabethan England and colonial America, impoverished children were "placed out" as indentured apprentices and farm workers. *Id.*

19. See *infra* Part II.A–C (describing the rise and rejection of the philosophy of rebirth).

20. See *infra* Part II.B (examining the rejection of the rebirth paradigm).

21. See *infra* Part II.C (discussing courts' and legislatures' increased willingness to regulate adoption).

22. See Fred S. Wilson, Comment, *Wrongful Adoption: A Guide to Impending Tort Litigation in Texas*, 24 ST. MARY'S L. J. 273, 276 (1992) ("[T]he common law of England failed to follow the direction of the Romans and neither recognized, nor established rules governing the adoption of children."); see also Joan Heifetz Hollinger, *Introduction to Adoption Law and Practice*, in *ADOPTION LAW AND PRACTICE* §1.02 (1990) ("As for English common law or statutory precedents, it is certainly true that English courts did not recognize a status of adoption equivalent to what American adoption laws began to recognize in the 19th century."). England did not enact a general adoption statute until 1926, due in part to the cultural emphasis on blood lineage as a basis for class distinction and hostility toward "illegitimacy." *Id.*

23. See Elizabeth N. Carroll, *Abrogation of Adoption by Adoptive Parents*, 19 FAM. L.Q. 155, 157 (1985) ("Adoption as we know it was unknown at common law. Today, adoption is a purely statutory procedure.").

adoption statute, the “Act to Provide for the Adoption of Children.”<sup>24</sup> Although the Massachusetts statute did not spawn the practice of adoption in the United States,<sup>25</sup> it was the first to formally regulate and require judicial supervision of adoption proceedings,<sup>26</sup> and nearly all modern American adoption law can be traced to this early act.<sup>27</sup> In a significant break from adoption policies in the past,<sup>28</sup> the statute made the welfare of the child its primary concern, a factor that has since become a permanent feature in all adoption regulations in the United States.<sup>29</sup> Lawmakers’ understanding of what constitutes a child’s best interest, however, has been a constant source of revision and debate.<sup>30</sup>

Because of this changing understanding of children’s best interests, adoption policies and practices have changed dramatically in the United States over the past two centuries.<sup>31</sup> In the nineteenth and early twentieth centuries, most adoptions took place through private agreements resembling the conveyance of real estate.<sup>32</sup> The details of

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24. Janet Hopkins Dickson, Comment, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 924 (1991).

25. See Naomi R. Cahn, *Perfect Substitutes or the Real Thing?*, in FAMILIES BY LAW: AN ADOPTION READER 19–22 (2004) (discussing adoption in America prior to 1851); Dickson, *supra* note 24, at 924 (noting that children were “adopted” through private legislation, particularly bills that changed their names, prior to the Act).

26. 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, 859 (1992) [hereinafter *Getting the Whole Truth*].

27. See Wilson, *supra* note 22, at 277 (“[T]he development of modern American adoption law can be isolated to a single, key event: passage of the ‘Act to Provide for the Adoption of Children’ . . .”). The Massachusetts Act included the following requirements that were forerunners of modern American adoption law: birth parents’ written consent, the child’s consent if he or she was over fourteen, joinder of the adopter’s spouse as a party to the adoption, judicial approval of the suitability of adoptive parents, and termination of biological parents’ rights. Madelyn Freundlich, *A Legal History of Adoption and Ongoing Legal Challenges*, in HANDBOOK OF ADOPTION: IMPLICATIONS FOR RESEARCHERS, PRACTITIONERS, AND FAMILIES 44, 45 (2007).

28. See Howe, *supra* note 17, (examining the history of adoption); see also *supra* note 18 (discussing objectives in adoption in different cultures).

29. See Wilson, *supra* note 22, at 277–79 (noting the significance of the statute).

30. See Erika Lynn Kleiman, *Caring For Our Own: Why American Adoption Law and Policy Must Change*, 30 COLUM. J. L. & SOC. PROBS. 327, 354 (1997) (describing how legislators consider race-matching policies in the best interest of the adoptee, when in fact, such policies are detrimental to the well-being of the child); Carroll, *supra* note 23, at 156–57 (“Although the best interests of the child is uniformly proclaimed as the applicable standard when the fate of any child is at stake, a look at current statutes and case law belies such proclamations.”); see also Frank A. Biafora et al., *The Future of Adoption: A Call to Action*, in HANDBOOK OF ADOPTION: IMPLICATIONS FOR RESEARCHERS, PRACTITIONERS, AND FAMILIES 527, 528–29 (2007) (noting the difficulty of garnering agreement on the definition of best interests).

31. See, e.g., Dickson, *supra* note 24, at 923–34 (examining the development of adoption in America).

32. *Getting the Whole Truth*, *supra* note 26, at 859.

these agreements were open to the public, and few legal or social barriers separated birth parents and adoptive parents.<sup>33</sup> Birth mothers often knew the adoptive parents and stayed with them during pregnancy.<sup>34</sup>

In the 1920s, a paradigm shift occurred in which adoption professionals began to conceive of adoption as a “rebirth” into the home of the adoptive parents.<sup>35</sup> Until that time, the public had considered adoption to be a source of shame for all members of the adoption triad:<sup>36</sup> the birthmother was called “promiscuous,” the child branded a “bastard,” and the adoptive parents considered “barren.”<sup>37</sup> In an effort to give the members of the adoption triad a fresh start, or “rebirth,” without lingering stigmatization, adoption professionals endeavored to create the illusion that the child was born into the adoptive family.<sup>38</sup> Adoption agencies matched parents and children according to physical characteristics, and states issued “birth certificates” listing the adoptive parents as the birth parents.<sup>39</sup>

Efforts to permanently separate adoptees and their adoptive families from birth families underlay the philosophy of rebirth.<sup>40</sup> To prevent bonding between the birth mother and child, nurses and adoption professionals went so far as to blindfold birth mothers and force them to wear earplugs in the delivery room so that they would never see or hear their child during the delivery process.<sup>41</sup> The philosophy of rebirth also led to reluctance on the part of adoption agencies and intermediaries to

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33. *Id.* at 859–60 (discussing information sharing and lack of barriers in early adoption practices). Adoption records were not sealed, proceedings were performed in open court, and newspapers even reported on the details of those proceedings on a routine basis. *Id.*

34. *Id.* at 860.

35. *See, e.g., id.* at 860 (discussing the movement toward secrecy in adoption and the “illusion” of rebirth); *see also* Marianne Brower Blair, *The Impact of Family Paradigms, Domestic Constitutions, and International Conventions on Disclosure of an Adopted Person’s Identities and Heritage: A Comparative Examination*, 22 MICH. J. INT’L L. 587, 595–97 (2001) [hereinafter *The Impact of Family Paradigms*] (describing the rebirth paradigm).

36. The birth parents, adoptive parents, and adopted persons constitute the adoption triad. David Brodzinsky, *Foreword* to RAFAEL A. JAVIER ET AL., *HANDBOOK OF ADOPTION: IMPLICATIONS FOR RESEARCHERS, PRACTITIONERS, AND FAMILIES*, at xiii (2007).

37. *See* Dickson, *supra* note 24, at 925–32 (discussing adoption’s “ignominious roots”).

38. *See* Dickson, *supra* note 24, at 938 (“Since adoption was a shameful event, secrecy allowed all parties to the adoption to get a fresh start in life.”); *see also* *The Impact of Family Paradigms, supra* note 35, at 596 (detailing the rebirth paradigm and its effects on modern adoption practices).

39. *Getting the Whole Truth, supra* note 26, at 860.

40. *See* *The Impact of Family Paradigms, supra* note 35, at 595 (analyzing the movement to permanently separate adoptees and their adoptive families from birth families during the twentieth century).

41. Dickson, *supra* note 24, at 938. Such practices occurred as late as the 1970s. *Id.*

share information regarding the adoptee's past.<sup>42</sup> Adoption professionals recommended that "adoptive parents should be provided with as little information as possible regarding the 'shadowy figures' of the birth parents."<sup>43</sup>

Adoption professionals and agencies believed such secrecy and separation promoted bonding among the newly formed family unit, and protected the adoptive family from unwanted intrusions of the biological family.<sup>44</sup> Adoption agencies also feared negative information might deter placement or stigmatize the child in the eyes of the adoptive family.<sup>45</sup> Agencies were especially reluctant to disclose adoptees' medical and social histories, and frequently withheld unpleasant information such as a mental illness, criminal behavior, and alcoholism.<sup>46</sup> In placing older children, agencies even withheld the adoptees' own medical and social histories.<sup>47</sup>

Adoption agencies were not alone in their support of the rebirth philosophy; lawmakers also subscribed to the philosophy of rebirth and believed in the benefits of secrecy and separation.<sup>48</sup> State legislatures enacted statutes that sealed adoption records from both the public and the parties to the adoption,<sup>49</sup> and courts strictly enforced anonymity between adoptive and birth parents.<sup>50</sup> In sum, for much of the twentieth century, the courts, legislatures, and adoption agencies were united in

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42. *The Impact of Family Paradigms*, *supra* note 35, at 596.

43. *Id.* at 597 (quoting ARTHUR D. SOROSKY ET AL., *THE ADOPTION TRIANGLE* 36-37 (1978)).

44. *See id.* at 595 ("Proponents of anonymity argued that birth mothers and their children would be protected from stigmatization, bonding between adoptive parents and their children would be facilitated, and all parties would be permanently insulated from unwanted interference in their lives."); *see also* Demosthenes A. Lorandos, *Secrecy and Genetics in Adoption Law and Practice*, 27 *LOY. U. CHI. L.J.* 277, 295 (1996) (examining the commonly held beliefs that were the rationale for state confidentiality statutes).

45. *Getting the Whole Truth*, *supra* note 26, at 862.

46. *Id.* at 861.

47. *The Impact of Family Paradigms*, *supra* note 35, at 597.

48. *See* Jennifer Emmaneel, Note, *Beyond Wrongful Adoption: Expanding Adoption Agency Liability to Include a Duty to Investigate and a Duty to Warn*, 29 *GOLDEN GATE U. L. REV.* 181, 183 (1999) (describing court decisions as a "philosophical reminder that adoption was essentially a 'rebirth'"); Lorandos, *supra* note 44, at 294 (discussing legislators' beliefs on secrecy in adoption).

49. *See Getting the Whole Truth*, *supra* note 26, at 860 (examining the history of disclosure of health-related information in adoption). Records were only opened upon a showing of "good cause," which was often difficult to demonstrate. *Id.* The statutes denied adoptees and their families access to birth records, health histories, and biological origins, and mandated the issuance of new "birth certificates" signifying that the adoptee was born to the adoptive parents. *See* Lorandos, *supra* note 44, at 294-96 (discussing early adoption statutes).

50. Emmaneel, *supra* note 48, at 183.

the belief that complete secrecy and anonymity were in the best interests of all members of the adoption triad, including the child.<sup>51</sup>

### B. Rebirth Rejected

By the mid-twentieth century, some adoption agencies interpreted the philosophy of rebirth not only to require secrecy, but also to permit lies.<sup>52</sup> As late as the 1960s, agencies not only kept secret information concerning adoptees' backgrounds in an attempt to create a fresh start; some also fabricated stories or told blatant lies about the health and background of adoptees.<sup>53</sup> Assuming prospective parents were not interested in "less-than-perfect" children,<sup>54</sup> certain agencies invented whatever tale they believed would appeal to adoptive parents and ultimately lead to placement.<sup>55</sup> This approach of placement-at-

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51. See *Getting the Whole Truth*, *supra* note 26, at 861 ("The conventional wisdom . . . was that adoptive parents and their children were better off not knowing background information . . ."); see also Emmaneel, *supra* note 48, at 183 (describing court decisions as a "philosophical reminder that adoption was essentially a 'rebirth'"); Lorandos, *supra* note 44, at 294 (describing the legislator's beliefs on secrecy in adoption).

52. See, e.g., *Wolford v. Children's Home Soc'y of W. Va.*, 17 F. Supp. 2d 577, 579–80 (S.D. W. Va. 1998) (applying West Virginia law) (when asked if facial features were due to fetal alcohol syndrome, agency told adoptive parents that the birth mother had not used alcohol and that features were due to a "familial look," knowing the birth mother was an alcoholic and that the child had been enrolled in a treatment program for children with fetal alcohol syndrome.); *Michael J. v. L.A. County Dep't of Adoptions*, 201 Cal. App. 3d 859, 863–68 (Cal. Ct. App. 1988) (agency told adoptive parents port-wine stain on adoptee was a birthmark when it was a manifestation of Sturge-Weber syndrome); *Roe v. Catholic Charities of the Diocese of Springfield*, 588 N.E.2d 354, 356 (Ill. App. Ct. 1992) (agency told adoptive parents that the children were physically and mentally normal when agency knew they had severe mental and emotional problems); *Mohr v. Commonwealth*, 653 N.E.2d 1104, 1107 (Mass. 1995) (agency told adoptive parents that the child did not have permanent medical or emotional problems and that birth mother was young and placed her child in foster care because she wanted to go into nursing when agency knew that birth mother was schizophrenic and a patient in the state mental hospital and that the child had been diagnosed as mentally retarded with cerebral atrophy); *Burr v. Bd. of County Comm'rs of Stark County*, 491 N.E.2d 1101, 1109 (Ohio 1986) (agency told adoptive parents that child was born to an eighteen-year-old, unwed mother who could not raise the child because she wanted the opportunity to find better employment when agency knew the child was born to a thirty-one-year-old, mildly retarded patient in a mental hospital).

53. See cases cited *supra* note 52.

54. Dickson, *supra* note 24, at 949.

55. For an egregious, but not isolated incident that is indicative of the extent of agencies' lies, see *Juman v. Louise Wise Med. Servs.*, 608 N.Y.S.2d 612 (N.Y. Sup. Ct. 1994), *aff'd on other grounds*, 211 A.D.2d 446 (N.Y. App. Div. 1995). In *Juman*, the agency told the adoptive parents that the birth mother:

. . . won a scholarship to a well known college and finished two years of it . . . [The birth mother] had been going out with someone seriously, but he died suddenly of a heart attack and so she could not marry him. She became pregnant quite soon after. She said that if her boyfriend had not died she would not have become pregnant. This shock led to some emotional difficulty and she later sought professional help for it.

whatever-the-cost proved to have disastrous consequences for some families.<sup>56</sup>

In many cases, adopted children did not receive necessary medical and psychiatric treatment when information that was in the agency's possession was withheld from the adoptive parents.<sup>57</sup> As a result, children with psychiatric disorders that may have been successfully alleviated or treated with early intervention and counseling instead engaged in violent and destructive behavior.<sup>58</sup> Some adopted children attempted suicide, mutilated themselves, abused, molested, and raped their siblings, and engaged in destructive behavior such as fire-setting, violence, and threats.<sup>59</sup> These tragedies were not limited to psychiatric and behavioral problems; agencies also withheld and misrepresented facts regarding adoptees' physical and genetic conditions with similar unfortunate results.<sup>60</sup> Such hardship devastated adoptive parents, who were unprepared—both financially and emotionally—for their children's behavioral, medical, and psychiatric needs.<sup>61</sup>

Because of such tragic consequences and a changing conception of the dynamics of families with adoptive children, commentators and adoption experts eventually came to reject the theoretical assumptions of the rebirth philosophy.<sup>62</sup> Most adoption professionals have since

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*Juman*, 608 N.Y.S.2d at 614. In reality, the birth mother was a diagnosed schizophrenic who had undergone a prefrontal lobotomy before giving birth. *Id.* Tragically, the adoptee committed suicide while the case was still pending. Harriet Dinegar Milks, Annotation, "Wrongful Adoption" Causes of Action Against Adoption Agencies Where Children Have or Develop Mental or Physical Problems that are Misrepresented or Not Disclosed to Adoptive Parents, 74 A.L.R. 5th 16 (1999).

56. See Marianne Brower Blair, *The Uniform Adoption Act's Health Disclosure Provisions: A Model That Should Not Be Overlooked*, 30 FAM. L.Q. 427, 429–31 (1996) [hereinafter *Health Disclosure Provisions*] (highlighting the tragic cases in which adoptees with untreated psychiatric problems engaged in destructive behavior).

57. *Id.* at 429–30.

