

Fraud by Adoption Agencies

By Richard Alexander

Introduction

This past year marked one of the first successful actions in California against a county adoption agency for its failure to disclose to adopting parents their adopted child's medical and psychological history. *Forster v. San Mateo County* is not unique. There are many equally tragic cases that await the discovery of mental health professionals and the efforts of trial lawyers to help these families obtain the funding necessary for lifetime psychiatric care.

1. The Adoption Agency's Duty of Disclosure

The essence of an adoption fraud case is contained in *Michael J. v. L.A. City Department of Adoptions* (1988) 201 Cal.App.3d 859, 876 [247 Cal.Rptr. 504], which in recognizing an action for misrepresentation and fraudulent concealment of an adopted child's pre-adoption history, held that in an adoption "there must be a good faith full disclosure of material facts concerning existing or past conditions of the child's health." (Emphasis added.)

Full disclosure is important because under Civil Code § 206 parents are under a lifetime obligation to support their adopted child and California law mandates that "it is the duty of the father, the mother, and the children of any person in need who is unable to maintain himself by



RICHARD ALEXANDER

work, to maintain such person to the extent of their ability."

Case law going back to the 1930's confirms that the term "person in need" includes a physically or mentally handicapped or disabled person who is unable to be self-maintaining by work. *Chun v. Chun* (1987) 190 Cal.App.3d 589 reiterates this longstanding public policy in its holding that an emotionally disabled adult was a "person in need" under the statute and imposed on the father the duty to support to prevent the adult child from becoming a public charge.

Adoptions occurring between January 1, 1979 and January 1, 1981 are governed by California Civil Code § 224s, amended Statutes 1978, Chapter 429, page 1339, which provides in part:

No agency shall place a child for adoption unless the agency had submitted a written medical report on the child's medical background, if available, and, so far as ascertainable, the medical background of the child's natural parents, conforming to requirements which shall be specified by the State Department of Social Services, to the prospective adopting parents and such prospective adopting parents have acknowledged in writing the receipt of such a report.

Civil Code § 224s was amended effective January 1, 1981, Statutes 1980, Chapter 1229, page 4153, as follows:

No agency shall place a child for adoption unless a written report on the child's background, if available, and, so far as ascertainable, the medical background of the child's birth parents, has been submitted to the prospective adopting parents and the prospective adoptive parents have acknowledged in writing the receipt of such report. The written report on the child's background shall contain all diagnostic information which is known, including current medical reports on the child, psychological evaluation, and scholastic information, as well as all known information regarding the child's developmental history and family life.

Both statutory duties are for the benefit of prospective adoptive parents and children. Further disclosure obligations have been imposed as described below.

While vigorous advocacy for the victims of adoption fraud can provide valuable remedies, these cases are extremely challenging from both a legal and factual perspective, and there are several potential pitfalls to be avoided.

2. Limit on Recoveries for Post-1983 Adoptions

The Legislature's intent in passing The Adoption Information Act of 1983 was to facilitate efforts by adopted children to find their natural parents. In order to promote that goal and anticipating complaints by both children and natural parents of poor record keeping or wrongful disclosure, the Legislature adopted a \$250 limit on damage claims against adoption agencies, where the adoption was finalized after January 1, 1984. (Civ. Code § 204t(14).) The unfortunate outcome is that the Act now can be used by both negligent and willful wrongdoers to shield

Mr. Alexander, former member of the CTLA Board of Governors, recognized as a Trial Lawyer by CTLA and certified as a trial advocate by the National Board of Trial Advocacy, is with the Alexander Law Firm in San Jose.

© 1993 by Richard Alexander.

themselves from responsibility for failure to disclose a child's medical history and the devastating damage caused by such concealment. This resulting injustice must be corrected by our Courts or Legislature.

Adoptions that are finalized before December 31, 1983 are not subject to this limitation, although the adoption agency will argue the contrary. In *Forster* this defense was raised by summary judgment and again at the time of trial. Since the damage caused by failing to disclose a child's history can have a devastating impact, in appropriate cases this statute must be challenged.

