

# Protecting the Rights of Hard to Place Children in Adoptions

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## INTRODUCTION

Adoptions, especially those beset with problems, are in the news. Mia Farrow accused Woody Allen of sexually abusing one or more of their adopted children.<sup>1</sup> The DeBoers lost custody of their adopted daughter of two years, "Baby Jessica," after her biological parents sued to reclaim her.<sup>2</sup> Dennis and Diane Nason adopted seventy-six children, most of whom were physically, mentally, or emotionally disabled. Described as "The Celebration Family," they appeared on the television program "60 Minutes." But later, after one infant died of malnutrition and two others died after suffering from shigella, a bacterial infection causing dysentery, Dennis and Diane Nason were accused of child abuse and fatal neglect.<sup>3</sup>

Cases like these have focused the nation's attention on the adoption process and the protection of the rights of those children placed by adoption. Unlike "Baby Jessica," a healthy newborn when adopted, the children most often lost in the adoption process and, therefore, the most in need of protection, are those children defined as "hard to place."<sup>4</sup> Hard to place children are those who are older (no longer infants) or who have physical handicaps or severe psychological, mental, emotional, or behavioral problems. In addition, the hard to place classification includes sibling groups, recognized as such by the

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\* J.D. Candidate, 1997, Indiana University School of Law—Bloomington; B.S. *magna cum laude*, 1984, Ball State University. I would like to thank Professor Aviva Orenstein for her helpful comments on earlier drafts of this Note. Many thanks also go to my family for their love and support and to the many friends who provided encouragement throughout this three year odyssey known as "law school." This Note is dedicated to my friends Paul and Dawn Thomas and their sons, Michael and John Joseph. Paul and Dawn's decision to add to their family led not only to the adoption of John Joseph, but also to my research in the area of adoption law and eventually to this Note's topic.

1. *Judges: Woody Has No Appeal*, NEWSDAY, May 13, 1994, at A31.

2. For an account of Jessica DeBoer's story, see Nancy Gibbs et al., *In Whose Best Interest?*, TIME, July 19, 1993, at 44.

3. Jeanie Senior, *Long and Complex Trial Ahead for Nasons*, PORTLAND OREGONIAN, June 15, 1994, at D2, available in 1994 WL 4519295. The charges filed against them included "failing to provide adequate physical and medical care for fifteen children in their care, . . . withholding food from two daughters, shocking some children with an electric cattle prod and kicking one of their sons." *Id.* Additionally, Diane Nason was accused of stabbing a son and striking a daughter with a bottle. *Id.* Surprisingly, while these charges remained pending, the Nasons won custody of their three-year-old grandson in a separate suit. *Nasons, Facing Trial on Abuse Charges, Win Custody of Grandson*, PORTLAND OREGONIAN, Feb. 16, 1994, at C2, available in 1994 WL 4576403.

4. Children who are hard to place are also called "children with special needs." The terms are used interchangeably throughout this Note.

Abandoned Infants Assistance Act of 1988.<sup>5</sup> Of all the children available for adoption, an estimated sixty percent are hard to place.<sup>6</sup> Hard to place children comprise the vast majority of children handled by public adoption agencies,<sup>7</sup> which now have the primary responsibility for their placement.<sup>8</sup>

The number of hard to place children residing in foster or group homes is ever increasing as a result of the combination of several factors. First, the deinstitutional movement has made many special needs children available for adoption. This movement has sought to close orphanages and similar institutions on the theory that they do not promote normal, healthy child development. The movement promotes the least restrictive environment possible for all children, regardless of their physical, emotional, or psychological problems.<sup>9</sup> Second, there is an increasing number of unwanted babies born addicted to narcotics or other substances.<sup>10</sup> Finally, there is a greater willingness today to remove abused and neglected children from their biological families.<sup>11</sup>

Due to the shortage of healthy infants available for adoption,<sup>12</sup> prospective parents who cannot afford to try to conceive through newer, expensive medical procedures and do not want to face a long waiting period before adopting must consider a hard to place child. Although some caseworkers celebrate this increased chance for adoption, they often overlook two potentially devastating problems. First, hard to place children face an increased risk of child abuse at the hands of their adopted or foster parents.<sup>13</sup> Second, they are subject to extreme emotional and psychological trauma due to the potential loss of sibling associations.<sup>14</sup>

Christina and Catherine Crossman's story illustrates these problems. After being physically and emotionally abused by their natural father, Christina, Catherine, and their two older brothers became wards of the court and were placed in separate foster homes. Following the termination of their natural parents' rights, the court approved the adoption of Christina and Catherine by Owen and Frances Crossman in April, 1981. Although Christina and Catherine

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5. 42 U.S.C. § 673(c)(2)(A) (1994). States use a similar definition when determining recipients of state assistance in the adoption process. *See, e.g.*, IND. CODE ANN. § 31-3-3-1(b) (Michie 1987 & Supp. 1996).

6. Susan L. Brooks, *Rethinking Adoption: A Federal Solution to the Problem of Permanency Planning for Children with Special Needs*, 66 N.Y.U. L. REV. 1130, 1132 (1991).

7. *Id.*

8. *Id.* at 1138. Since the majority of hard to place children are placed through public agencies, this Note limits its discussion to those adoption intermediaries. The reader should be aware, however, that other intermediaries, for example, private agencies or attorneys, do occasionally handle the adoptions of hard to place children.

9. *Id.* at 1137-38.

10. *Id.* at 1137.

11. *Id.*

12. This shortage is attributable to the increased availability of contraceptives and abortion, an increased willingness on the part of single parents to keep their children, as well as a generally declining birth rate. For analyses of the causes of the shortage, see *id.* at 1137 & nn.49-52.

13. *See infra* part III.A.

14. *See infra* part III.B.

remained separated from their brothers, they were lucky to be adopted together. However, the adoption was an inappropriate placement. In April, 1985, Christina and Catherine, who were then only eleven and twelve years old, reported to the Phoenix police that Owen Crossman began fondling them shortly after their placement and had subjected them to oral, anal, and vaginal intercourse approximately three times per week since April, 1983. Christina and Catherine again became wards of the court, and the Crossmans pled guilty to criminal charges for sexual abuse. Christina and Catherine sued the State of Arizona, alleging that the pre-adoption investigation of the Crossmans was negligently performed. Had a reasonable investigation occurred, authorities would have discovered that Owen Crossman had sexually abused an adult stepdaughter during her teenage years and had himself been a victim of sexual abuse as a child.<sup>15</sup>

Cases like this, which are not rare, make obvious the need for increased protection of the rights of hard to place children. This Note proposes that states expand the relatively new tort of wrongful adoption to provide this protection. Part I of this Note discusses the general trend in adoption policies away from a shroud of confidentiality and closed doors. Part II then discusses the evolution of the wrongful adoption tort and cases litigated thus far under this label. Part III discusses why hard to place children are more likely to be victims of child abuse and why the courts and other government officials must protect their sibling association rights. Part IV then discusses methods to provide this protection. This Part will include a discussion of current methods used, as well as why the shortcomings of those methods support the expansion of the wrongful adoption tort to provide necessary protection.