58. See *id.* (highlighting tragic cases of untreated psychiatric disorders in adoptees).

59. *Id.* at 430.

60. See, e.g., *Wolford v. Children's Home Soc'y of W. Va.*, 17 F. Supp. 2d 577, 579–80 (S.D. W. Va. 1998) (applying West Virginia law) (adoptive parents asked if facial features were due to fetal alcohol syndrome. Agency said birth mother had not used alcohol and that features were due to a "familial look" knowing the birthmother was an alcoholic and child had been enrolled in a treatment program for children with fetal alcohol syndrome.); *Michael J. v. Los Angeles County Dep't of Adoptions*, 201 Cal. App. 3d 859, 863–64 (Cal. Ct. App. 1988) (agency told adoptive parents port-wine stain on adoptee was a birthmark when it was actually a manifestation of Sturge-Weber syndrome).

61. See *Health Disclosure Provisions*, *supra* note 56, at 430–31 (discussing the consequences of special needs placements when the adoptive parents were not fully informed).

62. See *Getting the Whole Truth*, *supra* note 26, at 866 ("[T]he philosophical underpinnings . . . have weakened as adoption experts during the last decade have recognized that adoption cannot 'mirror biology.'"); see also *The Impact of Family Paradigms*, *supra* note 35, at 620–21 (noting

abandoned the theory that adoption should mirror biology, and now believe that disclosure and communication about the adoptees' backgrounds can alleviate the "genealogical bewilderment" commonly experienced by adoptees.<sup>63</sup> Professional guidelines now support comprehensive collection and disclosure of non-identifying health and background information to adoptive parents.<sup>64</sup> Adoption experts are united in the belief that complete medical and background information should be provided to adopting parents.<sup>65</sup>

*C. Responses to the Rejection of Rebirth: Mandatory Disclosure  
Statutes and Wrongful Adoption Suits*

State legislatures began responding to the changing attitudes toward secrecy and disclosure in the late 1970s<sup>66</sup> and 1980s by amending adoption statutes to require the collection and disclosure of health and background information prior to adoption.<sup>67</sup> Now, every state requires the disclosure of at least some health-related information to adoptive parents.<sup>68</sup> These laws, however, differ significantly from state to state in several important areas.<sup>69</sup> They vary according to the type of information to be disclosed, from whom the background information should be collected, the timing of disclosure, the extent of agency discretion permitted, and the extent of sanctions for failure to comply.<sup>70</sup>

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changes in adoption professionals' opinions regarding disclosure). The Child Welfare League of America, one of the nation's most prominent affiliation of adoption agencies, published guidelines as early as 1971 recommending that agencies provide adoptive parents with all pertinent, non-identifying information about the adoptee. *Getting the Whole Truth*, *supra* note 26, at 918.

63. *Getting the Whole Truth*, *supra* note 26, at 862–67 (discussing the "complete turn around in the attitude of experts in the adoption field toward disclosure of nonidentifying information"); *The Impact of Family Paradigms*, *supra* note 35, at 620–21 ("Experts now conclude that disclosure strengthens the bond between adoptive parents and their child by facilitating a more appropriate placement, and a better understanding of, and ability to provide for, a child's needs.").

64. *The Impact of Family Paradigms*, *supra* note 35, at 621.

65. *Dresser v. Cradle of Hope Adoption Ctr.*, 358 F. Supp. 2d 620, 641–42 (E.D. Mich. 2005) (applying Michigan law).

66. One of the first states to enact a mandatory disclosure law, California has required disclosure since 1974. Dickson, *supra* note 24, at 950.

67. See *The Impact of Family Paradigms*, *supra* note 35, at 621 ("Reflecting these changing attitudes . . . almost every state has now enacted legislation compelling the disclosure of at least some health-related information to prospective adoptive parents.").

68. *Id.*

69. See MADELYN FREUNDLICH & LISA PETERSON, *WRONGFUL ADOPTION: LAW, POLICY & PRACTICE* 33–34 (1998) (analyzing state disclosure statutes); Paula K. Bebensee, *In the Best Interests of Children and Adoptive Parents: The Need for Disclosure*, 78 IOWA L. REV. 397, 404–05 (1993) (highlighting the differences among state mandatory disclosure states).

70. See sources cited *supra* note 69 (comparing and contrasting disclosure statutes).

Current statutes also vary significantly on who is responsible for collecting the medical and social history.<sup>71</sup>

Courts used these state legislative measures to impose liability on adoption agencies through wrongful adoption claims.<sup>72</sup> Wrongful adoption is the shorthand term applied to the group of tort claims brought by adoptive parents and adoptees against adoption agencies for the agencies' acts or omissions in facilitating the adoption.<sup>73</sup> Wrongful adoption is not a distinct tort, but rather is a phrase that encompasses the application of traditional tort principles to the adoption setting.<sup>74</sup> Wrongful adoption claims allow adoptive parents and, more recently, adoptees to recover monetary damages for an agency's intentional or negligent misrepresentations of an adoptee's health and background information.<sup>75</sup> In addition to finding agencies liable for misrepresentations, courts have imposed liability for failure to affirmatively disclose health and background information.<sup>76</sup>

The development of wrongful adoption claims arose out of the inadequacy of previous remedies available to adoptive parents and adoptees.<sup>77</sup> Until 1986, adoptive parents' only remedy for the wrongdoings of adoption agencies was to annul or abrogate the adoption.<sup>78</sup> Many adoptive parents, however, had no desire to end their relationship with the child, but instead sought financial remuneration for

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71. Marianne Brower Blair, *Lifting the Genealogical Veil: A Blueprint for Legislative Reform of the Disclosure of Health-Related Information in Adoption*, 70 N.C. L. REV. 681, 743 (1992) [hereinafter *Lifting the Genealogical Veil*].

72. See Lorandos, *supra* note 44, at 296.

73. Milks, *supra* note 55, at 9.

74. *Roe v. Jewish Children's Bureau of Chi.*, 790 N.E.2d 882, 894 (Ill. App. Ct. 2003).

75. See Dickson, *supra* note 24, at 955 (introducing the tort of wrongful adoption); see also *Dresser v. Cradle of Hope Adoption Ctr.*, 358 F. Supp. 2d 620, 638–41 (2006) (predicting Michigan law and extending wrongful adoption causes of action to adoptees when parents waived the right to sue the agency in the adoption agreement).

76. See, e.g., *Mohr v. Commonwealth*, 653 N.E.2d 1104, 1112 (Mass. 1995) (“We add that an adoption agency does have an affirmative duty to disclose to adoptive parents information about a child that will enable them to make a knowledgeable decision about whether to accept the child for adoption.”); *Jackson v. Montana*, 956 P.2d 35, 50–51 (Mont. 1998) (holding that an agency has a statutorily-imposed duty to disclose all relevant information in its possession); *Gibbs v. Ernst*, 647 A.2d 882, 892 (Pa. 1994) (“An adoption agency has a duty to disclose fully and accurately to the adopting parents all relevant non-identifying information in its possession concerning the adoptee.”).

77. Dickson, *supra* note 24, at 956–57 (stating that wrongful adoption suits brought much needed relief for adoptive parents that past remedies could not provide).

78. See *id.* (discussing remedies for adoptive parents prior to *Burr*). Annulment is a legal action that revokes the original adoption decree and relieves the adoptive from all legal duties to the adoptee. Note, *When Love Is Not Enough: Toward a Unified Wrongful Adoption Tort*, 105 HARV. L. REV. 1761, 1765 (1992) [hereinafter *When Love Is Not Enough*]. Most annulment actions are brought by birth mothers seeking to reclaim their parental rights over the child. *Id.*

medical or psychiatric expenses incurred as a result of the child's undisclosed problem.<sup>79</sup> Courts disfavored annulments, believing that they dissolved the newly created family unit and forced the child to undergo a second dramatic change in his or her environment.<sup>80</sup> Nevertheless, courts were also reluctant to allow adoptive parents to recover damages under traditional tort theories for fear of creating unchecked liability and thereby hindering the socially beneficial practice of adoption.<sup>81</sup>

In 1986, however, Ohio became the first state to recognize a cause of action against an adoption agency based on an agency's misrepresentations to adoptive parents.<sup>82</sup> In *Burr v. Board of County Commissioners*, the agency told the parents that the child was born to an eighteen-year-old, unwed mother who could not raise the child because she wanted the opportunity to find better employment.<sup>83</sup> The agency's records, however, revealed that the child was born to a thirty-one-year-old, mildly retarded patient in a mental hospital.<sup>84</sup> The *Burr* court found that the adoption agency had wholly fabricated a story regarding the medical and familial history of the adoptee.<sup>85</sup> Holding that the adoptive parents proved each element of common law fraud, the *Burr* court stated, "It would be a travesty of justice and a distortion of the truth to conclude that deceitful placement of this infant, known by appellants to be at risk, was not actionable when the tragic but hidden realities of the child's infirmities finally came to light."<sup>86</sup> This

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79. See Dickson, *supra* note 24, at 956-57 (describing the inadequacy of pre-wrongful adoption remedies for adoptive parents); see also Emmaneel, *supra* note 48, at 184-85 (discussing traditional methods of redress against adoption agencies); Wilson, *supra* note 22, at 298-99 (discussing the weaknesses of annulment as a remedy).

80. John R. Maley, *Wrongful Adoption: Monetary Damages as a Superior Remedy to Annulment for Adoptive Parents Victimized by Adoption Fraud*, 20 IND. L. REV. 709, 709-10 (1987).

81. See Emmaneel, *supra* note 48, at 183-203 (discussing the evolution of wrongful adoption claims); John Gibeaut, *Disclosing Birth Secrets*, 84 A.B.A. J. 34, 35 (1998) ("The first courts to confront wrongful adoption claims were leery of letting the genie too far out of the bottle."); see also Richard P. v. Vista Del Mar Child Care Serv., 106 Cal. App. 3d 860, 867 (1980) (declining to recognize cause of action for adoption agency negligence based on public policy grounds that imposing liability would make the agency the "guarantor of the infant's future health").

82. See *Burr v. Bd. of County Comm'rs of Stark County*, 491 N.E.2d 1101, 1109 (1986) (holding the agency liable for its fraudulent misrepresentations concerning the background of the adoptee); *When Love Is Not Enough*, *supra* note 78, at 1770 ("Wrongful adoption' was virtually unheard of before the 1986 Ohio Supreme Court decision in *Burr v. County Commissioners*.").

83. *Burr*, 491 N.E.2d at 1103.

84. *Id.* at 1104.

85. See *id.* at 1101-04 (finding that the agency knowingly told lies about the adoptee's background).

86. *Id.* at 1105.

influential wrongful adoption decision, while extremely pivotal in the movement towards judicial recognition of this class of torts, nonetheless imposed very limited liability on adoption agencies for intentional misrepresentations.<sup>87</sup>

Despite its limitations, *Burr* unleashed a flood of litigation from adoptive parents seeking damages caused by the misrepresentations of adoption agencies.<sup>88</sup> As courts began to recognize that adoptive parents necessarily rely on the information provided by adoption agencies,<sup>89</sup> some gradually expanded the liability imposed on adoption agencies from fraud-based intentional misrepresentation claims to negligence-based claims.<sup>90</sup> Under negligence theories, agencies became liable in some jurisdictions for failing to use reasonable care in communicating with adoptive parents.<sup>91</sup> To date, however, courts have not unanimously recognized negligence claims in the adoption context,<sup>92</sup> nor have they uniformly defined the duties of adoption agencies.<sup>93</sup>

In the late 1980s and early 1990s, courts considering negligent misrepresentation in the wrongful adoption context declined to impose

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87. *See id.* at 1109 (“It is not the mere failure to disclose the risks inherent in this child’s background which we hold to be actionable. Rather, it is the deliberate act of misinforming this couple” which constituted the agency’s transgression.).

88. *Getting the Whole Truth*, *supra* note 26, at 854–55.

89. *See Wilson*, *supra* note 22, at 280.

90. *See Dresser v. Cradle of Hope Adoption Ctr.*, 358 F. Supp. 2d 620, 639–40 (E.D. Mich. 2005) (applying Michigan law) (discussing the history and development of wrongful adoption cases); *see also Dickson*, *supra* note 24, at 955–62 (tracing the development of causes of action recognized in early wrongful adoption claims from intentional misrepresentation to intentional concealment to a negligence standard); FREUNDLICH & PETERSON, *supra* note 69, at 11–23 (detailing the legal developments of wrongful adoption claims).

91. Gibeaut, *supra* note 81, at 35. While this Comment focuses on adoption agencies’ liability, most claims could be brought against all adoption intermediaries including government agencies, private agencies, and adoption attorneys. *Getting the Whole Truth*, *supra* note 26, at 859–60.

92. *See Michael J. v. L.A. County Dept. of Adoptions*, 201 Cal. App. 3d 859, 874–75 (Cal. Ct. App. 1988) (holding that agencies “should not be liable for mere negligence in providing information”); *Richard P. v. Vista Del Mar Child Care Serv.*, 106 Cal. App. 3d 860, 867 (Cal. Ct. App. 1980) (reasoning that public policy prevents the imposition of negligence liability on adoption agencies).

93. *Compare Mallette v. Children’s Friend & Serv.*, 661 A.2d 67, 73 (R.I. 1995) (holding that a duty arises once an agency voluntarily undertakes to supply health related information), *and Meracle v. Children’s Servs. Soc’y of Wis.*, 437 N.W.2d 532, 537 (Wis. 1989) (holding the agency liable for negligent misrepresentation, but asserting that the agency was not under an affirmative duty to disclose health related information), *with Mohr v. Commonwealth*, 653 N.E.2d 1104, 1112 (Mass. 1995) (finding even absent parental questions, “an adoption agency does have an affirmative duty to disclose to adoptive parents information about a child that will enable them to make a knowledgeable decision about whether to accept the child for adoption”), *and Gibbs v. Ernst*, 647 A.2d 882, 892 (Pa. 1994) (holding that an agency has an affirmative duty to disclose in every placement).

an affirmative duty to disclose health and background information, regardless of the value of that information to adoptive parents.<sup>94</sup> These courts held that agencies only assume a duty of reasonable care to provide accurate information when they voluntarily undertake to communicate information about the health and background of the adoptee.<sup>95</sup> These holdings declined to impose an affirmative duty to disclose information within the agency's possession if the agency chose not to provide adoptive parents with any health or background information.<sup>96</sup>

More recently, however, courts have expanded the scope of liability from negligent misrepresentation to negligent nondisclosure.<sup>97</sup> While these courts have cited differing sources from which a duty to disclose arises,<sup>98</sup> they have made clear that an agency cannot avoid liability simply by withholding information and refraining from disclosure.<sup>99</sup> Since 1993, most courts have held that agencies have an affirmative duty to fully and accurately disclose all relevant, non-identifying information in their possession concerning the adoptee.<sup>100</sup>

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94. See *Malette*, 661 A.2d at 73 (reasoning that an agency only assumes a duty of reasonable care in its representations when it voluntarily supplies information to adoptive parents); *Meracle*, 437 N.W.2d at 537 (concluding that the agency had no affirmative duty to disclose).

95. See cases cited *supra* note 94 (describing courts declining to impose affirmative duty to disclose).

96. See *Malette*, 661 A.2d at 73 (“We are of the opinion that in order to avoid liability, an adoption agency needs simply to refrain from making representations, or if it does begin making representations it must do so in a nonnegligent manner.”); *Meracle*, 437 N.W.2d at 537 (“We do not hold that agencies have any duty to disclose health information.”).

97. See FREUNDLICH & PETERSON, *supra* note 69, at 16 (“The scope of liability for negligence has evolved . . . . Courts first recognized a cause of action for negligent misrepresentation, then for negligent nondisclosure.”).

98. Compare *Mohr v. Commonwealth*, 653 N.E.2d 1104, 1112 (Mass. 1995) (reasoning that the duty arises from the principle of good faith and fair dealing and state statutory law), with *Gibbs v. Ernst*, 647 A.2d 882 (Pa. 1994) (holding that the duty arises from the unique relationship between the agency and adoptive parents and from statutes).

99. *Mohr*, 653 N.E.2d at 1112 (stating that even absent parental questions, “an adoption agency does have an affirmative duty to disclose to adoptive parents information about a child that will enable them to make a knowledgeable decision about whether to accept the child for adoption.”); *Gibbs*, 647 A.2d at 892 (holding that an agency has an affirmative duty to disclose in every placement).