Many conduct disorders do not blossom until early puberty and are not fully appreciated until teenage years. As a practical matter, parents who report an incorrigible 13 or 14 year old born in 1979 or 1980, most probably completed the adoption before 1984 and can bring suit unimpeded by the necessity to challenge § 204t(14).

If the adoption was finalized after January 1, 1984, before challenging the legitimacy of the limitations on damages, carefully scrutinize the underlying facts to

determine if this is the optimum case before delving into the legislative history behind § 204t(14). There is no current case law on this statute. The legislative history behind the statutory scheme requiring full disclosure was intended to also allow for an adopted child to be able to find out about his/her natural parents. In order to avoid potential damages as a result of this disclosure process the Legislature limited damages under the new statute to \$250. Obviously, there was no intention to limit the lifetime damages of a child who has been irreparably injured by the willful misconduct of a social worker, or by other actions of employees of the Department of Social Services that have caused a child's life to be permanently warped.

Defendants will argue that The Adoption Information Act of 1983, specifically section 14 of chapter 1162 of the Statutes of 1983, limits their liability exposure to \$250 in all cases, even adoptions occurring before its effective date, January 1, 1984. For the argument to prevail, with regard to adoptions prior to December 31,

1983, a court would have to *retroactively* apply The Adoption Information Act. Courts routinely reject retroactive application of statutes under similar circumstances.

Retroactive laws are generally disfavored because the parties affected have no notice of new law affecting past conduct ... (citation omitted). Consequently, new enacted statutes are presumed to apply prospectively only unless a clear intent to the contrary is expressed by the Legislature (*Russell v. Superior Court, supra*, at p. 814.)

Courts have refused to apply new damage provisions retroactively in the absence of clear legislative intent, on the ground that the new statutes reduced the amount of available damages and thus worked a "modification of liability," changing the legal effect of past transactions, rights and obligations. (*Russell v. Superior Court, supra*, at p. 816.)

There is absolutely no indication of any intent, let alone a clear intent, by the Legislature to apply The Adoption Information Act of 1983 retroactively. In fact, the only reference to when The Adoption Information Act of 1983 would apply, other than the presumptive prospective application, is the delayed prospective application referenced in section 10 which states: "Sections 2, 4, 5, 6, and 7 of this act shall be operative January 1, 1986."

Even if there were a clear legislative intent to apply the 1983 statute retroactively, which there is not, such retroactive application should not effect a plaintiff's independent common law tort causes of action for fraud, intentional misrepresentation and concealment, negligent misrepresentation and concealment, intentional infliction of emotional distress, and negligent infliction of emotional distress. These common law tort causes of action exist independently from any statutory violation of Civil Code § 224s.

Lastly, and conclusively, in *Michael J., supra*, footnote 9, the Court stated:

The limitation of liability ... "with regard to the programs authorized by this act" to two hundred and fifty (\$250.00) for each such act or omission [citation omitted] would not apply to misrepresentations in the adoptive process outside of *these particular programs*. (Emphasis added.)

These "particular programs" enacted in

SECURITY EXPERT

- Specializing in -

Premises Liability

for Criminal Acts of Third Parties

- Also -

Security Misconduct, Negligence,
False Arrest, & Use of Force

- Crime Foreseeability & Adequacy of Security Evaluations
- Apartments, Hotels, Convenience Stores, Shopping Centers, Parking Lots, Restaurants, Bars, and ATM's



Chris E. McGoey, CPP, CSP
Toll-free: 1 (800) 982-1660

Birth Trauma

Malpractice Litigation

Obstetrical • Neonatal • Pediatric

Why :

- 1/3 Cost of Reviewing MD's
- If meritorious, will retain Board Certified, NON-ADVERTISING Practicing Medical Experts
- RNs — 10 yrs. clin. hosp. experience
- 6 yrs — medical malpractice claims adjusting "Bad Baby" cases
- 600 cases reviewed

What :

- Review Records / Fetal Monitor Strips
- Evaluate Liability
- Address Causation Problems
- Formulate Depo Questions
- Screen Potential Cases

How :

Nutt & Bezaire
818-795-7335

1983 did not exist beforehand, making liability for any act or omission with regard to programs authorized by this act an *impossibility* prior to December 31, 1983.