#### I. ADOPTION POLICY: A TREND TOWARD OPENNESS

Adoption is the statutory procedure establishing the parent-child relationship of persons who are not so related by blood.<sup>16</sup> The adoptee's ties with his biological parents are terminated, and the child becomes a child of the adoptive parents for legal and familial purposes. The goal of adoption is to "provide every child with a 'family-like living situation' that is permanent and safe."<sup>17</sup> The focus of modern adoption statutes is on the adoptee<sup>18</sup> and the best interest of the child remains the legal standard in adoption proceedings.<sup>19</sup>

Complete secrecy and confidentiality originally shrouded the adoption process. Prior to the 1970s, agencies treated adopted children as if they never had a birth family. Social workers tried to eliminate all traces of the birth family, and treated the adopted child as "reborn." As a result, many agencies continue to seal records

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15. *Adams v. State*, 916 P.2d 1156 (Ariz. Ct. App. 1995).

16. For an example of state adoption statutes, see IND. CODE ANN. § 31-3-1-1 to -12 (Michie 1987 & Supp. 1996).

17. RICHARD P. BARTH & MARIANNE BERRY, *ADOPTION AND DISRUPTION* 108 (1988).

18. Pat McDonald-Nunemaker, Comment, *Wrongful Adoption, The Development of a Better Remedy in Tort*, 12 J. AM. ACAD. MATRIMONIAL LAW. 391, 392 (1994).

19. Brooks, *supra* note 6, at 1136.

and to discourage communications between the birth family and the adoptive family.<sup>20</sup>

However, this presumption favoring confidentiality and secrecy has waned over the last two decades. Research has shown that full disclosure of non-identifying history offers psychological and practical benefits to the child and the adoptive family.<sup>21</sup> More important, disclosure of health information identifies children who may have special needs, and who need an environment prepared to accommodate them.

Adoption experts now call for the disclosure of non-identifying information to the adoptive parents. Disclosure of the adoptee's health information, including genetic history, is necessary to take advantage of new medical advances and technology.<sup>22</sup> Nondisclosure of health information often impairs medical and psychological diagnosis and treatment of adopted children, which prohibits prevention of future disorders.<sup>23</sup>

Without this diagnosis and treatment, adoptees are often placed with parents who are totally unprepared and unable to deal with the challenges of a child with special needs. Often these adoptive parents are aware of their financial and emotional limitations in dealing with a child's special needs. These parents specifically reveal to adoption caseworkers that they would be unable to adopt such a child. Having adopted without knowledge of the child's special needs and finding themselves unable to cope when the child's disorder later manifests, the adoptive parents may seek an annulment of the adoption. Annulments are highly disfavored due to the trauma caused to both the adoptive parents and the adoptee, and are seldom in the child's best interest.<sup>24</sup>

Attempting to reduce the number of annulments and recognizing the increasing importance of the need for the adoptive child's health history, state legislatures began enacting adoption statutes that allow greater disclosure of background information.<sup>25</sup> Forty-six states have now enacted disclosure statutes. A majority of these states require mandatory disclosure, while others provide for disclosure at the adoptive parents' request or at the adoption agency's discretion.<sup>26</sup> The purpose of these statutes is to prevent adoptions that are likely to end in annulment by providing as complete a physical and psychological history as possible.

Notwithstanding these statutes, the reality is that often this information is not revealed. A recent survey showed that approximately one-third of the families who had adopted children with physical and emotional traumas because of child abuse were not informed of the prior abuse before the adoption. In more than

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20. Note, *When Love Is Not Enough: Toward a Unified Wrongful Adoption Tort*, 105 HARV. L. REV. 1761, 1763 (1992) [hereinafter *When Love Is Not Enough*].

21. See *infra* text accompanying notes 29-30.

22. McDonald-Nunemaker, *supra* note 18, at 395.

23. D. Marianne Brower Blair, *Getting the Whole Truth and Nothing But the Truth: The Limits of Liability for Wrongful Adoption*, 67 NOTRE DAME L. REV. 851, 863 (1992).

24. McDonald-Nunemaker, *supra* note 18, at 393-94.

25. Blair, *supra* note 23, at 866.

26. For a listing of the disclosure statutes by state, see McDonald-Nunemaker, *supra* note 18, at 395-96 & n.29.

one-half of adoptions involving children who were victims of past sexual abuse, agencies did not inform the families of that fact before the adoptions were finalized.<sup>27</sup>

The continuing practice of nondisclosure arises from several causes. Many agencies cling to the belief that adoptive parents and adoptees are better off not knowing any background information. Many caseworkers feel that negative information hampers placement by stigmatizing the adoptee in the eyes of prospective parents. Also, there is a fear that the information will harm the child's self-image or cause anxiety about potentially developing an illness or disorder. Others feel that disclosing background information facilitates tracing of the birth parents and risks invasion of the birth family's privacy.<sup>28</sup>

However, disclosure actually eliminates many of these concerns. Disclosure of non-identifying health information facilitates diagnosis, prevention, and early treatment of physical and psychological disorders for which a child might be predisposed. Appropriate counseling and support services can prepare an adoptive family to accept and cope with any physical or mental limitations the adopted child might have.<sup>29</sup>

In addition, appropriate counseling and support services help with any stigmatization an adopted child might feel. Adopted children often develop identity conflicts from the lack of knowledge about the medical, social, and ethnic backgrounds of themselves and their birth parents.<sup>30</sup> Knowledge of their genetic background can aid adoptees when making future decisions about childbearing.<sup>31</sup> Also, if all disclosed information is non-identifying, "the concern that health information might facilitate tracing has not been viewed as significant, particularly in comparison to the compelling arguments favoring disclosure."<sup>32</sup>

In addition to the reluctance of adoption agencies to disclose, the disclosure statutes themselves are defective.<sup>33</sup> A major concern is that most statutes do not specify a standard of care for agencies to meet when making disclosures. As a result, agencies reveal facts only "if available" or "where practicable."<sup>34</sup> A more important concern is that the statutes do not impose a penalty on agencies that do not disclose the information the statutes demand when this information exists.<sup>35</sup>

Prospective parents are completely dependent on the adoption agency as the source of information. As such, they are vulnerable to fraud through

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27. *When Love Is Not Enough*, *supra* note 20, at 1764.

28. Blair, *supra* note 23, at 861-62.

29. *Id.* at 863-64.

30. *Id.* at 864-65.

31. See Rita Beck Black, *Genetics and Adoption: A Challenge for Social Work*, in *SOCIAL WORK IN A TURBULENT WORLD* 193 (Miriam Dinerman ed., 1981) (Seventh National Ass'n of Social Workers Symposium).

32. Blair, *supra* note 23, at 865.

33. *When Love Is Not Enough*, *supra* note 20, at 1765 & n.29.

34. *Id.* at 1765.

