TORTS

FRAUD IN THE ADOPTION SETTING

In *Burr v. Board of County Commissioners of Stark County*,[1] the Ohio Supreme Court countenanced a novel use of the fraud action in holding that a couple who were deceived by the state adoption agency about the history of the child they adopted had been victims of intentional fraud.[2]

When Russell and Betty Burr contacted their county adoption agency in 1964, they specifically requested a healthy male infant.[3] The county caseworker offered a seventeen-month-old infant, describing him as the healthy son of a healthy eighteen-year-old mother. The Burrs decided to adopt the child.[4]

In the years that followed, the child suffered from numerous physical problems.[5] In elementary school he was diagnosed as educable mentally retarded.[6] Eventually, he was discovered to be suffering from Huntington's Disease, a genetically transmitted terminal illness.[7]

In 1982, the Burrs obtained a court order to open the sealed adoption record. The record revealed that the representations which had been made to them by the caseworker were false. Their adopted son had been born at the state mental hospital to a thirty-one-year-old inmate who had a low I.Q., had been diagnosed as having "psychotic reactions," and was described as "bovine." His father, too, was presumed to be a mental patient.[8] The unsealed record also revealed that before placing the boy for adoption the county agency had been aware both that the child had suffered a high fever at birth and that a series of psychological assessments had shown that he was functioning at a low intellectual level.[9]

Believing that they had been deliberately deceived, the Burrs brought suit for "wrongful adoption"[10] to recover both general and special damages.[11] The Burrs testified that they were ill-equipped to raise a severely

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1. Burr v. Board of County Commissioners of Stark County, 23 Ohio St. 3d 69, 491 N.E.2d 1101 (1986).
2. The facts of *Burr* are as set out in 23 Ohio St. 3d at 69-72, 491 N.E.2d at 1101-04.
3. *Id.* at 70, 491 N.E.2d at 1103. Mrs. Burr is partially disabled by polio, a deciding factor in the couple's specific request for a healthy male infant.
4. *Burr*, 23 Ohio St. 3d at 69, 73 & n.3, 491 N.E.2d at 1101, 1106 & n.3.
5. *Burr*, 23 Ohio St. 3d at 70, 491 N.E.2d at 1103. The physical problems included poor motor skills, physical twitching, speech impediment, and learning disabilities.
6. *Id.*
7. *Burr*, 23 Ohio St. 3d at 70-71, 491 N.E.2d at 1103. Huntington's Disease destroys the central nervous system. The boy was hospitalized and comatose at the time of trial. His life expectancy from the time of onset of the Huntington's Disease was predicted to be eight years.
8. *Burr*, 23 Ohio St. 3d at 71, 491 N.E.2d at 1101, 1103-04.
9. *Burr*, 23 Ohio St. 3d at 71, 491 N.E.2d at 1104.
10. *Id.* The term "wrongful adoption" appears to be unique to this case.
11. *Id.* Damages had exceeded $80,000 for the Huntington's Disease alone.

handicapped child[12] and that they would never have adopted the child had it not been for the misrepresentations made by the county agency.[13] The jury returned a verdict in favor of the Burrs for $125,000. Both the appeals court and the Ohio Supreme Court affirmed the decision.[14]

This Comment examines the fraud action in Arizona in light of the *Burr* decision. It considers the potential liability of the state, of state agents, and of private adoption agents for false representations made to adopting parents. The potential liability of these parties for nondisclosure is also discussed, in light of both the duty to disclose imposed by state statute and the arguably fiducial nature of the relationship between the adoption agent and the adopting parents.

FRAUD IN ARIZONA

In Arizona, as in other states, the three broad categories of fraud are: intentional fraud,[15] negligent misrepresentation,[16] and strict liability for all representations made.[17] The fraud action is typically used to recover for pecuniary losses that result from reliance on false information given in a commercial bargaining transaction.[18] Although the fraud action has not ordinarily been employed to redress wrongs done to the plaintiff's personal, emotional, or familial well-being,[19] the subject matter of the fraud is not

12. *Burr*, 23 Ohio St. 3d 69, 73 & n.3, 491 N.E.2d 1101, 1106 & n.3. Q. "...would you have adopted Patrick?" A. "I couldn't have. I wouldn't have went [sic] to see the child because I'm a cripple myself. I'm very handicapped. And I wouldn't have felt that I might have had the strength to deal with what might've come up, knowing that he was the child of two mental patients."

13. The Burr's argument may be seen as analogous to a wrongful birth claim. For example, in University of Arizona Health Sciences Center v. Superior Court, 136 Ariz. 579, 667 P.2d 1294 (1983), the parents argued that but for the defendant's negligence they would not have been compelled to bear the financial burden, or to suffer the emotional distress, involved in raising the child born. *See also* Annotation, *Tort Liability for Wrongfully Causing One to Be Born*, 83 A.L.R. 3d 15 (1978). The Burrs testified that their physical limitations led them to request a healthy child and that had they known what the adoption agency knew at the time of the adoption, they would never have adopted their son. *Burr*, 23 Ohio St. 3d at 71, 491 N.E.2d at 1104.

14. *Burr*, 23 Ohio St. 3d 69, 71, 491 N.E.2d 1101, 1104.

15. In Arizona, nine elements must be shown for intentional fraud to be found: representation, materiality, falsity, speaker's knowledge of the falsity, speaker's intent to mislead, hearer's ignorance of falsity, hearer's reliance, hearer's right to rely, and proximate injury. Wagner v. Castell, 136 Ariz. 29, 663 P.2d 1020 (Ct. App. 1983). *See also* Staheli v. Kaufman, 122 Ariz. 380, 595 P.2d 172 (1979); Carrel v. Lux, 101 Ariz. 430, 420 P.2d 564 (1966).

16. *See* Van Buren v. Pima Community College District Board, 113 Ariz. 85, 546 P.2d 821 (1976) (damages will lie in a proper case for negligent misrepresentation), Frazier v. Southwest Savings & Loan Association, 134 Ariz. 12, 653 P.2d 362 (Ct. App. 1982) (Arizona recognizes cause of action for negligent misrepresentation).

17. *See* Bell v. Bell, 44 Ariz. 520, 39 P.2d 629 (1934) ("irrespective of moral guilt or intent of the fraudfeasor, the law declares [constructive fraud] fraudulent, because of its tendency to deceive others, to violate public or private confidence, or to injure public interests"); Condos v. Felder, 92 Ariz. 366, 377 P.2d 305 (1962) ("When a confidential relationship exists between two parties, even though no active fraud exists, other circumstances will give rise to an implied fraud.").

18. The usual case involves a plaintiff who has been induced to purchase land or enter into some other type of business deal as a result of the defendant's intentional fraud or negligent misrepresentation. Bechtel v. Liberty National Bank, 534 F.2d 1335 (9th Cir. 1976) (false representations regarding water capacity of wells on property sold by defendant); Carrel v. Lux, 101 Ariz. 430, 420 P.2d 564 (1966) (false representation regarding acreage of property sold by defendant); Madisons Chevrolet, Inc. v. Donald, 109 Ariz. 100, 505 P.2d 1039 (1973) (false representation regarding condition of automobile sold by defendant). *See also* 37 C.J.S. *Fraud* § 58 (1943).