A plaintiff's delayed discovery of the adoption agency's fraud, which tolls the commencement of the statute of limitations, should have no bearing on the applicability of the \$250 limit. Although causes of action will have accrued following delayed discovery, the law which applies to a defendant is that which was in effect at the time of defendant's misrepresentations and concealment.

3. Remedies Beyond Relinquishment

The defendants will claim that the parents' exclusive remedy is to relinquish their child under Civil Code § 228.10 which provides that a petition to relinquish "shall be filed within five years after the entering of the decree or order of adoption." In most cases, the five year statute will have run years ago and the agency will claim it is insulated from suit.

This argument is flatly contradicted by the express language of § 228.10 itself. There is no mention nor hint in § 228.10, nor in any case, that it was intended to be an exclusive remedy.

The plain wording of the statute is that relinquishment is one option. There is no mandatory language used in § 228.10. The word used is "may": "A petition setting forth those facts may be filed by the adoptive parents" and "If those facts are proved to the satisfaction of the court, it may make an order setting aside the decree or order of adoption."

Section 228.10 (formerly § 227(b)) dates back approximately fifty years, yet claims for *monetary damages* have been approved for concealment and misrepresentation in the area of social services. (*Michael J., supra*, at p. 875.)

If the adoption statutes are to be liberally construed to promote justice and the welfare of the children, they cannot be tortuously construed to insulate wrongdoers who conceal and misrepresent all to the harm of the child and their adopting parents.

Defendants will also claim in support of an exclusive remedy claim that money damages awards will cause more children

to be deemed "unadoptable" because they might later develop mental illness. The effect of exposure to money damages awards is to force full disclosure of information to the adopting parents in compliance with the law, and discourage the reprehensible concealment and misrepresentation seen in the instant case. After all, "just as 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." (*Michael J., supra*, footnote 10.) Adoptive parents should not be left to make the life-long decision of adoption with anything less than all the available information on the child.

If the exclusive remedy argument were the law, adoption agencies could routinely withhold vital information from adoptive parents with impunity. Civil Code § 224s would be rendered meaningless. Defendants could withhold information to facilitate the adoptive parents' agreement to adopt, and if the situation did not work out or the concealed information

became known, the adoptive parents could only petition to vacate the order of adoption, and only if within five years. Beyond five years the adoptive parents and the child would have no remedy for what will inevitably become a life-long tragedy for both. That is the true social cost of the concealment and misrepresentation that adoption agencies seek to protect from liability with their absurd exclusive remedy argument.

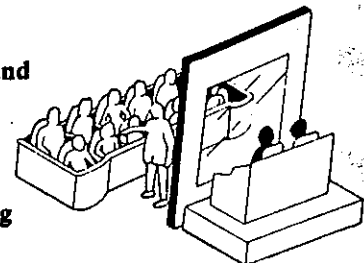
4. Initial Client Meeting

First determine if the initial placement or the adoption occurred before January 1, 1984, for the reasons explained above. Plan to devote several hours to working with your client to review all records and to begin writing a cogent history of every contact between the adoption agency and the family before and after placement. Your goal is to begin piecing together the history so that a detailed chronology will be readily available for reporting to your experts, as well as for motions, settlement conference statement, and trial brief. In

JURY TRIAL SIMULATION

Applying Socio-Psychological and Marketing Research to Litigation Proceedings

- † Pre-test prosecution/defense arguments and rebuttals
- † Establish critical issues, potential juror perceptions and attitudes
- † Evaluate witness performance parameters
- † Modify positions/strategies via monitoring of actual trial developments



Jury Trial Simulation uses a mock jury recruited based on the demographics and psychographics anticipated in actual jury selection. Sessions are taped and monitored via one-way mirrors or closed circuit TV. Attorneys present arguments. Then, reactions of the mock jurors are identified and analyzed. Appropriate strategies are developed. Actual trials may be monitored, or transcripts may be used in the simulations. Projects are custom designed to meet the needs of individual cases. Sessions may be conducted at existing facilities in one or more geographical areas throughout the metropolitan U.S. Brochure/sample report available.