35. *Id.*

misinformation or the omission of facts and other misrepresentations.<sup>36</sup> Often, this fraud does not become apparent for several years. For example, symptoms of a genetic disease for which the adoptee is predisposed may not appear until a child is older. To provide prospective parents the full information available in order to make their adoption decisions and to provide relief for unexpected lifetime expenses assumed without knowledge of a child's potential problems, courts are now allowing a new cause of action called "wrongful adoption."

## II. THE TORT OF WRONGFUL ADOPTION

"Wrongful adoption is a tort action, based in fraud or negligence, which allows adoptive parents to recover for intentional or negligent misrepresentations made by an adoption agency . . . regarding their adopted child's [physical or mental] health history or genetic background."<sup>37</sup> The cause of action accrues when the parents discover, or should have discovered, the illness or disorder and its causal relation to the agency's conduct, or when the parents actually discover the misrepresentation or fraud.<sup>38</sup> In a typical scenario, the cause of action accrues when adoptive parents learn of a misrepresentation upon manifestation of a child's disorder, or when they obtain the pre-adoption records.<sup>39</sup>

In 1986, the Ohio Supreme Court first recognized this new tort in *Burr v. Board of County Commissioners*.<sup>40</sup> The court extended the common law tort of fraud to material misrepresentations regarding an adopted child's background made in the adoption context, holding that "the deliberate act of misinforming this couple [the adoptive parents] . . . deprived them of their right to make a sound parenting decision and . . . led to the compensable injuries."<sup>41</sup> The court, however, limited the scope of the tort to agencies guilty of intentional, affirmative misrepresentation.<sup>42</sup>

Two years later, a California Court of Appeals extended the tort of wrongful adoption in *Michael J. v. Los Angeles County Department of Adoption*.<sup>43</sup> The court granted relief to adoptive parents for concealment of the fact that the agency's doctor refused to make a definite statement on the condition of their adopted child. The court established a standard of "good faith full disclosure of material facts concerning existing or past conditions of the child's health."<sup>44</sup> The court limited the cause of action to intentional concealment and

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36. Shannon M. Connelly, Note, *The Need for Disclosure Laws: A Survey of the Wrongful-Adoption Cause of Action and Statutory Remedies for Adoption Fraud*, 10 REV. LITIG. 793, 795 (1991).

37. McDonald-Nunemaker, *supra* note 18, at 391. For an exhaustive analysis of the tort of wrongful adoption, including its history, bases for recovery, limits of liability, measures for damages, and policy considerations both for and against recovery, see Blair, *supra* note 23.

38. McDonald-Nunemaker, *supra* note 18, at 391.

39. Connelly, *supra* note 36, at 797.

40. 491 N.E.2d 1101 (Ohio 1986).

41. *Id.* at 1109.

42. *Id.*

43. 247 Cal. Rptr. 504 (Ct. App. 1988).

44. *Id.* at 513.

misrepresentation by holding that agencies would not be liable for mere negligence in providing information about a child.<sup>45</sup>

However, in 1989, the Wisconsin Supreme Court, in *Meracle v. Children's Service Society*,<sup>46</sup> recognized a claim of negligent misrepresentation by an agency. In *Meracle*, the court held that if an agency voluntarily provided information, it must use reasonable care in doing so.<sup>47</sup>

Since 1989, several other states have allowed the tort of wrongful adoption, grounded in intentional concealment or intentional or negligent misrepresentation.<sup>48</sup> However, all states have stopped short of imposing a duty of reasonable investigation of an adoptee's past, although suits alleging this duty have been brought.<sup>49</sup> The courts have hesitated to place the additional burden on understaffed agencies to prevent making the agency a guarantor of good health.<sup>50</sup> Also, both parents and the adopted children themselves have recovered damages, but liability has been limited to failure to reveal the child's background information. To date, courts have not decided cases under the label of wrongful adoption that relate to problems outside the nondisclosure of an adoptee's background or history.

However, other causes of action are possible. Thus far, parents and adopted children have recovered based on the fiduciary nature of the relationship that arises between the agency and the parents, as well as the agency and the child. The fiduciary relationship between the parents and the agency is a confidential one based on the trust that arises between the prospective parents and the adoption caseworker.<sup>51</sup> The relationship between the agency and the child is one of guardian and ward, long recognized as a fiduciary relationship.<sup>52</sup> Because the agency owes the children in its custody a higher duty of care to be performed in the utmost good faith, courts can remedy violations of that duty by granting recovery to hard to place children harmed as a result of an inappropriate placement. Part IV discusses the expansion of the wrongful adoption tort, based on the agency's fiduciary duty toward hard to place children, to protect their special interests. These special interests, discussed in more detail below, include a greater risk of injuries from child abuse and the loss of sibling association rights.

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45. *Id.*

46. 437 N.W.2d 532 (Wis. 1989). The Meracles brought suit against the Children's Service Society of Wisconsin, an adoption agency, after their adopted daughter developed Huntington's Disease, a fatal genetic disorder. The agency had informed the Meracles that their daughter was not at risk for the disease.

47. *Id.* at 537.

48. Florida, Illinois, Louisiana, Minnesota, Mississippi, New York, and Pennsylvania have all recognized a form of the wrongful adoption tort. See McDonald-Nuneinaker, *supra* note 18, at 399-412. The Massachusetts Supreme Court recently recognized the tort for negligent or intentional misrepresentations in *Mohr v. Commonwealth*, 653 N.E.2d 1104 (Mass. 1995).

49. Blair, *supra* note 23, at 857 & n.15.

50. Connelly, *supra* note 36, at 798.

51. *Id.* at 799.

52. Michele Schiffer, Note, *Fraud in the Adoption Setting*, 29 ARIZ. L. REV. 707, 712 (1987). See generally AUSTIN W. SCOTT & WILLIAM F. FRATCHER, THE LAW OF TRUSTS §§ 2-16A (4th ed. 1987).

### III. THE SPECIAL INTERESTS OF HARD TO PLACE CHILDREN

#### *A. High Risk for Child Abuse*

Adoption agencies must prepare parents considering a hard to place child to cope with the special needs of these children. Without forewarning and preparation, serious emotional trauma for both the parents and the child is likely. This trauma is only exacerbated if the parents find they cannot cope and feel their only option is an annulment.<sup>53</sup> For the child's emotional health, as well as the prospective parents, proper preparation is necessary before a child is placed in a home.

Without screening and proper preparation of the parents, the risk of child abuse is great in the adoption of a hard to place child. Many hard to place children fall into the category of children who are at a "high risk" for abuse. Congenitally malformed, mentally retarded, and difficult children are especially prone to abuse.<sup>54</sup> Difficult children are defined as "irritable youngster[s], the constantly crying baby, the hyperactive child,"<sup>55</sup> in addition to those with emotional problems. However, all adopted children are more prone to emotional disturbances and personality disorders, even those who are not suffering from psychological trauma or those who were adopted at an early age.<sup>56</sup> Therefore, all adoptees need safeguarding, but especially those who are hard to place.