19. Rare exceptions have included tricking a plaintiff into an invalid marriage, or into marriage

considered to be material if the essential elements are present.[20]

ADOPTION IN ARIZONA

In Arizona, children may be adopted in one of three ways: (1) through the Department of Economic Security, which is the state adoption agency; (2) through a private agency, such as Catholic Social Services or Jewish Family Services; (3) or through private, independant adoption, usually handled by an attorney.[21] The state investigates, licenses, and sets standards for private agencies on an annual basis.[22] The agencies, in turn, investigate prospective adoptive parents to determine if they are fit to adopt. The agencies also investigate the suitability of a particular child's placement with the specific applicant.[23] It is an often cited maxim that in an adoption the best interests of the child are paramount.[24]

All persons interested in adopting in Arizona, whether through a public or a private agency, may apply to have the adoption subsidized.[25] Subsidies,

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to one who is physically unfit, and inducing a plaintiff to leave a spouse. *See* PROSSER AND KEETON ON THE LAW OF TORTS § 105 (W. Keeton 5th ed. 1984).

20. Culver v. Avery, 7 Wend. 380, 22 Am. D. 586 (N.Y. 1831) ("but it is not perceived how the nature or description of the false representation can affect the principle."). *See also* 37 C.J.S. *Fraud* § 5 (1943) ("If the essential elements of actionable or remedial fraud requisite to the particular remedy sought are present, the nature of the transaction or subject matter of the representation is immaterial."). *See generally* 37 C.J.S. *Fraud* §§ 46-59 (1943).

21. ARIZ. REV. STAT. ANN. § 8-130(C) (1985). "An attorney licensed to practice law in this state may assist and participate in direct placement adoptions and may receive compensation. . . ."

Such independent adoptions are illegal in nine states: Connecticut, Delaware, Georgia, Massachusetts, Michigan, Minnesota, North Dakota, Rhode Island, and Virginia; they are restricted in four others: Montana, Nebraska, New Jersey, and Wisconsin. *The Adoption Market: A Variety of Options*, N.Y. Times, June 26, 1986, § C, at 1, col. 3.

22. ARIZ. REV. STAT. ANN. § 8-126 (1986). Licensure and regulation of agencies.

The division [Department of Economic Security] shall:

1. License agencies on an annual basis subject to renewal. Before issuing a license, the division shall investigate the activities of the agency, its financial stability, the character and training of its personnel and the adequacy of the agency's intended services to ensure the welfare of parents and children using the services of the agency. If the agency meets the standards established by the division, a license shall be issued.
2. Provide for oversight of agencies.
3. Assist the staffs of all agencies by giving advice on methods and procedures.
4. Establish rules for:

(a) Licensing agencies, including professional licensing, and suspending, revoking and denying licenses.

(b) Annual renewal of agency licenses.

(c) The form and content of investigations, reports and studies concerning adoption placements.

(d) Reasonable fees chargeable by the division to agencies for licensure and renewal of licenses.

(e) Reasonable fees chargeable by an agency to any person for its services in connection with adoptions.

(f) Conducting reviews and making reports pursuant to § 8-114, subsection E.

Section 8-101(2) (1985), defines agency as "a person other than the division licensed by the division to place children for adoption including an attorney or law firm." Division, according to § 8-101(7) (1985), means the Department of Economic Security.

23. ARIZ. REV. STAT. ANN. § 8-105 (1985).

24. ARIZ. REV. STAT. ANN. § 8-116 (1977); Matter of Appeal in Maricopa County Juvenile Action No. A-25525, 136 Ariz. 528, 667 P.2d 228 (1983); In re Anonymous, 4 Ariz. App. 588, 422 P.2d 419 (1967); In re Clark's Adoption, 38 Ariz. 481, 1 P.2d 112 (1931).

25. ARIZ. REV. STAT. ANN. § 8-143 (1975).

which may consist of cash or of special services,[26] vary with the needs and circumstances of the particular child and family and are subject to periodic review.[27] At any time after the adoption, families may apply for a subsidy for any undiagnosed preexisting condition which the child is discovered to have.[28]

INTENTIONAL FRAUD IN THE ADOPTION SETTING

The facts of the *Burr* adoption are sufficient to satisfy Arizona's traditional nine elements of intentional fraud.[29] The adoption worker knowingly made material, false representations to the Burrs with the intent to mislead them. The Burrs, in ignorance of the falsity of the worker's statements, relied upon these representations and were injured. In Arizona, as in Ohio, intentionally misrepresenting the background of the child to the adopting parents would constitute per se intentional fraud by an adoption agent.[30]

DUTY TO DISCLOSE

In *Burr*, there was both active misrepresentation[31] and nondisclosure of information the agency had about the child.[32] The Ohio Supreme Court found liability based upon the intentional deception of the adopting parents[33] and hence did not reach the question of liability for nondisclosure.

Under common law, no general duty to disclose information is imposed.[34] Nondisclosure is given the same status by the courts as nonfeasance, where the actor who takes no action is held not liable.[35] This distinction, between acting and refraining from acting has generally been described as the difference between inflicting a positive harm and failing to

26. ARIZ. REV. STAT. ANN. § 8-144(B) (1981). The subsidy is limited to the amount allowable under foster family care or to the reasonable fee for a special service the child may require.

27. ARIZ. REV. STAT. ANN. § 8-144(A) (1981).

28. ARIZ. REV. STAT. ANN. § 8-144(D) (1981).

29. *See supra* note 15.

30. In Ohio the elements of intentional fraud are: a false representation (actual or implied) or the concealment of a material fact, knowledge of the falsity of the statement or an utter disregard for the truth of the statement, intent to mislead, reasonable reliance, and injury. Hooper v. Seventh Urban, Inc., 70 Ohio App. 2d 101, 434 N.E.2d 1367 (1980); Lloyd v. Classic Motor Coaches, Inc., 388 F. Supp. 785 (D. Ohio 1974); Greenwalt v. Goodyear Tire & Rubber Co., 164 Ohio St. 1, 128 N.E.2d 116 (1955).

31. *Burr*, 23 Ohio St. 3d at 70, 491 N.E.2d at 1103. The county caseworker described the child's mother as an eighteen-year-old unwed mother living with parents who were mean to the child. She further told the Burrs that the child's mother was working during the day and trying to take care of the child, and that she had surrendered the child for adoption and was going to Texas for better employment. The child was described as a "nice, big, healthy, baby boy," born at the city hospital.

32. *Burr*, 23 Ohio St. 3d at 71, 491 N.E. 2d at 1104. The county caseworker did not tell the Burrs that she knew the boy's mother was a thirty-one year old mental patient at the state mental hospital, that his father was also presumed to be a mental patient, that the child had suffered a fever at birth, that he was developing slowly, and that a series of psychological assessments indicated he was functioning at a lower intellectual level than his chronological age.

33. *Burr*, 23 Ohio St. 3d at 78, 491 N.E.2d at 1109.