100. See, e.g., *Wolford v. Children’s Home Soc’y of W. Va.*, 17 F. Supp. 2d 577, 583 (S.D. W. Va. 1998) (predicting that West Virginia law would find agency liable for failure to investigate); *Michael J. v. L.A. County Dep’t of Adoptions*, 201 Cal. App. 3d 859, 875 (Cal. Ct. App. 1988) (concluding that “there must be a good faith full disclosure of material facts concerning existing or past conditions of the child’s health”); *Mohr*, 653 N.E.2d at 1112 (holding that “an adoption agency does have an affirmative duty to disclose to adoptive parents information about a child that will enable them to make a knowledgeable decision about whether to accept the child for adoption”); *Jackson v. Montana*, 956 P.2d 35, 50–51 (Mont. 1998) (holding that an agency has a statutorily-imposed duty to disclose all relevant information in its

Through the evolution of wrongful adoption claims, courts have begun to assert that adoptive parents deserve the opportunity to “assume the awesome responsibility of raising a child with their eyes wide open.”<sup>101</sup> Courts and lawmakers have largely imposed the burden of informing adoptive parents on adoption agencies.<sup>102</sup> However, while mandatory disclosure statutes and wrongful adoption holdings clearly impose a duty to fully and truthfully disclose all health and background information to adoptive parents,<sup>103</sup> the contours and source of that duty remain partly undefined.<sup>104</sup>

### III. DISCUSSION

Like other states, Illinois responded to the changing trends in adoption policy and practice through both legislative and judicial means.<sup>105</sup> The Illinois legislature first imposed a duty to disclose information on adoption agencies in 1985 and has since refined and expanded that duty.<sup>106</sup> The legislature also allowed the Illinois Department of Child and Family Services (“DCFS”) to promulgate rules and regulations governing the mandatory disclosure statutes,<sup>107</sup> and DCFS recently revised its procedural rules for implementing Illinois legislation and administrative law.<sup>108</sup>

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possession); *Gibbs v. Ernst*, 647 A.2d 882, 892 (Pa. 1994) (holding that an agency has an affirmative duty to disclose in every placement); *Price v. Washington*, 980 P.2d 302, 309 (Wash. 1999) (noting that breach of duty to disclose is an essential element of a wrongful adoption claim).

101. *Roe v. Catholic Charities of the Diocese of Springfield*, 588 N.E.2d 354, 365 (Ill. App. Ct. 1992).

102. *See Catholic Charities*, 588 N.E.2d at 365–66 (discussing policy support for imposing a duty on the agency).

103. *See Dresser v. Cradle of Hope Adoption Ctr.*, 358 F. Supp. 2d 620, 641–42 (E.D. Mich. 2005) (applying Michigan law) (“Adoption experts are virtually unanimous in the belief that complete and accurate medical and social information should be communicated to adoptive parents.”); Erica Shultz, *Ignoring Distress Signals: Why Courts Should Recognize Emotional Distress Damages in Wrongful Adoption Claims*, 52 FLA. L. REV. 1073, 1086–87 (2000) (concluding that only “full, truthful disclosure of background information to parents will shield adoption agencies from liability”).

104. *See Dresser*, 358 F. Supp. 2d 635 (noting that authorities are not uniform as to the extent of adoption agencies’ duty to investigate). *See generally* Milks, *supra* note 55 (categorizing decisions according to the courts’ recognition of various wrongful adoption causes of action).

105. *See infra* Parts III.A & III.B (tracing the development of adoption agency duties in Illinois).

106. *See infra* Part III.A (detailing the development of the statutory duty to disclose).

107. 225 ILL. COMP. STAT. 10/7.4(c) (2006); 750 ILL. COMP. STAT. 50/18.4a (2006).

108. 401 Licensing Standards for Child Welfare Agencies § 401.510 (August 10, 2007), available at [http://dcfswebresource.prairienet.org/procedures/procedures\\_401/](http://dcfswebresource.prairienet.org/procedures/procedures_401/) [hereinafter Rule 401 Procedures].

This Part will trace the development of the duty of adoption agencies to gather and disclose health and background information under Illinois statutes, administrative law, and the recent DCFS procedural rules.<sup>109</sup> It will then examine Illinois court decisions, which defined and influenced the duties of adoption agencies.<sup>110</sup>

A. *Development of Statutory and Administrative Duty*

In 1985, the Illinois legislature revised the Adoption Act to reflect the changing attitudes in adoption policy rejecting the rebirth philosophy.<sup>111</sup> The 1985 amendment created a statutory duty to disclose health and background information to adoptive parents and adult adoptees.<sup>112</sup> The duty to disclose included the obligation to provide, if known, the biological family's basic background information, including the biological parents' age, race, religion, physical appearance, education, hobbies, and the existence of any other children.<sup>113</sup> The amendment

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109. See *infra* Part III.A (describing the development of an adoption agency's statutory duty).

110. See *infra* Part III.B (discussing the development of wrongful adoption tort liability).

111. See Pub. Act No. 83-1408, § 1 (effective Jan. 1, 1985) (current version codified at 750 ILL. COMP. STAT. 50/18.4 (2006)). Notably, the amendment created a mutual consent registry and mandatory disclosure provisions. *Id.* In voicing his opposition to this amendment, one representative stated:

[In voting for changes] you're really making a significant change in the purposes of adoption law in Illinois . . . . [O]ne of the premises of the adoption system is the opportunity for the child and the parents to establish a new family and to obtain a fresh start, so to speak, with no ties with the past and with the relationship between parent and child being absolutely and totally the same as any other family . . . . This Bill substantially retrenches that theory . . . I think [the bill] really goes a long ways toward saying that we really don't have a fresh start, that the Adoption Act doesn't mean what it's meant for that many years . . . you ought to be prepared to vote on the philosophy of whether you believe the Adoption Act is what it's been for that many years or whether it ought to be radically altered.

83RD GEN. ASSEMBLY, HOUSE TRANSCRIPTION DEBATE 35-36 (Ill., June 28, 1984) (statement of Rep. Johnson).

112. Pub. Act No. 83-1408, § 1 (effective Jan. 1, 1985) (current version codified at 750 ILL. COMP. STAT. 50/18.4 (2006)).

113. *Id.* The amendment required adoption agencies to disclose the following non-identifying information, if known, to adoptive parents prior to finalization of the adoption proceedings:

(i) age of biological parents; (ii) their race, religion and ethnic background; (iii) general physical appearance of biological parents; (iv) their education, occupation, hobbies, interests and talents; (v) existence of any other children born to the biological parents; (vi) information about biological grandparents; reason for emigrating into the United States, if applicable, and country of origin; (vii) relationship between biological parents; and (viii) detailed health history of biological parents and of their immediate relatives. However, no information provided pursuant to this subsection shall disclose the name or last known address of the biological parents, grandparents, or any other relative of the adopted.

*Id.*

also required disclosure of a “detailed” health history of biological parents and their immediate relatives.<sup>114</sup> The legislature considered these mandatory disclosure requirements to be vital steps toward adoption reform.<sup>115</sup>

In 1992, the legislature further expanded and refined adoption agencies’ duty to disclose.<sup>116</sup> The 1992 amendment to the Adoption Act broadened the “health history” disclosure requirement in a significant way by specifically including mental health information.<sup>117</sup> The amendment also mandated disclosure of information regarding both the birth family and the adoptee.<sup>118</sup> Previously, the Adoption Act required only disclosure of the birth family’s information.<sup>119</sup> Lastly, the 1992 amendment further defined the information that must be included in medical and mental health histories.<sup>120</sup>

The substance of these disclosure requirements has not changed significantly since the 1992 amendment, and the requirements are currently codified at Sections 18.4 and 18.4a of the Adoption Act.<sup>121</sup> Presently, Section 18.4 imposes a duty to disclose to adoptive parents detailed medical and mental health histories of the child, the biological parents, and their immediate relatives.<sup>122</sup> Section 18.4a requires that the

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114. Pub. Act No. 83–1408, § 1 (effective Jan. 1, 1985) (current version codified at 750 ILL. COMP. STAT. 50/18.4 (2006)).

115. 83RD GEN. ASSEMBLY, SENATE TRANSCRIPTION DEBATE 196 (Ill., June 21, 1984) (statement of Sen. Sangmeister) (describing the mandatory disclosure provision as one of the “big essentials of the bill”).

[T]his bill will now require that at the time of the adoption that a medical record be drawn up by the agency that is involved . . . . So at any time that there is a problem and we need to know . . . the history, it will be there for the adoptive parents and be furnished to them at the time of the adoption and it will be available for the child to be adopted at anytime that he wants it, and I think this is one of the big essentials of the bill.

*Id.*

116. See Pub. Act No. 87–617, § 3 (effective Jan. 1, 1992) (current version codified at 750 ILL. COMP. STAT. 50/18.4 (2006)) (expanding adoption agencies’ disclosure duties to include mental health information and information concerning the adoptee).

117. *Id.*

118. *Id.*

119. Pub. Act No. 83–1408, § 1 (effective Jan. 1, 1985) (current version codified at 750 ILL. COMP. STAT. 50/18.4 (2006)).

120. Pub. Act No. 87–617, § 3 (effective Jan. 1, 1992) (current version codified at 750 ILL. COMP. STAT. 50/18.4 (2006)).

121. 750 ILL. COMP. STAT. 50/18.4–18.4a (2006). Recently, Illinois Senator Mike Jacobs proposed a bill that would apply these medical disclosure requirements to private adoptions not facilitated by an agency. Telephone Interview with Sen. Mike Jacobs, 36th Dist. of Ill., in Chi., Ill. (Sep. 23, 2007). The bill eventually passed, but the Adoption Reform Committee substantially rewrote it and eliminated the disclosure provision. *Id.*

122. 750 ILL. COMP. STAT. 50/18.4 (2006).

medical and mental histories include: (1) conditions or diseases believed to be hereditary; (2) drugs or medications taken by the child's birth mother during pregnancy; (3) psychological and psychiatric information; and (4) "any other information that may be a factor influencing the child's present or future health."<sup>123</sup> Notably, however, the current Adoption Act significantly limits mandatory disclosures to information that is "known" or "currently in possession of the agency."<sup>124</sup>

While such limiting language is common among mandatory disclosure statutes, the duty imposed by the Adoption Act is passive when compared with the mandatory disclosure provisions of other states.<sup>125</sup> Whereas the Illinois statute imposes only a duty to disclose information that the agency already possesses,<sup>126</sup> many states' adoption regulations require agencies to disclose all reasonably available information, implying an affirmative obligation to make reasonable efforts to obtain outside information.<sup>127</sup> Some states even explicitly impose a duty to independently investigate the health and background

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123. 750 ILL. COMP. STAT. 50/18.4a (2006).

124. 750 ILL. COMP. STAT. 18.4-18.4a (2006).

125. Compare 750 ILL. COMP. STAT. 50/18.4-18.4a (2006) (limiting the duty to disclose to information within the agency's possession), with IND. CODE ANN. § 31-19-2-7 (West 1999) (mandating agency to compile a medical report without defining the degree of the effort to be used in obtaining the information in the report), and ME. REV. STAT. ANN. tit. 18-A, § 9-304 (1992) (requiring the agency to compile and disclose medical and background information, articulate any doubts about the accuracy of the information, and inform adoptive parents if any listed information cannot be obtained), and MICH. COMP. LAWS § 710.27 (Supp. 2001) (requiring the agency to obtain information from "any person who has had physical custody of the child for 30 days or more; or from any person who has provided health, psychological, educational, or other services to the child"), and N.C. GEN. STAT. § 48-3-205 (1999) (calling for disclosure of all "reasonably available" information), and OKLA. STAT. tit. 10, § 7504-1.1 (Supp. 2000) (requiring the agency to affirmatively seek out and compile medical and background information), and OR. REV. STAT. § 109.342 (1999) (mandating disclosure of medical history "when possible"), and VT. STAT. ANN. tit. 15A, § 2-105 (Supp. 2000) (requiring agency to disclose "reasonably available" information).

126. 750 ILL. COMP. STAT. 50/18.4-18.4a (2006).

127. See, e.g., CAL. FAM. CODE § 8706 (West 1994 & Supp. 2000) (requiring disclosure of information "so far as ascertainable"); CONN. GEN. STAT. § 45a-746 (West 1994 & Supp. 2000) (calling for compiling and disclosure "to the extent reasonably available"); IDAHO CODE ANN. § 16-1506(3) (2001) ("The investigative report shall include reasonably known or available medical and genetic information regarding both natural parents and sources of such information as well as reasonably known or available providers of medical care and services to the natural parents."); MICH. COMP. LAWS § 710.27 (Supp. 2001) (requiring compilation and disclosure of reasonably obtainable information); N.C. GEN. STAT. § 48-3-205 (1999) (requiring compilation and disclosure of reasonably available information); VT. STAT. ANN. tit. 15A, § 2-105 (Supp. 2000) (requiring disclosure of reasonably available information); WYO. STAT. ANN. § 1-22-116 (2001) (mandating disclosure "to the extent available").

of the child.<sup>128</sup> These states generally provide that the agency “shall compile” or “shall obtain” certain information without qualifying the extent of the effort to be used in gathering that information.<sup>129</sup>

In addition to limiting the duty to disclose, the Adoption Act also expressly limits the extent to which an agency can be held liable for its actions pursuant to the mandatory disclosure requirements.<sup>130</sup> Included in the sweeping reforms of the 1985 amendment,<sup>131</sup> Section 18.5 states that no agency can be held liable for acts or efforts made within the scope of the mandatory disclosure requirements of the Adoption Act.<sup>132</sup>

The mandatory disclosure rules, however, are not contained exclusively in the Adoption Act.<sup>133</sup> Section 18.4a of the Adoption Act also states that DCFS may promulgate rules and regulations governing the release of medical information and health histories.<sup>134</sup> However, the DCFS disclosure regulations add little information explaining what duty exists.<sup>135</sup> DCFS Rule 401.510 essentially repeats the requirements of Section 18.4a verbatim with one significant exception: Rule 401.510(g)(3)(E) does not limit required disclosures to information that is already in the possession of the agency.<sup>136</sup> Thus, Rule 401.510

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128. *See, e.g.*, ALA. CODE § 26-10A-19 (1995 & Supp. 2000) (mandating a pre-placement investigation which includes the medical history of the adoptee and birth parents); IOWA CODE ANN. § 600.8 (West 1996) (“A background information investigation and a report of the investigation shall be made by the agency”); ME. REV. STAT. ANN. tit. 18-A, § 9-304 (West 1992) (requiring that the agency “shall obtain medical and genetic information on the biological parents and the child”); MONT. CODE ANN. § 42-3-101 (1999) (“[A]gency shall provide prospective adoptive parents with social and medical histories of the birth families.”); OKLA. STAT. tit. 10, § 7504-1.1 (Supp. 2000) (requiring that the “child-placing agency shall compile a written medical and social history report of the minor to be adopted”); 23 PA. CONS. STAT. ANN. § 2533 (West 1991 & Supp. 2001) (requiring agency to obtain medical history or provide explanation for why history could not be obtained).

129. *See, e.g.*, ME. REV. STAT. ANN. tit. 18-A, § 9-304 (West 1992) (requiring that the agency “shall obtain medical and genetic information on the biological parents and the child”); MONT. CODE ANN. § 42-3-101 (1999) (“[A]gency shall provide prospective adoptive parents with social and medical histories of the birth families.”).

130. *See* 750 ILL. COMP. STAT. 50/18.5 (2006) (limiting liability for acts pursuant to certain provisions of the Adoption Act including the mandatory disclosure provisions in Sections 18.4 and 18.4a).

131. Pub. Act No. 83-1408, § 1 (effective Jan. 1, 1985) (current version codified at 750 ILL. COMP. STAT. 50/18.4 (2006)).

132. 750 ILL. COMP. STAT. 50/18.5 (2006).

133. *See* 750 ILL. COMP. STAT. 50/18.4a(b) (2006) (stating that DCFS may promulgate rules and regulations governing mandatory disclosure).

134. 750 ILL. COMP. STAT. 50/18.4a(b) (2006).

