
PUBLIC SERVANTS AND PRIVATE FIDUCIARIES

PARENTS: TRUSTED BUT NOT TRUSTEES OR (FOSTER) PARENTS AS FIDUCIARIES

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In April of 2010, the mass media was full of accounts of a seven-year-old Russian boy, Artyom (whose adoptive name is Justin), who had been returned to Moscow on his own by an American adoptive mother who felt unable to care for him. The mother, Torry Hansen, alleged that her family was afraid of the boy, specifically because he had threatened to burn their house down around them and had drawn pictures of it in flames.¹ She paid for someone to meet the child once he landed and had her mother deliver him to the gate before his ten hour flight.² While there could be many reasons for disquiet on hearing the story – not the least of which was putting that young a child onto a lengthy international flight unescorted – this Conference suggests that we pay attention to our feelings that Ms. Hansen at least attempted to do something that parents cannot: to give back a child.³

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¹ See, e.g., Clifford J. Levy, *Adopted Boy, 7, Is Sent Back, Outraging Russia*, N.Y. TIMES, Apr. 10, 2010, at A1.

² *Id.* The incident sparked great outrage in Russia, which temporarily suspended all U.S. adoptions. *Id.* They were apparently not halted, however. Clifford J. Levy, *Adoptions From Russia Continue, Official Says*, N.Y. TIMES, May 6, 2010, at A6.

³ As an article in the *New York Times* put it, “We do not know all the details. But returning a child like he was a damaged pair of pants is profoundly wrong.” Editorial, *A Safe, Loving Home*, N.Y. TIMES, Apr. 18, 2010, at WK9. For just one of many such comments on the Internet, see Tasha Kheiriddin, *You Can’t ‘Disannul’ a Child*, NAT’L POST, Apr. 11, 2010, <http://network.nationalpost.com/NP/blogs/fullcomment/archive/2010/04/11/tasha-kheiriddin-you-can-t-quot-disannul-quot-a-child.aspx>: “However, unlike consumer goods, children are not parcels to be sent or returned. Whatever his problems, Artyom deserved a better solution than a one-way plane ticket. One can only hope that he does get help, and finds a family willing to take on the challenge.” One response to the Kheiriddin article clearly makes the point about the permanence of parenting responsibilities:

This selfish woman was unprepared to deal with a difficult child. What if he’d come into her world the usual way (pregnancy)? Should she be allowed to unload him like a puppy who pees in the house or a cat who claws the furniture? Even pets should be a

If parents were fiduciaries of the type that concerns Professor Frankel, they could withdraw.⁴ This withdrawal might require court permission or finding a substitute or yielding to whoever was listed as a substitute in the trust or other fiduciary instrument. A trustee who declined to serve further might well suffer pecuniary loss, of the compensation specified in the trust instrument, any performance bond posted, or possible future remuneration coming from other trust opportunities. The withdrawing trustee would also probably and relatedly suffer a reputation loss, especially if the beneficiary or ward suffered during the transition. What will happen to Ms. Hansen? At the very least, she will suffer a lifetime of guilt.⁵ Another “disrupted” adoptive mother was quoted in the *New York Times*:

“I felt that I was a failure and that I condemned her to a life of hopelessness,” she said. “I knew I couldn’t help her, but I knew I didn’t want to throw her away. But sometimes as a parent you feel like you have a lot more power than you do. You say to yourself, ‘Can I make a difference in this child’s life?’ And if the answer is no, you need to walk away.”⁶

As a third mother with a similarly difficult child adopted from Russia said, “I love him. I have loved him for over three years. Although I didn’t lay eyes on him, I have been in love with this little boy for all this time. And just like my biological children, I cannot fathom turning my back on him.”⁷

Fifteen years ago, Elizabeth and Robert Scott described biological or adoptive parents as fiduciaries, with the autonomy and legal protections of

lifetime (of the pet) commitment. Every detail of this story tells us that this was all about her. Parenthood is an absolute commitment. It all flows in one direction – to the child, for the benefit of child. It is not for the selfish.

rick1000, Comment to *You Can’t ‘Disannul’ a Child*, NAT’L POST (Apr. 11, 2010, 2:02 PM), <http://network.nationalpost.com/NP/blogs/fullcomment/archive/2010/04/11/tasha-kheiriddin-you-can-t-quot-disannul-quot-a-child.aspx>.

⁴ See TAMAR FRANKEL, *FIDUCIARY LAW* 42-54 (2011).

⁵ An internet source said the Hansen family has left Tennessee. Brian Mosely, *Torry Hansen/Artyem Savelyev Update: “Fudging” of Falsifying Pre and Post-Adoption Reports?*, FAM. PRESERVATION ADVOC. (Aug. 22, 2010), <http://familypreservation.blogspot.com/2010/08/torry-hansenartyem-savelyev-update.html>. The possibility of criminal charges exists as well. *The Tennessean* reported in late July that the State was still considering whether to file charges against Ms. Hansen for abandoning the child. *Woman Still Mum on Return of Adopted Son to Russia*, THE TENNESSEAN, July 12, 2010, available at 2010 WLNR 13955587.

For Arytom, the future is unknown. An Associated Press story reported that Arytom was in another Russian orphanage. *Tennessee: Returned Boy Back in Russian Orphanage*, N.Y. TIMES, July 31, 2010, at A12.

