

2022

Filling in the Gaps: Inaccurate Medical Records in Adoption

Leah Rothfeld

Follow this and additional works at: <https://scholarlycommons.law.case.edu/healthmatrix>

 Part of the [Health Law and Policy Commons](#)

Recommended Citation

Leah Rothfeld, *Filling in the Gaps: Inaccurate Medical Records in Adoption*, 32 Health Matrix 399 (2022)
Available at: <https://scholarlycommons.law.case.edu/healthmatrix/vol32/iss1/9>

This Note is brought to you for free and open access by the Student Journals at Case Western Reserve University School of Law Scholarly Commons. It has been accepted for inclusion in Health Matrix: The Journal of Law-Medicine by an authorized administrator of Case Western Reserve University School of Law Scholarly Commons.

FILLING IN THE GAPS: INACCURATE MEDICAL RECORDS IN ADOPTION

Outstanding Note of the Year (2021)

Leah Rothfeld[†]

CONTENTS

CONTENTS	399
INTRODUCTION	400
I. THE IMPORTANCE OF COMPLETE AND ACCURATE MEDICAL RECORDS.....	402
A. <i>Effects on the Adoptee</i>	403
B. <i>Effects on the Adoptive Family</i>	405
C. <i>Inadequacy of the Wrongful Adoption Tort</i>	407
II. A SURVEY OF STATES' APPROACHES TO REPORTING	411
A. <i>Required Contents of the Report</i>	412
B. <i>Effort Required to Produce and Verify the Information</i>	413
III. FINANCIAL INCENTIVES TO LIE	415
A. <i>Financial Benefits for Birth Mothers</i>	416
B. <i>Financial Benefits for Adoption Agencies</i>	418
IV. PROPOSED CHANGES TO STATE LEGISLATION	419
A. <i>Overview of Proposal</i>	419
B. <i>Types and Logistics of Testing</i>	422
1. Drug Testing	422
2. Genetic and Diagnostic Testing	425
First Trimester.....	426
Second Trimester.....	427
Third Trimester.....	428
3. Sexually Transmitted Infection (STI) Testing	428
4. Payment for Tests.....	429
C. <i>Concerns Raised by the Proposal</i>	430
1. Adoptive Families Will Forgo the Medical Tests (Preventing Birth Mothers from Receiving Compensation).....	430
2. Fewer Babies Will Be Adopted	431
3. Wealthier Adoptive Families Will Get the Healthiest Babies	432
4. Increased Burden on Adoption Agencies.....	433
5. Limited Information from Testing	433
6. Lack of Information from the Biological Father.....	434
CONCLUSION	434

[†] J.D. Candidate, 2022, Case Western Reserve University School of Law; B.A. Duke University (2018). I would like to thank my family for supporting me throughout my entire law school career. I would also like to thank Professor Sharona Hoffman for her guidance throughout the writing process of this Note.

INTRODUCTION

In May 2020, the Youtuber Myka Stauffer and her husband made headlines for “rehomeing” their adopted son from China after they found themselves ill-equipped to handle his behavioral issues.¹ Their son had “a lot more special needs than we were aware of and we were not told,” the couple explained, blaming a lack of transparency in the adoption process.² It wasn’t until the Stauffers brought their son home as a toddler³ that he was diagnosed with Autism Spectrum Disorder Level 3.⁴ The Stauffers defended their decision to rehome their son, stating that this was a necessary decision the couple made for their son in order to “provide him with better care catered to his special needs.”⁵ While the couple predictably received criticism for their decision to surrender their son,⁶ the announcement also sparked discussion about the struggles of families that adopt a child with unknown medical problems.⁷

-
1. Stephanie McNeal, *A YouTuber Placed Her Adopted Autistic Son From China With A New Family — After Making Content With Him For Years*, BUZZFEED NEWS (May 28, 2020), <https://www.buzzfeednews.com/article/stephaniemcneal/myka-stauffer-huxley-announcement> [<https://perma.cc/34R8-N5B2>].
 2. Mckenna Aiello, *YouTuber Myka Stauffer Reveals Her Adopted Son is Living with a New ‘Forever Family,’* NBCDFW (May 27, 2020), <https://www.nbcdfw.com/entertainment/entertainment-news/youtuber-myka-stauffer-reveals-her-adopted-son-is-living-with-a-new-forever-family/2377713> [<https://perma.cc/Q7ZK-JE6Q>].
 3. McNeal, *supra* note 1.
 4. Aiello, *supra* note 2.
 5. Erika Celeste, *I Can Relate to Myka Stauffer, the Woman Who Gave Away Her Adoptive Son, Because I Once Made the Same Decision She Did*, INSIDER (June 22, 2020), <https://www.insider.com/myka-stauffer-rehomed-son-huxley-so-have-i-2020-6> [<https://perma.cc/69XE-JHVS>].
 6. *See Myka Stauffer: Backlash After Youtubers Give Up Adopted Son*, BBC (May 28, 2020), <https://www.bbc.com/news/world-us-canada-52839792> [<https://perma.cc/Y4Y2-N5TG>].
 7. *See, e.g.*, Celeste, *supra* note 5 (sharing the story of another mother’s own experience rehomeing her adopted child in response to the announcement of Myka Stauffer’s failed adoption); Suzy Weiss, *I Was ‘Rehomed’ and it Was the Best Thing that Ever Happened to Me*, N.Y. POST (May 29, 2020), <https://nypost.com/2020/05/29/i-was-rehomed-and-it-was-the-best-thing-that-ever-happened-to-me/> [<https://perma.cc/V3A6-TXQR>] (in response to the judgment of the Stauffers, adoptee writes about being rehomed to a second adoptive family after her first adoptive family tried and failed to get her medical treatment for her unknown issues); Katherine Osnos Sanford, Opinion, *What the Outrage Over the YouTube Stars ‘Rehomeing’ Their Autistic Son Misses*, WASH. POST (June 15, 2020), <https://www.washingtonpost.com/opinions/2020/06/15/what-outrage-over-youtube-stars-rehomeing-their-autistic-son-misses/> [<https://perma.cc/6JYJ-CQLN>] (highlighting how badly the resource must be lacking if

Incomplete or falsified medical information in adoption is often regarded as an international adoption issue, explainable by other countries' low standards for background checks.⁸ This problem, however, is not unique to international adoptions.⁹ Even in a domestic adoption, adoptive families commonly agree to adopt children with incomplete medical information or unknowingly agree to adopt children with undisclosed medical conditions.¹⁰ The domestic practice of falsifying and concealing potential adoptees' background information in order to successfully match with a prospective adoptive family is incentivized by states' policies that allow adoption agencies and birth mothers to benefit financially from adoption.¹¹

This Note will advocate for a change that rewards birth mothers and adoption agencies for reporting thoroughly and honestly. Section I will explain how adoption agencies harm adoptees and adoptive families when they provide incomplete medical records. It will also argue that the wrongful adoption tort does not adequately address such harm. Section II will describe states' current laws and regulations for the reporting of adoptees' backgrounds in domestic adoptions. Section III will explore adoption agencies' and birth mothers' incentives to report incomplete or falsified information. Section IV contains a proposal for new state legislation on private adoption that would financially incentivize birth mothers to participate in medical testing in order to produce more thorough and accurate information about adoptees. This proposed change centers the adoption process on the adoptee's mental

a family as wealthy and connected as the Stauffers couldn't even get the support they needed).

8. See Celeste, *supra* note 5 (“With international adoptions, what we sometimes find is many countries don’t require in-depth research or background checks. So families who adopt may not know the issues of abuse or substance abuse in utero . . . ,” Rita Soronen, President and CEO of the Dave Thomas Foundation for Adoption, told Insider.”); see also *Domestic vs. International Adoption*, ADOPTION NETWORK, <https://adoptionnetwork.com/domestic-vs-international-adoption#:~:text=Domestic%20adoptions%20are%20of%20newborn,whom%20to%20pursue%20the%20adoption> [https://perma.cc/H72T-MJP7] (last visited Oct. 20, 2020) (“If it is important for you to have medical, familial and social background on a child — you are looking at a domestic adoption.”).
9. See, e.g., *Jackson v. State*, 287 Mont. 473, 477-81 (1997) (describing a domestic adoption of a baby born to an incarcerated woman in Montana suffering from psychological impairment, which was not disclosed to the adoptive parents); *Gibbs v. Ernst*, No. 90-03066-19-2, 1991 WL 325294, at *1-2 (Pa. Com. Pl. Bucks Cnty., Mar. 19, 1991) (describing the domestic adoption of a 5-year-old child who was a ward of the state of Pennsylvania).
10. See, e.g., *Jackson*, 287 Mont. at 477-481; *Gibbs*, 1991 WL 325294, at *1-2.
11. See discussion *infra* Section III.

and physical health needs to best set the child up for a successful transition and childhood.