135. *See* ILL. ADMIN. CODE tit. 89, § 401.510(g)(3)(e)-(g)(4) (2006), available at [http://dcfswebresource.prairienet.org/rules/rules\\_401/](http://dcfswebresource.prairienet.org/rules/rules_401/) (copying statutory language of 750 ILL. COMP. STAT. 50/18.4-18.4a (2006)).

136. ILL. ADMIN. CODE tit. 89, § 410.510(g)(3)(e) (2006).

implies an affirmative duty to obtain medical and mental health histories before disclosure, while Section 18.4a appears to only mandate disclosure of information which the agency has already obtained.<sup>137</sup>

Recent amendments to the Illinois Child Care Act of 1969 (“Child Care Act”) are also relevant to the issue of an adoption agency’s duty to investigate and disclose medical and background information.<sup>138</sup> While many of the pertinent provisions of the statute concern more general issues of transparency in adoption proceedings, such as public disclosure of fees and policies,<sup>139</sup> Section 7.4(c) of the Child Care Act provides that every adoption agency must disclose “all circumstances material to the placement of a child for adoption.”<sup>140</sup> The provision then designates DCFS to implement rules for such disclosures.<sup>141</sup> However, the DCFS regulations repeat statutory language and, for the most part, do not impose any additional duties beyond those in the Child Care Act and the Adoption Act.<sup>142</sup>

Although Rule 401 may not fully describe the duties imposed by the Child Care Act and the Adoption Act, DCFS’s recently revised procedures for implementing Rule 401 (“the Procedures”) are considerably more definitive.<sup>143</sup> Rather than mirroring the passive

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137. Compare ILL. ADMIN. CODE tit. 89, § 410.510(g)(3)(e) (2006) (requiring that the agency shall provide medical and mental health history), with 750 ILL. COMP. STAT. 50/18.4a (2006) (requiring disclosure of information but only “to the extent currently in the possession of the agency”).

138. 225 ILL. COMP. STAT. 10/7.4 (2006).

139. Pub. Act No. 94–586, § 5, (effective Aug. 15, 2005) (current version codified at 225 ILL. COMP. STAT. 10/7.4(a) (2006)). The amendment requires that adoption agencies:

[S]hall provide to all prospective clients and to the public written disclosures with respect to its adoption services, policies, and practices, including general eligibility criteria, fees, and the mutual rights and responsibilities of clients, including biological parents and adoptive parents. The written disclosure shall be posted on any website maintained by the child welfare agency that relates to adoption services.

*Id.*

140. 225 ILL. COMP. STAT. 10/7.4(c) (2006). The Child Care Act includes more specific disclosure requirements for private agencies placing children in foster family homes. ILL. COMP. STAT. 10/7.4(c–5) (2006). Foster family homes do not include “adoption-only homes[.]” *Id.* “Adoption-only homes” are defined as those homes receiving children “whose parents’ parental rights have been terminated or surrendered for the purpose of adoption only.” 225 ILL. COMP. STAT. 10/2.23 (2006).

141. 225 ILL. COMP. STAT. 10/7.4(c) (2006).

142. See ILL. ADMIN. CODE tit. 89, § 401.510(a)–(f) (2006) (repeating and citing language of Child Care Act in 225 ILL. COMP. STAT. 10/7.4(a)–(c)); ILL. ADMIN. CODE tit. 89, § 401.510(g)(3)(E) (2006) (repeating language of the Adoption Act in 750 ILL. COMP. STAT. 50/18.4a (2006)); ILL. ADMIN. CODE tit. 89, § 401.510 (g)(4)(2006) (copying Adoption Act in 750 ILL. COMP. STAT. 50/18.4 (2006)).

143. See Rule 401 Procedures, *supra* note 108 (describing the procedural requirements for compliance with Rule 401). The Procedures are not included in the administrative code, but are

wording of the Adoption Act, the Procedures use affirmative language to characterize adoption agencies' duties to gather and disclose information.<sup>144</sup> The Procedures require that, before placement occurs, the agency must disclose its "documented *efforts to obtain* the child and birth parent's relevant medical and mental health information, regarding" the information defined in Sections 18.4 and 18.4a of the Adoption Act.<sup>145</sup>

The Procedures also require the agency to provide adoptive parents with a copy of a form describing their rights and responsibilities ("Adoptive Parent's Rights Form").<sup>146</sup> Adoptive parents must initial each page of the Adoptive Parent's Rights Form in the presence of a representative of the adoption agency, who also must sign the form.<sup>147</sup> These signatures indicate that the adoptive parents understand their rights and responsibilities, and that the agency has agreed to respect those rights.<sup>148</sup> Included in this list of rights is the right to receive, in writing, non-identifying information about the child and birth family, including thirteen specific categories of health and background information.<sup>149</sup> These categories include the specific required

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distributed to all private adoption agencies in Illinois. Interview with Christina M. Schneider, Special Assistant Gen. Counsel, Ill. Dep't of Child and Family Servs., in Chi., Ill. (Oct. 18, 2007) [hereinafter Interview with Christina M. Schneider].

144. See Rule 401 Procedures, *supra* note 108 (implying that adoption agencies are under an affirmative duty to gather information in order to satisfy adoptive parents' rights to that information).

145. *Id.* § 401.510(g)(3)(E).

146. *Id.* § 401.510(g)(3)(A).

147. *Id.* § 401.510(g)(3)(A).

148. Interview with Christina M. Schneider, *supra* note 143.

149. Adoptive Parent's Rights and Responsibilities in Illinois, Form 403-D, 2 (Sept. 2007), available at <http://www.state.il.us/DCFS/docs/CFS403d.pdf> [hereinafter Adoptive Parent's Rights and Responsibilities Form]. The Adoptive Parent's Rights Form states that parents have the right to receive:

- Drugs or medications taken by the child's biological mother during pregnancy;
- Date and birth place of the child; immunization records; and conditions or diseases known to be hereditary;
- Drugs or medications taken by the child's biological mother during pregnancy;
- Psychological and psychiatric information known about the child and birth family;
- Any other information that may be a factor influencing the child's present or future physical, mental or emotional health;
- Information on previous placements, if any, and reasons for placement changes, excluding identifying information on previous caregivers;
- Any known behavioral information about the child necessary to care for the child and other children in your home;
- Age, general physical appearance, ethnic background, race, religion, education, occupations, hobbies, interests and talents of each of the biological parents;
- Existence of any other children born to the biological parents;

disclosures enumerated in the Adoption Act,<sup>150</sup> but they also include certain information that agencies are currently only required to disclose in foster care placements.<sup>151</sup>

### *B. Court-Imposed Tort Duties in Wrongful Adoption Claims*

In addition to legislative mandates, Illinois courts also imposed duties on adoption agencies to use reasonable care in answering adoptive parents' questions concerning the health and background of adoptees and their birth families.<sup>152</sup> The courts created these duties by extending common law fraudulent and negligent misrepresentation causes of action to the adoption setting.<sup>153</sup> Illinois courts and federal courts applying Illinois law, however, have not characterized adoption agencies' duties uniformly.<sup>154</sup>

Like many courts across the country, early Illinois courts were reluctant to impose tort-based duties on adoption agencies.<sup>155</sup> In one of the earliest negligence cases against an adoption agency in Illinois, *Petrowsky v. Family Service of Decatur*, the Illinois Appellate Court, Fourth District, declined to recognize a negligence cause of action against the agency.<sup>156</sup> *Petrowsky* involved an adoption that was

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- Information about biological grandparents; reason for emigrating into the United States, if applicable, and country of origin;
  - Relationship between biological parents;
  - Detailed medical and mental health histories of the child, the biological parents, and members of their immediate families;
  - In the case of emergency placements, known information may be provided verbally, but subsequently must be provided in writing;
  - Information learned by the agency between the time of placement and the time of the adoption finalization as it is acquired.

*Id.*

150. 750 ILL. COMP. STAT. 50/18.4–18.4a (2006).

151. The Adoptive Parent's Rights and Responsibilities Form mandates disclosure of the information listed in 225 ILL. COMP. STAT. 10/7.4 (c–5) including immunization records, information on previous placements, educational history, and any "known behavioral information about the child necessary to care for the child and other children in your home . . ." Adoptive Parent's Rights and Responsibilities Form, *supra* note 149 at 2; *see also supra* note 140 and accompanying text (discussing 225 ILL. COMP. STAT. 10/7.4(c–5) (2006)).

152. *Roe v. Jewish Children's Bureau of Chi.*, 790 N.E.2d 882, 896 (Ill. App. Ct. 2003); *Roe v. Catholic Charities of the Diocese of Springfield*, 588 N.E.2d 354, 365 (Ill. App. Ct. 1992).

153. *Catholic Charities*, 588 N.E.2d at 365.

154. *See infra* Part III.B (discussing Illinois courts characterizations of adoption agencies' duty).

155. *See Petrowsky v. Family Service of Decatur*, 518 N.E.2d 664, 666 (Ill. App. Ct. 1987) (declining to impose a duty of reasonable care on the adoption agency).

156. *See id.* at 666 ("[W]e . . . find no precedent or policy compelling us to recognize the tort of adoption agency malpractice.").

interrupted when the birth mother provided conflicting information regarding the child's biological father.<sup>157</sup> The adoptive parents succeeded in finalizing the adoption, but alleged that the agency breached a duty to them by failing to properly investigate and document the child's paternity.<sup>158</sup> The court ultimately declined to impose a common law duty on the agency and held that "no precedent or policy compel[led it] to recognize the tort of adoption agency malpractice."<sup>159</sup>

Five years later, however, the Illinois Appellate Court, Fifth District, expressly rejected the fourth district's line of reasoning in *Petrowsky*, and became the first Illinois court to recognize wrongful adoption causes of action.<sup>160</sup> In *Roe v. Catholic Charities of the Diocese of Springfield* ("*Catholic Charities*"), three sets of prospective adoptive parents clearly communicated to the agency that they would only consider adopting a physically and mentally healthy child.<sup>161</sup> Each couple also requested that the agency provide all available information regarding their child's background.<sup>162</sup> The agency assured the adoptive couples that their child was in normal physical and mental condition and "only needed lots of love."<sup>163</sup> At the time it made these statements, however, the agency had information that each of the three children displayed severe mental, emotional, and behavioral problems.<sup>164</sup> After the adoption, the children continued to exhibit acute behavioral

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157. *Id.* at 665. The birth mother "changed her original story regarding the child's biological father and her former husband recanted his prior denial of paternity." *Id.*

158. *Id.* at 665-67.

159. *Id.* at 666. The court cited *Martino v. Family Service Agency of Adams County*, 445 N.E.2d 6 (Ill. App. Ct. 1983), with favor. *Id.* In *Martino*, the fourth district declined to recognize the tort of social worker malpractice when the defendant social worker seduced a marriage counseling patient. *Martino*, 445 N.E.2d at 7-8. The *Martino* court held that "[i]n the absence of Illinois precedent we find no compelling policy reason to initiate the recognition of the tort of social worker malpractice for unintended 'hurts' most of which we deem likely to be 'slight hurts which are the price of a complex society.'" *Id.* at 9.

160. *Roe v. Catholic Charities of the Diocese of Springfield, Ill.*, 588 N.E.2d 354, 359 (Ill. App. Ct. 1992).

161. *Id.* at 356.

162. *Id.*

163. *Id.* Agents of the agency indicated that each child had the physical and mental development of a child of similar age and that the adoptive parents would not incur unusual expenses in treating them. *Id.*

164. *Id.* At the time the agency made the assurances, it knew that one of the children had seen several psychiatrists and "mental health professionals for violent and uncontrollable behavior as well as intellectual, social and emotional retardation." *Id.* The agency knew that the second child had displayed several "instances of abnormal behavior such as smearing feces on the interior walls of past foster homes." *Id.* The agency also knew that the third child received counseling for emotional and social retardation and had displayed destructive behavior in past foster homes including stomping the foster family's dog to death. *Id.*

problems for which the adoptive parents incurred “extraordinary expenses” in treating.<sup>165</sup>

The *Catholic Charities* court held that adoption agencies could be liable for fraudulent and negligent misrepresentation in Illinois.<sup>166</sup> The court expressly rejected the argument that adoptions are statutory in nature and, thus, not subject to common law causes of action.<sup>167</sup> The court reasoned that, while statutes control some aspects of adoption such as who can and cannot adopt, an adoption agency can be sued for a common law tort in the same way a corporation or manufacturer, also creatures of statute, can be sued.<sup>168</sup> The *Catholic Charities* court held that because only the agency has access to the adoptees’ familial and medical history, public policy compels placing the burden of disclosing that information on the agency.<sup>169</sup> While the court imposed a new common law duty on adoption agencies, it framed that duty narrowly, requiring only that agencies make statements that are true to the best of the agency’s knowledge.<sup>170</sup> Notably, the court chose not to impose any duty to investigate a child’s history or to investigate the veracity of statements made by birth parents.<sup>171</sup> In limiting the duty, the court explained, “[a]gencies are not the guarantors of the future health and happiness of adoptive children . . . . Neither are agencies guarantors of the truthfulness of the natural parent’s statement of background.”<sup>172</sup>

In 2002 the U.S. District Court for the Northern District of Illinois became the next Illinois court to consider novel wrongful adoption causes of action in *Dahlin v. Evangelical Child and Family Agency*.<sup>173</sup>

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165. *Id.* After the adoption, “[o]ne child cut the whiskers off the family cat and flattened his mother’s tires. Another child painted a neighbor’s house and exposed himself to neighbors. The other child had severe episodes of violent behavior requiring the aid of professional counseling” and was institutionalized by the time his adoptive parents brought the suit. *Id.*

166. *See id.* at 365–66 (remanding for further proceedings on fraud and negligence counts).

167. *Id.* at 359.

168. *Id.*

169. *See id.* at 365 (“The consequence of placing that burden on [the agency] is [that the agency] discloses what information it has in response to an adopting parent’s inquiry, so that adoptive parents assume the awesome responsibility of raising a child with their eyes wide open.”).

170. *See id.* (“We find specifically that a duty was owed to plaintiffs by defendant, in this particular instance the duty of an honest and complete response to plaintiffs’ specific request concerning the characteristics of the potentially adoptable child . . . .”).

171. *See id.* at 361 (“[T]he fourth district appellate court remanded two counts but declined to impose an additional contractual duty to investigate . . . . By our decision today, we do not impose such a duty either.”).

172. *Id.* at 360.

173. *Dahlin v. Evangelical Child & Family Agency*, No. 01C1182, 2001 WL 840347, at \*1 (N.D. Ill. July 24, 2001) (applying Illinois law), *corrected by* *Dahlin v. Evangelical Child & Family Agency*, 252 F. Supp. 2d 666 (N.D. Ill. 2002) (applying Illinois law).

In *Dahlin*, the adoptive parents alleged that the agency disclosed encouraging information about the birth mother,<sup>174</sup> but neglected to disclose negative information, such as a family history of suicide and sexual abuse.<sup>175</sup> In addition to the wrongful adoption causes of action for fraudulent and negligent misrepresentation recognized in *Catholic Charities*, the adoptive parents filed separate counts for violation of the mandatory disclosure provisions of the Adoption Act<sup>176</sup> and for breach of fiduciary duty.<sup>177</sup>

The court first considered and dismissed the adoptive parents' claim with respect to the mandatory disclosure provisions of the Adoption Act.<sup>178</sup> Applying the Illinois Supreme Court's test for an implied statutory cause of action,<sup>179</sup> the court held that the adoptive parents could not meet the fourth prong of the test: that the implied cause of action "is necessary to provide an adequate remedy for violations of the statute."<sup>180</sup> The court reasoned that the plaintiffs already had appropriate common law remedies in fraud and negligence, and dismissed the implied statutory count for failure to state a claim on which relief can be granted.<sup>181</sup>

The *Dahlin* court, however, allowed the plaintiffs' novel breach of fiduciary duty claim to survive beyond the 12(b)(6) stage.<sup>182</sup> The

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174. This flattering information included that the birth mother was a talented pianist and had an interest in linguistics. *Dahlin*, 2001 WL 840347 at \*1 (applying Illinois law).

175. *Id.*

176. *See id.* at \*1-3 (considering the implied statutory cause of action).

177. *See Dahlin*, 252 F. Supp. 2d at 668 (applying Illinois law and outlining the causes of action alleged in the complaint).