⁶ Sarah Kershaw, *In Some Adoptions, Love Doesn’t Conquer All*, N.Y. TIMES, Apr. 18, 2010, at ST1. “Disruption” occurs “[w]hen parents end an adoption, legally terminating their parental rights.” *Id.*

⁷ *Id.*

parenthood substituting for the pecuniary rewards other fiduciaries receive.⁸ While their idea is justly famous,⁹ and they themselves note that their analogy is imperfect,¹⁰ this piece will focus on the differences between legal parents and fiduciaries rather than on the similarities the Scotts pointed out. The story of Artyom concerns the attempted unilateral severing of the relationship. But the differences I see in the way the idea of trust plays out in parenting extends beyond endpoints.¹¹

⁸ Elizabeth S. Scott & Robert E. Scott, *Parents As Fiduciaries*, 81 VA. L. REV. 2401, 2402 (1995). An earlier description is found in John Locke's *The Second Treatise of Government*:

The *Power*, then, *that Parents have* over their Children arises from that Duty which is incumbent on them, to take care of their Off-spring, during the imperfect state of Childhood. To inform the Mind, and govern the Actions of their yet ignorant Nonage, till Reason shall take its place, and ease them of that Trouble, is what the Children want, and the Parents are bound to. For God, having given Man an Understanding to direct his Actions, has allowed him a freedom of Will, and liberty of Acting, as properly belonging thereunto, within the bounds of that Law he is under. But whilst he is in an Estate, wherein he has not *Understanding* of his own to direct his *Will*, he is not to have any Will of his own to follow: He that *understands* for him, must *will* for him too; he must prescribe to his Will, and regulate his Actions; but when he comes to the Estate that made his *Father a Freeman*, the *Son is a Freeman* too.

JOHN LOCKE, TWO TREATISES OF GOVERNMENT 324-25 (Peter Laslett ed., Cambridge Univ. Press 1980) (1690).

⁹ A Westlaw search reveals 147 citing law review articles. Fifteen of these are my own earlier work.

¹⁰ Scott & Scott, *supra* note 8, at 2402-03 ("Particular features of the parent-child relationship distinguish it from most traditional fiduciary relationships, however, and thus present some unique challenges. This relationship is broader in scope than are many other fiduciary relationships. Beyond this, the parental relationship, once established, has intrinsic value for the child that extends beyond successful performance of caretaking tasks. Obviously, the unique characteristics of family relationships necessarily shape legal regulation in idiosyncratic ways.").

¹¹ I have similarly quibbled with the use of analogies to marriage before. See Margaret F. Brinig, "*Money Can't Buy Me Love*": A Contrast Between Damages in Family Law and Contract, 27 J. CORP. L. 567, 586-600 (2002) (suggesting, as the title implies, that division of marital property and spousal support on divorce does not follow contract principles); Margaret F. Brinig, *Status, Contract and Covenant*, 79 CORNELL L. REV. 1573, 1574 (1994) (reviewing MILTON C. REGAN, JR., *FAMILY LAW AND THE PURSUIT OF INTIMACY* (1993)) (claiming that his suggestion that law return to thinking about marriage as a status was incomplete). For a like treatment of alimony, see Ira M. Ellman, "*Contract Thinking*" Was Marvin's *Fatal Flaw*, 76 NOTRE DAME L. REV. 1365, 1367 (2001).

While the Scotts use the words "trust" or "trustee" fifty-three times in their piece, there is only one occasion on which they are not referring to the fiduciary law capacity: "Parents in family units share their children's standard of living and, through informal influences, can usually be trusted collectively to take their children's needs into account in allocating family resources." Scott & Scott, *supra* note 8, at 2448.

As I have argued elsewhere in an extensive treatment of the interaction of families and community, “trust is related to society’s choice of which relationships are deemed to be family, how the family works in creating social capital, and how burgeoning rights may threaten social capital.”¹² For the purposes of this Essay, we can examine how societal trust in adults’ ability to parent well affects whether or not they will be denoted legal “parents,” with all the obligations and privileges the Scotts describe.¹³

Since I have developed the full model elsewhere,¹⁴ I will merely report briefly on one such difference – that between biological or adoptive parents and adults acting as foster parents or kin caregivers. Biological parents, or adoptive parents like Torry Hansen, are full parents in the eyes of the law.¹⁵ As the Scotts note, parents will have to deviate in very major ways before the state will intervene to require particular actions or even, in extreme cases, to terminate parental rights.¹⁶ I have argued that these parents bear the legal and social norm protection of full societal trust because they most often love their children unconditionally and permanently. As the Supreme Court famously put it in *Parham v. J.R.*¹⁷:

¹² MARGARET F. BRINIG, FAMILY, LAW, AND COMMUNITY: SUPPORTING THE COVENANT 145 (2010).

¹³ The Scotts describe the historical role of parents as “almost limitless” in scope. Scott & Scott, *supra* note 8, at 2407. The Supreme Court provides a presumption that what fit parents decide for their child is in the child’s best interests. *Parham v. J.R.*, 442 U.S. 584, 602 (1979); *see also* *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000) (“Accordingly, so long as a parent adequately cares for his or her children (*i.e.*, is fit) there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s children.”).

In order to overcome this presumption, parents must be found at least temporarily unfit (to have neglected, abandoned or abused the child). This finding, in turn, requires the use of substantial due process protections. *See Santosky v. Kramer*, 455 U.S. 745, 759-60 (1982) (explaining that the State may not presume, at the factfinding stage of a parental rights termination proceeding, that the interests of parent and child diverge).

¹⁴ *See* Margaret F. Brinig & Steven L. Nock, *How Much Does Legal Status Matter? Adoptions by Kin Caregivers*, 36 FAM. L.Q. 449, 463-74 & 473 tbl.2 (2002); *see also* BRINIG, *supra* note 12, at 34-35 tbl.1.2, 37 tbl.1.3.

¹⁵ Janet Hopkins Dickson, *The Emerging Rights of Adoptive Parents: Substance or Specter?*, 38 UCLA L. REV. 917, 925 (1991).

¹⁶ For example, they make the point that:

In other settings, beneficiaries and other agents are presumed to be as well served by one fiduciary as another, and fiduciaries who perform poorly are replaced. In contrast, once the parent-child relationship is established, even suboptimal parents have idiosyncratic value to their child. The relational model thus argues against severing this relationship unless it results in greater harm than benefit to the child.

Scott & Scott, *supra* note 8, at 2451.

¹⁷ 442 U.S. 584 (1979).