#### *B. Loss of Sibling Association Rights*

State governments regularly make decisions that affect children and their family status. State courts often determine placement of children in divorces, custody disputes, and adoption approvals. State agencies often determine placement in adoption and foster care. State legislatures regulate the adoption process. As a result of these adoption processes, adoption caseworkers separate approximately 35,000 brothers and sisters into different foster or adoptive homes each year.<sup>57</sup> Siblings who are initially separated in different placements for what is intended to be a short time have dramatically decreased chances of being placed together later.<sup>58</sup> Siblings who are separated suffer trauma not only from being separated from their natural parents, but also from anxiety over the loss of association with their brothers and sisters.

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53. It is not only children with severe genetic or psychological disorders who are at risk. It is estimated that one in every 10 adoptions of children over the age of three results in termination. See McDonald-Nunemaker, *supra* note 18, at 392.

54. BLAIR JUSTICE & RITA JUSTICE, *THE ABUSING FAMILY* 248 (1976).

55. *Id.* at 252.

56. MARY KATHLEEN BENET, *THE POLITICS OF ADOPTION* 167 (1976).

57. William Wesley Patton & Dr. Sara Latz, *Severing Hansel from Gretel: An Analysis of Siblings' Association Rights*, 48 U. MIAMI L. REV. 745, 745 (1994).

58. *Id.* at 787.



There is some state recognition of the importance of maintaining sibling association. Courts have long recognized the importance of not separating siblings in custody disputes. Judges have noted that siblings "need each other's strengths and association in their everyday and often common experiences" and that the emotional and biological bonds are quite strong.<sup>59</sup> In addition, courts avoid the separation of siblings to sustain sibling bonds, because the parents will probably die before the children and they will only have each other as they become adults.<sup>60</sup>

A child's best interests should require a showing of compelling reasons before siblings are separated. As such, courts have begun to emphasize the sibling relationship and to place it above the wishes of adoptive parents. Courts have held that "a family court can order maintenance contacts between siblings when necessary to protect the child's best interests, even if such contacts are opposed by the adoptive parents."<sup>61</sup>

State legislatures are also defining sibling rights. Several states have enacted statutory provisions to facilitate visitations between siblings, if they must be separated. Most state statutes direct the courts to use the best interests standard when deciding whether to grant sibling visitation rights.<sup>62</sup>

Despite these protections, judges do not show the reluctance to separate siblings in foster care or adoption placements that they show in custody decisions accompanying divorces. There are several causes for this disparity. First, in custody disputes accompanying divorces, the choice is usually between granting one parent custody of the group or separating siblings by placing one or more of them, but not all, with one parent. One can assume judges are reluctant to separate the siblings when they can easily grant custody of all the siblings to one parent, and grant the other parent joint custody or visitation rights.

Second, finding adoptive parents to take a group of siblings is always difficult, if not impossible.<sup>63</sup> In addition, the Abandoned Infants Assistance Act of 1988<sup>64</sup>

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59. Barbara Jones, Note, *Do Siblings Possess Constitutional Rights*, 78 CORNELL L. REV. 1187, 1190 (1993).

60. *Id.*

61. *Id.* at 1192. See, for example, *New York ex rel. Sibley v. Sheppard*, 429 N.E.2d 1049 (N.Y. 1981), in which the New York Court of Appeals ordered maintenance contacts between siblings over the wishes of the adoptive parents. The court felt the sibling contact was in the child's best interest. Jones, *supra* note 59, at 1192 n.24.

62. See, e.g., ARK. CODE ANN. § 9-13-102 (Michie 1993); CAL. FAM. CODE § 3102 (Michie 1993); LA. REV. STAT. ANN. § 9:572 (West 1991); NEV. REV. STAT. ANN. § 125A.330 (Michie 1993); N.J. STAT. ANN. § 9:2-7.1 (West 1993); N.Y. DOM. REL. LAW § 71 (McKinney 1988 & Supp. 1993). The New York statute states:

[T]he court, by order, after due notice to the parent or any other person or party having the care, custody, and control of such child, to be given in such manner as the court shall prescribe, may make such directions as the best interest of the child may require, for visitation rights for such brother or sister in respect to such child.

63. William Wesley Patton, *The World Where Parallel Lines Converge: The Privilege Against Self-Incrimination in Concurrent Civil and Criminal Child Abuse Proceedings*, 24 GA. L. REV. 473, 492 (1990).

64. 42 U.S.C. §§ 670-679(a) (1994).

provides that adoption is the preferred model of permanent and stable placement for children. States operate under this presumption by separating siblings when they are not adoptable as a group, but where one or more of the siblings can be placed individually.<sup>65</sup>

Patton and Latz argue that the presumption of adoption as the best placement is harmful to displaced children. First, adoption is an unrealistic expectation given the low percentage of adoptions in relation to the number of children in need of placement. Second, states can lose federal funds for not implementing the mandate to end indeterminate placements in foster homes or guardianships. This presumption of adoption forces social workers to find adoptive homes based upon the economic necessity of the state rather than the best interests of the child or sibling group. This "forced adoption" results in lower self-esteem among hard to place children. Also, prospective long-term guardians or foster parents are viewed as second-class providers, when they may be the best providers for these children under the circumstances. Finally, with the presumption of adoption as the best placement, brothers and sisters are split apart without consideration given to keeping them together in alternative care, such as a residential home.<sup>66</sup> In essence, caseworkers consider the best interests of the adoptee standing alone, without any consideration of the best interests of the sibling group.

The importance of the sibling bond has not escaped the study of psychologists, sociologists, scientists, and philosophers.<sup>67</sup> Studies demonstrate that the sibling bond may be as important in childhood development as the parental one. Foremost among these studies is attachment research.

"Attachment research offers a rich empirical basis for evaluating the nature and importance of bonding. *Attachment* describes an enduring emotional bond manifest by efforts to be in close proximity, *especially at times of stress*."<sup>68</sup> The search for attachment relationships is a central goal of early childhood development, and the success of finding such relationships has been proffered as a foundation for characteristics such as self-esteem, capacity for intimacy, basic trust in relationships, and adaptivity throughout adult life.<sup>69</sup> Without these relationships, adverse developmental problems may occur. These problems include "depressed educational attainments," and findings show persons who were deprived of these relationships are "disproportionally represented among the ranks of the unemployed, the mentally ill, drug abusers, and criminals."<sup>70</sup> Though emphasis has historically been on the parent-child relationship, attachment research now recognizes that "sibling relationships are perhaps the most important and the least recognized."<sup>71</sup>

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65. Patton & Latz, *supra* note 57, at 752-53.

66. *Id.* at 753.

67. For a discussion of different studies concerning the importance of sibling bonds, see *id.* at 760-68.

68. *Id.* at 761 (second emphasis added).

69. *Id.* at 762.