I. THE IMPORTANCE OF COMPLETE AND ACCURATE MEDICAL RECORDS

Full disclosure of all known information regarding an adoptee's background is essential for a successful adoption.¹² Information about the adoptee should include the child's medical and genetic history as well as the child's family and social background.¹³ Ideally, the background report should have "actual copies of reports, assessments, or other documents" instead of mere summaries of these documents.¹⁴

Despite the importance of a complete background report, the report's accuracy and completeness are often compromised.¹⁵ It is common for the child's paternal information to be incomplete or totally absent from the background report.¹⁶ The biological father's identity may be unknown to the birth mother, he may be unwilling to participate in the adoption process, or the birth mother may have another reason to exclude him from the adoption process.¹⁷ Birth mothers may also withhold or lie about unfavorable facts such as drug use.¹⁸ It should be noted that if the birth parents are young, the birth

-
12. Child Welfare Information Gateway, *Providing Background Information on Children to Prospective Adoptive Parents*, CHILDREN'S BUREAU 1 (Oct. 2018) [hereinafter Child Welfare Information Gateway, *Background Information*], https://www.childwelfare.gov/pubPDFs/f_background_bulletin.pdf [https://perma.cc/Y5G7-7AL9].
 13. Child Welfare Information Gateway, *Providing Adoptive Parents with Information About Adoptees and Their Birth Families*, CHILDREN'S BUREAU 2 (Aug. 2020) [hereinafter Child Welfare Information Gateway, *Providing Adoptive Parents with Information*], <https://www.childwelfare.gov/pubpdfs/collection.pdf> [https://perma.cc/Z6FZ-V6WW].
 14. Child Welfare Information Gateway, *Background Information*, *supra* note 12, at 3.
 15. Laurie C. Miller & Linda G. Tirella, *Medical Issues in Domestic Adoption*, in ADOPTION FACTBOOK V 447, 447 (National Council for Adoption 2011).
 16. *Id.*
 17. *Unsupportive, Uninterested or Unknown Birth Fathers*, AMERICAN ADOPTIONS [hereinafter AMERICAN ADOPTIONS, *Unsupportive*], https://www.americanadoptions.com/pregnant/birth_father_isnt_supportive [https://perma.cc/8HJA-RK2F] (last visited Jan. 15, 2021) (describing potential relationships between the birth mother and birth father, including those with a psychologically or sexually abusive birth father or a birth father who wants the pregnancy aborted).
 18. See Hayley R. Price et al., *Screening Pregnant Women and Their Neonates for Illicit Drug Use: Consideration of the Integrated Technical, Medical, Ethical, Legal, and Social Issues*, FRONTIERS PHARMACOLOGY,

parents' knowledge of their own health might be limited because they will be unaware of diseases that manifest at an older age.¹⁹

A fundamental flaw of adoptees' medical records is that they represent only known information at the moment the background information is transmitted and are not typically updated as the birth family discovers new health issues.²⁰ The background record is a "snapshot" instead of a continuously updated file.²¹ Unfortunately, because incomplete and falsified medical records are common, prospective adoptive parents are advised to proactively test their new child for certain conditions.²² Because most adoptees' only chance to learn about their familial history is the initial background report shared with the adoptive family, it is important the background report be as complete and accurate as possible.

A. *Effects on the Adoptee*

An incomplete or falsified background report lends itself to numerous problems for the adoptee. Most notably, lack of information leads to delayed treatment and diagnosis in adopted children.²³ Two of the most important pieces of information include whether the biological family has a history of mental illness and if the child was exposed to medications the mother used.²⁴ If a child's adoptive parents are fully aware of her background, she will be able to receive necessary early intervention services because her parents will have the opportunity to prepare.²⁵ Otherwise, the adoptee may miss out on the opportunity to receive care that her adoptive family might have sought.²⁶ The impact on the adoptive parents is discussed in further detail below in Section I.B.

Aug. 28, 2018, at 2 (describing the issue of untruthfulness when pregnant woman self-report drug usage).

19. Miller & Tirella, *supra* note 15.

20. *Id.*

21. *Id.*

22. *Id.* at 451 (recommending HIV testing).

23. *See Your Adopted Child's Health Needs*, NATIONAL HEALTH SERVICE UK (Aug. 30, 2018), <https://www.nhs.uk/live-well/healthy-body/your-adopted-childs-health-needs/> [<https://perma.cc/4BVT-99NJ>] (describing how gaps in an adoptees' medical record can present a challenge for their adoptive parents).

24. Miller & Tirella, *supra* note 15.

25. Child Welfare Information Gateway, *Providing Adoptive Parents with Information*, *supra* note 13, at 1.

26. Maureen McCauley, *Adoptees and Suicide Risk*, ADOPTIVE FAM. ASS'N OF BC, <https://www.bcadoption.com/resources/articles/adoptees-and-suicide> [<https://perma.cc/5GZK-AAQ6>] (last visited Nov. 9, 2021).

The birth mother's ingestion of certain substances and prescribed medications while the adoptee is in the womb can lead to health consequences for the adoptee.²⁷ When it comes to abuse of illegal substances, birth mothers may omit information intentionally or because of recall bias.²⁸ Recall bias occurs when people remember past events inaccurately, and it is especially prevalent when people are asked to recall undesirable behavior such as drug usage or the consumption of unhealthy food.²⁹

It is estimated that one in ten babies born in the U.S. is affected by prenatal exposure to alcohol and illicit drugs.³⁰ Cocaine is known to cross the placenta and reach the fetus, slowing bone and intestine growth.³¹ As marijuana is legalized in more states, a higher percentage of pregnant women are using it.³² While the impact of light marijuana use during pregnancy is not clear, there is a notable link between heavy usage and health problems such as low birth weight and preterm birth.³³

Medical records of birth mothers often contain incomplete information even about the *legal* medicines taken during pregnancy.³⁴ The birth mother's prescription medication use is important because some prescription drugs, such as ADHD medication, are known to be associated with birth defects that will impact the child throughout life.³⁵ High-dose aspirin use can cause poor heart development and brain bleeding in the baby.³⁶ Babies exposed to antiepileptic drugs in utero can have impaired cognitive and behavioral development as well as

-
27. Miller & Tirella, *supra* note 15, at 448.
 28. *Id.* at 449.
 29. Spencer et al., *Recall Bias*, in CATALOGUE OF BIAS (McCall MacBain Foundation, 2017), <https://catalogofbias.org/biases/recall-bias/> [<https://perma.cc/DRH5-9LA5>].
 30. Price et al., *supra* note 18, at 1.
 31. Punam Sachdeva et al., *Drug Use in Pregnancy; a Point to Ponder!*, INDIAN J. PHARM. SCI., Jan.-Feb. 2009, at 1, 5.
 32. Torri D. Metz & Laura M. Borgelt, *Marijuana Use in Pregnancy and While Breastfeeding*, 132 OBSTET. GYNECOL. 1198, 1998-99 (2018) (reporting an increase from 2.37% in 2002 to 3.85% in 2014).
 33. *Id.* at 1203-04.
 34. Miller & Tirella, *supra* note 15, at 448.
 35. See Anderson et al., *ADHD Medication Use During Pregnancy and Risk for Selected Birth Defects: National Birth Defects Prevention Study, 1998-2011*, 24 J. ATTENTION DISORDERS (2020) 479, 486 (finding an association between ADHD medication use in early pregnancy and gastroschisis, omphalocele, and transverse limb deficiency).
 36. Yvonne Butler Tobah, *Is it Safe to Take Aspirin During Pregnancy?*, MAYO CLINIC (Feb. 6, 2021), <https://www.mayoclinic.org/healthy-lifestyle/pregnancy-week-by-week/expert-answers/aspirin-during-pregnancy/faq-20058167> [<https://perma.cc/KTF7-Z63P>].

physical defects.³⁷ While untreated depression during pregnancy can cause premature birth, certain antidepressants pose a risk of fetal defects including a heart defect.³⁸