The law's concept of the family rests on a presumption that parents possess what a child lacks in maturity, experience, and capacity for judgment required for making life's difficult decisions. More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.¹⁸

On the other hand, foster parents and relatives caring for children who do not adopt them (kin caregivers)¹⁹ begin their relationships by contract, – at least in the case of unrelated foster parents,²⁰ and in the case of many kin caregivers, the contractual relationship arises with assumption of custody – have significant interventions and intrusions during the relationship, and may

¹⁸ *Id.* at 602 (citing 1 WILLIAM BLACKSTONE, COMMENTARIES *447; 2 JAMES KENT, COMMENTARIES *190).

¹⁹ The exception, which is described both in Brinig & Nock, *supra* note 14, at 463-67, and in Margaret F. Brinig & Steven L. Nock, *The One-Size-Fits-All Family*, 49 SANTA CLARA L. REV. 137, 140 (2009), is that for African-American families, kinship caregiving works as well as does adoption in serving children's needs. One financial ramification of a kin caregiver adopting a child that may work in a perverse fashion is demonstrated by the Iowa law allowing "special needs" subsidies to be paid to parents adopting children who were their foster children. This benefit is not available for most kin caregivers, since the child must be placed from state care rather than directly by the biological parent or parents. See *Becker v. Iowa Dep't of Human Servs.*, 661 N.W.2d 125, 127 (Iowa 2003).

²⁰ For an example of a case where the foster parent contract was quoted in both the majority and dissenting opinions, see *In re J.C.*, 417 S.2d 529, 531 (Miss. 1982):

We understand that the actual permanent legal custody of children placed in our home for Foster Care will remain in either the natural parent or parents of the child or the Department according to the facts of the individual case, and that by placing a child in our home for foster care, the Department does not confer any right to custody in us, and we hereby expressly waive any right to custody of a child placed in our home for Foster Care and expressly agree that we will not attempt to adopt any child placed in our home for Foster Care unless the child is made free for adoption by the written decision and action of the State Department of Public Welfare.

Despite the contract, the majority found that in other cases foster parents had been permitted to adopt and that at least one social worker testified that "being licensed as a foster home was definitely an advantage to becoming a licensed adoptive home." *Id.*

The dissenting opinion not only quoted the contract but also found that the payment of money to the foster parents disqualified them as adoptive parents. *Id.* at 534 (Broom, J., dissenting). The judge voiced concern about the example that their repudiating the contract would have on other parents waiting for adoption:

To allow the appellants to prevail here is in effect saying to them and to the whole world that once a child's name is placed on the registry, then the first adoption petitioners who win the "foot race" and beat all others to the courthouse door and file their petition first will somehow have priority over anyone else who has obeyed the law and gotten on the list by proper application and complying with established procedures.

Id. at 535. The dissent concluded: "By its decision this Court has sanctioned the appellants' unjustifiable repudiation of a solemn contract and allowed them to make an 'end run' thereby magically projecting themselves ahead of the statutory list of others who seek to adopt a child in accordance with established procedures mandated by the legislature." *Id.*

have the child removed, through no fault of their own, to be adopted elsewhere or returned to the biological parent or parents. They therefore lack both the autonomy and the sense of permanency given to legal parents.²¹

The effect on children of these two different relationships – one with full protection of the law, one with characteristics much closer to those of

²¹ Despite this lack of permanence, the children may love them unconditionally, and “[i]t is not surprising then that many children, particularly those that enter foster care at a very early age and have little or no contact with their natural parents during extended stays in foster care, often develop deep emotional ties with their foster parents.” *Smith v. Org. of Foster Families for Equal. & Reform*, 431 U.S. 816, 836 (1977). However, the foster parents are supposed to both not expect permanence and, occasionally with difficult children, act as monitoring agents for the police. *See, e.g., J.M.A. v. State*, 542 P.2d 170, 174-76 (Alaska 1975) (discussing foster parent who discovered marijuana in search of child’s room and holding that the fact that she was paid by the state did not necessarily mean that Fourth Amendment prohibitions applied to her activities). For another illustration of the lack of permanence in this context, see a recent story in the local diocesan religious newspaper, which talked of a now-elderly woman who for many years following her husband’s death took in babies, which she would hurriedly return to the agency. Karen Clifford, *Rose Culp Was Foster Parent to 79 Babies*, TODAY’S CATHOLIC, Sept. 12, 2010, at 11. The woman indicated that one of the hardest aspects of being a foster parent is not becoming emotionally attached: “One time I had a little boy named Bobby who was about 10 months old when I got him. I was standing at the sink and he came up to me and took my pants and starting [sic] saying ‘mama.’ My children were calling me mama. I called Peg (her social worker) and said, ‘You are going to have to come and get Bobby.’” *Id.*

The State of Indiana requires prospective parents to use the County Office of Family and Children (OFC) or a licensed child-placing agency to facilitate the adoption, though families who plan to adopt their stepchildren, grandchildren, or nieces and nephews can do a direct placement from the child’s parents. IND. CODE § 31-19-7-1(a). Adoptive parents are required to get foster care training before adopting. The Department of Child Services describes the difference between adoption and foster parenting (called resource parenting):

Changes in Dynamics when a Resource Parent Adopts

When resource parent(s) adopt a child(ren) placed with them on a foster care basis and for whom they have provided a substitute family for a planned period of time, new dynamics develop. Most importantly, there is a shift in roles and role expectations relative to the resource/adoptive family. That shift is felt primarily by the resource parents but definitely affects the child. With life experiences and foster care training and knowledge in hand, resource/adoptive parents perceive clear distinctions between foster care and adoption.

Adoption means that resource parents:

1. Are making a commitment to provide permanency for the child; and
2. No longer share decision making responsibility and liability with the agency or court.

They are solely responsible, legally and financially, for the total parenting, care, growth, and development of the child. This includes seeing that the long-term developmental, therapeutic, social, medical, educational, and emotional needs of the child are met.

Resource Parent Adoption, IND. DEP’T OF CHILD SERVS., http://www.in.gov/dcs/files/10.10_Resource_Parent_Adoption.pdf (last visited Feb. 22, 2010).

commercial fiduciaries – is perhaps not surprising. Children who do not live with legal parents do not fare as well.²² As adolescents, as the following Table shows, they are more likely to be depressed, to use tobacco, alcohol or marijuana, to be delinquent, and to fear dying or being killed.