70. WILLIAM FEIGELMAN & ARNOLD R. SILVERMAN, *CHOSEN CHILDREN* 29 (1983).

71. Patton & Latz, *supra* note 57, at 763-64.

The importance of the sibling relationship becomes paramount when the stress of severance from the biological parent is present. As one commentator has noted, often children under this stress

form a sub-family with one child assuming the parental responsibility for another. Consequently, the ties between siblings are often even stronger than the ties of the children to their biological parents. These ties are strengthened when the children are placed in a foster [or adoptive] family; they tend to cling together to reduce some of the overwhelming strangeness . . . Children separated from brothers and sisters may never resolve their feelings of loss, even if there are new brothers and sisters whom they grow to love.<sup>72</sup>

Among siblings separated from their natural families, more of them search for their biological siblings than for their birth parents.<sup>73</sup> One of the major reasons children give for running away from foster homes is to see their natural siblings.<sup>74</sup> These facts demonstrate the strength of the sibling bond.

#### IV. PROVIDING PROTECTION FOR THE RIGHTS OF HARD TO PLACE CHILDREN

Adoption caseworkers operate with severe budget constraints, have overwhelming case loads, and often presume that adoption is always the ideal solution for a child with special needs. In order to reduce their case loads, caseworkers often attempt to stretch the preferences of prospective parents and "whitewash" the adoptee's background.<sup>75</sup> As a result, hundreds of inappropriate placements occur each year, creating potentially dangerous situations for these children.<sup>76</sup> In addition, it has been estimated that forty-one percent of displaced children nationwide are separated from their siblings in foster or adoptive homes.<sup>77</sup> This occurs even though adoption agencies owe these children a high standard of care, as the guardian-ward relationship is characterized as a fiduciary one.<sup>78</sup> Therefore, the agency already has a duty to act in the utmost good faith in protecting the welfare of these children.

Hard to place children need protection to prevent the traumas resulting from inappropriate placements. Because state adoption agencies place the majority of children with special needs, potential actions under § 1983<sup>79</sup> provide some protection for these children. However, as this Note will show, this protection is not sufficient. By recognizing that the fiduciary duty of adoption agencies requires them to protect hard to place children from inappropriate placements and allowing recovery to the children under the negligence component of the

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72. Patton, *supra* note 63, at 491-92 (quoting CLAUDIA L. JEWETT, ADOPTING THE OLDER CHILD 161-62 (1978)).

73. Patton & Latz, *supra* note 57, at 780.

74. *Id.*

75. "Whitewashing" occurs when caseworkers present the child's background information in a positive light, regardless of any past or present difficulties that the child might have. Brooks, *supra* note 6, at 1154 & n.185.

76. *Id.* at 1154-55.

77. Patton & Latz, *supra* note 57, at 758. For sibling statistics by state, see *id.* at 756, 802.

78. See *supra* note 52 and accompanying text.

79. 42 U.S.C. § 1983 (1994).

wrongful adoption tort, courts will provide the added protection these children need.

#### *A. Insufficient Protection Through § 1983 Actions*

As stated previously, state adoption agencies handle the majority of placements for children with special needs.<sup>80</sup> As such, § 1983, which grants a civil cause of action to one deprived of a constitutional right by a person exercising authority under color of state law, may provide recovery for damages resulting from inappropriate placements. Section 1983 does not create rights, but provides remedies for rights guaranteed by the Constitution or federal laws.<sup>81</sup>

In addition to the fact that rights must already be recognized under the Constitution or federal law, other impediments limit the usefulness of § 1983 actions for hard to place children. Adoptees cannot sue state governmental entities and state officials acting in their official capacity for damages under § 1983. Therefore, public adoption agencies that are subdivisions of a state department will not be liable for damages.<sup>82</sup> Employees of the state agency can be sued in their individual capacity, but the employee must have acted personally in depriving the right.<sup>83</sup> Also, framing the cause of action as a negligent violation, rather than intentional, may bar recovery. In *Daniels v. Williams*,<sup>84</sup> the Supreme Court held that ordinary negligence cannot form the basis for a § 1983 action.<sup>85</sup> These restrictions severely limit the use of § 1983. Other obstacles specific to abuse cases and to the loss of sibling association rights show that § 1983 protection alone is not enough.

#### 1. Child Abuse Cases Under § 1983

The seminal case concerning recovery for child abuse injuries under § 1983 is *DeShaney v. Winnebago County Department of Social Services*.<sup>86</sup> In this case, state social workers investigated four separate reports of child abuse against Joshua DeShaney by his father, Randy. Although caseworkers suspected Joshua's injuries were the result of physical abuse and Randy did not abide by recommendations he agreed to with the Winnebago County Department of Social Services, caseworkers let Joshua remain in his father's custody. Randy subsequently beat Joshua so severely that he fell into a life-threatening coma and is expected to spend the rest of his life confined to an institution for the mentally retarded.<sup>87</sup>

Joshua and his mother sought damages from the Department of Social Services under § 1983 for failing to protect Joshua. However, the Supreme Court held that

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80. *See supra* notes 7-8 and accompanying text.

81. Blair, *supra* note 23, at 963.

82. *Id.*

83. *Id.* at 962.

84. 474 U.S. 327 (1986).

85. *Id.* at 332-33.

86. 489 U.S. 189 (1989).

87. *Id.* at 192-93.

the social workers who had investigated the instances of abuse were not liable for Joshua's injuries. This decision seems fatal to claims by hard to place children attempting to recover from agency employees for placement in an abusive home. Such claims are distinguishable, however, from the claim in *DeShaney*.

In *DeShaney*, the Court held that a state's failure to protect an individual against violence by a private actor is not a violation of the Due Process Clause,<sup>88</sup> and that there is "no affirmative right to governmental aid."<sup>89</sup> However, in contrast to Joshua DeShaney, the hard to place child is usually in state custody before the state places him or her in an abusive home. In *Youngberg v. Romeo*,<sup>90</sup> the Court held that "the Constitution requires the responsible state officials to take steps to prevent children in state institutions from deteriorating physically or psychologically."<sup>91</sup> Citing *Youngberg*, the Seventh Circuit has allowed children to recover when placed in a foster home with a known abuser.<sup>92</sup>

Therefore, hard to place children who were in the custody of a state agency before placement have a viable argument. However, Judge Posner stated that, in light of *DeShaney*, recovery after placement in the private home may be limited.<sup>93</sup> Therefore, additional protection beyond that provided by § 1983 is necessary.

## 2. Protection of Sibling Association Rights Under § 1983

Courts have allowed recovery for loss of sibling association rights under § 1983. Specifically, some federal courts have allowed recovery for siblings denied visitation rights in foster placement,<sup>94</sup> and for the loss of association due to wrongful death.<sup>95</sup> However, other federal courts, and even judges in the same district, have denied recovery in similar cases.<sup>96</sup> This disparity exists because § 1983 protects rights guaranteed by the Constitution or other federal laws and, to

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88. U.S. CONST. amend. XIV, § 1.

89. *DeShaney*, 489 U.S. at 196.