178. *See Dahlin*, 2001 WL 840347 at \*1-4 (applying Illinois law and examining and dismissing the implied statutory cause of action).

179. In order for a statute to imply a cause of action, the court must find:

- (1) the plaintiff is a member of the class for whose benefit the statute was enacted; (2) the plaintiff's injury is one the statute was designed to prevent; (3) a private right of action is consistent with the underlying purpose of the statute; (4) implying a private right of action is necessary to provide an adequate remedy for violations of the statute.

*Id.* at \*2.

180. *See id.* (concluding that the plaintiffs "flounder on the fourth element: they have an adequate, alternative remedy").

181. *See id.* at \*2-3 (concluding that recognized wrongful adoption causes of action were adequate to protect the plaintiffs' interests and dismissing the complaint).

182. *Dahlin v. Evangelical Child & Family Agency*, 252 F. Supp. 2d 666, 669 (N.D. Ill. 2002) (applying Illinois law and holding that the breach of fiduciary duty claim "cannot . . . be determined on a motion to dismiss pursuant to Rule 12(b)(6)"). Rule 12(b)(6) allows a court to dismiss a complaint for failing to state a claim on which relief can be granted. FED. R. CIV. P. 12(b)(6). "[T]o state claim for breach of fiduciary duty, it must be alleged that a fiduciary duty exists, that the fiduciary duty was breached, and that such breach proximately caused the injury of which the plaintiff complains." *Neade v. Portes*, 739 N.E.2d 496, 502 (Ill. 2000). The *Dahlin*

adoptive parents alleged that, due to the agency's superior access to information and the trust which they placed in it, the agency owed them a fiduciary duty.<sup>183</sup> The court reasoned that a fiduciary duty would impose broader liability on the agency than a negligence standard, and it concluded that the breach of fiduciary duty claim was not a mere duplicate of a negligence cause of action as defined by *Catholic Charities*.<sup>184</sup> Whereas the *Catholic Charities* court imposed a duty to give an "honest and complete response" to adoptive parents' inquiries, the *Dahlin* court contemplated that a fiduciary relationship would entail a duty to disclose even in the absence of a request.<sup>185</sup>

Although the *Dahlin* court believed that the *Catholic Charities* court implicitly rejected the imposition of a heightened fiduciary duty, it recognized that the controlling inquiry was what the Illinois Supreme Court would do if faced with the issue, not what the Illinois Appellate Court, Fifth District, in *Catholic Charities* would do.<sup>186</sup> Ultimately, the court concluded that, although it was unlikely that plaintiffs could establish by clear and convincing evidence that a fiduciary relationship existed, dismissal was inappropriate at the 12(b)(6) stage.<sup>187</sup>

The next major Illinois wrongful adoption decision occurred in 2003 in a case factually similar to *Catholic Charities* and *Dahlin*.<sup>188</sup> In *Roe v. Jewish Children's Bureau of Chicago* ("*Jewish Children's Bureau*"), the Illinois Appellate Court, First District, further elaborated the

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court examined the first element, the existence of a fiduciary duty. *Dahlin*, 252 F. Supp. 2d at 669.

183. *Dahlin*, 252 F. Supp. 2d at 669.

184. *See id.* at 668–69 (considering whether Illinois law would recognize a cause of action for breach of fiduciary duty).

185. *Id.*

186. *Id.* at 669. The *Dahlin* court believed that the *Catholic Charities* court limited adoption agencies' duty to an "honest and complete answer" in an effort to define a duty that was not "unreasonable or unduly onerous." *Id.*

187. *Id.* A fiduciary relationship can be found as a matter of law, such as an attorney-client relationship. *Id.* A fiduciary relationship can also be "based on the facts of a particular situation, such as a relationship where confidence and trust is reposed on one side, resulting in dominance and influence on the other side." *Id.* Illinois law requires clear and convincing evidence to establish the existence of a specific fiduciary relationship. *Id.* Although the court believed it was unlikely that the plaintiffs could meet the burden of clear and convincing evidence, it held that they properly pled facts to establish the existence of such a relationship. *Id.* The *Dahlin* case never produced a published opinion after the 12(b)(6) ruling.

188. *See Roe v. Jewish Children's Bureau of Chi.*, 790 N.E.2d 882, 887–88 (Ill. App. Ct. 2003) (describing the background of the suit). The adoptive parents told the agency that they only wanted to adopt a child whose parents were "normal" and who did not have a "history of psychiatric problems." *Id.* at 887. The agency told the plaintiff that the birth mother had no health problems while possessing information that she "had a history of emotional problems including psychiatric hospitalization." *Id.*

traditional wrongful adoption claims of fraudulent and negligent misrepresentation.<sup>189</sup> The court outlined the elements of a cause of action for negligent misrepresentation,<sup>190</sup> noting that it differs from fraudulent misrepresentation only in the mental state required.<sup>191</sup> Fraudulent misrepresentation requires that the defendant know the statement is false, whereas a claim of negligent misrepresentation requires the plaintiff to establish that the defendant was negligent in ascertaining the truth.<sup>192</sup> Perhaps in response to the *Dahlin* court's intimations that a fiduciary duty could require an adoption agency to disclose information absent an inquiry from the adoptive parents,<sup>193</sup> the *Jewish Children's Bureau* court held that adoptive parents must prove they asked a question that rational parents would consider relevant to gauging the risks of future mental health or physical illness.<sup>194</sup> They must further show that, but for the adoption agency's false statement regarding that risk, they would not have adopted the child.<sup>195</sup>

In sum, adoption agencies have at least six sources defining their duty to investigate and disclose information to adoptive parents: (1) section 18.4 of the Adoption Act mandates disclosure of a detailed medical and mental health history, if known;<sup>196</sup> (2) section 18.4a expands the requirements of Section 18.4;<sup>197</sup> (3) the Child Welfare Act requires full disclosure of "all circumstances material to the placement of the child for adoption;"<sup>198</sup> (4) DCFS Regulations use several phrases to describe agencies' duty to disclose;<sup>199</sup> (5) the Procedures require not only

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189. *Id.* at 893.

190. The elements are:

(1) a false statement of material fact; (2) carelessness or negligence in ascertaining the truth of the statement by the party making it; (3) an intention to induce the other party to act; (4) action by the other party in reliance on the truth of the statement; (5) damage to the other party resulting from such reliance; and (6) when the party making the statement is under a duty to communicate accurate information.

*Id.*

191. *Id.*

192. *Id.* Negligent misrepresentation is generally easier to prove because the adoptive parents do not have to prove that the agency intentionally lied. *See* Emmaneel, *supra* note 48, at 191–92 (describing court movement toward accepting negligent misrepresentation claims).

193. *See* *Dahlin v. Evangelical Child & Family Agency*, 252 F. Supp. 2d 666, 668–69 (N.D. Ill. 2002) (applying Illinois law and noting that "a fiduciary duty typically entails a duty of disclosure of material information even in the absence of a request").

194. *Jewish Children's Bureau of Chicago*, 790 N.E.2d. at 895.

195. *Id.*

196. 750 ILL. COMP. STAT. 50/18.4 (2006).

197. 750 ILL. COMP. STAT. 50/18.4a (2006).

198. 225 ILL. COMP. STAT. 10/7.4 (2006).

199. ILL. ADMIN. CODE tit. 89, § 410.510.

disclosure, but also efforts to obtain certain information before placement;<sup>200</sup> and (6) *Catholic Charities* defines agencies' duties as an honest and complete response to adoptive parents' questions based on information the agency possessed and had available.<sup>201</sup>

The legislature and DCFS have consistently expanded the agencies' duties since they enacted the first Illinois mandatory disclosure statute in 1985.<sup>202</sup> While the early statutes limited disclosure to information in the possession of the agency,<sup>203</sup> the recent Procedures appear to affirmatively require efforts to obtain<sup>204</sup> a broad array of information.<sup>205</sup> Accordingly, the Procedures appear more like the affirmative mandatory disclosure statutes of other jurisdictions which require that agencies "shall compile" or "shall obtain" certain health and background information.<sup>206</sup>

Notwithstanding these changes, the passive language of the Illinois Adoption Act limiting disclosure to information already in the possession of the agency has not been repealed or amended.<sup>207</sup> Moreover, the duty imposed by the seminal *Catholic Charities* decision reflects the limited requirement of Section 18.4a of the Adoption Act.<sup>208</sup> Ultimately, such ambiguity and inconsistency can have harmful effects in adoption proceedings.<sup>209</sup>

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200. Rule 401 Procedures, *supra* note 108, § 401.510(g)(3)(A).

201. *Roe v. Catholic Charities of the Diocese of Springfield, Ill.*, 588 N.E.2d 354, 365 (Ill. App. Ct. 1992).

202. Compare 750 ILL. COMP. STAT. 50/18.4 (2006) (mandating disclosure of a detailed medical and mental health history, if known), and 750 ILL. COMP. STAT. 50/18.4a (2006) (mandating disclosure of information within the agency's possession), with Rule 401 Procedures, *supra* note 108, § 401.510(g)(3)(A) (requiring not only disclosure but also efforts to obtain certain information before placement).

203. 750 ILL. COMP. STAT. 50/18.4a (2006).

204. See Rule 401 Procedures, *supra* note 108, § 401.510(g)(3)(A) (requiring disclosure and efforts to obtain certain information).

205. See Adoptive Parent's Rights and Responsibilities Form, *supra* note 149, at 2 (mandating written disclosure of extensive health and background information including immunization records, conditions or diseases believed to be hereditary, and any known behavioral problems).

206. See *supra* note 129 (listing statutes that require agencies to independently investigate and obtain information before disclosure).

207. 750 ILL. COMP. STAT. 50/18.4a (2006).

208. Compare 750 ILL. COMP. STAT. 50/18.4a (2006) (limiting duty to disclose to information currently in the possession of the agency), with *Roe v. Catholic Charities of the Diocese of Springfield, Ill.*, 588 N.E.2d 354, 365 (describing agencies' duty only as that of a response to adoptive parents' questions based on the information which the agency possessed and had available).

209. See *infra* Part IV (discussing problems with the inconsistent statutes and unpredictable nature of liability).

## IV. ANALYSIS

Because of the many sources discussing and defining adoption agencies' duties to obtain and disclose health and background information, it is currently uncertain which operative language governs adoption agencies' duties.<sup>210</sup> While it is apparent that adoption agencies have a duty to disclose information in their possession, it remains unclear whether and to what extent agencies are under an affirmative duty to independently investigate, inquire, and obtain the information that they must disclose.<sup>211</sup> It also remains unclear whether agencies can be held liable under Illinois tort law for failure to perform such an investigation.<sup>212</sup> Accordingly, it is uncertain whether the adoptive parents who brought the allegations listed in Part I would prevail if their cases were decided on the merits.<sup>213</sup>

Part IV analyzes the several statutes and administrative provisions governing adoption agencies' duty to investigate and disclose health and background information.<sup>214</sup> This Part asserts that several of the provisions are in conflict.<sup>215</sup> It then avers that the Procedures, once published, will remedy many of these conflicting and inadequate provisions.<sup>216</sup> Next, the Analysis turns to the Illinois courts' and federal courts' application of Illinois law in decisions that affect adoption agencies duties.<sup>217</sup> Part IV contends that an Illinois court's decision whether to impose a duty to investigate will depend on which statute or administrative provision the court chooses to apply.<sup>218</sup> This Part asserts that, although no court has affirmatively held that an agency has a duty to investigate, a future Illinois court could impose liability for negligent failure to investigate under current Illinois law.<sup>219</sup> Lastly, Part IV

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210. See *infra* Part IV.A (analyzing inconsistencies among mandatory disclosure statutes).

211. See *infra* Part IV (discussing statutory and tort duty to investigate).

212. See *infra* Part IV.B (predicting possible outcomes of claims for failure to investigate).

213. See *supra* Part I (listing negligence allegations against Illinois adoption agencies for failure to investigate).

214. See *infra* Part IV.A (describing inconsistencies among statutory and administrative provisions).

215. See *infra* Part IV.A (discussing the incompatible differences between statutory and administrative provisions).

216. See *infra* Part IV.A (examining Rule 401 and the Procedures relationship to the statutes).

217. See *infra* Part IV.B (discussing wrongful adoption holdings).

218. See *infra* Part IV.B (predicting the likely outcome of an Illinois court's decision on a claim for negligent failure to investigate).

219. See *infra* Part IV.B.1 (predicting that an Illinois court could hold an agency liable for failure to investigate).

contends that an Illinois court could also impose a duty to investigate through a breach of fiduciary duty cause of action.<sup>220</sup>

*A. Conflicting Statutory and Administrative Duties to Obtain Information*

Several statutory provisions speak to private adoption agencies' duty to disclose health and background information in non-foster care placements.<sup>221</sup> DCFS Rule 401.510 and the Procedures then repeat,<sup>222</sup> supplement,<sup>223</sup> and modify<sup>224</sup> these requirements,<sup>225</sup> some of which appear to be at odds with their statutory counterparts.<sup>226</sup> While it is certain that adoption agencies have a duty to disclose adoptees' pertinent medical and background information, it is unclear which statutory or administrative provision governs that duty.<sup>227</sup>

For example, Section 18.4a of the Adoption Act limits mandatory medical and mental health history disclosures to information that the agency already possesses.<sup>228</sup> DCFS Rule 401.510(g)(3)(E), however, appears to expand an agency's duty by calling for disclosure of the same information listed in Section 18.4a, but without limiting disclosure to information within the agency's possession.<sup>229</sup> Because DCFS routinely copied statutory language verbatim in its disclosure

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220. See *infra* Part IV.B.2 (predicting that an Illinois court could recognize a cause of action for breach of fiduciary duty to investigate).

221. Those provisions are 225 ILL. COMP. STAT. 10/7.4(c) (2006), 750 ILL. COMP. STAT. 50/18.4 (2006), and 750 ILL. COMP. STAT. 50/18.4a (2006).

222. See ILL. ADMIN. CODE tit. 89, § 401.510(d)–(f) (reciting statutory language).

223. See ILL. ADMIN. CODE tit. 89, § 401.510(g)(3)(D) (implementing a required disclosure not found in the Adoption Act or Child Care Act).

224. See ILL. ADMIN. CODE tit. 89, § 401.510(g)(3)(E) (copying language of Section 18.4a of the Adoption Act, but removing the phrase “to the extent currently in possession of the agency”).

225. See ILL. ADMIN. CODE tit. 89, § 401.510 (implementing the provisions of the Child Care Act and Adoption Act).

226. Compare 750 ILL. COMP. STAT. 50/18.4a (2006) (mandating disclosure of medical and mental health information in the agency's possession), with ILL. ADMIN. CODE tit. 89, § 401.510(g)(3)(E) (mandating disclosure of the same information, but not limiting the requirement to information in the agency's possession), and Rule 401 Procedures, *supra* note 108, § 401.510(g)(3)(E) (providing that agencies must make efforts and document efforts to obtain the information listed in Section 18.4a of the Adoption Act).

227. See 225 ILL. COMP. STAT. 10/7.4(c) (2006) (requiring full and fair disclosure of “all circumstances material to the placement of the child for adoption”); 750 ILL. COMP. STAT. 50/18.4 (2006) (mandating disclosure of a detailed medical and mental health history, if known); ILL. ADMIN. CODE tit. 89, § 401.510 (using several phrases to describe an agencies' duty to disclose).

228. 750 ILL. COMP. STAT. 50/18.4a (2006).

229. Compare 750 ILL. COMP. STAT. 50/18.4a (2006) (mandating disclosure of known medical and mental health information), with ILL. ADMIN. CODE tit. 89, § 401.510(g)(3)(E) (mandating disclosure of the same information with no limitation as to possession).

regulations, this provision appears to intentionally omit the limiting language of Section 18.4a.<sup>230</sup> Thus, the DCFS regulations appear to create a broader duty than the legislation they were drafted to promulgate.<sup>231</sup>

Moreover, adoption agencies arguably have a mandate in Section 7.4(c) of the Child Care Act that subsumes the Adoption Act.<sup>232</sup> Requiring full disclosure of *all circumstances* material to the placement of a child for adoption, Section 7.4(c) and its counterpart, Rule 401.510(f), appear to call for much broader disclosure than the limited and enumerated requirements of the Adoption Act.<sup>233</sup> While it is uncertain whether the legislature intended Section 7.4(c) to encompass the mandatory disclosure provisions of the Adoption Act,<sup>234</sup> it seems clear that Section 7.4(c) calls for broader disclosure than the Adoption Act.<sup>235</sup>

Regardless of which statutory language governs agencies' duties, both the Adoption Act and the Child Care Act have their own individual

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230. Compare ILL. ADMIN. CODE tit. 89, § 401.510(d)–(f) (copying and citing statutory language of Adoption Act and Child Care Act), and ILL. ADMIN. CODE tit. 89, § 401.510(g)(2) (repeating disclosure requirements of Section 18.4 of the Adoption Act), with ILL. ADMIN. CODE tit. 89, § 401.510(g)(3)(E) (copying language of Section 18.4a of the Adoption Act, but removing the phrase “to the extent currently in possession of the agency”).