The negative effects of falsified or incomplete medical records can extend for multiple generations, as the adoptee will have incorrect or limited information to pass on to her own biological children when the time comes.³⁹ For example, investigation of the cause of a young child's seizures may involve inquiry into each of the child's parents' family health history to assist in determining contributing inheritable conditions.⁴⁰ If one of the child's parents is unable to provide this information because they do not know their own family health history, the doctor may have a more difficult time identifying the young child's problem.⁴¹

B. *Effects on the Adoptive Family*

In addition to the direct impact on the adoptee, poor medical records create difficulty for the adoptive family. Adoptive families are asked about their preferences regarding certain characteristics of their future child, including their willingness to parent a child with a disability.⁴² The adoptive family relies on accurate disclosure of the

-
37. Evan Gedzelman & Kimford J. Meador, *Antiepileptic Drugs in Women with Epilepsy During Pregnancy*, 3 THERAPEUTIC ADVANCES DRUG SAFETY 71, 71 (2012).
 38. *Antidepressants: Safe During Pregnancy?*, MAYO CLINIC (Jan. 8, 2020), <https://www.mayoclinic.org/healthy-lifestyle/pregnancy-week-by-week/in-depth/antidepressants/art-20046420#:~:text=The%20biggest%20concern%20is%20typically,of%20complications%20for%20your%20baby> [https://perma.cc/CXG5-MV45].
 39. See Hannah Greico, *Finding the Missing Piece: What Happens When Adoptees Become Parents*, WASH. POST (May 1, 2020), <https://www.washingtonpost.com/lifestyle/2020/05/01/finding-missing-piece-what-happens-when-adoptees-become-parents/> [https://perma.cc/QA9Y-M8J5] (reporting the adoptees' experiences having their own biological children, including the parenting challenge they face when they have only limited medical information to pass on to their biological children).
 40. See Lisa Esposito, *When Adoptees Uncover Their Medical History*, U.S. NEWS & WORLD REP. (Oct. 7, 2015), <https://health.usnews.com/health-news/patient-advice/articles/2015/10/07/when-adoptees-uncover-their-medical-history> [https://perma.cc/73NN-L2DY] (sharing the story of an adopted man who, when working with a genetic counselor to determine the cause of his daughter's seizures, was unable to provide any of his family's history to help his daughter).
 41. *Id.*
 42. See, e.g., *Home Study Sample Questions*, ADOPTION INFO. SERV., <http://adoptioninfosvcs.com/wp-content/uploads/2016/06/AIS-Home-Study-Sample-Questions.pdf> [https://perma.cc/9GYE-CGSY] (last visited Nov. 11, 2021) (listing multiple questions for prospective adoptive parents about their willingness and ability to parent a special needs child);

child's background to "determine whether they are equipped to meet the child's physical and mental health needs and whether they can provide the services that might be necessary."⁴³ Despite adoptive families' need for an accurate medical record, adoptive families can expect the background information to be incomplete.⁴⁴ Between transcription errors, missing information, and undiscovered information, the record is "always" imperfect.⁴⁵

As previously mentioned, the prospective adoptive family may want to know whether the biological family has a history of mental illness because this can signal that the child has a high risk of developing the same condition.⁴⁶ A child with a first-degree relative with schizophrenia is eleven times more likely to have schizophrenia.⁴⁷ A child with a first-degree relative with Tourette's syndrome is 174 times more likely to have Tourette's syndrome.⁴⁸ This information can therefore shed light on a child's relative risk of presenting certain illnesses and symptoms.

Adopted children's particular medical needs often "do not become apparent until after the time of placement in an adoptive home."⁴⁹ For example, if the adoptee contracts a sexually-transmitted infection (STI) from the birth mother, symptoms may not manifest for months or years after the child is born.⁵⁰ Although the Centers for Disease Control and Prevention recommend that all pregnant women be tested because STIs can be asymptomatic, some doctors do not routinely screen pregnant patients.⁵¹ Ideally, prospective adoptive parents should have information about the birth mother's lifestyle choices that put the child

The Steps to Adoption, VA. DEP'T SOC. SERV., https://www.dss.virginia.gov/files/division/dfs/ap/intro_page/publications/B032-01-0975-01-eng.pdf [<https://perma.cc/597W-8YG3>] (last visited Nov. 11, 2021) (describing the adoption process, including a home study during which the adoption worker will have a discussion with the prospective adoptive family about what children the family is prepared to adopt).

43. Child Welfare Information Gateway, *Background Information*, *supra* note 12, at 1-2.
44. *Id.* at 3-4.
45. *Id.*
46. Miller & Tirella, *supra* note 15, at 448.
47. *Id.*
48. *Id.*
49. Veronnie F. Jones, *Comprehensive Health Evaluation of the Newly Adopted Child*, 129 PEDIATRICS e214, e214 (2012).
50. *STDs During Pregnancy – CDC Fact Sheet*, CTRS. FOR DISEASE CONTROL & PREVENTION [hereinafter CDC, *Fact Sheet*], <https://www.cdc.gov/std/pregnancy/stdfact-pregnancy.htm> [<https://perma.cc/E55C-FSA9>] (last visited Jan. 10, 2021).
51. *Id.*

at risk of contracting an STI, as well as her drug and alcohol use.⁵² Examples of STI-related complications for the baby include a growth in the larynx from Human papillomavirus, low birth weight from Hepatitis C, and brain and heart issues from Syphilis.⁵³

Ultimately, health-related misrepresentations can lead a family to adopt a child they otherwise would not have agreed to adopt.⁵⁴ The adoptee may develop a health condition the adoptive family is unable to handle. Life for siblings in the household will be complicated as siblings of a special-needs child receive less of the parents' attention and financial resources.⁵⁵ The psychology community is beginning to recognize post-adoption depression in adoptive families.⁵⁶ When the new family faces undesirable differences between “the reality and the expectations of the parenting experience” without adequate support, family members may become depressed or even suffer physical health consequences, such as heart attacks.⁵⁷

C. Inadequacy of the Wrongful Adoption Tort

A cause of action for wrongful adoption – the “wrongful adoption tort” – may potentially enable parents to recover financially if their adopted child suffers from a condition the adoption agency knew about and failed to report.⁵⁸ It is in the adoption agency's interest to provide all known background information about the child to prevent wrongful

-
52. *Jones, supra* note 49, at 215-16. See Amy E. Renwick, *Preparing to Adopt a Child*, KIDSHEALTH (Oct. 2021), <https://kidshealth.org/en/parents/medical-adopt.html> [<https://perma.cc/QR7Y-YWVL>] (recommending that adoptive parents get information about the birth mother's sexually transmitted diseases that could impact the baby's health).
 53. *STDs during Pregnancy – CDC Fact Sheet (Detailed)*, CTRS. FOR DISEASE CONTROL & PREVENTION (July 22, 2021) [hereinafter CDC, *Detailed Fact Sheet*], <https://www.cdc.gov/std/pregnancy/stdfact-pregnancy-detailed.htm> [<https://perma.cc/5LDX-Q3HC>].
 54. See *Burr v. Board of County Commissioners*, 491 N.E.2d 1101, 1106 (Ohio 1986); *Juman v. Louise Wise Services*, 663 N.Y.S.2d 483, 486 (Sup. Ct. N.Y. Cnty. 1997).
 55. Batya Swift Yasgur, *Emotional Problems Facing Siblings of Children With Disabilities*, PSYCHIATRYADVISOR (June 20, 2017), <https://www.psychiatryadvisor.com/home/topics/child-adolescent-psychiatry/emotional-problems-facing-siblings-of-children-with-disabilities/> [<https://perma.cc/9HKX-78LJ>].
 56. See Karen J. Foli, *Parental Post-Adoption Depression*, in ADOPTION FACTBOOK V 149, 151 (National Council for Adoption 2011).
 57. *Id.*; *Ross v. Louise Wise Services, Inc.*, 868 N.E.2d 189, 193 (N.Y. 2007) (claiming that both adoptive parents became clinically depressed, and ultimately divorced); *Juman v. Louise Wise Services*, 770 N.Y.S.2d 305, 306 (App. Div. 2004).
 58. See *Burr*, 491 N.E.2d at 1104-05 (establishing the wrongful adoption tort).

adoption lawsuits.⁵⁹ This tort has developed over the years and allows recovery in limited situations.⁶⁰ Despite the tort's expansion to allow recovery when an adoption agency negligently misrepresents or deliberately withholds information about the child's health, it does not provide recovery when an agency discloses information reported by the birth mother without first investigating its accuracy.⁶¹