34. PROSSER AND KEETON ON THE LAW OF TORTS § 106, (W. Keeton 5th ed. 1984). *See also* Dunahay v. Struzik, 96 Ariz. 246, 393 P.2d 930 (1964) (Fraud may be committed by failure to speak, but a duty to speak must first be imposed.); King v. O'Reilly Motor Co., 16 Ariz. App. 518, 494 P.2d 718 (1972) (fraudulent concealment versus mere nondisclosure).

35. *See* PROSSER AND KEETON ON THE LAW OF TORTS §§ 56, 106 (W. Keeton 5th ed. 1984).

protect from harm.[36] However, several exceptions have been created to mitigate the potentially harsh results of this rule of no liability for nondisclosure of known information:[37] one may not deceive by telling a half-truth,[38] one must reveal a change of circumstances which makes an earlier representation false,[39] and, of particular relevance to this discussion, nondisclosure is not permissible in the case of one who stands in the role of a fiduciary.

36. *See* Terry v. Linscott Hotel Corp., 126 Ariz. 548, 617 P.2d 56, 61 (Ct. App. 1980) (acts of nonfeasance or omission not sufficient; guest must show active misfeasance of innkeeper).

37. These exceptions are reflected in § 551 of the RESTATEMENT (SECOND) OF TORTS, Liability for Nondisclosure (1977):

> (1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, if, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.
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> (2) One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated
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> (a) matters known to him that the other is entitled to know because of a fiduciary or other similar relation of trust and confidence between them; and
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> (b) matters known to him that he knows to be necessary to prevent his partial or ambiguous statement of the facts from being misleading; and
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> (c) subsequently acquired information that he knows will make untrue or misleading a previous representation that when made was true or believed to be so; and
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> (d) the falsity of a representation not made with the expectation that it would be acted upon, if he subsequently learns that the other is about to act in reliance upon it in a transaction with him; and
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> (e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

Other relations of trust and confidence include those of the executor of an estate and its beneficiary, a bank and an investing depositor, and those of physician and patient, attorney and client, priest and parishioner, partners, tenants in common and guardian and ward.

Section 551 was discussed by the Arizona Court of Appeals in Frazier v. Southwest Savings and Loan Ass'n, 134 Ariz. 12, 653 P.2d 362 (Ct. App. 1982), wherein the court quotes subsection 2(e) and concludes that if a person has such knowledge, a duty to exercise reasonable care will be imposed (and finding no such duty in this case). *See also* King v. O'Reilly Motor Co., 16 Ariz. App. 518, 494 P.2d 718 (1972) (Court acknowledges section 551 for nondisclosure, but finds no application in the case at bar).

The writers of the Restatement note that the continuing development of modern business ethics has limited somewhat the privilege to take advantage of another's ignorance. For instance, good faith and fair dealing may require a disclosure if one knows that the listener by reason of the relationship between them, or other objective circumstances, is reasonably relying upon a disclosure of the unrevealed fact if it exists. The example cited is that "a seller who knows that his cattle are infected with tick fever. . .is not free to unload them on the buyer and take his money, when he knows that the buyer is unaware of the fact, could not easily discover it, would not dream of entering into the bargain if he knew and is relying upon the seller's good faith and common honesty to disclose any such fact if it is true." RESTATEMENT (SECOND) OF TORTS § 551 Comment l.

38. *See* State v. Coddington, 135 Ariz. 480, 662 P.2d 155 (Ct. App. 1983) ("When one conveys a false impression by disclosure of some facts and the concealment of others, such concealment is, in effect, a false representation that what is disclosed is the whole truth."); Epperson v. Roloff, 719 P.2d 799 (Nev. 1986) (Defendant is liable for representation which is misleading because it partially conceals information); Caldwell v. Pop's Homes, Inc., 54 Or. App. 104, 634 P.2d 471 (Ct. App. 1981) (Proof that defendant concealed fact can be basis for fraud action); Wirth v. Commercial Resources Inc., 96 N.M. 340, 630 P.2d 292 (N.M. Ct. App. 1981) ("The duty to reveal all known material facts on a subject is triggered by revealing some information on the subject.").

39. PROSSER & KEETON ON THE LAW OF TORTS § 106 (W. Keeton 5th ed. 1984). *See also* Mammas v. Oro Valley Townhouses, Inc., 131 Ariz. 121, 638 P.2d 1367 (Ct. App. 1981) (defendants liable for failure to correct representations they subsequently learned were false concerning the size of a mobile home); Strand v. Librascope, 197 F. Supp. 743 (E.D. Mich. 1961) (seller of equipment liable for failure to disclose that equipment was defective when he learned this subsequent to

The fiducial or confidential relationship is one that reasonably elicits the trust and confidence of one party in another.[40] It typically arises in a situation where the relaxing of one's wariness is thought to be a natural and appropriate result of the relationship. Examples include the relationship between attorney and client, between guardian and ward, and between principal and agent.[41]

The fiducial relationship is said to impose an affirmative duty of "the utmost good faith, and full and fair disclosure of all material facts."[42] The existence or nonexistence of a confidential relationship is a question of fact.[43]

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sale, but prior to delivery); Hush v. Reaugh, 23 F. Supp. 743 (E.D. Ill. 1938) (buyer of property failed to disclose changes in the value of property subsequent to negotiation, but prior to sale).

40. In Condos v. Felder, 92 Ariz. 366, 377 P.2d 305 (1962), the Arizona Supreme Court cited with approval BOGERT ON TRUSTS listing the following examples of fiduciary relationships: guardian and ward, attorney and client, and principal and agent.

The *Condos* court also quoted the following language from BOGERT:

> But there are other cases where there is just as great intimacy, disclosure of secrets, entrusting of power, and superiority of position in the case of the representative, but where the law has no special designation for the position of the parties. It cannot be called a trust or executorship, and yet it is so similar in its creation and operation that it should have like results.

3 BOGERT ON TRUSTS AND TRUSTEES Part 1 § 482 (1946).

41. The phrases "fiduciary relationship" and "confidential relationship" appear to be used interchangeably by courts today. Hal Taylor Associates v. Unionamerica, Inc., 657 P.2d 743 (Utah 1982); Lowrance v. Patton, 710 P.2d 108 (Okla. 1985); Liebergesell v. Evans, 93 Wash. 2d 881, 613 P.2d 1170 (1980).

In a more strict use of the terms, fiduciary relationships can be said to be a subset of the broader category of confidential relationships. More specifically, one who is in a fiduciary relationship to another is obligated to act for the benefit of the other concerning matters within the scope of the relationship. Well-known examples include the relationship between a guardian and ward, an agent and principal, and a trustee and beneficiary.

A confidential relationship may exist even though there is no formal fiduciary relationship. It arises between two people where one has gained the trust of another and purports to act or advise with the other's interests in mind. Examples of the "confidential" relationship include priest and penitent, husband and wife, and physician and patient. Merritt v. Easterly, 226 Iowa 514, 284 N.W. 397 (1939). Note, however, that "Mere confidence or faith in another's honesty is not sufficient to create a confidential relationship." Apolito v. Johnson, 3 Ariz. App. 232, 413 P.2d 291 (1966), reh'g denied, 3 Ariz. App. 358, 414 P.2d 442 (1966).