231. Compare 750 ILL. COMP. STAT. 50/18.4a (2006) (mandating disclosure of medical and mental health information in the agency's possession and designating DCFS to create rules and regulations promulgating such mandated disclosures), with ILL. ADMIN. CODE tit. 89, § 401.510(g)(3)(E) (mandating disclosure of the same information mentioned in the Adoption Act, but not limiting the requirement to information in the agency's possession).

232. See 225 ILL. COMP. STAT. 10/7.4(c) (2006) (mandating disclosure of “all circumstances material to the placement of child for adoption”).

233. Compare 225 ILL. COMP. STAT. 10/7.4(c) (2006) (mandating disclosure of material circumstances), with 750 ILL. COMP. STAT. 50/18.4 (2006) (enumerating certain required disclosures), and 750 ILL. COMP. STAT. 50/18.4a (2006) (limiting disclosure to information already in the possession of the agency and enumerating information to be contained in medical and mental health histories).

234. See, e.g., 94TH GEN. ASSEMBLY, HOUSE TRANSCRIPTION DEBATE 29–39 (Ill. Apr. 14, 2005) (Statement of Rep. Feigenholtz) (discussing the many purposes and provisions of the amendment that implemented Section 7.4(c) without mentioning medical and mental health disclosures or the Adoption Act). Significant changes in the amendment include: establishing a complaint registry, barring out-of-state agencies from advertising in Illinois, and requiring that all agencies become registered not-for-profit organizations. *Id.* The legislature intended the amendment to provide transparency, accountability and structure for adoption agencies. 94TH GEN. ASSEMBLY, HOUSE TRANSCRIPTION DEBATE 38 (Ill. Apr. 14, 2005) (Statement of Rep. Lindner).

235. Compare 225 ILL. COMP. STAT. 10/7.4(c) (2006) (mandating disclosure to adoptive parents and birth parents of all circumstances material to placement), with 750 ILL. COMP. STAT. 50/18.4–18.4a (2006) (calling for disclosure only to adoptive parents of certain types of information within the agencies' possession).

flaws.<sup>236</sup> Agencies abiding by the Adoption Act's limited mandate to disclose information in their possession might deliberately refrain from gathering certain information that would make placement difficult.<sup>237</sup> Some agencies believe that they can avoid liability by willfully neglecting to obtain negative information about adoptees.<sup>238</sup> These agencies reason that the less they know about the child's health and background, the less likely they will be held responsible for any future problems the child develops.<sup>239</sup> Agencies that purposely decline to gather unattractive facts about the adoptee could deprive the adoptive parents of the vital information that was the impetus for the mandatory disclosure statutes and wrongful adoption cases thirty years ago.<sup>240</sup> These agencies, nevertheless, would not be in violation of the Adoption Act because they never possessed the information, and therefore did not violate a duty to disclose it.<sup>241</sup>

On the other hand, the language of the Child Care Act is perhaps too expansive.<sup>242</sup> Section 7.4(c) leaves the critical decision of what information is "material" to the discretion of the individual caseworker at the agency.<sup>243</sup> The scope of this discretion is overly broad, and caseworkers need more explicit guidance on the type of information that should be collected and disclosed.<sup>244</sup> To address this issue, many other

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236. 225 ILL. COMP. STAT. 10/7.4(c) (2006); 750 ILL. COMP. STAT. 50/18.4–18.4a (2006); *cf.* Bebensee, *supra* note 69, at 405 (detailing the problems of open-ended and ambiguous mandatory disclosure statutes); *When Love is Not Enough*, *supra* note 78, at 1765 (calling mandatory disclosure statutes "plagued with ambiguity").

237. Telephone Interview with Marianne Blair, Professor, University of Tulsa College of Law, in Chi., Ill. (Sept. 19, 2007) (on file with author) [hereinafter Interview with Marianne Blair]; *see also* Dickson, *supra* note 24, at 951–52 (discussing similar problems with a California statute).

238. Interview with Marianne Blair, *supra* note 237; *see also* *When Love is Not Enough*, *supra* note 78 at 1773 (asserting that imposing a duty to disclose without imposing a duty to investigate creates a "perverse incentive structure: the less agencies know about the adoptees, the less likely agencies will be found guilty of any wrongdoing").

239. *When Love is Not Enough*, *supra* note 78, at 1773.

240. Interview with Marianne Blair, *supra* note 237.

241. *See* 750 ILL. COMP. STAT. 50/18.4–18.4a (2006) (mandating disclosure of "known" information or information within the possession of the agency); *see also* Dickson, *supra* note 24, at 951–52 ("A caseworker who suspects a particular problem may make little effort to ask the right questions or seek the right file, thereby making placement easier while still remaining within the bounds of the law.").

242. 225 ILL. COMP. STAT. 10/7.4(c) (2006) (calling for disclosure of "all circumstances material to the placement of a child").

243. *Id.*

244. *See* Bebensee, *supra* note 69, at 405 (discussing preference for the specific requirements of the Oregon statute over the ambiguity of the Pennsylvania statute because the Pennsylvania statute "allows the case worker to decide whether the particular information must be disclosed and fails to provide any substantial guidance in making this decision"); Dickson, *supra* note 24, at

states call for disclosure of specific classes of information in lieu of such broad and ambiguous language.<sup>245</sup> The Oklahoma statute, for example, lists more than thirty distinct categories of information that must be disclosed, and requires that the agency use reasonable efforts to obtain that information.<sup>246</sup>

Rule 401 and the recently drafted Procedures address some of the problems in the Adoption Act and Child Care Act.<sup>247</sup> The Procedures dissuade agencies from willfully neglecting to gather health information by requiring agencies to document their efforts to obtain the information required in Section 18.4a.<sup>248</sup> Moreover, adoptive parents have a right to receive, in writing, extensive health and background information from the agency.<sup>249</sup> Because the Procedures require agencies to document their efforts to obtain information, it will be more difficult to neglect to gather negative but crucial health information.<sup>250</sup>

Rule 401 and the Procedures also rectify the ambiguity of the Child Care Act.<sup>251</sup> Whereas the Child Care Act required broad and ambiguous disclosure of all circumstances material to the placement of a child for adoption, the Adoptive Parent's Rights Form provides a thirteen-point list of specific health and background information that adoptive parents

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953 (noting a lack of "specificity and clarity" in disclosure statutes and regulations); Katherine T. Land, *Whose Baby Are You Adopting? A Critique of Massachusetts Adoption Laws*, 2 SUFFOLK J. TRIAL & APP. ADVOC. 1, 15–16 (1997) (faulting the Massachusetts statute for its "permissive and ambiguous wording" and stating that exact disclosure requirements would benefit the adoptive parents).

245. See, e.g., CAL. FAM. CODE § 8706 (West 2004) ("The report on the child's background shall contain all known diagnostic information, including current medical reports on the child, psychological evaluations, and scholastic information, as well as all known information regarding the child's developmental history and family life."); CONN. GEN. STAT. § 45a–746 (West 1994 & Supp. 2000) (enumerating detailed disclosure requirements); ME. REV. STAT. ANN. tit. 18–A, § 9–304(b) (1992) (requiring the adoption agency to obtain specific information such as an account of prenatal care, immunization records, and records of drugs and prescriptions taken by the birth mother); TEX. FAM. CODE ANN. § 162.005 (Vernon 2002) (requiring disclosure of a history of abuse in addition to medical, psychological, and psychiatric information).

246. OKLA. STAT. tit. 10, § 7504–1.1 (Supp. 2000).

247. See ILL. ADMIN. CODE tit. 89, § 401.510 (providing regulations that govern the statutory duties in the Child Care Act and Adoption Act); Rule 401 Procedures, *supra* note 108, § 401.510 (providing procedures to implement the statutory requirements of the Child Care Act and Adoption Act).

248. See Rule 401 Procedures, *supra* note 108, § 401.510(g)(3)(E) (mandating agencies document their efforts to obtain information).

249. *Id.*

250. See *id.* (requiring release of documented efforts to obtain information).

251. See ILL. ADMIN. CODE tit. 89, § 401.510 (regulating the statutory duties in the Child Care Act and Adoption Acts); Rule 401 Procedures, *supra* note 108, § 401.510 (providing implementation procedures for the Child Care Act and Adoption Act statutory requirements).

are entitled to receive from the agency.<sup>252</sup> This list resolves the ambiguity of Section 7.4(c) of the Child Care Act by providing direction and guidance for caseworkers on the type of information that they should collect.<sup>253</sup>

### B. Tort Duty to Investigate

Commentators have argued that, in addition to statutory duties to investigate, courts should impose a common law duty on agencies to use reasonable efforts to investigate health and background information, and that agencies should be liable for their negligent failure to do so.<sup>254</sup> Courts, however, are wary of making adoption agencies the guarantors of the health and wellbeing of adopted children,<sup>255</sup> and there are practical limitations to imposing such a duty.<sup>256</sup> One of the most prominent barriers is the risk of invading birth parents' privacy rights.<sup>257</sup> Birth mothers may not want the agency to investigate sensitive subjects such as a history of drug use or the child's paternity.<sup>258</sup> If they believe that they will be subject to an invasive background search, birth mothers may be less likely to consider adoption.<sup>259</sup> Moreover, some agencies may simply lack the financial or labor resources to perform an adequate investigation.<sup>260</sup>

Because defining the duty to investigate can be one of the most problematic aspects of wrongful adoption torts,<sup>261</sup> no court in any jurisdiction, including Illinois, has held an agency liable for failure to investigate alone.<sup>262</sup> Nevertheless, Illinois courts have left the door

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252. See Adoptive Parent's Rights and Responsibilities Form, *supra* note 149, at 2 (including a bulleted list of information to which adoptive parents are entitled).

253. See *id.* (providing examples of important information to guide caseworkers).

254. E.g., *Getting the Whole Truth*, *supra* note 26, at 948–50 (weighing the burden and benefit of imposing a duty to investigate); *When Love is Not Enough*, *supra* note 78, at 1773–75.

255. *Roe v. Catholic Charities of the Diocese of Springfield*, 588 N.E.2d 354, 360 (Ill. App. Ct. 1992).

256. See FREUNDLICH & PETERSON, *supra* note 69, at 39–42 (providing case examples illustrative of the difficulty of defining a duty to investigate); Shultz, *supra* note 103, at 1087–88 (describing the “social and pragmatic barriers” to the imposition of a duty to investigate).

257. See FREUNDLICH & PETERSON, *supra* note 69, at 39–42 (illustrating the ways in which privacy rights and health and background investigations could clash).

258. Interview with Christina M. Schneider, *supra* note 143.

259. See FREUNDLICH & PETERSON, *supra* note 69, at 42 (“Birth parents may find such an investigative approach so discomfoting—particularly when added to the stresses and complexities inherent in the relinquishment decision—that adoption becomes an even more rarely considered alternative than is currently the case.”).

260. Shultz, *supra* note 103, at 1088.

261. *Getting the Whole Truth*, *supra* note 26, at 948.

262. Interview with Marianne Blair, *supra* note 237.

open for the imposition of such liability through an extension of a wrongful adoption negligence cause of action or through a breach of fiduciary duty claim.<sup>263</sup>

### 1. Extending Wrongful Adoption Negligence to Include Failure to Investigate

To date, *Petrowsky* is the only Illinois court to consider imposing liability for failure to investigate.<sup>264</sup> While the *Petrowsky* court expressly chose not to impose such liability,<sup>265</sup> its holding has little predictive value.<sup>266</sup> The facts in *Petrowsky* are dissimilar to most wrongful adoption claims because the adoptive parents alleged negligence in investigating and documenting the adoptee's paternity, rather than misrepresentation concerning the adoptee's medical and mental health history.<sup>267</sup> Moreover, the *Petrowsky* court never addressed the discrete claim for negligent failure to investigate because it held that no policy or precedent compelled it to recognize any negligence claim against an adoption agency.<sup>268</sup> At the time *Petrowsky* was decided, only one court had recognized a wrongful adoption claim in fraud,<sup>269</sup> and no jurisdiction had held an agency liable for negligent

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263. See *infra* Part IV.B.1–2 (discussing the potential for an Illinois court to impose liability for failure to investigate).

264. See discussion *supra* Part II.C (discussing history of wrongful adoption claims in Illinois).

265. See *Petrowsky v. Family Serv. of Decatur*, 518 N.E.2d 664, 666 (Ill. App. Ct. 1987) (finding that no policy or precedent compelled the court to recognize a tort of adoption agency malpractice).

266. Compare *Petrowsky*, 518 N.E.2d at 666 (declining to recognize a tort of adoption agency malpractice), with *Regsenburger v. China Adoption Consultants*, 138 F.3d 1201, 1208 (7th Cir. 1998) (applying Illinois law) (considering a negligence action against an agency providing adoption-related services), and *Dahlin v. Evangelical Child and Family Agency*, 252 F. Supp. 2d 666, 669–70 (N.D. Ill. 2002) (applying Illinois law) (considering wrongful adoption causes of action), and *Roe v. Jewish Children's Bureau of Chi.*, 790 N.E.2d 882, 894 (Ill. App. Ct. 2003) (recognizing a negligence action against adoption agency), and *Roe v. Catholic Charities of the Diocese of Springfield*, 588 N.E.2d 354, 365 (Ill. App. Ct. 1992) (“After analyzing the approach of the fourth district in *Martino* and *Petrowsky* and comparing it with the analysis in *Horak*, . . . we choose to follow the position of the second district appellate court in *Horak* and recognize that one can allege a cause of action grounded in negligence against an adoption agency.”).

267. Compare *Petrowsky*, 518 N.E.2d at 665 (“[T]his case involves an adoption agency's alleged shoddy investigation and paper work.”), with *Milks*, *supra* note 55, at 12 (“Typically, [wrongful adoption] actions allege negligence or misrepresentations regarding the child's medical condition, reliance thereon by the adoptive parents, and damages in the form of the cost of medical or psychiatric care.”).

268. See *Petrowsky*, 518 N.E.2d at 665–66 (dismissing a negligence cause of action).

269. The Ohio Supreme Court recognized a cause of action for fraud in 1986 in *Burr v. Bd. of County Comm'rs*, 491 N.E.2d 1101, 1107 (Ohio 1986).

misrepresentation.<sup>270</sup> This is patently not the case today.<sup>271</sup> Presently, most jurisdictions, including the first and fifth district appellate courts of Illinois, have recognized causes of action for negligence against adoption agencies.<sup>272</sup>

Despite this change in precedent, it is uncertain how an Illinois court would decide a claim for negligent failure to investigate today.<sup>273</sup> As the U.S. District Court for the Eastern District of Michigan stated, “[T]he authorities are not uniform as to whether an adoption agency has a duty to investigate extensively and report on a child’s medical history.”<sup>274</sup> To date, no court has affirmatively imposed such a duty, and a few courts have explicitly chosen not to do so.<sup>275</sup>

A leading decision on the duty to investigate,<sup>276</sup> *Gibbs v. Ernst*, lays out the steps that courts take in determining whether to impose a duty.<sup>277</sup> In *Gibbs*, the Supreme Court of Pennsylvania expressly

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270. The Wisconsin Supreme Court was the first to recognize a cause of action for negligence in wrongful adoption in 1989 in *Meraclé v. Children’s Serv. Soc’y of Wisconsin*, 437 N.W.2d 532 (Wis. 1989).

271. See Milks, *supra* note 55, at 14–19 (summarizing courts that have recognized causes of action for negligent misrepresentation and negligent nondisclosure in the adoption context).