The wrongful adoption tort was first recognized in *Burr v. Board of County Commissioners*.⁶² In *Burr*, the court found for the adoptive family after they discovered that their adopted son's medical background had been misrepresented to them.⁶³ The description of the child as "a nice, big, healthy baby boy" induced the adoptive parents to agree to his adoption.⁶⁴ This case was brought under fraud theory, meaning that the adoptive family had to prove: a) that the agency misrepresented or concealed a fact; b) that the fact was material; c) that the agency had knowledge of the fact's falsity or was so reckless that the agency's knowledge is inferred; d) that the agency intended to mislead the adoptive parents into relying upon this information; e) that the adoptive parents were justified in relying upon the representation or concealment; and f) that their reliance caused them injury.⁶⁵ The *Burr* court limited the scope of its ruling, specifying that its decision was based only on "the deliberate act of misinforming this couple which deprived them of their right to make a sound parenting decision."⁶⁶ By focusing on the intentional disclosure of false information and ignoring the agency's intentional withholding of known information, the court avoided imposing a duty to disclose information.⁶⁷

Three years later, in the 1989 case of *Meracle v. Children's Service Society*, a Wisconsin court expanded the wrongful adoption tort to include negligent misrepresentation.⁶⁸ To prevail in a claim for negligent misrepresentation, the adoptive family must show: 1) that the agency misrepresented a material fact; 2) that the agency either knew the

-
59. Child Welfare Information Gateway, *Background Information*, *supra* note 12, at 2.
60. *See infra* discussion of *Burr*, *Meracle*, and *Caritas*.
61. *See* M.H. v. Caritas Family Services, 488 N.W.2d 282, 286, 290 (Minn. 1992).
62. *See generally* *Burr*, 491 N.E.2d 1101.
63. *Id.* at 1104-05. Marketed as a healthy boy born to an 18-year-old, the son was diagnosed with Huntington's disease and in fact was born to a 31-year-old mentally ill, intellectually disabled woman. *Id.* at 1103-04.
64. *Id.* at 1103.
65. *Id.* at 1105.
66. *Id.* at 1109 (emphasis added).
67. *Id.* at 1108-09.
68. *See* *Meracle v. Child. Serv. Soc'y*, 437 N.W.2d 532, 537 (Wisc. 1989).

statement was false, did not know whether it was true or false, or should have known it was false; 3) that the agency intended the statement to induce the prospective adoptive parents to agree to the adoption; and 4) that the adoptive family was injured after justifiably relying on the misrepresentation.⁶⁹ This theory contains elements of the fraud theory in *Burr*, but presents a lower bar for adoptive parents who do not have to prove the agency's knowledge (or inferable knowledge) of the statement's falsehood.⁷⁰

In *Meracle*, the adoption agency did disclose to the prospective adoptive parents that the child had a familial history of Huntington's disease.⁷¹ However, the agency assured them that the child was at no heightened risk for the disease since it only passed between generations and the child's father had already tested negative.⁷² This was a misrepresentation because the child, who did develop Huntington's disease, was statistically at a heightened risk for developing Huntington's disease.⁷³ The *Meracle* court held the adoption agency liable for *negligent* misrepresentation,⁷⁴ whereas the adoption agency in *Burr* was liable under fraud theory for *intentional* misrepresentation.⁷⁵ The court explained that its decision to find the agency liable for negligent misrepresentation would "give potential parents more confidence in the adoption process and in the accuracy of the information they receive."⁷⁶ The court did not have to speculate about whether the adoption agency had knowledge of the disease's heritability or whether it was just ignorant and therefore negligent in making the representation.⁷⁷

By 1992, the wrongful adoption tort had further developed beyond negligent misrepresentation to encompass a duty to disclose certain known information.⁷⁸ In the case of negligent misrepresentation, the reporting party is liable for information it *has shared* in an irresponsible way.⁷⁹ A duty to disclose, on the other hand, creates liability for

69. *See Gibbs v. Ernst*, 647 A.2d 882, 889 (Pa. 1994).

70. Compare *Burr*, 491 N.E.2d 1101 with *Gibbs*, 647 A.2d 882.

71. *Meracle*, 437 N.W.2d at 533.

72. *Id.*

73. *Id.*

74. *Id.* at 537.

75. *Burr*, 491 N.E.2d at 1108.

76. *Meracle*, 437 N.W.2d at 537.

77. *See id.*

78. *See M.H. v. Caritas Family Services*, 488 N.W.2d 282, 288 (Minn. 1992).

79. RESTATEMENT (SECOND) OF TORTS § 552 (1977) (emphasis added).

information the reporting party has *not* communicated.⁸⁰ Once an adoption agency has assumed the role of disclosing medical information to the adoptive parents, it may not mislead the adoptive parents by withholding information.⁸¹

In *M.H. v. Caritas*, the adoption agency failed to disclose unfavorable information that it had known since it started looking for a placement for the adoptee. This information included the fact that the child was conceived by siblings, a mentally-ill 17-year-old boy and his 13-year-old sister.⁸² The agency merely reported the “possibility of incest” but withheld the full background story.⁸³ The *Caritas* court found that adoption agencies were subject to the common law duty to disclose, which requires disclosure of a fact when already-disclosed facts would be misleading in the absence of the withheld fact.⁸⁴ Recognizing “the compelling need of adoptive parents for full disclosure of medical background information that may be known to the agency” about the adoptee and his genetic parents,⁸⁵ the *Caritas* court found the agency liable for negligently withholding information and misleading the adoptive parents.⁸⁶

Despite the evolution of the wrongful adoption tort, courts have not yet found adoption agencies liable for a failure to investigate the background of the children they place.⁸⁷ In *Gibbs v. Ernst*, the Supreme Court of Pennsylvania ruled that an adoptive couple could not proceed to trial based on their allegation that the adoptive agency had breached a duty to investigate.⁸⁸ The *Gibbs* court found that neither state legislation nor the Adoption Act of 1970 imposed such a duty.⁸⁹ Rather, it interpreted the legislative intent as prohibiting adoption agencies from selectively disclosing information about the adoptee.⁹⁰ Adoption agencies are only mandated to “make reasonable efforts to disclose fully and accurately the medical history they have already obtained.”⁹¹ All adoption agencies have to do to avoid liability is make a good faith

80. See *Caritas*, 488 N.W.2d at 288-89 (finding the adoption agency liable for withholding material information).

81. *Id.* at 288.

82. *Id.* at 285-86.

83. *Id.* at 285.

84. *Id.* at 288.

85. *Id.* at 287.

86. *Id.* at 288.

87. See generally *Gibbs v. Ernst*, 647 A.2d 882 (Pa. 1994).

88. *Id.* at 891, 893.

89. *Id.* at 893-94.

90. *Id.* at 892.

91. *Id.* at 893.

effort to obtain information and then state a reason for the missing information.⁹² The court further explained that a requirement of only a good faith effort was preferable to a “requirement of a comprehensive investigation” because the latter would unduly burden adoption agencies.⁹³

Although some adoptive families do successfully collect damages for adoption agencies’ deceit, the tort does not cast a wide enough net to capture all cases in which adoptive families have been harmed by deceit.⁹⁴ Namely, it does not require adoption agencies to test the birth mother for easily discoverable diseases and conditions or otherwise investigate the truthfulness of information she provides.⁹⁵ Instead, the tort allows agencies to remain willfully ignorant. The absence of a duty to investigate and certain financial incentives (discussed in Section III) are a combination that breeds dishonesty. Concerns about such dishonesty may dissuade prospective parents from pursuing adoption and deprive children of the opportunity to find a happy home.

II. A SURVEY OF STATES’ APPROACHES TO REPORTING

Adoption is largely a state law issue.⁹⁶ States must comply with certain federal laws, such as respecting biological parents’ rights under the U.S. Constitution, but they ultimately act independently.⁹⁷ While states share many common approaches to adoption, adoption laws across the country are not uniform.⁹⁸ Because a decision in one state – even if it is made in that state’s highest court – does not bind judges in other states, states vary in their approaches to the reporting of adoptees’ background information.⁹⁹

The primary differences among state adoption statutes are what adoption agencies *must* include in the background report, what they

92. *Id.* at 894.

93. *Id.*

94. *See* M.H. v. Caritas Family Services, 488 N.W. 2d 282, 287-89 (Minn. 1992) (failing to impose a duty to investigate onto adoption agencies despite them being in a better position to obtain information than the adoptive parents).