In Rhoads v. Harvey Publications, Inc., 145 Ariz. 142, 700 P.2d 840 (Ct. App. 1984), the court found no fiduciary relationship between an employer and employee (publisher and cartoonist) and, as a result of their minimal and arms length dealings, "no great intimacy, disclosure of secrets, entrusting of power" so as to constitute a confidential relationship. *See infra* note 43 and accompanying text. *See also* Klinger v. Hummel, 11 Ariz. App. 356, 464 P.2d 676 (1970) (evidence insufficient to show a confidential relationship so as to support a claim of constructive fraud). *Compare* In Re Guardianship of Chandos, 18 Ariz. App. 583, 504 P.2d 524 (1972) (quantum of evidence necessary to show constructive fraud present).

42. The following factors are among those considered important by courts in determining the presence of a fiducial relationship: The relation of the parties to one another; the nature of the fact not disclosed (i.e. the intrinsic defect versus the extrinsic defect); the general class to which the person concealing the defect belongs; the importance of the fact not disclosed and any conduct of the person not disclosing something to prevent discovery. PROSSER AND KEETON ON THE LAW OF TORTS § 106 (W. Keeton 5th ed. 1984).

43. The nature of a confidential relationship was discussed by the Arizona Court of Appeals in Rhoads v. Harvey Publications, Inc., 145 Ariz. 142, 700 P.2d 840 (Ct. App. 1984). The court found that a relationship between a cartoonist and his publisher lacked any of the hallmarks of a confidential relationship — namely, intimacy, disclosure of secrets, entrusting of power, and superiority of the position of the representative. Mere friendly relations were not enough, the court noted. Instead, a confidential relationship is one in which one is bound to act for the benefit of the other and can take no advantage for himself from his acts relating to the interests of the other. The discussion of the court in *Rhoads* may be analogized to the adoption setting.

Refering to the opinion in Stewart v. Phoenix National Bank, 49 Ariz. 34, 64 P.2d 101 (1937), Once a confidential or fiduciary relationship has been found to exist, there is a presumption of constructive fraud, which shifts the burden of proof to defendants to show they acted with entire fairness.[44]

A fiduciary is one who stands in a confidential relation to another such that the other reposes special confidence in the fiduciary's devotion to his best interests.[45] These characteristics are arguably present in the adoption setting[46] where the adoption agent is both advisor and confidant of the adoption applicants, and the applicants are encouraged to share personal information with the adoption agent in order to achieve a favorable determination regarding their ultimate goal of adoption.[47] The adopting parents must rely upon the agent to use his superior knowledge and professional skill to find a child for them. It is not surprising that adopting parents such as

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the *Rhoads* court noted that the doctrine of confidential relations has been applied to husband and wife, parent and child, guardian and ward, attorney and client, and partners and joint venturers.

44. In Re Guardianship of Chandos, 18 Ariz. App. 583, 504 P.2d 524 (1972) (guardians of aged man required to show affirmatively that his conveyance of land to them was "fair and free from undue influence").

45. For examples of fiduciaries, see *supra* notes 40, 41, 43, and accompanying text.

46. One writer defines the assessment (of the adoptive parents) process as "a shared responsibility between social worker and adoptive family. As far as possible, the worker's role is to help members of the family gain more information and understanding about their family. . .and to give them as much information as possible about adoption in general and about particular children to be considered. On the basis of an enhanced understanding of their family and knowledge about the demands of adoption, the worker helps the family make a decision about adoption and if they decide to adopt, helps them prepare."

As the worker and adoption applicants move through the adoption process, "a relationship begins to develop. In fact, it is out of the clear, honest and open discussion of purpose, role, and tasks that a relationship of trust grows. The worker's identification with the adoptive parent's wish to have a child and his or her interest in helping the family obtain this goal strengthens the growing relationship."

"The ultimate responsibility for the child in the agency's care is in the hands of the worker and the agency. The worker must act in the best interests of the child. However, the welfare of the applicant is also of concern to the worker and the agency. It is the worker's aim to protect the family from the pain, frustration, feelings of disappointment, and failure that accompany an adoptive placement that does not work out." HARTMAN, FINDING FAMILIES: AN ECOLOGICAL APPROACH TO FAMILY ASSESSMENT IN ADOPTION 25, 32, 85 (1979).

In Hector M. v. Commissioner of Social Services, 102 Misc. 2d 676, 425 N.Y.S.2d 199 (1980), the parents argued that they had been fraudulently induced by a social worker to sign an agreement surrendering their two children for adoption. The court found that "Clearly the social worker, attorney, trustee and guardian alike must serve the interests of the other party of the relationship. Nevertheless, the very nature of the trust reposed in the attorney, trustee and guardian is sui generis: the distinguishing hallmark lies in the authority and responsibility to act in the place and stead of the client, cestui que trust and ward respectively. . . . [t]he character of the social worker-client relationship does not warrant a per se presumption of an "unequal situation" in the context of the doctrine of constructive fraud." *Hector M.*, 102 Misc. 2d at 682, 425 N.Y.S.2d at 203.

The court noted, however, that "that does not mean that the doctrine may not be deemed applicable to a social worker-client relationship . . . on an ad hoc basis upon evidence establishing probable unfairness" but found no such evidence here. *Hector M.*, 102 Misc. 2d at 683, 425 N.Y.S.2d at 204.

The court found that the social worker had intentionally misled the father in order to induce him to sign a surrender agreement. And that "under all the circumstances, *including the social worker-client relationship factor*, the father was justified in trusting and relying upon the social worker." *Hector M.*, 102 Misc. 2d at 689, 425 N.Y.S.2d at 207 [emphasis added].

47. "The worker may define the parents' role [in the adoption setting] as follows: the applicant's must be ready to share a good deal about themselves to facilitate the process; the applicant should trust the worker and understand that the worker is there to help; the parent need not fear sharing problems or difficulties in the family as this will be perceived as honesty, openness, and healthy insight; and the parent should take an active, participatory role and not wait for the worker to take leadership in decision-making." HARTMAN, *supra* note 46.

the Burrs may come to rely on the word of the adoption agent and believe that the agent they have worked so closely with, and who has approved them as adopting parents, is acting in their interest.[48] Certainly the adoption agent is bound to act for their benefit in that he can take no advantage for himself from his position.[49] When a fiduciary relationship exists, nondisclosure is no defense to a claim of fraud.[50]

The general rule of no liability for nondisclosure is also inapplicable where there is a statutorily imposed affirmative duty to disclose.[51] In 1985, the Arizona legislature imposed just such a specific, affirmative duty to disclose on the adoption agency,[52] (which is defined in the statute to include the independent attorney[53]). Arizona Revised Statutes section 8-129, provides that prospective adoptive parents must be given a complete, written, health and genetic history of the child to be adopted.[54] The statute signals clear legislative intent that the state agent/agency *not* follow a policy of silence regarding the child's background. An exception to the disclosure requirement of section 8-129 exists if "the birth parents are deceased, their whereabouts are unknown, or the information is not otherwise reasonably available,"[55] but the agent's failure to disclose *known* health and genetic information to the adopting parents would clearly violate the Arizona statute and subject the agent or agency to liability for intentional fraud.[56] The legislatively imposed duty precludes the common law option of nondisclosure for information known at the time of the transaction.[57] When a statutory duty exists, nondisclosure is no defense to a claim of fraud.