Director of JTS operations, Martin M. Buncher has completed thousands of social, consumer and industrial research projects during his 30 years as an industrial psychologist throughout the U.S. and over 50 foreign countries.

"30 Years of Excellence"



Intercontinental Marketing Investigations Inc.
P.O. Box 2147, Rancho Santa Fe, California 92067
Phone (619) 756-1765 • Fax (619) 756-4605



MARTIN M. BUNCHEP
President

FIREARMS PRODUCT LIABILITY

DESIGN MALFUNCTIONS

SAFETY RELATED ISSUES

ACCIDENTAL DISCHARGE

EXPERT WITNESS TESTIMONY

LAW OFFICES OF
RICHARD A. GRZYBOWSKI
2768 - 35TH AVENUE
SAN FRANCISCO, CA 94116
TEL: 415-564-0523
FAX: 415-564-9533

Richard H. Polsky, Ph.D.
Animal Behaviorist

DOG BITE CASES

- Expert Testimony
- Comprehensive Evaluation & Assessment
- Qualified Expert

310-474-3776

Animal Behavior Counseling Services, Inc.
2288 Manning Ave. Los Angeles, CA 90064

PREMISES LIABILITY

HOTELS-BARS-DISCO-RESTAURANTS

Nationally acclaimed *hospitality industry expert* specializing in proving negligence and establishing liability for injured patrons. Call Fred Del Marva (415) 892-1027 for CV and fees.

METALLURGY WELDING

BERNARD FAAS, P.E.
METALLURGIST • EXPERT WITNESS

FAILURE ANALYSIS • INSPECTION
WELD PROCEDURES • CODES & SPECS

CALIF. LIC. MT1202 (310) 530-5664

large part this history will not be finished until after the agency's adoption records have been produced.

At the initial meeting find out what type of child the adopting parents initially requested from the adoption agency when they filed their application. Other key areas of inquiry should include: What were they told about the child's and his/her natural parents' medical and social history *at the time of placement or adoption* as required by Civil Code § 224s?

Is the child's condition today consistent with undisclosed prenatal abuse, fetal alcohol syndrome, pre-adoption physical, emotional abuse or neglect, or inherited mental illness? Has there been a failure to bond? Is the child abusive, rebellious, out-of-control, sexually active, or violent?

Has the adoption agency admitted at any time that it failed to fully disclose or at any time after the adoption made any additional disclosure? Has the client demanded from the agency all records which may indicate the cause of the child's current condition? If so, when? How long has the client's statute of limitations time clock been ticking?

Has the failure to disclose aggravated the child's condition or delayed securing appropriate treatment?

5. Claim Filing

As soon as the child's parents suspect fraud by a public adoption agency, a claim must be filed within six months to preserve the parents' and the child's claims for damages for lifetime support. The six month period may be tolled by late discovery (*Martinez v. County of Los Angeles* (1978) 78 Cal.App.3d 242 [144 Cal.Rptr. 123]), but not by the child's minority. (*Ridley v. City etc. of San Francisco* (1969) 272 Cal.App.2d 290 [77 Cal.Rptr. 199].)

The time for filing a claim against the public agency begins to run *as soon as a reasonable person should have been on notice* of governmental misconduct. This defense is not summarily avoided because the issue is factual, and each new fact uncovered concerning the child's history becomes a further piece of defense ammunition to be advanced against the plaintiff in light of all the surrounding facts.

The pitfall to be avoided is inadvertently

proving the defense in efforts to establish the parents' and child's claim for damages for emotional harm. While it may be true that the parents and child have suffered over the years as a result of the agency's misconduct, proving the parents' damage case by emphasizing the bizarre conduct of the child and the length of time it continued also helps to establish the defense that "anybody would have suspected" prenatal injury, pre-adoption abuse, and the like. In short, because hindsight is perfect there is a natural tendency to assume that the adopting parents should have concluded that they have been defrauded long before they learned the truth. So keep in mind that while proving damages these same facts will be argued by the defense in support of its statute of limitations defense.