95. *See* Ferguson v. City of Charleston, 532 U.S. 67, 70, 85-86 (2001) (holding that a drug test of a pregnant woman, without her consent, is a violation of her 4th amendment rights).

96. *Adoption Law: Turkey, United States*, LIBRARY OF CONGRESS 9 (May 2013), <https://tile.loc.gov/storage-services/service/l1/lglrd/2018298765/2018298765.pdf>.

97. *Id.*

98. *Id.* at 10.

99. *See* Child Welfare Information Gateway, *Providing Adoptive Parents with Information*, *supra* note 13, at 2-3.

may include in the report, who is responsible for producing this report,¹⁰⁰ and how the availability of information impacts reporting obligations.¹⁰¹ In the majority of states, the agency arranging the adoption is responsible for compiling the adoptee's background information.¹⁰² This Section discusses how states' varying statutes address adoptees' background reports and ultimately impact the completeness and accuracy of the report.

A. *Required Contents of the Report*

States vary as to what information is required in the adoptee's background report. Some states are vague about content requirements,¹⁰³ while other states specify in detail the types of information that must be reported.¹⁰⁴ Some states require that any identifying information about the birth mother and/or biological family be excluded from the background report,¹⁰⁵ while other states require that this information be included.¹⁰⁶ Others still are silent as to whether identifying information must be included or excluded.¹⁰⁷

Delaware is one of the states that has vague report content requirements.¹⁰⁸ In Delaware, adoption agencies must disclose familial background and physical and mental conditions of the child.¹⁰⁹ The Delaware statute does not specify what background information is relevant, such as whether background information includes mental health history or genetic history or which family members are relevant.¹¹⁰ It is not clear whether the child's mental and physical conditions can be presented in summary form or if original medical records must be produced.

100. *Id.*

101. Compare CAL. FAM. CODE § 8706(b) (West 1997) with FLA. STAT. § 63.085 (West 2012).

102. Child Welfare Information Gateway, *Providing Adoptive Parents with Information*, *supra* note 13.

103. See DEL. CODE ANN. tit. 13, § 912 (West 2018).

104. See 750 ILL. COMP. STAT. 50/18.4 (West 2017) (specifying that relevant birth parent background includes religion, general physical appearances, and "detailed medical and mental health histories of the child, the birth parents, and their immediate relatives").

105. See, e.g., ARK. CODE ANN. § 9-9-212 (West 2019); IND. CODE ANN. § 31-19-17-2 (West 2012).

106. See, e.g., COLO. REV. STAT. ANN. § 19-5-207 (West 2018); KAN. STAT. ANN. § 59-2130 (West 2018).

107. See, e.g., DEL. CODE ANN. TIT. 13, § 912 (West 2018).

108. *See id.*

109. *Id.*

110. *Id.*

Other states are more stringent about the contents of the background report. For an adoption in California, the agency must produce a report that contains “all known diagnostic information, including current medical reports on the child, psychological evaluations, and scholastic information, as well as all known information regarding the child’s developmental history and family life.”¹¹¹ Texas also requires an elaborate report about the child’s background.¹¹² There, the report must include many details about the birth parents such as eye color and height, education and professional achievements, and criminal records if existent.¹¹³

Illinois law also requires a wide array of information for the background report.¹¹⁴ Unlike California,¹¹⁵ however, it requires only the provision of “nonidentifying information,” of which there are ten categories.¹¹⁶ Nevertheless, the report must include details regarding the parents’ known “education, occupation, hobbies, interests and talents.”¹¹⁷ Additionally, the code in Illinois has a special provision focusing on the adoptee’s medical and mental health history.¹¹⁸ This provision specifies four categories of information that must be provided to the prospective adoptive parents: “(1) Conditions or diseases believed to be hereditary; (2) Drugs or medications taken by the child’s birth mother during pregnancy; (3) Psychological and psychiatric information; (4) Any other information that may be a factor influencing the child’s present or future health.”¹¹⁹

B. Effort Required to Produce and Verify the Information

As noted above, California’s statute appears to demand that a large amount of information on the adoptee be reported.¹²⁰ However, the requirement is not burdensome because the law requires only information that is “known.”¹²¹ There is no requirement that an adoption agency verify a mother’s claims of abstinence from drugs through a toxicology report, for example.¹²² The adoption agency can

111. CAL. FAM. CODE § 8706(b) (West 1997).

112. See TEX. FAM. CODE § 162.007 (West 2020).

113. *Id.*

114. See 750 ILL. COMP. STAT. 50/18.4 (West 2017).

115. See CAL. FAM. CODE § 8706(b) (West 1997).

116. 750 ILL. COMP. STAT. 50/18.4(a) (West 2017).

117. *Id.* 50/18.4(a)(iv).

118. *Id.* 50/18.4(a).

119. *Id.*

120. See CAL. FAM. CODE § 8706(b) (West 1997).

121. *Id.*

122. See *id.*

try to collect a blood sample, but biological parents are not required or even incentivized to submit to testing.¹²³

California is not unique in omitting an investigation requirement. Maryland adoption agencies only need to give prospective adoptive parents access to the required information “if available to the agency,” signaling that adoption agencies are free to make little if any effort to chase down the information.¹²⁴ Illinois requires only information that is “known.”¹²⁵ Even in Illinois’ special medical and mental health provision discussed above, the adoption agency’s duty is only to disclose information “to the extent currently in possession of the agency.”¹²⁶ Illinois’ Licensing Standards for Child Welfare Agencies require that the agency verify information before giving it to the adoptive parents and alert them when it cannot do so.¹²⁷ The standard does not clarify what level of effort is needed to suffice as an attempt at verification.¹²⁸

State statutes that require more information to be reported in an adoption, such as those of California and Illinois, may create a false sense of security for parents. These statutes, however, set the bar low and leave a large grey area for adoption agencies to interpret what terms such as “if known” and “available” mean.

Florida’s statute more directly states that adoption agencies’ responsibilities extend only to the information that the biological parents disclose.¹²⁹ In Florida, the adoption agency must “. . . provide the prospective adoptive parents with information concerning the background of the child to the extent such information is disclosed to the adoption entity by the parents.”¹³⁰ The statute does specify what information the prospective parents should disclose (i.e., all of the adoptee’s physical and mental health records and special needs of the

123. *See id.* (“The birth parents may provide a blood sample at a clinic or hospital approved by the State Department of Health Services. *The birth parents’ failure to provide a blood sample shall not affect the adoption of the child.* The purpose of the stored sample of blood is to provide a blood sample from which DNA testing can be done at a later date after the entry of the order of adoption at the request of the adoptive parents or the adopted child.” (emphasis added)).

124. MD. CODE ANN., FAM. LAW § 5-3A-39 (West 2006).

125. 750 ILL. COMP. STAT. § 50/18.4(a) (1985).

126. *Id.*

127. ILL. ADMIN. CODE tit. 89, § 401.510(g)(3)(D) (2012) (“Adoption agencies shall provide the adoptive family with all non-identifying information about the child that has been verified as accurate, whenever possible. If it is not possible to verify the accuracy of the information provided to the adoptive parents, the agency may provide the information to the adoptive family, but shall note that the information has not been verified.”).

128. *See id.* § 401.510(g)(3).

129. *See* FLA. STAT. ANN. § 63.085 (West 2012).

130. *Id.* § 63.085(2)(a).

child) but does not impose any additional duty upon the adoption agency should the birth parents not supply that information.¹³¹ It appears that the adoption agency must only ask the birth parents for the listed information and then serve as a messenger between the birth and adoptive parents.

Because there is no investigation requirement, individual adoption agencies vary in their preferred methods of obtaining information from the birth mother about the adoptee's background. Some adoption agencies voluntarily request that the birth mother submit to testing for HIV and drugs and seek reports from the birth mother's OB/GYN.¹³² On the other hand, some adoption agencies intentionally refrain from testing the birth mother.¹³³ As one agency explains, it abandoned its previous policy of mandated drug testing for birth mothers because of the negative impact this policy had on its relationship with pregnant mothers.¹³⁴ The agency found that birth mothers interpreted the screenings to mean that the agency did not trust them.¹³⁵

III. FINANCIAL INCENTIVES TO LIE

With the exception of Hawaii, Wyoming, and Rhode Island, states' adoption statutes allow and regulate the exchange of payment between the adoptive family and birth mother in private adoption

131. *See id.* § 63.085.