THE ROLE OF SOVEREIGN IMMUNITY

In *Burr*, the county adoption agency argued that in 1964, at the time of the adoption, it was the policy of the agency not to divulge to the adopting parents any information whatsoever about the child's background and the agency argued that such a policy decision was protected by sovereign immunity.[58] They further argued that since the county owed no duty to disclose the boy's background, there was no actionable breach of duty owed to the adopting parents.[59] The *Burr* court dismissed this argument, finding that the suit was premised not on injuries resulting from an official policy of si-

48. *See supra* note 41.
49. *See supra* note 43. The "benefit" which the fiduciary may not take for himself does not preclude the fiduciary from receiving a salary or a fee for services rendered, as in the case of the agent or the attorney.
50. *See supra* note 43.
51. PROSSER AND KEETON ON THE LAW OF TORTS § 106 (W. Keeton 5th ed. 1984).
52. ARIZ. REV. STAT. ANN. § 8-129(A) (1984).
53. *See supra* note 23.
54. ARIZ. REV. STAT. ANN. § 8-129(A) (1984).
55. *Id.*
56. *Id.*
57. *Id.*
58. *Burr*, 23 Ohio St. 3d at 76, 491 N.E.2d at 1108.
59. The adoption agency contended that the Burrs would have adopted the boy anyway absent the false representations made to them, and thus the costs of caring for the boy were merely the incidental and unpredictable costs of parenthood, totally unrelated to any reliance upon representations made to the plaintiffs when they decided to adopt. *Burr*, 23 Ohio St. 3d at 73, 491 N.E.2d at 1105. The county also maintained that, per Ohio statute, the sole remedy available to adoptive

lence, but on an active and knowing misrepresentation of fact.[60] The court noted that what was actionable was not the "mere failure to disclose the risks inherent in [the] child's background," but rather the deliberate act of misinforming the couple that deprived them of their right to make an informed decision and led to their compensable injuries.[61]

In Arizona, under the sovereign immunity statute adopted in 1984,[62] absolute sovereign immunity protects the state and the state agent in the exercise of fundamental governmental policy.[63] Adherence to a fundamental governmental policy of silence would presumably preclude state liability for negligent misrepresentation in Arizona under the sovereign immunity statute.[64] The legislatively declared policy in Arizona, however, is not one of silence but of candor.[65] Consequently, because a state action is inconsistent with fundamental policy if it is in violation of state law, the "mere failure to disclose," which the *Burr* court implied would have been insufficient to impose liability in Ohio, would not preclude governmental liability for misrepresentation in an Arizona adoption.[66] And in a case of intentional

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parents of a "special needs" child is expense money. *Burr*, 23 Ohio St. 3d at 74, 491 N.E.2d at 1107.

The court found the statute limiting compensation to be inapplicable, as it pertains only to the knowing placement of a child with special needs, in a case where the parties enter into an agreement before adoption to make payments to offset the added expense of raising such a child. *Burr*, 23 Ohio St. 3d 69, 491 N.E.2d 1101 (1986).

60. *Burr*, 23 Ohio St. 3d at 78, 491 N.E.2d at 1109.

61. *Id.*

62. The Arizona Supreme Court abolished governmental immunity in 1963 in Stone v. Arizona Highway Comm'n, 93 Ariz. 384, 381 P.2d 107 (1963), holding that the State of Arizona is liable in tort for the negligent acts of its officers, agents, and employees.

Under the Arizona sovereign immunity statute enacted in 1984, the state has reimposed some absolute immunity: A public entity shall not be liable for acts and omissions of its employees constituting: (1) The exercise of a judicial or legislative function; or (2) The exercise of an administrative function involving the determination of fundamental governmental policy." ARIZ. REV. STAT. ANN. § 12-820.01(A)(1)&(2).

Section 12-820.02 (1-6)(1984) also reimposes some qualified immunity, including, for example, immunity for failure to arrest, or for failure to discover violations in an inspection. However, while the boundaries of this immunity have not yet been interpreted by the courts, it does not appear to cover the actions under discussion here: intentional fraud or negligence by the state adoption agent or agency (the Department of Economic Security) in conveying information to adopting parents.

63. § 12-820.01(A)(2)(1984). ("a public entity shall not be liable for acts and omissions of its employees constituting: . . . (2) The exercise of an administrative function involving the determination of fundamental governmental policy").

In Richard P. v. Vista Del Mar Child Care Serv., 106 Cal. App. 3d 860, 165 Cal. Rptr. 370 (1980), the plaintiffs sued the defendant for negligent misrepresentation after the child they had adopted through the defendant was later found to have extreme emotional and adjustment problems. They argued that they had not been warned that the child's premature birth might lead to physical or mental health problems. On grounds of public policy the court dismissed the negligent misrepresentation cause of action.

64. *Supra* note 63.

65. ARIZ. REV. STAT. ANN. § 8-129(A)(1984) provides that

> Before placing a child for adoption, the division or the agency or the person placing the child, if the child is not placed by the division, shall compile and provide to the prospective adoptive parents detailed written nonidentifying information imcluding a health and genetic history and all nonidentifying information about the birth parents or members of a birth parent's family set forth in a document that is separate from any document containing identifying information. This subsection does not apply if the birth parents are deceased, their whereabouts are unknown or the information is not otherwise reasonably available.

66. This liability is bolstered by § 536 of the RESTATEMENT (SECOND) OF TORTS, which provides that: "If a statute requires information to be furnished... for the protection of a particular class of persons, one who makes a fraudulent misrepresentation in so doing is subject to liability to the

fraud by the state adoption agency, the State of Arizona would also be liable as was the State of Ohio in *Burr*.[67]

In Arizona, the state adoption agent would also be personally liable for his intentional fraud both civilly and perhaps criminally through application of Arizona Revised Statutes section 13-2311, which makes it a felony for anyone to defraud or deceive in any matter related to the business conducted by any department or agency of the state.[68] This statute has been used in the past exclusively to prosecute the private individual dealing with the state agency,[69] but it would seem to apply readily to a state employee who defrauds adopting parents in the course of an adoption.

The shield of sovereign immunity is, of course, inapplicable to the private adoption agency or the independent adoption agent. Although they are required to follow state procedures and abide by state regulations governing adoption, private agencies and agents are not agents of the state for purposes of sovereign immunity and they are liable for their intentional and negligent torts.

NEGLIGENT MISREPRESENTATION

In 1982, Arizona recognized a cause of action for negligent misrepresentation and adopted section 552 of the Restatement (Second) of Torts.[70] Negligent misrepresentation occurs when the speaker fails to exercise rea-

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persons for pecuniary loss suffered through their justifiable reliance. . . ." RESTATEMENT (SECOND) OF TORTS § 536 (1977).