272. See *Dresser v. Cradle of Hope Adoption Ctr.*, 358 F. Supp. 2d 620, 639–40 (E.D. Mich. 2005) (noting that “a majority of jurisdictions that have considered the question have extended traditional fraud and negligence theories to provide relief to parents who sought to bring claims against adoption agencies for failure to disclose accurate histories of their adopted children”); see also *Roe v. Jewish Children’s Bureau of Chi.*, 790 N.E.2d 882, 896 (Ill. App. Ct. 2003) (holding that causes of action for fraudulent and negligent misrepresentation are viable when the element of causation is met); *Roe v. Catholic Charities of the Diocese of Springfield*, 588 N.E.2d 354, 366 (Ill. App. Ct. 1992) (holding that causes of action in fraudulent and negligent misrepresentation may lie).

273. *Dresser*, 358 F. Supp. 2d at 636 (stating that authorities are not uniform on the extent of adoption agencies’ duty to investigate).

274. *Id.*

275. See Shultz, *supra* note 103, at 1086 (“[N]o court has been willing to compel adoption agencies to independently investigate the backgrounds of the children they seek to place. Courts consistently refuse to burden adoption agencies with a duty to investigate . . .”). For an overview of courts’ differing approaches to the duty to investigate, see Milks, *supra* note 55, at 31–32.

276. One popular child law textbook uses *Gibbs v. Ernst*, 647 A.2d 882 (Pa. 1994), as an illustration of post-adoption disputes and wrongful adoption cases. CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE 699–706 (Douglas E. Abrams & Sarah H. Ramsey eds., 4th ed. 2007) [hereinafter Abrams & Ramsey].

277. *Gibbs*, 647 A.2d at 893–94. In *Gibbs*, the agency told the adoptive parents that the adoptee had been in foster care with one family, was hyperactive, was behind in his school, had been verbally abused, and had been neglected by his mother. *Id.* at 885. The agency specifically denied a history of physical or sexual abuse. *Id.* Shortly after being adopted, the child became violent and aggressive. *Id.* He tried to amputate the arm of a five year old, attempted to suffocate his younger cousin, tried to hit another cousin over the head with a lead pipe, and started a fire that seriously injured a younger cousin. *Id.* The agency’s records eventually revealed that he had been in ten different foster care placements and that there was a long history of sexual and

declined to recognize a cause of action for negligent failure to investigate, and this court is one of the few courts to explain its rationale in reaching its conclusion.<sup>278</sup> Relying heavily on the language of the Pennsylvania mandatory disclosure statutes, the court recognized causes of action for fraudulent and negligent misrepresentation,<sup>279</sup> but concluded that those statutes did not compel the court to impose a duty to investigate.<sup>280</sup> The pertinent Pennsylvania statute required the adoption agency to file a statement that it obtained a medical history or a statement of its reason for failing to do so.<sup>281</sup> The *Gibbs* court concluded that, although this provision implied a duty to make good faith efforts to obtain a medical history, it did not create a duty to investigate for which the agency could be liable.<sup>282</sup> The court reasoned that if the legislature wished to impose such a duty, it would have done so unequivocally.<sup>283</sup> Without a statutory directive, the court concluded that judicial imposition of a duty to investigate would improperly “strain the resources of adoption intermediaries and reduce the number of adoptions.”<sup>284</sup>

Despite the lack of precedent for a duty to investigate in Illinois and nationwide, adoptive parents have alleged that Illinois agencies have such comprehensive and extensive duties as those listed in Part I.<sup>285</sup> These parents alleged that the agency had a legal duty in Illinois to

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physical abuse by his biological parents, including an attempt by his mother to cut off his penis. *Id.* at 885–86.

278. *Id.* at 893–94.

279. The court relied on title 23, section 2909(a) of the Pennsylvania Consolidated Statutes as a basis for the imposition of liability for fraudulent and negligent misrepresentation. *Gibbs*, 647 A.2d at 892 (citing 23 PA. CONS. STAT. ANN. § 2909(a) (West 1991 & Supp. 2001)). Section 2909(a) provides that the adoption agency or intermediary “shall deliver” the medical report to the adoptive parents. *See* 23 PA. CONS. STAT. ANN. § 2909(a) (West 1991 & Supp. 2001) (stating that the intermediary “shall deliver” the report); 23 PA. CONS. STAT. ANN. § 2533(b)(12) (West 1991 & Supp. 2001) (stating that the report must include a medical history or an explanation why the medical history could not be obtained). The court held that the word “shall” shows the legislative intent to impose such a duty. *Gibbs*, 647 A.2d at 892.

280. *See Gibbs*, 647 A.2d at 894 (“imposition of a duty to investigate cannot be grounded in a statutory directive”).

281. *Id.* at 893–95. The court relied on title 23, section 2533(b)(12) of the Pennsylvania Consolidated Statutes. *Gibbs*, 647 A.2d at 893–95. Section 2533(b)(12) requires that the agency compile a report that includes “[a] statement that medical history was obtained and if not obtained, a statement of the reason therefore.” 23 PA. CONS. STAT. ANN. § 2533(b)(12) (West 1991 & Supp. 2001).

282. *Gibbs*, 647 A.2d at 894.

283. *See id.* (“Had the legislature wished to impose such a duty, it would have done so.”).

284. *Id.*

285. *See supra* Part I (listing allegations of negligent failure to investigate).

order psychological testing on the adoptee before placement,<sup>286</sup> to secure the birth mother's medical records, and to learn the specific anti-depressant medications the birth mother was taking.<sup>287</sup> One adoptive couple alleged that the agency not only had a duty to obtain information, but that it also had to "recognize and appreciate the medical significance" of that information.<sup>288</sup> This couple successfully obtained a \$780,000 settlement with the agency.<sup>289</sup>

Following the *Gibbs* line of reasoning, the outcome of such claims for negligent failure to investigate will depend on which provisions the court believes governs adoption agencies' duty to investigate.<sup>290</sup> If the court examines the Adoption Act, it will likely reach the same conclusion as *Gibbs* because of the similarities between the Adoption Act and the Pennsylvania statute.<sup>291</sup> Like the Pennsylvania statute, the Adoption Act uses affirmative language to mandate disclosure,<sup>292</sup> but it limits agencies' duty to gather the information contained in those disclosures.<sup>293</sup> Moreover, agencies have interpreted the broad immunity language in Section 18.5 as evidence that the legislature did not intend to impose broad liability under the Adoption Act.<sup>294</sup> Accordingly, an Illinois court examining the Adoption Act would likely come to the same conclusion as the *Gibbs* court—the legislature did not

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286. Motion to Dismiss for Bethany Christian Servs., *supra* note 6, at 3.

287. Plaintiff's Response to Defendant's Motion for Summary Judgment, *supra* note 7, at 11–12.

288. *Id.* at 11.

289. Walsh, Knippen, Knight & Pollack, \$780,000 Wrongful Adoption Case Settlement, <http://www.wkkplaw.com/new18.htm> (last visited Nov. 16, 2007) [hereinafter Wrongful Adoption Case Settlement].

290. See *infra* notes 291–306 and accompanying text (predicting the outcome of claims for failure to investigate in Illinois).

291. Compare 255 ILL. COMP. STAT. 10/7.4(c) (2006) (stating that agency "shall disclose" material circumstances), and 750 ILL. COMP. STAT. 50/18.4 (2006) (stating that agency "shall give" information to adoptive parents), and 750 ILL. COMP. STAT. 50/18.4(a) (information "shall be provided" to adoptive parents), with 23 PA. CONS. STAT. ANN. § 2909(a) (West 1991 & Supp. 2001) (intermediary "shall deliver" report to adoptive parents).

292. See statutes cited *supra* note 291 (comparing Illinois and Pennsylvania statutory language).

293. Compare 750 ILL. COMP. STAT. 50/18.4(a) (2006) (limiting agencies' duty to disclose information that is within the possession of the agency), with 23 PA. CONS. STAT. ANN. § 2533(b)(12) (West 1991 & Supp. 2001) (stating that, if the agency does not obtain medical history, it can provide a statement for the reason therefore).

294. See 750 ILL. COMP. STAT. 50/18.5 (2006) (stating that no liability shall attach to any agency or acts for efforts made within the scope of the mandatory disclosure requirements in Sections 18.4 and 18.4a); see also Motion to Dismiss for Bethany Christian Servs., *supra* note 6, at 4–6 (contending that "the Illinois General Assembly specifically provided participants in adoption proceedings with broad statutory immunity" under 750 ILL. COMP. STAT. 50/18.5 (2006)).

wish to impose a duty to investigate for which agencies can be held liable.<sup>295</sup>

Moreover, Illinois appellate courts have shared the *Gibbs* court's reluctance to place an overbroad burden on adoption agencies.<sup>296</sup> The *Catholic Charities* and *Jewish Children's Bureau* courts emphasized that agencies cannot guarantee either the health of the children they place in adoptive homes or the statements of birth parents about those children.<sup>297</sup> In light of this precedent, an Illinois court would likely agree with *Gibbs* that, absent a legislative directive, judicial imposition of a duty to investigate would be inappropriate.<sup>298</sup>

On the other hand, if the court looked to the Procedures, it could find the legislative directive absent from the Adoption Act and Pennsylvania statute.<sup>299</sup> According to the Procedures, adoptive parents have a right to receive a broad array of facts not limited to information in the possession of the agency.<sup>300</sup> Moreover, in requiring agencies to document their efforts to obtain medical and mental health information, the Procedures imply that agencies bear the responsibility to collect that information.<sup>301</sup> Taken as a whole, the Procedures suggest a legislative preference for the disclosure of more information than previously required under the Adoption Act.<sup>302</sup> Accordingly, a court examining the Procedures could find that the legislature and DCFS intended to

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295. See *Gibbs v. Ernst*, 647 A.2d 882, 893–94 (Pa. 1994) (discussing the passive wording of the Pennsylvania statute and concluding that the legislature would have clearly imposed a duty to investigate if it had wished to do so).

296. Compare *Gibbs*, 647 A.2d at 893–94 (declining to impose an “undue burden”), with *Roe v. Jewish Children's Bureau of Chi.*, 790 N.E.2d 882, 894 (Ill. App. Ct. 2003) (quoting *Roe v. Catholic Charities of the Diocese of Springfield*, 588 N.E.2d 354, 360 (Ill. App. Ct. 1992)) (reiterating the *Catholic Charities* court's refusal to place an unbearable burden on adoption agencies), and *Catholic Charities*, 588 N.E.2d at 360, 365 (declining to place an “unbearable” burden on the agency).

297. See *Jewish Children's Bureau*, 790 N.E. 2d at 894 (holding agencies liable for fraud or misrepresentation would not create an undue burden); *Catholic Charities*, 588 N.E.2d at 360 (choosing to limit the scope of the duty imposed so as not unduly burden the agency).

298. See *Gibbs*, 647 A.2d at 894 (“Thus imposition of a duty to investigate cannot be grounded in a statutory directive, and absent such directive, judicial imposition of such a duty would be, in our estimation, an undue burden on adoption agencies.”).

299. Rule 401 Procedures, *supra* note 108, § 401.510; 23 PA. CONS. STAT. ANN. § 2533(b)(12) (West 1991 & Supp. 2001).

300. *Id.*; see also Adoptive Parent's Rights and Responsibilities Form, *supra* note 149, at 2 (defining the information to which adoptive parents are entitled).

301. See Rule 401 Procedures, *supra* note 108, § 401.510 (g)(3)(E) (stating that an agency must document its efforts to obtain health and background information).

302. See *id.* (calling for disclosure of broader information than required in the Adoption Act and requiring agencies to document their efforts to obtain that information).

impose a duty to investigate on agencies, and that an agency can be held liable for its failure to do so.<sup>303</sup>

Although the *Catholic Charities* and *Jewish Children's Hospital* courts held that an agency only has a duty to disclose information in its possession, those decisions are not binding on other appellate districts.<sup>304</sup> Because the Illinois Supreme Court has not spoken on the issue,<sup>305</sup> the First and Fifth District Courts' decisions in *Catholic Charities* and *Jewish Children's Hospital* do not preclude the possibility that a different appellate district could extend adoption agencies' duties to include use of reasonable care in investigating and obtaining health and background information.<sup>306</sup>

## 2. Breach of Fiduciary Duty to Investigate

In holding that a claim for breach of fiduciary duty was cognizable under Illinois law, the *Dahlin* court created the possibility that a court could hold an agency liable for failure to investigate under a breach of fiduciary duty theory.<sup>307</sup> Under Illinois law, a fiduciary duty would impose greater obligations on adoption agencies than the duty already imposed by the negligence standard.<sup>308</sup> Commentators have advocated for the recognition of such a duty, noting that adoptive parents place special trust in the adoption agency and often discuss the intimate details of their lives with the counselors at the agency.<sup>309</sup> At least one

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303. Cf. Rule 401 Procedures, *supra* note 108, § 401.510 (indicating that agencies have an affirmative duty to obtain information before disclosure).

304. See *State Farm Fire & Cas. Co. v. Yapejian*, 605 N.E.2d 539, 542 (Ill. 1992) (stating that the decisions of Illinois appellate districts are not binding on other districts).

305. See *Roe v. Jewish Children's Bureau of Chicago*, 803 N.E.2d 500 (Ill. 2003) (denying appeal); *Petrowsky v. Family Servs. of Decatur*, 522 N.E.2d 1256 (Ill. 1998) (denying appeal); *Roe v. Catholic Charities of the Diocese of Springfield*, 602 N.E.2d 475 (Ill. 1992) (denying appeal).

306. See *State Farm Fire & Cas. Co.*, 605 N.E.2d at 542 (stating that decisions of Illinois appellate districts are not binding on one another); see also *Dahlin v. Evangelical Child & Family Agency*, 252 F. Supp. 2d 666, 669 (N.D. Ill. 2002) (stating that, when applying Illinois law, the federal district court is not controlled by decisions of the Illinois appellate court, but by how the Illinois Supreme Court might address the issue).

307. See *supra* Part III.B (noting that the *Dahlin* court held that the plaintiffs properly pled facts to state a claim for breach of fiduciary duty).

308. See *supra* Part III.B (discussing how the duties imposed in *Catholic Charities* under a negligence standard are extremely limited).

309. See *Getting the Whole Truth*, *supra* note 26, at 908 (discussing fiduciary relationship as a basis for imposing liability in a wrongful adoption context).

court in Arizona agreed with this reasoning and expressly recognized a cause of action for breach of fiduciary duty.<sup>310</sup>

In *Taeger v. Catholic Family & Community Services*, the Arizona Court of Appeals held that the trial court erred in holding that the adoption agency did not have a fiduciary relationship with the adoptive parents as a matter of law.<sup>311</sup> Reasoning that the adoptive parent-adoption agency relationship is a relationship that naturally leads adoptive parents to place a great degree of trust in the agency, the court remanded the case for a jury to determine if a fiduciary duty existed.<sup>312</sup> Although the *Taeger* court did not consider whether a fiduciary duty would include a duty to investigate, the court stated that a fiduciary duty would require the agency “to use the utmost fairness and honesty in its dealings with adoptive parents and the children it places for adoption.”<sup>313</sup>

Illinois courts have similarly characterized fiduciary duties in the attorney-client context.<sup>314</sup> The Illinois Appellate Court, First District, held that a fiduciary duty requires “fidelity, honesty, and good faith” in professional relations with the client.<sup>315</sup> Ultimately, an Illinois court could interpret such a broad duty of fidelity, honesty, and good faith in

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310. *Taeger v. Catholic Family & Cmty. Servs.*, 995 P.2d 721, 727–30 (Ariz. Ct. App. 1999) (examining the nature of the adoptive parent-adoption agency relationship and concluding that the evidence created a question of fact as to the existence of a fiduciary duty).

311. *Id.* at 730.

312. *Id.* The court stated that a fiduciary relationship is a confidential relationship including great intimacy, disclosure of secrets, and entrusting of power in which the fiduciary holds “superiority of position” over the beneficiary. *Id.* at 726. The court reasoned that a fiduciary duty could be found in the adoption context because:

The relationship between adoptive parents and the agency from which they are accepting a child is, by its very nature, a relationship that would reasonably lead the adoptive parents to place a great degree of trust in the agency. The agency’s will is necessarily substituted for that of the parents with regard to the decision as to what background information is relevant and should be disclosed to the adoptive parents. The adoptive parents, not having access to that information, cannot make a choice as to what information is disclosed. Only the agency has the ability to disclose or withhold information. Thus, the agency is in a superior position, and the adoptive parents must necessarily rely on the agency to act in the adoptive child’s best interests in providing the information.