132. *See, e.g., Frequently Asked Adoption Questions*, ADOPTION & SURROGACY [hereinafter ADOPTION & SURROGACY], <https://adoptionandsurrogacy.com/adoption/adoptive-parent-faqs/#1609388085869-9b903203-fbf0> [<https://perma.cc/W5WN-6QUQ>] (last visited Nov. 20, 2021) (“In each case we request HIV testing and drug screening, in addition to all standard OB/GYN tests. Adoptive parents may request additional non-invasive testing, excluding amniocentesis, which the doctors will only perform for a medical reason. Sonograms are routinely conducted and generally assist in determination of the gender of the child.”).

133. *See How Are Birth Mothers Screened?*, CONSIDERING ADOPTION, <https://consideringadoption.com/adopting/finding-birth-parents/how-are-birth-mothers-screened/> [<https://perma.cc/RQ4Z-SRZ9>] (last visited Nov. 20, 2021) (“All adoption agencies handle screening in their own way Some agencies also screen pregnant mothers for substance abuse.”); *see also Can I Place My Baby for Adoption If I Am Pregnant and Addicted?*, ADOPTIONS TOGETHER, <https://www.adoptionstogether.org/pregnant/addicted-and-pregnant/> [<https://perma.cc/PN29-GJ6E>] (last visited Nov. 20, 2021) (assuring pregnant women with an addiction that they will not be drug tested at Adoptions Together adoption agency and can choose what information they would like to share about their substance abuse).

134. *How We Do and Don't Screen Pregnant Mothers*, AMERICAN ADOPTIONS, https://www.americanadoptions.com/adopt/birth_mother_drug_screening [<https://perma.cc/96US-ZK7L>] (last visited Nov. 20, 2021).

135. *Id.*

arrangements.¹³⁶ Private adoption arrangements are those that occur with the assistance of a private adoption agency or attorney and without the involvement of a public agency.¹³⁷ This Section will explore how both birth mothers and adoption agencies profit from a successful match with a prospective adoptive family, which in turn can incentivize the concealment or falsification of important information in the adoptee's records.

A. *Financial Benefits for Birth Mothers*

A woman who surrenders her baby for adoption can benefit financially if the adoptive family compensates her.¹³⁸ Many families looking to adopt are willing to pay more than the cost of raising the child¹³⁹ and will cover the birth mother's medical care, rent, counseling, and travel to court appearances.¹⁴⁰ Many states limit how much money the adoptive family can pay the birth mother.¹⁴¹ This amount can be exceeded with court approval based on factors such as the birth mother's living standard and financial need.¹⁴² Some states do not cap

136. Child Welfare Information Gateway, *Regulation of Private Domestic Adoption Expenses*, CHILDREN'S BUREAU 1-2 (Mar. 2017) [hereinafter Child Welfare Information Gateway, *Regulation*], <https://www.childwelfare.gov/pubpdfs/expenses.pdf> [https://perma.cc/NG27-PH3Z].

137. *Id.*

138. *Id.* (“In private or independent adoptions, the adoptive parents may pay some of the birth mother's expenses, particularly in the case of a pregnant woman planning to place her infant for adoption. Approximately 45 States, the District of Columbia, American Samoa, and the Northern Mariana Islands specify in their statutes the type of birth parent expenses a prospective adoptive family is allowed to pay.”).

139. See Mark Lino, *The Cost of Raising a Child*, U.S. DEP'T OF AGRIC.: FOOD & NUTRITION (Feb. 18, 2020), <https://www.usda.gov/media/blog/2017/01/13/cost-raising-child> [https://perma.cc/EC96-ZQ6B] (“Middle-income, married-couple parents of a child born in 2015 may expect to spend \$233,610 (\$285,570 if projected inflation costs are factored in*) for food, shelter, and other necessities to raise a child through age 17.”).

140. Child Welfare Information Gateway, *Regulation*, *supra* note 136, at 2.

141. See, e.g., ARIZ. REV. STAT. ANN. §§ 8-114(A)-(B) (West 1986) (setting a maximum of \$1,000 to be overcome by a court order if the court finds a larger amount “reasonable and necessary”); CONN. GEN. STAT. ANN. § 45a-728c (West 1993) (setting living expenses maximum to \$1500, to be exceeded in “unusual circumstances”); IDAHO CODE ANN. § 18-1511 (West 2000) (capping the payments at \$2000, which can be overcome with court authorization).

142. ARIZ. REV. STAT. ANN. §§ 8-114(A)-(B) (West 1986); CONN. GEN. STAT. ANN. § 45a-728c (West 1993); IDAHO CODE ANN. § 18-1511 (West 2000).

the compensation, requiring only that the amount reflect reasonable medical and living expenses.¹⁴³

In California, adoptive families may voluntarily give the birth mother “attorney’s fees, medical fees and expenses, counseling fees, or living expenses.”¹⁴⁴ In Idaho, a birth mother with a demonstrable financial need may accept payment for living expenses as well as up to 6 weeks of living expenses postpartum.¹⁴⁵ In Connecticut, the birth mother is permitted to accept “reasonable telephone charges and maternity clothing expenses” as well as the cost of transportation to her postpartum counseling.¹⁴⁶ Delaware’s laws are extremely restrictive, allowing adoptive families to cover only court costs and legal fees for the birth mother.¹⁴⁷

To avoid what would otherwise look like the purchase of a baby, many states limit payments to certain categories.¹⁴⁸ In Florida, for example, adoption statutes prohibit the selling or surrendering of the rights to a child for anything of value.¹⁴⁹ The law specifies that “[t]he payment of living or medical expenses by the prospective adoptive parents before the birth of the child does not, in any way, obligate the parent to sign the consent for adoption.”¹⁵⁰

States differ as to what happens financially when a birth mother chooses not to place her child with the prospective adoptive family.¹⁵¹ In Idaho, the birth mother must reimburse all adoption expenses received from the prospective adoptive family if she decides not to place her baby with the prospective adoptive family.¹⁵² Some statutes specify that selling a child is illegal.¹⁵³ In California, the compensation cannot

143. *See, e.g.*, CAL. PENAL CODE § 273 (West 1998).

144. CAL. FAM. CODE § 8812 (West 1993); CAL. PENAL CODE § 273 (West 1998).

145. IDAHO CODE ANN. § 18-1511 (West 2000); IDAHO CODE ANN. § 16-1515 (West 1998).

146. CONN. GEN. STAT. ANN. § 45a-728 (West 1996).

147. 13 DEL. LAWS § 928 (2009).

148. Child Welfare Information Gateway, *Regulation, supra* note 136, at 3.

149. FL. STAT. ANN. § 63.212(c) (West 2021).

150. FL. STAT. ANN. § 63.085(1) (West 2021).

151. Child Welfare Information Gateway, *Regulation, supra* note 136, at 3 (specifying that only in Montana, North Carolina, and Vermont are the adoptive parents allowed to halt payments to the birth mother if she changes her mind about the adoption).

152. IDAHO CODE ANN. § 16-1515 (West 1998) (stating, “the court shall order the natural parent . . . to reimburse the adoptive or prospective adoptive parents for all adoption expenses.”)

153. *See, e.g.*, IDAHO CODE ANN. § 18-1511 (West 2000).

be contingent upon the birth mother's consent to the adoption.¹⁵⁴ At the same time, it is also illegal for the birth mother to receive money from the adoptive parents without the intent to consent to and complete the adoption (though she may later change her mind).¹⁵⁵

B. Financial Benefits for Adoption Agencies

Current legislation disincentivizes adoption agencies from investigating adoptees' backgrounds because if uncovered information causes an adoption to be disrupted, the adoption agency will suffer a financial loss.¹⁵⁶ Although adoption agencies present themselves as altruistic organizations,¹⁵⁷ private adoption agencies are ultimately businesses.¹⁵⁸ Agencies charge prospective adoptive parents advertising fees for the opportunity to have their biographies and photos reach birth mothers.¹⁵⁹ As of 2021, adoption and child welfare services in the U.S. constitute a \$15.5 billion industry.¹⁶⁰

As of 2016, the Child Welfare Information Gateway recommended that prospective adoptive parents pursuing a private agency adoption (meaning the agency "matches" prospective parents with a birth

154. CAL. PENAL CODE § 273(a) (West 1998).

155. CAL. PENAL CODE §§ 273(c)-(d) (West 1998).

156. *See generally We're Committed to Reducing your Financial Risk*, GRACEFUL ADOPTIONS, <https://gracefuladoptions.com/financial-protection/> [<https://perma.cc/2T5S-QWLC>] (last visited Jan. 8, 2021) (an adoption agency, describing its policy of absorbing the financial loss if an adoption falls through).