90. 457 U.S. 307 (1992).

91. *K.H. v. Morgan*, 914 F.2d 846, 851 (7th Cir. 1990) (interpreting *Youngberg*).

92. *Id.* at 853-54.

93. *Id.* at 852.

94. *Rivera v. Marcus*, 696 F.2d 1016 (2d Cir. 1982) (holding that half-sister who lived with half-brother and half-sister for several years had a liberty interest in preserving the integrity and stability of the family under the Due Process Clause); *Aristotle P. v. Johnson*, 721 F. Supp. 1002 (N.D. Ill. 1989) (holding that siblings' freedom of association rights included the right to maintain and develop their relationship).

95. *Trujillo v. Board of County Comm'rs*, 768 F.2d 1186 (10th Cir. 1985) (holding that sister had constitutionally protected First Amendment interest in her relationship with her brother, who died while incarcerated in a county jail).

96. *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984); *B.H. v. Johnson*, 715 F. Supp. 1387 (N.D. Ill. 1989); *Ascani v. Hughes*, 470 So. 2d 207 (La. Ct. App. 1985). The reasons given in these cases for not extending recovery to siblings is the lack of a clearly established constitutional right and other considerations similar to those given by the state courts in denying damages. See *infra* text accompanying notes 120-23. For a history of how state and lower federal courts have thus far dealt with the issue of siblings' associational rights, see *Jones*, *supra* note 59, at 1189-1209.

date, no state supreme court, nor the United States Supreme Court, has specifically addressed whether a person, as an individual member of a family with independent rights, has a right to maintain sibling relationships.<sup>97</sup> Concrete recognition of these rights is necessary to fully protect hard to place children under § 1983.

Commentators argue that principles firmly established by the United States Supreme Court provide constitutional protection for sibling association rights. These commentators contend that the substantive Due Process Clause of the Fourteenth Amendment and the First Amendment provide this protection.

Using the three guidelines established by the Supreme Court to define the qualities of a family in *Smith v. Organization of Foster Families*,<sup>98</sup> commentators contend protection of siblings is provided by the substantive Due Process Clause. The first guideline is a biological relationship, which exists between full-blood and half-blood siblings. The second guideline requires "emotional attachments that derive from the intimacy of daily association."<sup>99</sup> Siblings who are raised in the same home share these types of emotional bonds. The third guideline requires that the origin of the familial relationship be derived from outside the power of the State. This guideline is met as siblings are family members by birth and not by state decree. Because sibling relationships meet these three guidelines, the commentators conclude that the Fourteenth Amendment should provide constitutional protection of sibling association rights.<sup>100</sup>

Commentators further contend that the First Amendment protects sibling relationships even if the biological relationship required under the *Smith* analysis is not present. This would include the protection of the association rights of adopted siblings and step-siblings.

This argument is based on the Supreme Court's holding in *Roberts v. United States Jaycees*.<sup>101</sup> The Court stated that protection from unjustified state interference is offered for "the formation and preservation of . . . highly personal relationships."<sup>102</sup> In describing family relationships, the Court stated:

Family relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. Among other things, therefore, they are distinguished by such attributes as relative smallness, a high degree of selectivity in decisions to begin and maintain the affiliation, and seclusions from others in critical aspects of the relationship. As a general matter, only relationships with these sorts of qualities are likely to reflect the

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97. Jones, *supra* note 59, at 1188; Patton & Latz, *supra* note 57, at 768. For a thorough analysis of arguments for recognition of sibling association as a fundamental right under the United States Constitution, see Jones, *supra* note 59, at 1209-19; Patton & Latz, *supra* note 57, at 768-800.

98. 431 U.S. 816, 843-47 (1977).

99. *Id.* at 844.

100. Jones, *supra* note 59, at 1208-09; see also Patton, *supra* note 63, at 492 & n.69.

101. 468 U.S. 609 (1984). In this case, the Supreme Court discussed freedom of association rights under the First Amendment in holding that the Minnesota Human Rights Act did not violate the Jaycees' association rights by compelling them to accept women as members.

102. *Id.* at 618.

considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.<sup>103</sup>

Commentators contend that sibling relationships, including those formed by adoptive and step-siblings, clearly fit into this characterization and therefore should have First Amendment protection.<sup>104</sup> The court in *Aristotle P.* agreed and held that siblings' freedom of association rights included the right to maintain and develop their relationship.<sup>105</sup>

If the United States Supreme Court, when again faced with the opportunity, adopts either of these arguments, it would provide the powerful protection necessary to protect sibling association rights under § 1983. Until the Court extends this protection, however, additional protection is necessary to induce adoption agencies to give the appropriate consideration to these rights of hard to place children.

### *B. Expanding the Tort of Wrongful Adoption to Protect Hard to Place Children*

As stated in Part II, courts have thus far limited the causes of action under the tort of wrongful adoption to those wrongs emanating from nondisclosure of an adoptee's background or history. Because agencies have a fiduciary duty to protect children in their care, courts can expand the negligence cause of action under this tort to provide the additional protection that hard to place children need.

#### 1. Expanding the Tort to Provide Protection from Abuse

To protect hard to place children from abusive environments, courts should expand the duty of adoption agencies to include a reasonable investigation into, and evaluation of, the possibility that prospective parents might have abusive tendencies. Among the factors courts consider in negligence cases when deciding whether to impose a duty include the gravity, probability, and foreseeability of harm, the policy of preventing future harm, and the burden on the actor.<sup>106</sup> Here, these factors support requiring the agency to make this determination before placement. Injury to the child is foreseeable, preventable, potentially very grave, and the additional burden on the agency is minimal.

This additional burden is minimal because the adoption statutes already require the agency to conduct a pre-adoption investigation.<sup>107</sup> These laws require a check with statewide central registries of child abuse reports for any reports made on the prospective parents. The additional duty to be imposed would require the

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103. *Id.* at 619-20.

104. Jones, *supra* note 59, at 1209.

105. *Aristotle P. v. Johnson*, 721 F. Supp. 1002 (N.D. Ill. 1989).

106. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53, at 359 & n.24 (5th ed. 1984).

107. See, e.g., ARIZ. REV. STAT. ANN. § 8-105 (1989); NEV. REV. STAT. ANN. § 127.2805 (Michie 1993); N.H. REV. STAT. ANN. § 170-B:14 (1994); N.Y. DOM. REL. LAW § 112 (McKinney 1992 & Supp. 1995); OKLA. STAT. ANN. tit. 10, § 60.13 (West 1995).

further step of psychological evaluations of the parents. These evaluations would be in the form of screenings to identify indicators showing potential for abusive behavior.

These evaluative tests are possible "[b]ecause the profile of the abusing parent is fairly well established."<sup>108</sup> These predictive evaluations focus on "feelings of isolation, reaction to criticism, feelings toward spouse, parental treatment, expectations of children, attitudes toward punishment and feelings of nervousness, distress, and potential loss of control."<sup>109</sup> Assuming these evaluations accurately predict the possibility of an abusive environment, potential harm to hard to place children should be foreseeable.