Table 1. Effect of Children's Legal Relationship to Parents²³

<i>Variable</i>	<i>Depression</i>	<i>Drug Use</i>	<i>Delinquency</i>	<i>Mortality</i>
Child in Kin-Care	1.257 (0.355)**	0.460 (0.205)*	1.631 (0.409)**	0.013 (0.009) ns
Child Adopted	.732 (0.263)*	0.010 (0.150) ns	.597 (0.303)*	0.011 (0.007) ns
Child Fostered	3.244 (0.916)**	1.164 (0.542)*	2.175 (1.066)*	0.069 (0.030)*

*Standard errors are in parentheses. Statistical significance is indicated by * for $p < 0.05$ and ** for $p < 0.01$.*

A more common situation than that of Artyom (of attempting to just return a child), but involving the same sort of problems, surfaces in so-called “wrongful adoption” cases.²⁴ In these cases, couples who have adopted children through public or private agencies sue the agencies when something turns out to be very wrong with their adopted child.²⁵ Some, but not all of these cases also involve “disrupted adoptions.”²⁶ In others, the parents sue the agency for fraud and misrepresentation or to recoup the additional costs of raising a disabled

²² See *infra* Table 1.

²³ In each case, the situations are compared to children living with their biological parent or parents. The equations hold constant the mother's marital status, the child's age and sex, household income, the mother's age, and the mother's and child's race. The standard errors are in parentheses, and * denotes significance at $p < 0.05$, with ** denoting $p < 0.01$. Richard Udry & Peter Bearman, *The National Longitudinal Study of Adolescent Health*, Carolina Population Center, U.N.C. (1994-1995), <http://www.cpc.unc.edu/projects/addhealth/data>.

²⁴ See Note, *When Love Is Not Enough: Toward a Unified Wrongful Adoption Tort*, 105 HARV. L. REV. 1761, 1762 (1992).

²⁵ *Id.*

²⁶ See *id.* at 1764 (estimating that as many as ten percent of all adoptions are terminated). The process is simpler in the case of foster parents who find they cannot care for a child. More resources will be provided in the interest of maintaining stability in the child's life, but the child may be removed and placed elsewhere if the placement is ultimately unsuccessful. Foster parents may, in effect, give the child back. *Become a Foster Parent*, COMMUNITY CARE RESOURCES, INC., <http://www.communitycareresources.com/becomefosterparents.html> (last visited Feb. 22, 2011).

child for whom they had not bargained, but these parents do not terminate the adoption.²⁷

Elsewhere I have analogized the problem of wrongful adoption to the “market for lemons,” justly made famous by economist George Akerlof.²⁸ In order to allow for the adoption of disabled and other “hard to place” children, I argued that some amount of fraud may be optimal.²⁹ That is, from the child’s

²⁷ This cause of action might have been available to Torry Hansen, suing for the additional expenses of bringing up Artyom. Some recent “wrongful adoption” cases also involve Russian adoptees with what sounds like similar behavioral issues. *See, e.g.,* Ferenc v. World Child, Inc., 977 F. Supp. 56, 59-61 (D.D.C. 1997) (applying District of Columbia law, the court did not grant adoptive parents relief for “wrongful adoption” based on the discovery that their child was unknowingly suffering from “one or more serious and irreversible congenital neurological and visual disorders”). Parents were unable to recover in the more recent case of *Harshaw v. Bethany Christian Services*, 714 F. Supp. 2d 771, 774 (W.D. Mich. 2010) (applying Virginia law, the court denied relief for the parents of a 3 ½-year-old boy with fetal alcohol syndrome because “[t]he application stated that they would accept a child with ‘very minor medical problems and would not consider a child with moderate to severe medical problems’” (quoting the parents’ Application for International Adoption)).

²⁸ *See* George A. Akerlof, *The Market for “Lemons”: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970) (discussing the relationship between quality and uncertainty). This section is drawn from MARGARET F. BRINIG, *FROM CONTRACT TO COVENANT: BEYOND THE LAW AND ECONOMICS OF THE FAMILY* 68-70 (2000). Professor Frankel herself has commented on the problems with analogizing adoption to commercial markets in this law review. *See* Tamar Frankel & Francis H. Miller, *The Inapplicability of Market Theory to Adoptions*, 67 B.U. L. REV. 99 (1987).

²⁹ BRINIG, *supra* note 28, at 68-70. For the economic theory, see generally Michael R. Darby & Edi Karni, *Free Competition and the Optimal Amount of Fraud*, 16 J.L. & ECON. 67 (1973); Phillip Nelson, *Information and Consumer Behavior*, 78 J. POL. ECON. 311 (1970). For its application to adoptions, see, for example, Kevin Johnson, *Family Sues Over Adoption*, USA TODAY, Mar. 8, 1990, at 3A. For analysis of the effect of information on adoption success generally, see RICHARD P. BARTH & MARIANNE BERRY, *ADOPTION AND DISRUPTION: RATES, RISKS, AND RESPONSES* 112-113, 169 (1988); TRUDY FESTINGER, *NECESSARY RISK: A STUDY OF ADOPTIONS AND DISRUPTED ADOPTIVE PLACEMENTS* 40 (1986). Since there are too few homes available for hard-to-place children, they frequently remain unadopted. *See, e.g.,* *The Baby Chase*, TIME, Oct. 9, 1989, at 86. In 2009, the Children’s Bureau website counted 115,000 children waiting for adoption. *Trends In Foster Care and Adoption – FY 2002-FY 2009*, U.S. CHILDREN’S BUREAU, ADMINISTRATION FOR CHILDREN AND FAMILIES, available at http://www.acf.hhs.gov/programs/cb/stats_research/afcars/trends.htm (based on data submitted by states as of July 29, 2010). These children had been in foster care for a median of 29 months. *AFCARS Report – Preliminary FY 2009 Estimates as of July 2010*, U.S. CHILDREN’S BUREAU, ADMIN. FOR CHILD. & FAMILIES, http://www.acf.hhs.gov/programs/cb/stats_research/afcars/tar/report17.htm (last visited Feb. 23, 2011). Thirty percent were Black and twenty-two percent Hispanic. *Id.* The median age at removal was 4.1 years. *Id.* An earlier report notes that of the states reporting children awaiting adoption, 71.5% were “special needs,” according to their Title IV eligibility. *Adoption Exhibit 25 Special Needs of Children Waiting to be Adopted*, ADMIN.

perspective, being adopted is better than foster care. Agencies, who are often staffed by people highly sympathetic to these children and wishing their placement for both altruistic and financial motivations,³⁰ will tend to stress the children's good points and at least play down their least desirable qualities.