157. *The Truth About the Adoption Industry*, ADOPTION & BIRTH MOTHERS, <https://www.adoptionbirthmothers.com/adoption-truth/adoption-industry/> [<https://perma.cc/7795-B7XN>] (last visited Jan. 5, 2021) (blog created by former birth mothers and adoptees, labeling adoption agencies as exploitative of birth mothers to obtain babies and exploitative of adoptive parents to obtain money).

158. *See New York State Adoption Agency Business Plan*, N.Y.S. OFF. CHILD. & FAMILY SERVS., <https://ocfs.ny.gov/adopt/adoptAgencyProcess.asp> [<https://perma.cc/29B5-UPLH>] (last visited Feb. 20, 2022); *see also* Solomon O'Chucks, *Starting an Adoption Agency Business*, PROFITABLE VENTURE, <https://www.profitableventure.com/starting-an-adoption-agency/> [<https://perma.cc/KPN7-JEF8>] (last visited Jan. 14, 2021) (discussing business models for starting an adoption agency).

159. *See The Truth About Adoption Costs*, PURL ADOPTION ADVISORY (Apr. 3, 2019), <https://www.purladoptions.com/learn-about-adoption/2019/4/3/the-truth-about-adoption-costs> [<https://perma.cc/XG45-73R3>]; *see also 5 Common Questions About Adoption Costs*, AMERICAN ADOPTIONS, https://www.americanadoptions.com/adopt/FAQs_about_adoption_costs [<https://perma.cc/HM4N-YCQY>] (last visited Nov. 8, 2021).

160. *Adoption & Child Welfare Services in the US – Market Size 2002-2026*, IBISWORLD (Oct. 19, 2020), <https://www.ibisworld.com/industry-statistics/market-size/adoption-child-welfare-services-united-states/> [<https://perma.cc/U5VL-5L2S>].

mother¹⁶¹) should prepare for a price tag of \$20,000 to \$45,000.¹⁶² A home study fee, ranging from \$1,500 to \$4,000, may or may not be included with this price tag.¹⁶³ In some situations, the prospective parents and birth mother have already found each other and only come to the private agency to facilitate the adoption.¹⁶⁴ For many families, the price of adoption is unaffordable without special efforts to raise money. Prospective adoptive parents are urged by many sources to hold fundraisers or pick up a second job to afford these fees.¹⁶⁵ GoFundMe, a crowdfunding site, advertises itself to families as a popular method for crowdfunding adoption costs.¹⁶⁶

IV. PROPOSED CHANGES TO STATE LEGISLATION

To improve this broken system, I propose new legislation. State laws should promote the accuracy and thoroughness of adoptee's medical records by incentivizing birth mothers to participate in medical testing.

A. Overview of Proposal

I propose that state legislation condition the privilege of financial compensation on the birth mother's voluntary participation in medical tests. Because states have created the current adoption system through which birth mothers and adoption agencies are rewarded financially, they have obligated themselves to mitigate any associated temptations for dishonesty. Existing financial benefits for the birth mother already raise ethical concerns such as a fear that the money could persuade

161. Child Welfare Information Gateway, *Planning for Adoption: Knowing the Costs and Resources*, CHILDREN'S BUREAU 2 (Nov. 2016) [hereinafter Child Welfare Information Gateway, *Planning for Adoption*], https://www.childwelfare.gov/pubPDFs/s_costs.pdf [https://perma.cc/DLZ9-ZT6Y].

162. *Id.* at 3.

163. *Id.*

164. *Id.*

165. See Shelley Skuster, *Affording Adoption Guide*, ADOPTION.COM (Apr. 2, 2015), <https://adoption.com/guide-to-affording-adoption> [https://perma.cc/UA66-DQAK] (offering ideas for prospective families to raise money for adoption, including holding bake sale fundraisers and offering handiwork repair jobs to neighbors); see also *How to Fundraise for Adoption*, AM. ADOPTIONS, <https://www.americanadoptions.com/adopt/adoption-fundraising> [https://perma.cc/34YE-VC6F] (last visited Jan. 15, 2021) (suggesting 52 fundraiser ideas such as selling homemade jewelry and hosting a "Driveway Basketball Tournament").

166. *How to Quickly Raise Money to Adopt a Foster Child*, GOFUNDME (Nov. 15, 2019), <https://www.gofundme.com/c/blog/adopt-foster-child> [https://perma.cc/U3ZH-GQKK].

women desiring abortion to give birth.¹⁶⁷ Some worry about the birth mother's future after the compensation ceases.¹⁶⁸ Given the already-contentious nature of the concept of compensation, states must implement safeguards into their legislation. The proposed legislation should require drug testing, genetic testing, and STI testing, discussed in further detail below.

This proposal is limited to the 47 states in which adoptive families' payment to birth mothers is legalized.¹⁶⁹ The benefits of this proposal are also naturally limited to private, infant adoption from a pregnant birth mother. The proposed testing is to be conducted on the birth mother, not on the adoptee, to gather information about the adoptee's development in utero.

To clarify, this proposal is not founded on the premise that birth mothers should be prohibited from receiving financial assistance. Rather, this is a proposal to address the flaws in the current system so that financial exchange can continue in a way that is not harmful to adoptees' health. Compensation can stabilize the birth mother's living conditions, improve her access to health care and healthy food, and reduce stress related to her finances.¹⁷⁰ Because this financial assistance can be crucial, the proposal does not condition the birth mother's receipt of the money on the biological father's participation. Requiring his participation may present a large, and in some cases insurmountable, obstacle for the birth mother and effectively preclude her from receiving compensation.¹⁷¹

For prospective adoptive parents, the price of covering various expenses for the woman carrying their future baby is well worth the benefit. Unstable housing conditions for pregnant women are known to

167. Elisabeth M. Landes & Richard A. Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUDIES 323, 347-48.

168. See Stacey Stark, *3 Things to Consider Before Paying "Birth Mother Expenses,"* ADOPTION.COM (May 27, 2018), <https://adoption.com/consider-birth-mother-expenses/> [<https://perma.cc/WLU7-HHHS>] ("Many women make their adoption plan in crisis, are supported financially during their pregnancy, then are back in crisis afterwards. Hopeful adoptive parents paying rent and utilities, simply because it is allowed, is not a sustainable solution. Women and families will need resources after the adoption is complete. How are they being provided with those?").

169. Child Welfare Information Gateway, *Regulation*, *supra* note 136, at 2.

170. See *Financial & Emotional Birth Mother Support*, ADOPTION NETWORK, <https://adoptionnetwork.com/birth-mothers/understanding-adoption/financial-emotional-support/> [<https://perma.cc/74CR-35SB>] (last visited Jan. 8, 2021) (describing how adoptive parents' financial support can help a birth mother who has lost her housing and is living through a stressful time).

171. See discussion *infra* Section IV.C.

create health complications in both the mother and her unborn baby.¹⁷² Women in unstable housing may have limited meal preparation facilities, for example, leading to nutritional deficiencies and low birth weight in the infant.¹⁷³ Prospective adoptive parents, and the public at large, have an interest in pregnant women's health.¹⁷⁴ This proposal enables a birth mother to receive support so long as she contributes to the baby's health by participating in medical tests.

The proposal also does not force birth mothers to undergo invasive testing in order to put their children up for adoption. As the U.S. Supreme Court ruled in 2001, the obligation and desire to respect the bodily autonomy of pregnant mothers makes mandatory invasive testing a violation of 4th Amendment rights.¹⁷⁵ The proposal only encourages mothers to opt in to testing for the benefit of the unborn child by requiring that they consent to testing before receiving financial benefits. If a birth mother chooses not to participate in the medical tests, she still may surrender her baby for adoption through a private agency, independent agency, or public agency.¹⁷⁶ It is noteworthy that adoptive parents already endure extensive investigations to ensure a safe future for the adoptee.¹⁷⁷ Many adoption agencies require adoptive parents to undergo criminal background checks, fingerprinting, physical examinations, and other methods of investigation.¹⁷⁸

172. *See generally* Robin E. Clark et al., *Homelessness Contributes to Pregnancy Complications*, 38 HEALTH AFF. 139 (2019).

173. Diana B. Cutts et al., *Homelessness During Pregnancy: A Unique, Time-Dependent Risk Factor of Birth Outcomes*, 19 MATERNAL CHILD HEALTH J. 1276, 1281 (2015).