In *Forster*, the County repeatedly raised its limitations defense throughout discovery hoping to be able to develop enough facts to prove at trial that the parents *should* have suspected something was awry when their son's conduct began to become unacceptable, which was long before they filed their claim. It is reasonable to expect that this will occur in every case. Therefore, as the child's history comes forward it is important to keep it in perspective and within the context of the challenges of helping an adopted child adjust, often a lifetime process. Parents of adopted children must always struggle with making adjustments, and childhood conduct by itself without the benefit of knowing the child's history, medical background, and parental health care history does not lead to any meaningful action by parents. In addition, even with early referral to a child psychologist, without an accurate history the professional efforts of the therapist are dramatically less effective. Nonetheless, once the concealed history is revealed the etiology becomes so clear and compelling that it is easy for a lay person to mistakenly conclude that Mom and Dad should have suspected pre-adoption abuse, prenatal alcohol or drug abuse by the natural mother, or the birth parents' history of mental illness, and thereby provide the adoption agency with a good defense. An early claim disposes of this hazard.

As soon as a parent suspects fraud by the placing agency, a claim should be filed immediately. As a practical matter,

the real basis of the action will not be provable until counsel examines the voluminous records created in every public adoption. These documents are only available with a court order once an action is filed, so do not delay in filing a claim at the very earliest moment, because it is only after suit that plaintiffs' counsel will be able to verify the facts initially reported by the adopting parents.

6. Contents of the Claim and the Complaint

Under current law, a claim is treated as a pleading and must set forth, each party, each legal theory upon which a recovery will be sought and each item of damage.

It is important to include as claimants both the child, the adopting parents, and any siblings who have also suffered as a result of the disruption to the family home caused by the adopted child's psychiatric condition.

A claim must include each theory of liability and the supporting facts. In short, say more rather than less in explaining the basis of liability and the damages claimed. Since the essence of the action is delayed discovery, be especially careful to plead the date your client first suspected they had a cause of action against the adoption agency.

Government Code §§ 818.8 and 822.2 grant public entities immunity from liability for negligent misrepresentation. The immunities apply only to interferences with financial or commercial interests, including issuances of permits or licenses. (*Johnson v. State* (1968) 69 Cal.2d 782, 800.) These immunities do not shield defendants from liability for misrepresentation or deceit in adoptions. (*Michael J., supra*, at p. 872.) While the claim must include as grounds for liability willful misrepresentation and concealment, in order to secure the resources and participation of the agency's insurance carriers in any eventual settlement, the claim and the complaint to follow must plead the defendants' negligent conduct, negligent infliction of emotional harm and negligence *per se* for violating statutory duties.

Claimed economic damages should include: past and future mental health care for life, including residential care; supervising advocate for life; lifetime home care and supervision; lifetime lost wages

Credible.

Medical Experts

Our physicians have jury credibility because they are medical professionals, not professional witnesses. We have more than 900 California physicians who will review your malpractice case and, if it has merit, testify for you. Plaintiff or defense.

Physicians for Quality

1-800-284-3627

Satisfaction guaranteed or your money back!

SCARS & DISFIGUREMENT

Expert in the Psychological and Social Effects of Facial and Other Physical Disfigurement due to Accident and Surgery

ROBERT C. MASHMAN, Ph.D.
Diplomate in Clinical Psychology, ABPP
(619) 481-9650

see article in 9 Am Jur Proof of Facts 3d
(Reprints available)

psychology license psy 5628

POLICE/SECURITY EXPERT

- Foreseeability of Harm
- Excessive Force Allegations
- Premises Liability
- Pursuit Driving
- Crime Pattern Analysis
- Police/Security Tactics
- Special Event Security
- Threat Assessments

Police Academy Director
Stan Kephart, MA. Ed.

--- (916) 342-6051 ---

Former Olympic Games Security Administrator



for the child; and non-economic, general damages for every claimant.

Although public entities as a matter of law are not subject to punitive damages for oppression and despicable misconduct, public employees can be held liable for punitive damages. While punitive damages need not be listed in the claim, be sure to include a punitive damage claim against the individual tortfeasors in the final complaint.

7. Case Costs

Preparing an adoption fraud case, like any case involving damages in excess of a million dollars, is expensive because of the need for expert witness testimony. Knowing what resources you will need will help you prepare and assure a complete investigation, before unnecessarily committing funds to a case where a

recovery is problematic.