If these tests indicate a high risk for abuse, agencies could then require that, at a minimum, the prospective parents undergo counseling before an agency will place a child in their home. In addition, agencies could require stringent and comprehensive post-adoptive services to help these parents while undergoing the life changes that occur when a child moves in. Post-adoptive services for the child and the parents can make the difference between a successful and unsuccessful placement of special needs children.<sup>110</sup> However, if the tests show that the risk of abuse is too great, the agency would refuse the placement.

Various policy reasons support imposing this duty on adoption agencies.<sup>111</sup> The first is a policy of matching parental resources and a child's needs. Parents whose evaluations show a low risk for abusive behavior, and who are willing to adopt a child with special needs, can be matched with such a child. This prevents parents who practically can only care for a child without such needs from inflicting further trauma on the hard to place child.

Another policy reason for imposing a duty on the agency is that the threat of liability for subjecting children to abuse would have a deterrent effect. To escape damage awards, agencies would put procedures in place to insure proper pre-adoptive investigations. This would help avoid the harmful consequences an adoptee faces in an abusive home.

A policy of compensation also supports the parental evaluation. If the agencies do not investigate the psychological profile of the prospective parents, the agencies should compensate the child for injury and emotional trauma traceable to the failure to investigate. This policy is equivalent to the policy of compensating children whose backgrounds are not disclosed and later develop problems preventable with early treatment. This is the compensation allowed thus far in wrongful adoption cases.<sup>112</sup>

Finally, imposing the duty to evaluate prospective parents fosters the institution of adoption. As some commentators have noted, the public must have confidence in the processes of adoption because:

[A]doption serves important societal interests. Through adoption, children who might not otherwise have a permanent family or . . . appropriate care and

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108. JUSTICE & JUSTICE, *supra* note 54, at 243.

109. *Id.*

110. Brooks, *supra* note 6, at 1152.

111. For a discussion of various policy considerations in wrongful adoption actions, see Blair, *supra* note 23, at 877-96.

112. *See supra* part II.



stability can have the opportunity to receive the care and nurturing they need in a familial setting from parents who have made a long term commitment to them. To the extent that children have the opportunity to develop a positive self-identity in a supportive, stable environment, society is spared the social problems that often accompany societal failure to meet the physical and emotional needs of its youngest members. Birth parents who are not prepared emotionally or financially to raise a child are provided an option that allows them to plan for the care of their child and postpone parenting until they feel ready for it. . . . Adoptive parents have the opportunity to experience the joys of parenthood.<sup>113</sup>

The obvious objection to requiring this additional evaluation is the costs involved in both administration and interpretation of the tests, as well as any additional post-adoptive services that might be necessary. Post-adoptive services are expensive and often receive low priority due to budget constraints.<sup>114</sup>

To overcome this objection, agencies could require the prospective parents to contribute to the costs by having them pay for the evaluations. Not only does this allow the agency to conserve its funds, but it also provides a good indicator of those prospective parents who really want to adopt, helping to eliminate those who may only be seeking the financial assistance provided to parents who adopt children with special needs.<sup>115</sup>

The evaluation results will also provide information to the agency for use in focusing where to best expend funds for post-adoptive services. Although post-adoptive services are necessary in all adoptions of hard to place children, the agency can direct its scarce funds toward placements where it is most needed. Also, any initial increase in funds that the agency itself may expend in the adoption process will eventually save money if more permanent placements are successful. Agencies will save money on the additional necessary custodial care,

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113. Blair, *supra* note 23, at 888.

114. Brooks, *supra* note 6, at 1153.

115. Under federal law, a state may qualify for federal subsidies for foster care and adoption assistance if it provides financial assistance to adoptive parents of children with special needs. See 42 U.S.C. §§ 670-73 (1994). Most states provide this assistance. See, e.g., IND. CODE ANN. § 31-3-3-2 (Michie Supp. 1996). However, as stated in the Indiana statute, these payments are made "to the extent that funds are available." *Id.* § 31-3-3-2(b). Due to budget constraints, the assistance, in all probability, will not be enough to cover additional expenses due to medical or psychological problems of hard to place children or the additional costs of adopting a sibling group. Therefore, adopting parents will need to have resources available to cover these costs. The author does not necessarily advocate limiting adoptions to those who can afford to pay the screening fees. However, in the case of special needs children, the willingness to pay these fees provides evidence of the parents' ability and desire to expend their resources to provide for the additional lifetime expenses these children might need.

The goal of the federal legislation is to provide permanent placement for children with special needs. Denying adoptions because of the high risk of abuse or to prevent sibling separation may result in the states' loss of this much needed assistance. Granting adopted children these causes of action will encourage Congress to decrease the pressure on agencies by increasing funding for post-adoptive services and the development of residential alternatives, such as group homes, for special needs children. See Brooks, *supra* note 6, at 1153-55, 1159-63.

which is very expensive, and subsequent placement costs if the adoptee is not returned to the agency's care due to an inappropriate placement.<sup>116</sup>

The duty to require tests that predict abuse would not require the agencies to guarantee that adoptees will never be subject to abuse. It would only require that the agency take reasonable steps to prevent abuse when indicators show it to be a substantial risk. Such steps include providing alternative placement or requiring counseling and post-adoptive services to minimize the risks. Imposing this duty provides valuable protection to lessen the chance that children like Christina and Catherine Crossman will suffer debilitating physical and psychological injuries.

## 2. Expanding the Tort to Protect Sibling Association Rights

An expansion of the wrongful adoption tort to encompass procedures beyond disclosing the adoptee's background will also help protect the sibling association rights of hard to place children. Requiring the agency to consider these rights when making placement decisions would lower the number of siblings who are needlessly separated due to the presumption of adoption as the ideal solution. Again, the factors courts consider when determining whether a duty exists<sup>117</sup> support imposing this requirement.

The emotional trauma occurring due to the separation of siblings is foreseeable and potentially very grave. This trauma is preventable by considering alternative placements for the sibling group, such as a residential or group home. The consideration of sibling association rights and alternative placements is not an additional burden, as the agencies are already instructed by state statutes to consider the best interests of the child. Therefore, they will incur no additional costs. The agencies must simply consider the best interests of the sibling group when deciding the best interests of an individual child within that group.

One policy reason for imposing this duty is to bolster the confidence of displaced children and the public in the institution of adoption. Many displaced children do not trust the adoption process because they fear that adoption will separate them from a sibling. As noted previously, the reason most children who run away from foster or adoptive homes give for their actions is to see their siblings who have been placed elsewhere.<sup>118</sup>

The strongest policy consideration favoring the expansion of the wrongful adoption tort to cover loss of sibling association is the deterrent effect it will provide. It is in the case of sibling groups that the presumption of adoption as the ideal solution is the most dangerous. Providing a deterrent to separating siblings is critical so that caseworkers will recognize that the sibling bond is often stronger than a parental bond and vital to the emotional health of many hard to place children. If adoption means separation of siblings who have formed deep attachments to one another, that placement may do more harm than good. Because adoption assistance programs focus on private placement, this

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116. Brooks, *supra* note 6, at 1161-62.