An adoptive parent may be seen as a purchaser who acquires a baby at considerable cost (in terms of cash, time, and emotional investment) from a seller (usually an agency). The seller possesses more information about the baby than the buyer,³¹ and, except in open adoption cases, it is often impossible for the adoptive parent to discover this important "quality information" about disability prior to consummating the transaction.³² Such problems as fetal alcohol syndrome or autism do not appear for months.³³ "Older children who were victims of sexual abuse by their parents may not show unusual behavior until they reach puberty. The requirement of agency investigation of birth parents and adoptive homes is designed to overcome some of these information problems."³⁴ Because agencies cannot charge a higher price for compliance – since states forbid child selling – the agencies have incentives to place the greatest number of children rather than to ensure the quality of the children placed.³⁵

"Once the child has been placed with adoptive parents and a major problem is discovered, the question becomes one of remedy. In some cases, adoptions are annulled because of agency misrepresentation or nondisclosure."³⁶ More

FOR CHILD. & FAMILIES (1990), http://www.acf.hhs.gov/programs/cb/stats_research/afcars/vcis/iv25.htm (last visited Feb. 23, 2011).

³⁰ State agencies are awarded for increases in placements over a "base amount" calculated through reports filed in accordance with the Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (codified as amended at 42 U.S.C. § 679b).

³¹ See *In re Baby Girl D.*, 517 A.2d 925, 927 (Pa. 1986) (discussing what expenses can properly be attributed to the adoptive parents ("buyers")).

³² See, e.g., Daniel Golden, *When Adoption Doesn't Work*, BOSTON GLOBE MAGAZINE, June 11, 1989, at 16; Dianne Klein, "Special" Children; Dark Past Can Haunt Adoptions, L.A. TIMES, May 29, 1988, at 1 (explaining that numbers are an indication of a social worker's efficiency, and statistics justify staff, which leads social workers to withhold information from prospective parents to increase chances of adoption).

³³ See, e.g., DAN E. BURNS, SAVING BEN: A FATHER'S STORY OF AUTISM 34 (2009) (recounting biological son's autism diagnosis made in 1990 when the child was three years and four months old).

³⁴ BRINIG, *supra* note 28, at 69; see, e.g., Dickson, *supra* note 15, at 950 & n.175.

³⁵ See, e.g., BETTY REID MANDELL, WHERE ARE THE CHILDREN? 78-79 (1973). To compare in the business world, see Robert F. Springer & H.E. Frech III, *Detering Fraud: The Role of Resale Price Maintenance*, 59 J. BUS. 433 (1986).

³⁶ BRINIG, *supra* note 28, at 69. Presumably that is what might have happened had Torry Hansen followed correct procedures. See, e.g., Klein, *supra* note 32, at 1 (reporting sixty-nine failed adoptions in California between 1983 and 1987 due to fraudulent agency misrepresentation).

often, the parents demand money damages.³⁷ Courts tend to allow recovery³⁸ where the child had a life-threatening disease,³⁹ and where agencies deliberately misrepresented the child as healthy.⁴⁰ “The parents were able to

³⁷ See, e.g., CYNTHIA R. MABRY & LISA KELLY, *ADOPTION LAW: THEORY, POLICY, AND PRACTICE* 735 (2006).

³⁸ See, e.g., *Michael J. v. Cnty. of L.A. Dep't of Adoptions*, 247 Cal. Rptr. 504, 513 (Ct. App. 1988); *Mohr v. Commonwealth*, 653 N.E.2d 1104, 1112 (Mass. 1995); *M.H. v. Caritas Family Servs.*, 488 N.W.2d 282, 288 (Minn. 1992); *Jackson v. State*, 956 P.2d 35, 44-47 (Mont. 1998); *Burr v. Bd. of Cnty. Comm'rs*, 491 N.E.2d 1101, 1105-07 (Ohio 1986); *Gibbs v. Ernst*, 615 A.2d 851, 854 (Pa. Commw. Ct. 1992); *Malette v. Children's Friend & Serv.*, 661 A.2d 67, 72-73 (R.I. 1995); *Meracle v. Children's Serv. Soc'y*, 437 N.W.2d 532, 537 (Wis. 1989). In *Michael J.*, the child had clear symptoms of a progressive neurological disease, which the county maintained was just a birthmark. 247 Cal. Rptr. at 505. In this case, it is the agency, not the parents, acting in a fiduciary capacity:

By recognizing an action for intentional misrepresentation or fraudulent concealment, we are not imposing on the agency a duty to predict the future health of a prospective adoptee. However, there must be a good faith full disclosure of material facts concerning existing or past conditions of the child's health. If the adoptive parents had been informed of the doctor's refusal to make a prognosis they would have been placed on notice, allowing a consideration of the significance of such refusal and an independent inquiry into the matter. The County was not without the means or resources with which to competently investigate the total medical condition of an obviously blemished child. Public policy cannot extend to condone concealment or intentional misrepresentation which misleads prospective adoptive parents about the unusual calamity they are assuming. *The adoption of a child is an act of compassion, love and humanitarian concern where the adoptive parent voluntarily assumes enormous legal, moral, social and financial obligations.* Accordingly, a trustworthy process benefits society, as well as the child and parent. As keepers of the conscience of the community, we cannot countenance conduct which would allow persons who desire entrance into the emotional realm of parenting to be unprotected from schemes or tactics designed to discharge societal burdens onto the unsuspecting or unwary. *As trustees of the child's destiny the agency was obligated to act with morals greater than those found in a purveyor's common marketplace.*

Id. at 513 (emphasis added).