Forter v. County of San Mateo required the testimony of the original treating psychologist who first saw the plaintiff when he was age three, as well as the current child psychiatrist to testify concerning his current condition, prognosis, and the impact of the concealment of his psychiatric history and delayed treatment. Other experts included: a professor of social work on the failure to meet the standard of care in the original placement of the child; the treating pediatrician, who had not been provided with the child's psychiatric records; a pediatric neurologist concerning the importance of a complete history in diagnosing childhood disorders; an adult psychiatrist concerning the plaintiff's prognosis in the absence of immediate special care; a psychologist/educational specialist who prepared a treatment lifeplan and presented the cost of services

for the balance of this teenager's life expectancy; and an economist. There were several thousand pages of records to read from psychologists, several mental hospitals, Child Protective Services, AFDC files, adoption files and criminal records on the natural mother and total discovery came to twenty lengthy depositions. Pre-trial case costs advanced in *Forter*, exclusive of attorney's time, totaled \$47,000. But for accepting the responsibility to pay these expenses and the anticipation that contingency fee would be approved by the court, this child's future psychiatric needs would remain unpaid.

Conclusion

Adoption fraud cases couple claims for psychiatric injuries to a child, with the claims of parents who have been emotionally and financially brutalized by an adoption that was expected to bring happiness to their home and family. Losing the expectation of a happy child and a wholesome home life, and having it replaced with wholesale grief is an especially tragic injury to be inflicted on parents who opened their homes, families, financial resources, and their hearts to a needy child. The lifetime damage inflicted on children, leaving them only with the prospect of being anti-social and unemployable due to emotional injuries and damaged personalities, obviously leaves them as prime candidates for criminal activity, prosecution and imprisonment.

The strength of the tort law is that it provides a public forum to express the community's standard of accountability. In the wrongful placement of children for adoption, there are no emotional or psychological impediments to the jury's unleashing a roar of disapproval, once the legal hurdles have been overcome. Obtaining recovery for a wrongful adoption placement requires informed and extremely vigorous advocacy.

Current legal impediments to assure these victims full and complete psychiatric care should be removed. Our least protected citizens, orphaned children, deserve the best possible care by county adoption agencies, and when that does not occur our Courts and Legislature should provide full and complete remedies to hold perpetrators of adoption fraud fully accountable.

EXPERT WITNESSES

INSURANCE

Over 150 highly experienced and skilled insurance professionals, located throughout the United States, available to plaintiff and defense counsel for consultation and expert witness testimony on all classes of insurance.

Write or call for a brochure and sample resumé.

O · H A R A

& ASSOCIATES

10447 Des Moines Avenue
Northridge, CA 91326

818 832-8966 800 288-1906

“...a discount on my malpractice insurance?”

First, our marks.

<table style="margin: 0 auto;"> <tr> <td style="text-align: center;">CW</td> <td style="text-align: center;">Your Broker</td> </tr> <tr> <td style="text-align: center;">YES</td> <td style="text-align: center;">YES NO</td> </tr> </table>	CW	Your Broker	YES	YES NO	<table style="margin: 0 auto;"> <tr> <td style="text-align: center;">CW</td> <td style="text-align: center;">Your Broker</td> </tr> <tr> <td style="text-align: center;">YES</td> <td style="text-align: center;">YES NO</td> </tr> </table>	CW	Your Broker	YES	YES NO
CW	Your Broker								
YES	YES NO								
CW	Your Broker								
YES	YES NO								
Does your broker offer free coverage analysis? <input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>	Does your broker work with California attorneys exclusively? <input checked="" type="checkbox"/> <input type="checkbox"/> <input type="checkbox"/>								

At CAPITAL WORKSHOP we have always believed that the value of our product goes far beyond the policy itself. If you answered NO to these questions, you are not getting everything you could from your legal malpractice insurance broker.

TOLL FREE 800 662-1300

CW

CAPITAL WORKSHOP GENERAL INSURANCE AGENCY

550 California Street, 10th Floor, San Francisco, CA 94104-0870, 415 981-8200, FAX 415 394-7111

Mailing Address: P.O. Box 410870, San Francisco, CA 94141-0870