



Wrongful Adoption: What It Is, What It Is Not

BY SAM TOTARO

◆ ***After we adopted our daughter, we discovered that she had significant medical problems. We think our adoption agency was aware of this but didn't tell us. Is there anything we can do?***

In the vast majority of cases, adopted children do not have any significant impairment, and adjust well. But occasionally placements turn out to be disastrous. In some of those cases, adoption agencies or professionals, either intentionally or negligently, failed to make a good faith effort to identify all of the medical and/or social background information available regarding the adopted child and his or her birth family, and then to divulge that information to prospective adoptive parents. The courts have started to address these issues by allowing lawsuits, commonly referred to as “wrongful adoption.”

◆ ***What are the basic elements of a wrongful adoption lawsuit?***

Although brought under a number of different legal theories, most wrongful adoption lawsuits contain a count of misrepresentation or fraud, i.e., an allegation that the adoption agency or other professional

intentionally or negligently failed to make a good faith effort to find out and reveal material information to the adoptive parents. Not all information, however, is considered “material.” “Material information” is that information which, if it had been divulged—or if divulged and inaccurate—would have caused the adoptive parents not to adopt the child.

◆ ***Our adoption facilitator gave us all the information he had about our child and his family. Yet, he has now been diagnosed with a crippling hereditary disease. Is the facilitator liable?***

No court in the U.S. has held an adoption agency or professional to such a high standard that it would make them a guarantor of any child's future health. The courts have held that there is a duty on the part of agencies and professionals to make a good faith effort to investigate the child's background and then to divulge all non-identifying material information in their possession, so that the adoptive parents can make an informed decision as to whether to adopt the child.

◆ ***I adopted my daughter from a foreign country. My agency used a facilitator to gather the information about my child, which we discovered was inaccurate. Is my agency liable?***

The U.S. agency may be liable if it is determined that the foreign facilitator is

an agent of the U.S. agency. If so, the U.S. agency will be responsible for the facilitator's acts and omissions.

◆ ***The medical information that we were sent includes the statement “We can not guarantee the accuracy or truth of any diagnosis made or not made, and you take full responsibility for any result.” Is this enforceable?***

The disclaimer protects the adoption professional, but only if a good faith effort was made to assure that the information provided was accurate and complete.

◆ ***We've been asked to sign an adoption contract stating that we give up the right to file any lawsuit for any reason whatsoever. Is this enforceable?***

Such “hold harmless” clauses should be the biggest concern of any adopting parent entering into a contract with an adoption provider. Their enforceability varies by jurisdiction. Some courts have enforced them as valid clauses in a contract. Others have refused to enforce them as against public policy. Adopting parents should consult with an attorney in their state before signing a contract containing such a clause.

Sam Totaro, past president of the American Academy of Adoption Attorneys, practices law in Bensalem, Pennsylvania. He represents both adoption agencies and adoptive parents in wrongful adoption cases.

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Is there a legal question you'd like an adoption attorney to address?

[email] letters@adoptivefamilies.com

[mail] 42 W. 38 St., Ste. 901, NYC 10018

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