*Id.* at 727. The court also held “that an agency’s concurrent representation of adoptive parents, the child, and biological parents does not preclude a fiduciary relationship with any of these persons.” *Id.* at 729.

313. *Id.*

314. *See, e.g., In re Winthrop*, 848 N.E.2d 961, 973 (Ill. 2006) (calling an attorney’s fiduciary relationship one of “undivided fidelity”); *Doe v. Roe*, 681 N.E.2d 640, 645 (Ill. App. Ct. 1997) (“Among the fiduciary duties imposed upon an attorney are those of fidelity, honesty, and good faith . . .”).

315. *Doe*, 681 N.E.2d at 645.

the adoption context to include a duty to ensure that prospective parents are able to make a fully informed decision by providing them access to all important information about the adoptee that could be discovered through a reasonable investigation.<sup>316</sup>

In sum, the decisions of Illinois courts do not preclude the possibility that adoption agencies can be held liable for omissions like those listed in Part I.<sup>317</sup> An Illinois court's decision whether to impose such a duty is likely to depend on that court's interpretation of legislative intent.<sup>318</sup> Because the governing legislation and administrative provisions are inconsistent and contradictory, however, the outcome of a claim for breach of duty to investigate remains unpredictable,<sup>319</sup> and Illinois agencies are compelled to settle such claims for large sums.<sup>320</sup>

## V. PROPOSAL

Adoption agencies' duty to investigate need not be ambiguous and unpredictable.<sup>321</sup> In an important effort to clarify the existing requirements, the Procedures attempt to encompass and define the objectives of the mandatory disclosure provisions of both the Child Care Act and the Adoption Act.<sup>322</sup> However, because the language of these acts does not accurately reflect the language in the Procedures, there remains considerable lack of clarity as to the extent and scope of adoption agencies' duties.<sup>323</sup> Accordingly, this Part recommends that the legislature update the mandatory disclosure provisions of the Child Care Act and the Adoption Act to reflect the duties imposed by the

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316. Cf. *id.* at 645 (using broad language of "fidelity, honest, and good faith" to define fiduciary duty); *Getting the Whole Truth*, *supra* note 26, at 950–51 (asserting that the duty to investigate should be "inherent in the undertaking to place a child for adoption").

317. See *supra* note 7 and accompanying text (listing allegations of negligent failure to investigate).

318. See *supra* Part IV.B.1 (reviewing the various potential outcomes of an Illinois court's analysis of a claim for failure to investigate).

319. See *supra* Part IV.B.1 (noting that a court's decision on a claim for breach of a duty to investigate turns on which statutory or administrative provision the court deemed to govern the agency's duty).

320. See, e.g., *Wrongful Adoption Case Settlement*, *supra* note 289 (describing the settlement that followed after the adoptive parents were "successful in establishing that the [agency] negligently failed to investigate the mental health history of the birth mother of the adopted baby").

321. See *infra* Part V.A–B (making recommendations to remove inconsistencies from Illinois adoption legislation and create predictable outcomes in court).

322. See Rule 401 Procedures, *supra* note 108 (incorporating provisions of both the Adoption Act and the Child Care Act).

323. See *supra* Part IV.A (examining the discrepancies in mandatory disclosure provisions in Illinois).

Procedures.<sup>324</sup> Next, this Part argues that Rule 401 and the Adoption Act should require agencies to make “reasonable efforts” to obtain the health and background information required in the disclosures.<sup>325</sup> Such a duty should provide the statutory directive necessary for an Illinois court to impose liability for breach of a duty to investigate and obtain information.<sup>326</sup> Lastly, this Part proposes that the legislature revise Section 18.5 of the Adoption Act to allow immunity only for reasonable efforts made pursuant to the Adoption Act.<sup>327</sup>

Although a relatively small number of adoptions fail, wrongful adoption lawsuits are likely to continue because today’s adoption dockets include large numbers of children with emotional and physical disabilities.<sup>328</sup> Accordingly, it is crucial that the legislature revise Illinois adoption legislation to provide consistency and predictability for future wrongful adoption claims.<sup>329</sup>

#### A. Streamlining the Language to Reflect the Procedures

In order for the Adoption Act to reflect the mandates of the Procedures, several changes must be made.<sup>330</sup> First, the words “to the extent currently in the possession of the agency” should be removed from Section 18.4a of the Adoption Act.<sup>331</sup> This limitation is an aberration in Illinois adoption law, as no other statute or administrative provision limits disclosure only to information in the agency’s possession.<sup>332</sup> Moreover, the provision creates a perverse incentive for agencies to gather as little information as possible about the adoptee

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324. See *infra* Part V.A (proposing ways to remove inconsistencies in mandatory disclosure provisions).

325. See *infra* Part V.B (recommending a “reasonable efforts” standard to define agencies’ duty to investigate).

326. See *infra* Part V.B (describing the “reasonable efforts” standard as vital to the recognition of the tort of negligent failure to investigate).

327. See *infra* Part V.C (proposing that the legislature include the word “reasonable” in 750 ILL. COMP. STAT. 50/18.5 (2006)).

328. Abrams & Ramsey, *supra* note 276, at 706.

329. See *infra* Part V.A–C (proposing changes to Illinois adoption legislation).

330. Compare 750 ILL. COMP. STAT. 50/18.4a (2006) (limiting the duty to disclose information in the possession of the agency), with Rule 401 Procedures, *supra* note 108 (requiring an agency to document its efforts to obtain the information in 750 ILL. COMP. STAT. 50/18.4a).

331. 750 ILL. COMP. STAT. 50/18.4a (2006).

332. See, e.g., ILL. ADMIN. CODE tit. 89, § 401.510(g)(3)(E) (2006) (requiring disclosure of the health and background information listed in 750 ILL. COMP. STAT. 50/18.4a, but not limiting disclosure to information in the agency’s possession).

before placement.<sup>333</sup> Accordingly, Section 18.4a should be revised with the limiting language removed.<sup>334</sup>

Second, the broad disclosure provision in Section 7.4(c) of the Child Care Act should include a reference to Sections 18.4 and 18.4a of the Adoption Act.<sup>335</sup> The mandate in Section 7.4(c) to disclose “all circumstances material to the placement of a child for adoption . . .” is overly broad and provides little practical direction for caseworkers.<sup>336</sup> This Section should instead point to the more specific disclosure requirements in the Adoption Act.<sup>337</sup> The legislature should revise the Section 7.4(c) mandate to require disclosure of “all information material to the placement of a child for adoption, including the required disclosures of Section 18.4 and 18.4a of the Adoption Act.”<sup>338</sup>

Third, the legislature should expand the enumerated mandatory disclosures in Sections 18.4 and 18.4a of the Adoption Act to include each of the thirteen categories of information referred to on the Adoptive Parent’s Rights Form.<sup>339</sup> The Rule 401 Procedures and the Adoptive Parent’s Rights Form currently mandate disclosure of several types of information not mentioned in the Child Welfare Act or Adoption Act, including immunization records, information concerning past placements, reason for past placement changes, and “[a]ny known behavioral information about the child necessary to care for the child and other children in [the] home.”<sup>340</sup> These facts are vital to a prospective adoptive parent’s decision, and should not only be included in the Procedures, but also in the enumerated disclosure requirements of the Adoption Act.<sup>341</sup> Ultimately, these three changes will remove ambiguity in Illinois adoption legislation and explicitly mandate broad but detailed disclosure.<sup>342</sup>

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333. Interview with Marianne Blair, *supra* note 237; see *When Love is Not Enough*, *supra* note 78, at 1773 (asserting that imposing a duty to disclose without imposing a duty to investigate incentivizes incomplete investigations).

334. 750 ILL. COMP. STAT. 50/18.4a (2006).

335. 225 ILL. COMP. STAT. 10/7.4(c) (2006).

336. *Id.*; see *supra* Part IV.A (discussing deficiencies of the Child Care Act).

337. 750 ILL. COMP. STAT. 50/18.4–18.4a (2006).

338. 225 ILL. COMP. STAT. 10/7.4(c) (2006).

339. Adoptive Parent’s Rights and Responsibilities Form, *supra* note 149.

340. *Id.*; Rule 401 Procedures, *supra* note 108; 750 ILL. COMP. STAT. 50/18.4–18.4a (2006).

341. 750 ILL. COMP. STAT. 50/18.4a (2006).

342. See *supra* notes 330–341 and accompanying text (proposing three changes to eliminate inconsistencies in adoption legislation).

*B. Imposing a Clear Duty to Investigate*

The legislature and DCFS should amend the Adoption Act, Rule 401, and the Procedures to clearly state that “agencies shall make reasonable efforts to obtain” the contents of the required disclosures.<sup>343</sup> Although Rule 401 and the Procedures imply that agencies have a duty to obtain health and background information, they do not explicitly state that the agency must do so.<sup>344</sup> An explicit “reasonable efforts” requirement will remove any ambiguity as to whether agencies have a duty to collect health and background information, and will properly place that burden on the agency.<sup>345</sup>

A reasonable efforts requirement will also create the legislative directive the *Gibbs* court believed was necessary to impose liability for negligent failure to investigate.<sup>346</sup> Although no court has held an agency liable for failure to investigate and obtain information, it is imperative that this duty be placed on adoption agencies.<sup>347</sup> Agencies can only disclose the information of which they are aware, and their efforts at gathering information will necessarily define the content of their disclosures.<sup>348</sup> Where reasonable efforts could have uncovered vital health and background information, failure to obtain that information and relay it to the adoptive parents will have no less tragic results than if the agency intentionally withheld the information.<sup>349</sup> Thus, the legislature should alert the courts of its desire to impose a duty to investigate through an unequivocal imposition of reasonable efforts to obtain health and background information.<sup>350</sup>

A reasonable efforts requirement will not overburden adoption agencies because it allows juries to determine what information was

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343. 750 ILL. COMP. STAT. 50/18.4–18.4a (2006); ILL. ADMIN. CODE tit. 89, § 401.510 (2006); Rule 401 Procedures, *supra* note 108.

344. ILL. ADMIN. CODE tit. 89, § 410.510 (2006); Rule 401 Procedures, *supra* note 108.

345. *See Lifting the Genealogical Veil*, *supra* note 71, at 744–49 (advocating for a reasonable efforts duty to investigate).

346. *See Gibbs v. Foster*, 647 A.2d 882, 893–95 (Pa. 1994) (stating that the statute created no duty to investigate and holding that a legislative directive requiring investigation was needed in order for the court to find tort liability).

347. *See Getting the Whole Truth*, *supra* note 26, at 948–59 (advocating for the imposition of a tort duty to investigate).

348. *Cf. id.* (discussing the need for a tort duty to investigate).

349. *Id.* at 948.

350. *See Lifting the Genealogical Veil*, *supra* note 71, at 744–49 (explaining why a reasonable efforts duty to investigate is preferred).

reasonably available *under the circumstances*.<sup>351</sup> By examining the circumstances on a case-by-case basis, juries can take into account specific barriers to gathering information, such as a birth parent's reluctance to disclose, privacy rights, or the general lack of accessibility of information.<sup>352</sup> Moreover, given Illinois courts' restraint in defining the scope of agencies' duties and their unwillingness to make agencies responsible for the health and happiness of adoptees, they will not likely hold agencies liable for attenuated and unsubstantiated claims.<sup>353</sup> Accordingly, a reasonable efforts requirement will only oblige agencies to obtain health histories from reasonably available and accessible sources, and it will not overburden the agency by straining its resources or mandating that it violate privacy rights.<sup>354</sup>

The reasonable efforts requirement may include some of the duties listed in Part I, such as obtaining the birth mother's medical records or consulting with her psychiatrist.<sup>355</sup> These duties would be much more likely to be deemed reasonable when, as in the case from which the allegations were taken, the birth mother gave the agency permission to obtain that information.<sup>356</sup> But not all of the allegations in Part I would be subsumed under a reasonable efforts requirement.<sup>357</sup> For example, a reasonable efforts requirement only compels the agency to *obtain* information, not to "recognize or appreciate the medical significance" of it.<sup>358</sup> Such a requirement would impose a heightened level of medical expertise that would be unreasonable and unduly burdensome.<sup>359</sup> Ultimately, the reasonable efforts requirement will only require the

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351. See *Getting the Whole Truth*, *supra* note 26, at 948–50 (“In a myriad of settings, courts have asked juries to determine whether conduct was reasonable under the circumstances. There is no reason why such a determination cannot be made in the context of adoption practice.”).

352. See *id.* (describing the benefits of a jury evaluation of “what conduct was reasonable under the circumstances”).

353. See *supra* Part IV.B.1 (discussing the Illinois appellate court's reluctance to place an overbroad duty on adoption agencies).

354. Cf. *Getting the Whole Truth*, *supra* note 26, at 948–50 (discussing the flexibility of the reasonable efforts standard).

355. See *supra* note 7 and accompanying text (listing negligence allegations against Illinois agencies for failure to investigate).

356. See Plaintiff's Response to Defendant's Motion for Summary Judgment, *supra* note 7, at 11–12 (describing the agency's failure to obtain medical records after birth mother had given it permission to do so).

357. See *supra* Part I (describing negligent failure to investigate allegations against Illinois agencies).

358. Cf. *Getting the Whole Truth*, *supra* note 26, at 948–50 (describing the scope of a reasonable efforts standard).

359. See Plaintiff's Response to Defendant's Motion for Summary Judgment, *supra* note 7, at 11 (alleging that agency was negligent in failing to recognize and appreciate the medical significance of the adopted child's tremors).

agency to obtain information from reasonably available and accessible sources and will not unduly hinder its efforts at placement.<sup>360</sup>

*C. Redefining the Immunity Section of the Adoption Act*

Finally, the legislature should revise Section 18.5 of the Adoption Act to provide immunity only when agencies act reasonably.<sup>361</sup> The current statute provides, “[n]o liability shall attach to . . . any licensed agency . . . for acts or efforts made within the scope of [the mandatory disclosure provisions.]”<sup>362</sup> Adoption agencies have argued that this broad language provides agencies with blanket immunity for any act or omission, including negligence, relating to the mandatory disclosure provisions of the Adoption Act.<sup>363</sup> Illinois courts, however, have not provided agencies with such immunity.<sup>364</sup> Rather, they have consistently held agencies liable when they intentionally and negligently misrepresent information in their disclosures to adoptive parents.<sup>365</sup> Section 18.5 should not appear, on its face, to provide immunity for acts which Illinois courts have already held agencies liable.<sup>366</sup> Accordingly, the legislature should revise Section 18.5 to state: “no liability shall attach to any licensed agency for *reasonable* acts or efforts made within the scope of the mandatory disclosure provisions.”<sup>367</sup>

## VI. CONCLUSION

Illinois adoption law has made significant progress since the time of secrecy and the philosophy of rebirth. Adoptive parents have access to more health and background information concerning adoptees than ever, and the recently drafted Procedures will do a great deal to ensure that agencies provide this information to them. Now more than ever, individuals and couples contemplating adoption are able to make their decision with their eyes wide open. Nevertheless, the current Illinois adoption legislation is not flawlessly clear or perfectly consistent, and several alterations and adjustments are needed to eliminate its

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360. Cf. *Getting the Whole Truth*, *supra* note 26, at 948–50 (defining limits of reasonable efforts standard).

361. 750 ILL. COMP. STAT. 50/18.5 (2006).

362. *Id.*

363. Motion to Dismiss for Bethany Christian Servs., *supra* note 6, at 4–6 (contending that the agency is immune from negligence action under 750 ILL. COMP. STAT. 50/18.5 (2006)).

364. See *supra* Part III.B (examining the recognition of wrongful adoption torts in Illinois).

365. See *supra* Part III.B (discussing Illinois courts’ holdings in wrongful adoption claims).

366. 750 ILL. COMP. STAT. 50/18.5 (2006).

367. *Id.*

discrepancies. Through these changes, Illinois adoption legislation and regulations can clearly define adoption agencies' duty to investigate and obtain health and background information.