67. *See supra* text accompanying note 30. As a possible bar to this liability, however, the Arizona sovereign immunity statute contains a provision that precludes state liability for the criminal felonies of its employees unless the state knew of their propensity for such activity. If a state employee were to act fraudulently but independently, and without the knowledge of the employer, the employee could apparently be held liable to the exclusion of the state. ARIZ. REV. STAT. ANN. § 12-820.05(B)(1984).

68. ARIZ. REV. STAT. ANN. § 13-2311 (1980). "Notwithstanding any provision of law to the contrary, in any matter related to the business conducted by any department or agency of this state or any political subdivision thereof, any person who, pursuant to a scheme or artifice to defraud or deceive, knowingly falsifies, conceals or covers up a material fact by any trick, scheme or device or makes or uses any false writing or document knowing such writing or document contains any false, ficticious or fraudulent statement or entry, is guilty of a class 5 felony."

Arizona's other primary fraud statute might also serve to impose liability on the state employee who intentionally defrauds. It states that "Any person who, pursuant to a scheme or artifice to defraud, knowingly obtains any benefit by means of false or fraudulent pretenses, representations, promises or material omissions is guilty of a class 2 felony." ARIZ. REV. STAT. ANN. § 13-2310(A) (1980).

69. Cases which have utilized § 13-2311 include: State v. Roberts, 138 Ariz. 230, 673 P.2d 974 (Ct. App. 1983) (fraudulently claiming to D.E.S. to be unemployed in order to collect A.F.D.C. assistance); and Hymer v. Moore, 18 Ariz. App. 554, 504 P.2d 495 (1972) (submitting false travel vouchers to State Auditor's Office).

70. In Frazier v. Southwest Savings and Loan Ass'n, 134 Ariz. App. 12, 653 P.2d 362, 366 (Ct. App. 1982), the Arizona Court of Appeals cited with approval § 552 of the RESTATEMENT (SECOND) OF TORTS. According to § 552:

> One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

RESTATEMENT (SECOND) OF TORTS § 552.1 (1977).

Comment (d) on subsection (1) explains that "the fact that the information is given in the course of the defendant's business, profession or employment is a sufficient indication that he has a sonable care in obtaining or communicating information.[71] It is not necessary that the speaker have knowledge of the falsity, or that he intend for the hearer to act upon the information. It is enough that in the course of the speaker's business or profession,[72] he has supplied false information (which may be either false on its face or false because it is incomplete) for the guidance of others, and that they have suffered pecuniary loss as a result of their reliance on the information given them.

If there is a duty of care to disclose fully, a speaker may be liable for either negligent communication or nondisclosure, according to the Restatement.[73] Negligent communication might occur where the speaker knows the facts but negligently fails to include them as, for example, where he neglects to include a crucial document in a packet of information, or neglects to relate a crucial fact in conversation. Negligent nondisclosure also might occur where the speaker has a duty to speak, such as that imposed by section 8-129, and yet fails to do so.

In a business setting, application of Restatement section 552 may be avoided by nondisclosure. Businesspersons who lack confidence in the reliability of their information can, barring the exceptions already noted, choose to remain silent on the subject so long as the information is not "basic" to the transaction.[74] It is doubtful that the writers intended to limit redress for

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pecuniary interest in it, even though he receives no consideration for it at the time." RESTATEMENT (SECOND) OF TORTS § 552.1, comment d (1977).

Note, too, that "Expressions of opinion can be treated as facts when expounded by experts." Fifty Associates v. Prudential Insurance Co., 450 F.2d 1007 (9th Cir. 1971). In *Fifty*, the court cites this quote as an accurate statement of the law, although it does not alter the court's reading of the facts in that case. (Prudential Insurance Co., which invests premium income in real estate mortgages, estimated the value of a parcel of real estate for an established real estate investment company. Fifty Associates disregarded a contract provision which entitled them to three certified appraisals if the value of the property was in dispute. The court found that Prudential was not acting as an expert when conveying this appraisal to a business with almost 150 years of real estate experience, where the appraisal was qualified as only an approximation.) *Fifty Associates*, 450 F.2d at 1101.

71. RESTATEMENT (SECOND) OF TORTS § 552 (1977).

72. The Restatement has been written with an eye to the business setting in which negligent misrepresentation typically occurs. Accordingly, § 552 refers to information supplied to guide another in a "business transaction." Section 552(3), however, states that "The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them." Comment (k) on Subsection (3) uses a recording clerk as an example and notes that the "usual case. . . is that of a public officer who, by his acceptance of his office, has undertaken a duty to the public to furnish information of a particular kind." RESTATEMENT (SECOND) OF TORTS § 552(3) comment k (1977).

73. RESTATEMENT (SECOND) OF TORTS § 552 (1977).

74. RESTATEMENT (SECOND) OF TORTS § 551.2(e), and comment (k) on clause (e).

> To a considerable extent, sanctioned by the customs and mores of the community, superior information and better business acumen are legitimate advantages, which lead to no liability. The [businessperson] may reasonably expect the plaintiff to make his own investigation, draw his own conclusions and protect himself; and if the plaintiff is indolent, inexperienced or ignorant, or his judgment is bad, or he does not have access to adequate information, the defendant is under no obligation to make good his deficiencies.

RESTATEMENT (SECOND) OF TORTS § 551.2(e), and comment (k) on clause (e).

But comment (l) notes that "The continuing development of modern business ethics has, however, limited to some extent this privilege to take advantage of ignorance." RESTATEMENT (SECOND) OF TORTS § 551.2(e) and comment (l) on clause (e). While noting that it is extremely difficult to be specific as to the factors that give rise to a plaintiff's "known and reasonable expectation of disclosure", the advantage taken by the defendant must generally rise to the level of a trap or a harm only to those who were harmed in their commercial roles. Although it serves both a practical and a social purpose not to hold people liable for careless statements they make in a social setting, there is little justification for limiting recovery by one who has relied on a misrepresentation made by a speaker in his professional capacity to instances in which reliance was commercial in nature. If the speaker in his professional role conveys information to one he knows will rely on this information in making a personal decision, it is consistent with the reasoning of the Restatement that the speaker be held responsible for the loss which results to his listener.

In the Arizona adoption setting, however, another rule applies. According to the Restatement, one whose *profession* it is to supply information for the guidance of others is under a duty of care and competence. If the matter is one which requires investigation, the supplier must exercise the competence of a person in the supplier's professional position to ascertain the facts on which the statement is based.[75] In the adoption setting, the duty to make a reasonable investigation can be derived implicitly both from the speaker's voluntary undertaking of the role of agent and from Arizona Revised Statutes section 8-129. While most childrens' health backgrounds do not include the parade of horribles present in the Burr adoption, every child has a health history and the statute entitles the adopting parents to it when it is "reasonably available."[76]

There is a logical connection between the duty to reasonably investigate and the half truth rule.[77] Failure to seek out information uniquely within one's grasp may result in the telling of a half truth where there is a statutory duty to tell the whole truth. A difficulty with this proposition is that there is no established standard in the community by which an investigation can be adjudged reasonable or unreasonable since there are no guidelines for the investigation of a prospective adopted child's health history. It could, therefore, be argued that the expectation of investigation is appropriate only if the social work profession in general would investigate in similar circumstances.[78] Because most adopting parents must rely on the skill and knowledge of the adoption worker in order to obtain any information about the child they are adopting it is reasonable to assume that when the legislature imposed a duty to reveal, it did not intend for the only party in the three-way[79] adoption transaction with an opportunity to seek the information to neglect to investigate. Therefore, it may be argued that given his superior position, it is negligent for the agent to fail to use means at his disposal to learn of the child's background.[80] As a result, the existence of such a duty to

swindle, although with changing ethical attitudes the concept of facts basic to a transaction may be expanding and the duty to disclose facts may also be increasing.