³⁹ *Michael J.*, 247 Cal. Rptr. at 505; *Burr*, 491 N.E.2d at 1107; *Meracle*, 437 N.W.2d at 533.

⁴⁰ See, e.g., *Mohr*, 653 N.E.2d at 1106-08, 1112 (allowing a suit in negligence for misrepresenting the adopted child's background because social worker told adoptive parents that six year old child was healthy, even though she knew that the child was suffering from cerebral atrophy (a wasting away of brain tissues) and that her mother was a committed mental patient diagnosed as a chronic schizophrenic reactionary). According to Brione B. Pattison, Note, *Case Retrospective: Mohr v. Commonwealth of Massachusetts and Pamela Tompkins*, 1 J.L. & FAM. STUD. 267 (1999), while the adoptive parents admit that they would not have agreed to meet and adopt the child had they known of her medical and family history, “they love her very much” and insist that “they never considered annulling the adoption and returning Betsy to the care of the state.” *Id.* at 275. Similarly, see *Ambrose v. Catholic Soc. Servs., Inc.*, 736 So. 2d 146, 148 (Fla. 1999) (recounting case where father had history of mental illness, which agency failed to disclose, and child was later diagnosed with bipolar disorder); *Roe v. Jewish Children's Bureau*, 790 N.E.2d 882,

recover for past or future medical expenses,” the courts reasoned, “even though the agencies were not guarantors of the child’s health. The courts noted that although the agencies knew of the genetic or other problems, the parents could not have discovered the illness or disability through their own diligence.”⁴¹

In other reported cases, the parents’ suits were barred.⁴² In some, the defects were not substantial, although the parents would not have wished them. For example, one child was deaf,⁴³ while in another case the child turned out to be unavailable for adoption because his father had never given consent.⁴⁴ “In others, although the agencies might have negligently failed to discover the problem, plaintiffs could not show fraud or prove that they would not have adopted the child had they known of the problems.”⁴⁵ As one court wrote:

In short, to impose liability in a case such as this would in effect make the adoption agency a guarantor of the infant’s future good health. . . . To do so would put adoption agencies in a quagmire because they want to continue to perform this service. Yet, they could not afford an unreasonable responsibility of guaranteeing the health of a child. Even natural parents are without this guarantee.⁴⁶

I have written before:

In most cases, returning the children to their birth parents or the agencies that placed them . . . presents an unacceptable alternative. Children need stability, particularly early in their lives. Disabled children may need a stable, loving home even more than those without special needs. Rescission of the adoption contract therefore loses power as a device because of the third-party effects, or externalities, involved. . . .

The special needs of hard-to-place infants create another barrier to recovery: a heightened burden of proof of fraud. Particularly if the

887 (Ill. App. Ct. 2003) (describing agency’s failure to disclose mother’s mental illness to parents who asked for a child whose parents had no history of mental or emotional problems and the child developed a whole series of mental health issues).

⁴¹ BRINIG, *supra* note 28, at 69 (discussing cases such as *Mohr*, 653 N.E.2d at 1112).

⁴² See, e.g., *Engstrom v. State*, 461 N.W.2d 309, 320 (Iowa 1990); *April v. Assoc’d Catholic Charities*, 629 So. 2d 1295, 1299 (La. Ct. App. 1993); *Foster v. Bass*, 575 So. 2d 967, 975-76, 983 (Miss. 1990); *Allen v. Children’s Servs.*, 567 N.E.2d 1346, 1348-49 (Ohio Ct. App. 1990). In other cases, though the facts might have suggested recovery, the parents’ claims were barred because of sovereign immunity, see, e.g., *Hren v. Bd. of Cnty. Comm’rs*, No. 94 AP 120096, 1995 Ohio App. LEXIS 4012, at *3-4 (Ct. App. May 30, 1995); *Zernhelt v. Lehigh Cnty. Office of Children & Youth Servs.*, 659 A.2d 89, 90-91 (Pa. Commw. Ct. 1995); or expiration of the statute of limitations, see *Henning v. Tuscarawas Cnty. Dep’t of Human Servs.*, C.A. No. 94 AP 120095, 1996 Ohio App. LEXIS 733, at *1 (Ct. App. Jan. 8, 1996).

⁴³ *Allen*, 567 N.E.2d at 1347.

⁴⁴ *Engstrom*, 461 N.W.2d at 312.

⁴⁵ BRINIG, *supra* note 28, at 69; see *Foster*, 575 So. 2d at 981.

⁴⁶ *Foster*, 575 So. 2d at 979, 984 n.22.

adoptive parents expressed a willingness to accept a special needs child, courts will be reluctant to penalize the agency by a finding of fraud and concomitant damages even if the agency withheld some important medical or psychological information. If these ‘wrongful adoption’ cases became routine, the government would have even fewer incentives to attempt permanent placement of disabled children, thus forcing still more to remain in permanent foster care.⁴⁷

Further, as in the “wrongful life” cases brought a generation ago,⁴⁸ the courts in the adoption fraud cases confront situations in which damages are very difficult to measure. Even if the child has some trait that the adoptive parent would have wished to avoid, he or she is nonetheless a human being, capable of giving and receiving love. As with the “wrongful birth” children, the courts typically find that the positive aspects of having a child outweigh the negative.⁴⁹ “Taken as a whole, the child presents a net benefit to the adoptive parents despite the misinformation.”⁵⁰ Thus parents who annul adoptions (and perhaps those who recover damages as well) will face considerable stigma, substantially more than the fiduciary who gets the court to relieve him or her from the fiduciary obligation.