117. See *supra* text accompanying note 106.

118. See *supra* text accompanying note 74.

presumption is strongly driven by economic considerations and requires a strong force to counteract it. Expanding the tort to provide that force will require caseworkers to consider the sibling bond and prevent the separation of siblings when it is not in their best interests. It will also require caseworkers to consider channelling the limited funds for post-adoptive services to facilitating sibling visitations when the separation of siblings is an absolute necessity.

A policy of compensation also supports the imposition of this duty. Damages in these cases would cover "emotional injuries due to loss of companionship, society, and comfort,"<sup>119</sup> that is, loss of sibling consortium. These emotional injuries can be severe due to the strength of the sibling bond among displaced children. However, even expanding the wrongful adoption tort to recognize a cause of action for loss of sibling consortium may not be enough. Although some states have allowed siblings to recover for loss of consortium in actions for the wrongful death of a sibling,<sup>120</sup> many have also denied recovery on this basis.<sup>121</sup> Courts often reject consortium claims outside the spousal relationship because of a fear that recovery would "cause an unreasonable expansion of tort liability, a multiplicity of lawsuits, difficulty in assessing damages, and would constitute an unwarranted failure to defer to the legislature."<sup>122</sup> Courts have denied recovery to children for loss of parental consortium for these same reasons.<sup>123</sup> Obviously these concerns make computing a damage award difficult. Despite this difficulty, recognition of a cause of action for the loss of sibling association under this tort is still necessary. Compensation for these injuries contributes to the deterrent effect and recognition of this cause of action provides a step in the right direction towards the realization of sibling association as a fundamental liberty right protected by the Constitution.

#### CONCLUSION

All children deserve the help necessary to enable them to become fully functional, contributing members of society. Hard to place children need extra protection. Like all adoptees suffering from the trauma of separation from birth parents and resulting identity conflicts, they are at a disadvantage starting out. They do not need the burden of further traumas resulting from the separation of their siblings or the placement in an abusive home. In addition, an annulment resulting from a disruptive adoption placement causes the child "tremendous

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119. Matthew Brady, *Back Up and Hit Him Again: Illinois' Problem with Parental Consortium Lost Because of Nonfatal Injury*, 25 LOY. U. CHI. L.J. 545, 548 (1994).

120. *See, e.g., In re Estate of Young*, 601 N.E.2d 699 (Ill. 1992); *Crystal v. Hubbard*, 324 N.W.2d 869 (Mich. 1982).

121. *See, e.g., Williams v. Texaco Ref. & Mktg., Inc.*, 868 S.W.2d 873 (Tex. App. 1993); *Long v. Dugan*, 788 P.2d 1 (Wash. Ct. App. 1990).

122. Brady, *supra* note 119, at 556.

123. *See, e.g., Borer v. American Airlines, Inc.*, 563 P.2d 858 (Cal. 1977) (holding that denial of recovery on these grounds does not violate equal protection).

instability, emotional upheaval, and a sense of rejection that can be permanently damaging<sup>124</sup> and can diminish chances for later adoption.<sup>125</sup>

One adoption specialist noted that it makes no sense to place children with parents who cannot handle their needs and nurture them.<sup>126</sup> To insure that the number of these inappropriate placements is reduced, this Note argues that courts should expand the tort of wrongful adoption by requiring adoption agencies to evaluate prospective parents to determine their tendencies for abusive behavior. The agencies will not guarantee that an adoptee will never be abused. However, proper psychological testing of prospective parents and comprehensive post-adoptive services will dramatically reduce the risk an adoptee might otherwise face.

Many psychologists and sociologists have concluded that adopted children should have "an inalienable right . . . to avoid the anguish and damage that the denial of [familial association] would inflict upon them."<sup>127</sup> More recognition of the special attachments children have with siblings is necessary to protect sibling association rights. Agencies should consider alternatives for siblings other than adoption, such as residential homes. Until the United States Supreme Court provides the necessary recognition by extending constitutional protection to sibling association rights, courts should expand the tort of wrongful adoption to include recovery for sibling associations that are unnecessarily denied. The agencies would not guarantee sibling association. It is possible that the child's best interests might require a severance of ties to a sibling, such as when siblings are separated when extremely young, or when they have never lived together and formed sibling attachments. The duty would only require that agencies, whose employees have specialized knowledge and training, use that expertise in considering whether the best interests require that the siblings remain unified in placement or in placements that facilitate visitation and contact. The agencies must stop presuming that adoption is always the ideal placement and consider the best interests of the sibling group when determining an individual child's best interests. By expanding the tort of wrongful adoption to encompass these duties, courts will help give hard to place children the chance they deserve.

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124. Blair, *supra* note 23, at 882.

125. *Id.*

126. *Id.* at 864.

127. FEIGELMAN & SILVERMAN, *supra* note 70, at 29.

# The Expanding Importance of Temporary Physical Takings: Some Unresolved Issues and an Opportunity for New Directions in Takings Law

DENNIS H. LONG\*

“Most people know a taking when they see one, or at least they think they do.”<sup>1</sup>

## INTRODUCTION

The Takings Clause of the United States Constitution neither enlarges nor restricts the powers of government. It does, however, under certain circumstances, require that compensation be paid to owners when governments seize or physically occupy property, or when they institute laws or regulations which substantially interfere with full use or economic benefit from property.

Recent contradictory decisions reached by lower federal courts in the area of temporary physical takings law have highlighted a major area of uncertainty and ambiguity in takings jurisprudence. Historically, temporary physical takings have played a minor role in comparison to the much more numerous and more controversial cases involving permanent physical takings and regulatory takings.

For reasons based more on historical evolution than on logic or legal theory, takings law has developed into two distinct branches which resolve seemingly similar cases using very different legal rules and judicial tests. In the more ancient branch, permanent seizure or permanent physical occupation of land by government is treated as a *per se* taking and must be compensated no matter how slight the deprivation, no matter how small the economic harm, and no matter how important the public benefit of the government action. In contrast, when the alleged taking consists of a limitation on use of property resulting from a statute or regulation without physical entry, the rules are much different. Here, the courts engage in a very detailed and fact-sensitive balancing process to determine whether or not a taking<sup>2</sup> has occurred. In this balancing procedure, courts compare the nature of the government action, its benefits to society, the economic impact on the landowner, and even the reasonable expectations of the landowner to profit from and enjoy the use of her land. In practice, courts have

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1. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 592 (2d ed. 1988).

2. In accordance with common usage, the word “deprivation” will be used in this Note to describe any injury to property caused by any level of government. The word “taking” will be used to describe only those deprivations which actually violate the Takings Clause and must be compensated. A deprivation becomes a taking whenever a court recognizes it as such. A “taking claim” is a claim that a deprivation is, in fact, a taking.