75. RESTATEMENT (SECOND) OF TORTS § 552, comment (f) (1977).

76. ARIZ. REV. STAT. ANN. § 8-129 (1985).

77. *See supra* note 38.

78. This is the standard of care applied to physicians in medical malpractice cases. The physician is expected to possess and use the knowledge and ability of members of the profession in good standing. In seeking a standard by which to evaluate the investigation performed by a social worker, a court might determine that the appropriate standard is to determine what other social workers in good standing do in like circumstances.

79. Consenting parent, adoption agent, adopting parent.

80. Traditionally, the position in which a person stands in relation to others may require that

investigate is reinforced by Restatement section 552 which imposes liability for failure to exercise reasonable competance in obtaining information to be communicated.[81]

Given the bureaucratic nature of the adoption process, adopting parents find that the difficulties involved in gaining information regarding the child's background are significant. In many situations, however, an investigation may be no less troublesome for the adoption agent, who often has to rely on the veracity of the adopted child's natural parents.

INVESTIGATING THE CHILD'S BACKGROUND

While in the best of circumstances the biological parents and their families might freely provide a comprehensive health history about the child to the adoption agent, many biological parents of children available for adoption lack the sophistication or the knowledge to provide useful facts about the child's genetic and health history. Conversely, fear of jeopardizing the placement of the child may motivate the biological relatives to conceal negative information which they do possess.

In difficult cases, relatives of the child may be unwilling to provide any information at all.[82] The statute imposes no duty on the natural parents to disclose their histories, nor could it, seemingly, without a significant invasion of privacy.[83] Not only does the birth parent have no duty to reveal information to the agent, if the parent does volunteer information the agent has no guarantee of its reliability. Thus, the adoption agent has a statutory duty to disclose information which can only come from limited sources whose reliability he does not control.

RISK OF ILL HEALTH

Adoption agencies have never been held to "insure" the fitness of the children they place, and adopting parents are said to bear the same risks as natural parents.[84] But the mere fact that adopting parents, by choosing to

person to know enough to conduct an intelligent inquiry as to the things he does not know. "Where a duty to use care is imposed and where knowledge is necessary to careful conduct, voluntary ignorance is equivalent to negligence." PROSSER AND KEETON ON THE LAW OF TORTS § 32 (W. Keeton 5th ed. 1984), *citing* Gobrecht v. Beckwith, 82 N.H. 415, 420, 135 A. 20, 22 (1926).

81. RESTATEMENT (SECOND) OF TORTS § 552.1 (1977).

82. As could be the case when a child has been removed from an unfit home and is now being offered for adoption.

83. The right to privacy is guaranteed in the Arizona Constitution, Article 2, Section 8. *See, e.g.*, Bacon v. Graham, 348 F. Supp. 996 (D. Ariz. 1972). Although a statute or rule was enacted by the state in a legitimate exercise of state power, it may nonetheless be held constitutionally invalid when it operates to deprive an individual of a protected right; State v. Goff, 99 Ariz. 79, 407 P.2d 55 (1965) (search for truth must yield when it clashes with constitutional rights); State v. Murphy, 117 Ariz. 57, 570 P.2d 1070 (1977) (the class of rights deemed to be "fundamental" for right of privacy purposes under the Federal Constitution includes activities relating to marriage, procreation, contraception, family relationships, and child rearing and education); State v. Johnson, 143 Ariz. 318, 693 P.2d 973 (Ct. App. 1984) (a statute is overbroad when its language, given its normal meaning, is so broad that sanctions may apply to conduct which the state is not entitled to regulate). *But see* State v. Bateman, 113 Ariz. 107, 547 P.2d 6 (1976), cert. denied 429 U.S. 864 (1976). (the right of privacy is not unqualified and must be considered in the light of important state interests).

84. The Ohio Supreme Court said, "Adoptive parents are in the same position as, and confront risks comparable to those of, natural parents relative to their child's future. . . .However, just as

adopt, have shown a willingness to incur the risk that the child will develop health problems does not mean that they are willing to have such a child fraudulently foisted upon them. The *Burr* court noted that just as couples must weigh the risks of becoming natural parents, so too should adopting parents be allowed to weigh the risks of adopting a child, something impossible for the Burrs to do when they had been deliberately misinformed.[85]

In the area of medical malpractice, the doctrine of "informed consent" is used to express the duty of the physician to reveal the risks involved in a particular medical intervention.[86] The patient is said to have the right to decide what is to be done to his own body, and sufficient information about his condition and the risks of treatment are deemed essential to the formulation of an informed decision. The same principal may be seen to be at work in the adoption setting. The legislature has provided adopting parents with a statutory right to the same sort of health history natural parents have about their own families when they weigh the risks of becoming parents; otherwise an informed decision is impossible.

If a couple adopts based on insufficient or false information, they may suffer hardship as a result of the stresses caused by a child whose disabilities were not anticipated. In addition, the resentment and anger which the couple may feel as a result of not having been permitted an informed choice could be misdirected at the child, an obviously harmful result.[87] It is, therefore, a state interest that adopting parents make an informed decision and be fully prepared to accept the particular child they are adopting.[88] The best interests of the child who is resented at home or returned to the adoption agency are not being served.

FIDUCIAL DUTY TO DISCLOSE

In Arizona, the courts distinguish between "actual fraud," characterized by an actual intent to deceive, and "constructive fraud," which is characterized by a breach of duty arising out of a fiduciary or confidential

couples must weigh the risks of becoming natural parents, taking into consideration a host of factors, so too should adoptive parents be allowed to make their decision in an intelligent manner." *Burr*, 23 Ohio St. 3d at 77-79, 491 N.E.2d at 1109.

85. *Id.*

86. Annotation, *Modern Status of Views as to General Measure of Physician's Duty to Inform Patient of Risks of Proposed Treatment*, 88 A.L.R. 3d 1008 (1978). Annotation, *Malpractice: Physician's Duty to Inform Patient of Nature and Hazards of Treatment in Pregnancy and Childbirth Cases Under the Doctrine of Informed Consent*, 69 A.L.R. 3d 1250 (1976). *See also* Reidisser v. Nelson, 111 Ariz. 542, 534 P.2d 1052 (1975); Halley v. Birbiglia, 390 Mass. 540, 458 N.E.2d 710 (1983).