Finally, there is some evidence that suggests that the agencies’ withholding information from parents may actually be doing the child good.⁵¹ The Iowa Adoption Study matched and compared children with birthmothers of about the same age and adopted through the same agency from 1950-1969.⁵² In each pair, one child had parents with known problems – substance abuse, mental illness or criminal history – and the other did not.⁵³ These children have been followed to the present, and a great deal is known about them. A number of

⁴⁷ BRINIG, *supra* note 28, at 70.

⁴⁸ *See, e.g.*, Turpin v. Sortini, 643 P.2d 954, 957 (Cal. 1982). “Wrongful life” cases are typically those brought on the child’s behalf, and “wrongful birth” cases are those brought by parents. *Id.* at 957 n.4.

⁴⁹ *See, e.g.*, Keel v. Banach, 624 So. 2d 1022, 1024 (Ala. 1993).

⁵⁰ BRINIG, *supra* note 28, at 70.

⁵¹ *Id.* Note the contrast between this finding and that made by adoption professionals. *See, for example, Harshaw v. Bethany Christian Services*, 714 F. Supp. 2d 771, 798 (W.D. Mich. 2010), where the expert is quoted as follows:

[A] resounding consensus . . . has emerged since the 1970’s among adoption and child welfare experts that disclosure of information about a child’s medical and social history before an adoptive placement is always in the best interest of the child and serves to strengthen adoptive families. The Child Welfare League of America (CWLA), for example, has long favored the disclosure of all pertinent health and background information about an adoptive child, as has the National Association of Social Workers (NASW), the American Academy of Pediatrics, the Donaldson Adoption Institute, and many other professional organizations.

⁵² The study was conducted over several decades and yielded multiple articles. *See* Margaret F. Brinig, *Empirical Work in Family Law*, 2002 U. ILL. L. REV. 1083, 1101 n.138.

⁵³ BRINIG, *supra* note 12, at 146.

papers look at the relative effect of their genetic endowments (their biological parents' problems) versus the influence of "nurture" – the adoptive homes in which they grew up.⁵⁴ For the present purposes, one extremely interesting finding is that where the adoptive parents knew of the problems in the biological background, the children fared worse than when they did not.⁵⁵ This kind of result seems to go well beyond the fiduciary relationships in Professor Frankel's book.

The other piece of empirical evidence I would like to offer here deals with the attenuation of the parental relationship, not through an action as rare as that of Torry Hansen or concerning the parents whose children are in foster care,⁵⁶ but through the much more common occurrence of loss of custody at separation or divorce.⁵⁷ The argument is that having a legal agreement or order giving custody to the other parent, while maintaining that the noncustodial parent remains "fit," impliedly dubs him (since the majority are fathers) less trustworthy than the other in a normative sense. An award of custody to the child's mother means that as far as the child's welfare is concerned (the so-called "best interests of the child"), placement with the mother is preferable.⁵⁸ Here we are interested in the effect that the lack of societal trust has on the fathers, holding other things constant.

⁵⁴ See generally, Kristin Riggins-Caspers & Remi J. Cadoret, *Family Process as Mediator of Biology X Environment Interaction*, 33 MARRIAGE & FAM. REV. 101 (2001) (discussing in depth how expression of biological traits depends on the environment); Kristin Riggins-Caspers et al., *Gene X Environment Interaction and the Moderating Effect of Adoption Agency Disclosure on Estimating Genetic Effects*, 27 PERSONALITY & INDIVIDUAL DIFFERENCES 357 (1998).

⁵⁵ Riggins-Caspers et al., *supra* note 54, at 366-75.

⁵⁶ According to the Children's Bureau of the Department of Health and Human Services, the current count of foster children is 424,000 as of September 30, 2009. See *Trends in Foster Care*, *supra* note 29. The total minor child population in the United States in 2009 was 74.5 million, of which the 424,000 children in foster care are 0.05 percent. *Child Population*, CHILDSTATS.GOV, <http://www.childstats.gov/americaschildren/tables/pop1.asp> (last visited Feb. 23, 2011).

⁵⁷ The original and more extended discussion appeared in Margaret F. Brinig & Steven L. Nock, "I Only Want Trust": *Norms, Trust, and Autonomy*, 32 J. SOCIO-ECON. 471, 471-87 (2003), and is reprinted in BRINIG, *supra* note 12, at 77 tbl.2.6. In the same survey, there were 74,230,000 children under 18. The Census Bureau reports that as of 2009, there were 7,865,000 children whose parents were divorced or separated and who were living with their mothers only. *America's Families and Living Arrangements: 2009*, U.S. CENSUS BUREAU tbl.C3, <http://www.census.gov/population/www/socdemo/hh-fam/cps2009.html> (last visited Feb. 23, 2011). This computes to 10.6% of children under age 18.

⁵⁸ Brinig & Nock, *supra* note 57, at 480.

What Table 2 shows, holding other things constant, is indicated by the bolded row. It is that fathers, controlling for many other things including their depression at an earlier time, are significantly more depressed if a “legal agreement” (including a divorce decree) grants custody to the mother. In “*I Only Want Trust*”: *Norms, Trust, and Autonomy*, sociologist Steven Nock and I argued that this depression stems from the double loss of trust that comes first from the loss of his wife’s trust in the marriage,⁵⁹ then from the loss of societal trust that comes with the judgment about custody.

⁵⁹ *Id.* at 484. Wives file for divorce about two-thirds of the time. See Margaret F. Brinig & Douglas W. Allen, “*These Boots Are Made for Walking*”: *Why Most Divorce Filers Are Women*, 2 AM. L. & ECON. REV. 126, 127 (2000).