87. According to the National Committee for Adoption, in an independent adoption "The adoptive parents may not receive full and accurate information about the health issues of the child. Frequently, problems are covered up or not mentioned in the hope that bonding or finalization will take place and the adoptive parents will have no recourse." NATIONAL COMMITTEE FOR ADOPTION, ADOPTION FACTBOOK (1985).

88. Otherwise, "The child's rights to permanency may not be protected. The couple wants a normal child, if the child is not, the child may be left in legal limbo while the lawyer (or other independent actor) and the biological parents attempt to arrange some other placement." Also left unprotected in the independent adoption are the biological parents who may receive little counseling because "In independent adoptions, it is not in the best interest of the third party [adoption agent], whose fee is being paid by the persons who wish to get a child, to say anything which conflicts with the best interest of the client who is paying the fee." ADOPTION FACTBOOK, *supra* note 88, at 48 (1985).

relationship.[89] This has the effect, in some cases, of imposing strict liability for all representations made by someone who, because of his position of confidence, the court determines "ought to have known, or else ought not to have spoken."[90]

Constructive fraud is a breach of moral or equitable duty that the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interest. Dishonesty of purpose and intent to deceive are not essential elements of constructive fraud.[91] The key elements are that the speaker implies or professes specific knowledge and that the hearer relies on this knowledge.[92] Where one relies, the other has a duty to make a full and truthful disclosure of all material facts and is liable for misrepresentation or concealment. Breach of this duty gives rise to an action in constructive fraud.[93] One effect of a finding of constructive fraud is that a lesser degree of proof is required of the plaintiff than is required when the parties are equals dealing at arm's length.[94]

Whereas Arizona Revised Statute section 8-129 imposes a duty to reveal known health information, the fiducial relationship may be said to impose a higher duty. The fiduciary must act in the best interest of the adopting parents since they are compelled to rely upon and to trust the adoption agent, who is their only source of information vital to making an informed decision. As a result, the agent's duty to reveal known health information must implicitly be buttressed by a duty to investigate further on the adopting parent's behalf. The mere assertions of the natural parents, when incomplete or suspect, are inadequate to enable the adopting parents to make an informed decision. If the relationship is a confidential one, the adoption agent has an obligation to act in his principal's best interest.

While it would be unreasonable to cast the adoption agent in the role of genetic sleuth, responsible for unearthing every conceiveable health and genetic fact in a child's background, a court could find that an agent fails in his fiduciary duty if, for example, he merely hands an abstruse, multi-page questionaire to a marginally literate birth mother. The extent of the investigation or probing that might be deemed appropriate must depend upon the circumstances of the case. For example, if adopting parents are to bear the same risks as natural parents,[95] then the appropriate degree of information required might be that which an ordinary couple would typically have about

89. In Re McDonnell's Estate, 65 Ariz. 248, 179 P.2d 238 (1947), *citing* 37 C.J.S., *Fraud* § 2, at 208-215. *See also supra* text accompanying notes 42-44.

90. Gauerke v. Rozga, 112 Wis. 2d 271, 332 N.W.2d 804 (1983), *citing* Law Notes for Trial Judges in Wis.J.I. no.2400, *Misrepresentation: Bases for Liability & Damages.*

91. Rhoads v. Harvey Publications, Inc., 145 Ariz. 142 , 700 P.2d 142 (Ct. App. 1984). Condos v. Felder, 92 Ariz. 366, 377 P.2d 305 (1962) (when a confidential relationship exists between two people, circumstances may give rise to implied fraud even though no actual fraud exists); Hassenpflug v. Jones, 84 Ariz. 33, 323 P.2d 296 (1958) (Where a confidential relationship exists one need not prove moral guilt, intent to defraud, or reliance by the plaintiff in order to prove fraud.).

92. Rice v. Tissaw, 57 Ariz. 230, 112 P.2d 866 (1941) (party does not know the falsity of his statements, but makes them recklessly when it is his duty to ascertain the truth).

93. Bell v. Bell, 44 Ariz. 520, 39 P.2d 629 (1934).

94. In Re McDonnell's Estate, 65 Ariz. 248, 179 P.2d 238 (1947), *citing* Waddell v. White, 56 Ariz. 420, 108 P.2d 565 (1940).

95. *See supra* note 86.

their own health and genetic background.[96]

The fiducial nature of the relationship between the adopting parents and the adoption agent becomes more obvious in the independent or private adoption. In the case of a private adoption there is usually an attorney-client relationship, the relationship which is quintessentially fiducial. The conflict of interest which exists for the fiduciary handling an adoption is most evident in the area of private adoptions arranged by an attorney.[97]

The attorney handling a private adoption owes a traditional fiducial duty to his client, but his loyalty is diluted by his dual obligation. The fiduciary duty arising out of the attorney/client relationship (or principal/agent relationship, in the case of a private agency) must be weighed against the statutory duty to reveal and the attorney's duty as a state representative in the adoption to keep the best interests of the child paramount.[98]

CONCLUSION

In *Burr*, the Ohio Supreme Court awarded damages to a couple who had been intentionally misled about the health and family history of the child they adopted from a county agency. A similar set of facts would also be sufficient to satisfy the traditional nine elements of intentional fraud found in Arizona law.

The more interesting problem for the Arizona courts concerns the possible application of the negligent misrepresentation cause of action to the adoption setting. The potential for state and agent liability in this area arises as a result of Arizona's statutory imposition of a duty on the adoption agent to disclose health information to the adopting parents. As a result of the statutory duty, the common law option of nondisclosure is unavailable. Further, what may be deemed the fiducial nature of the relationship between the adopting parent and the adoption agent may leave the agent strictly liable for all information conveyed and for all information which should rightly have been conveyed by one in a confidential relationship.

Thus, an unusual fact pattern in an Ohio case points out the potential liability for misrepresentation or nondisclosure and, consequently, the need for guidelines for public and private Arizona adoption agents and agencies regarding the duty to reveal health and genetic information to the adopting parents. A standardized list of health and genetic questions, and guidelines as to the extent and manner of investigation required of the adoption representative, could lessen the possibility of liability for negligent misrepresentation or nondisclosure. Otherwise, Arizona has placed an amorphous

96. *Richard P., supra*, note 64. ("After all, such a guarantee (of future good health) is unavailable to natural parents who, when fortunate enough to bring into the world a healthy child, have no guarantee whatsoever that the child will continue to enjoy good physical and emotional health.").

97. Some commentators argue that a lawyer who does not refer his clients to a child placement agency is doing them a great disservice: "The fact is that lawyers are not competent and do not have the requisite training and experience to deal with what has become recognized as a special area of social service. . . .It is clear that he would violate his professional responsibility if he ventured to secure a child or suggest the means of securing a child outside recognized agencies, if indeed he knows of any sources." Elson, *A Study of Adoption Practice*, Child Welfare League of Am., Inc., selected papers presented at the national conference on adoption, 153 (1955).

98. *See supra* note 41.

statutory duty on the agency and the agent to provide information, with little guidance as to what might fulfill this duty, and has thereby exposed them to liability for failure to comply.

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