Table 2. Risk of Men's Depression as a Result of Changes to Children's Living Arrangements, Comparisons Based on Time 1 (1988) and Time 2 (1993) (Men's Responses Only)⁶⁰

<i>Variable</i>	<i>B (Constant = 13.403)</i>
Married since Time 1 (1988)?	-1.760 (1.743)
Remarried since Time 1?	-2.341 (2.608)
Divorced since Time 1?	1.298 (1.799)
Widowed since Time 1?	1.733 (2.732)
Education (years)	-0.123 (0.058)*
Respondent is Black (1=yes/0=no)	4.753 (0.967)***
Respondent is Hispanic	1.919 (1.377)
Respondent is Asian	-2.519 (3.747)
Respondent is Am. Indian	.181 (5.196)
R has biological minor children now living elsewhere who were living with R at Time 1 (1=y, 0=n)	0.189 (1.516)
R has legal agreement granting custody of children to other parent? (1=yes, 0=no, not applicable)	4.256 (1.541)***
R Income – Time 1 (\$1,000s)	-0.027 (0.016)
R Income – Time 2	-0.042 (0.001)***
<i>Standard errors are in parentheses. Statistical significance is indicated by * for p < 0.05, ** for p < 0.01, and *** for p < 0.001.</i>	

⁶⁰ This chart is reprinted in Brinig & Nock, *supra* note 57, at 481, and the data is from the NATIONAL SURVEY OF FAMILIES AND HOUSEHOLDS, <http://www.ssc.wisc.edu/nsfh/home.htm> (last visited Feb. 23, 2011), which was first administered in 1987-1988 and included personal interviews with 13,007 respondents. In 1992-1994, 10,007 of these individuals were re-interviewed. The dependent variable is the CEDS2, a brief version of the "Centers for Epidemiological Studies Depression Scale." Averages for married respondents were 13.0843, for divorced 18.07. Respondents are compared to those who never married. "In practical terms, loss of custody through a legal agreement or decision increases depression by about 4 points or 1/4 of a standard deviation on average." Brinig & Nock, *supra* note 57, at 480. This is even while taking into account the greater risk of depression following separation from the marriage (and, inferentially, from the child).

Foster parents are fiduciaries in Professor Frankel's sense: their relationships with the children for whom they care formally begin in most cases by contract. They are frequently compensated for the caretaking they do.⁶¹ They receive formal training by the state and typically expect their relationship to be temporary.⁶² While children are in their care, they are expected to place the children's interests above their own and to safeguard their welfare.⁶³ Adoption agencies have also been given the responsibility of fiduciaries in the placement of children in their care. Remedies are, as Rob Sitkoff's *The Economic Structure of Fiduciary Law* suggests, designed to deter fiduciaries who do not place their principals' concerns first.⁶⁴

Legal parents, biological and adoptive, are not acting according to a contract, relational though it might be. They are compensated by the love of their children and by the feelings generated by their own love – capacity, respect, and trust – and, rather than being subsidized, suffer a financial loss during their children's minority.⁶⁵ If they do not place their children's interests first, there certainly is no damages or disgorgement remedy.⁶⁶ That is perhaps

⁶¹ Foster parents who care for unrelated children receive compensation from the government, with stipends varying among the states. Foster parents may receive a larger stipend for children who are determined to be "hard to place" for adoption because they are of minority or mixed race, have siblings who also must be placed, are older, or are disabled. See, e.g., *A Guide for Foster and Pre-Adoptive Parents*, MASS. DEPARTMENT OF SOC. SERVICES 8 (June 2003), http://www.mass.gov/Eeohhs2/docs/dss/c_fp_ap_guide.pdf. This compensation is extended in almost all states to kin caregivers, certainly to those who are formal foster parents certified by the state (as kin caregivers are required to be in Massachusetts). See, e.g., *GrandFacts: A State Fact Sheet for Grandparents and Other Relatives Raising Children*, AARP FOUNDATION ET AL. (Mar. 2008), <http://www.grandfactsheets.org/doc/Massachusetts%2008.pdf>.

⁶² See, e.g., *A Guide for Foster and Pre-Adoptive Parents*, *supra* note 61, at 3.

⁶³ See, e.g., *id.* at 9-10.

⁶⁴ Robert Sitkoff has stated:

The agent is induced to act in the best interests of the principal by the threat of after-the-fact liability for failure to have done so. The agent is given broad discretionary powers . . . but she must exercise that discretion in the best interests of the principal on pain of damages and disgorgement remedies.

Robert H. Sitkoff, *The Economic Structure of Fiduciary Law*, 91 B.U. L. REV. 1039, 1043 (2011).

⁶⁵ According to the Department of Agriculture's Report, *Expenditures on Children by Families, 2006*, the annual cost of raising a child in a two parent, married family ranged from \$7,580 to \$8,570 for the younger child of a two-child family with less than \$44,500 in income, to \$15,490 to \$16,970 for families with incomes in excess of \$74,900. U.S. DEP'T OF AGRIC., EXPENDITURES ON CHILDREN BY FAMILIES, 2006 at ii tbl.ES1 (2007), available at <http://www.cnpp.usda.gov/Publications/CRC/crc2006.pdf>. This would compute to an average of \$143,790 for all years the child is under eighteen. *Id.* Single families would correspondingly spend, on average, \$136,200. *Id.* at 9 tbl.10. Of course these expenses will continue, and grow, if the parents pay for the child's college education.

⁶⁶ See, for example, *Burnette v. Wahl*, 588 P.2d 1105 (Or. 1978), in which children in

why the loss of custody is so devastating – the noncustodial parent loses a good part of the benefit while continuing to bear the financial obligations of parenthood. In the end, then, the difference between parents and fiduciaries, as Professor Frankel portrays them, seems to be one of gift as opposed to contract, love rather than exchange.⁶⁷

foster care sought to sue for damages of emotional and psychological injury caused by their mothers' failure to perform their parental duties to them. In denying their claim for relief because the state had a comprehensive plan of assuring adequate care for children and removing them when the care was not provided, the court noted that "there is a limitation to the extent to which use may be made of tort actions for the purpose of accomplishing social aims. . . . There are certain kinds of relationships which are not proper fodder for tort litigation, and we believe this to be one of them." *Id.* at 1111.

⁶⁷ See Gary L. Hansen, *Moral Reasoning and the Marital Exchange Relationship*, 131 J. SOC. PSYCHOL. 71, 79 (1991), for the conclusion that, regardless of moral reasoning characteristics and religiosity, an exchange relationship was inconsistent with marital happiness.