174. *See Stable Food and Housing Are Essential to Women's Health*, NAT'L P'SHIP WOMEN & FAMILIES (July 2018), <https://www.nationalpartnership.org/our-work/resources/health-care/stable-food-and-housing-are-essential-to-womens-health.pdf> [<https://perma.cc/9NHN-C49F>] (describing multiple federal programs that work to promote the health of women and infants).

175. *See* *Ferguson v. City of Charleston*, 532 U.S. 67, 86 (2001) (holding that a drug test of a pregnant woman, without her consent, is a violation of her 4th amendment rights).

176. *See* Child Welfare Information Gateway, *Planning for Adoption*, *supra* note 161. Both private agency and independent agency adoptions occur outside of the public child welfare system, with private adoptions arranged by private adoption agencies and independent adoptions arranged between directly between adoptive families and expectant mothers with the assistance of an attorney.

177. Child Welfare Information Gateway, *Background Checks for Prospective Foster, Adoptive, and Kinship Caregivers*, CHILDREN'S BUREAU 1-3 (Sept. 2018), <https://www.childwelfare.gov/pubPDFs/background.pdf> [<https://perma.cc/C8KD-XXZL>].

178. *See, e.g., We Pre-Screen Our Adoptive Parents*, GRACEFUL ADOPTIONS [hereinafter GRACEFUL ADOPTIONS, *We Pre-Screen*], <https://gracefuladoptions.com/considering-adoption/screening-process/> [<https://>

B. *Types and Logistics of Testing*

The purpose of testing is not to guarantee the adoptive family a perfect baby¹⁷⁹ but to promote the well-being of the child.¹⁸⁰ The types and frequency of the tests should balance the goal of providing knowledge to the adoptive parents with the need to respect the birth mother's autonomy and dignity.

1. Drug Testing

State statutes should require a birth mother's participation in drug testing as a condition for receiving financial benefits from the adoptive family. Research shows that drug screening is important for identifying drug use in pregnant women.¹⁸¹ Drug testing produces more reliable information than self-reporting because self-reports of drug use are susceptible to untruthfulness and recall bias.¹⁸² Universal drug testing is preferable to screening women based on perceived risk for drug use, based, for example, on previous drug use or tendency to miss doctors' appointments.¹⁸³ This method of screening has potential for bias and can lead to missed substance abuse.¹⁸⁴

While urine screening is one of the less invasive methods of screening, it only shows substance abuse in the relatively recent past, giving less information about the mother's substance use.¹⁸⁵ Even heavy cannabis use, defined as daily use, can be detected in urine for only up to ten days.¹⁸⁶ The limitations of a urine test allow the woman to strategically plan her urine tests so her system will be drug-free at the

perma.cc/79GP-E3C2] (last visited Oct. 20, 2020); *Tips and Questions About the Adoptive Parents Screening Process*, ADOPTION NETWORK, <https://adoptionnetwork.com/tips-and-questions-about-the-adoptive-parents-screening-process> [https://perma.cc/L5LE-Z6CNhttps] (last visited Oct. 20, 2020) (requiring criminal background checks, employment history, "extended family trees," etc.).

179. See *ASHG/ACMG Statement: Genetic Testing in Adoption*, 66 AM. J. HUM. GENETICS 761, 764 (2000) [hereinafter *ASHG/ACMG Statement*].

180. *Id.*

181. See Grace Chang & Emily Rosenthal, *Substance Use During Pregnancy: Screening & Prenatal Care*, UPTODATE, <https://www.uptodate.com/contents/substance-use-during-pregnancy-screening-and-prenatal-care> [https://perma.cc/ULN5-2SP2] (last visited Feb. 21, 2022).

182. Price et al., *supra* note 18.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Marijuana – Tetrahydrocannabinol (THC)*, MAYO CLINIC LABORATORIES, <https://www.mayocliniclabs.com/test-info/drug-book/marijuana.html> [https://perma.cc/Y9N5-YJ27] (last visited Jan. 25, 2021).

time of testing.¹⁸⁷ Heavy cannabis use by a pregnant woman is dangerous to the fetus,¹⁸⁸ meaning the birth mother would have to be tested regularly to ensure the baby is not at risk of health complications from cannabis exposure.

Hair testing is preferable to urine testing because it provides a much larger detection window and is better for detecting lower frequency of drug usage.¹⁸⁹ A patient's drug usage is detectable for up to 90 days.¹⁹⁰ One test can provide information about the usage of multiple harmful drugs including marijuana, cocaine, amphetamines, and opioids.¹⁹¹ Hair testing has been adopted for drug detection in both clinic and workplace settings.¹⁹² It is a painless and minimally invasive test, requiring only that 100-120 strands of hair be cut close to the scalp.¹⁹³ This bunch of hair is the width of a pencil and can be taken from a discrete place on the head.¹⁹⁴

Requiring a birth mother's participation in a drug screening via a hair test to qualify for birth mother expenses would serve the purposes of the proposal well. The results would inform the adoptive parents about the adoptees' exposure to the types of drugs and drug usage that are harmful. The test also respects the dignity of the birth mother because it can be performed just once to capture a large window of time,¹⁹⁵ and the haircut can be hidden to preserve her privacy.¹⁹⁶

187. Price et al., *supra* note 18.

188. Metz & Borgelt, *supra* note 32.

189. Jan Gryczynski et al., *Hair Drug Testing Results and Self-Reported Drug Use Among Primary Care Patients with Moderate-Risk Illicit Drug Use*, 141 DRUG ALCOHOL DEPEND. 44, 45 (2014).

190. *The Benefits of Hair Drug Testing*, QUEST DIAGNOSTICS [hereinafter QUEST DIAGNOSTICS], <https://www.questdiagnostics.com/home/companies/employer/drug-screening/products-services/hair-testing/hair-testing-overview/> [<https://perma.cc/W2AH-FTUH>] (last visited Feb. 20, 2022); *Hair Follicle Drug and Alcohol Testing*, INT'L TRAVEL VACCINATION CENTRE, <https://travelvaccines.com.au/hair-follicle-drug-and-alcohol-testing.html> [<https://perma.cc/Z8W3-CC5V>] (last visited Jan. 30, 2021).

191. Gryczynski et al., *supra* note 189.

192. *Id.*

193. *Hair Drug Test Collections from Trained Professionals*, QUEST DIAGNOSTICS, <https://www.questdiagnostics.com/home/companies/employer/drug-screening/products-services/hair-testing/hair-testing-overview/> [<https://perma.cc/C2UR-3529>] (last visited Jan. 26, 2021).

194. *Hair Drug Testing*, CHESHIRE & N. WALES L. SOC'Y, <https://www.cnwls.co.uk/hair-drug-testing/> [<https://perma.cc/9FNZ-CR9Q>] (last visited Feb. 21, 2022).

195. QUEST DIAGNOSTICS, *supra* note 190 (describing the hair test's ability to capture drug usage up to 90 days prior to testing).

196. See Mary Sauer & Debra Sullivan, *Everything You Should Know About a Hair Follicle Drug Test*, HEALTHLINE (Mar. 7, 2019),

Despite the benefits of hair testing, this method has been criticized and challenged for its disparate impact on Black individuals.¹⁹⁷ Cocaine may bind more easily to hair with higher melanin levels¹⁹⁸ “generat[ing] false-positive results in processing the type of hair common to many black individuals.”¹⁹⁹ The use of “ethnic hair-care products”²⁰⁰ and chemical treatments popular for Black women may also increase the hair’s absorption of drug residue present in the surrounding environment.²⁰¹ The First Circuit Court of Appeals recently held that an employer’s use of the hair test is acceptable unless the employee shows a non-discriminatory alternative that adequately meets the employer’s needs.²⁰² Although this case dealt with drug testing in the workplace, not in adoption, the recent holding reflects the idea that hair testing can be acceptable – despite the potential for discrimination – when its use serves an important purpose.

In light of this information, state legislation should require birth mothers’ participation in either a single hair test or randomized, frequent urine tests throughout the pregnancy. This provides an alternative if the woman is concerned that drugs present in her environment will contaminate her hair. Although the alternative may be burdensome, the purpose of reliable drug testing is highly important to the health of the child. Therefore, states should not feel obligated to settle for an alternative test with less drug detection sensitivity.

<https://www.healthline.com/health/hair-follicle-drug-test#accuracy> [<https://perma.cc/Q3WM-XBGB>] (explaining that a bald spot can be avoided).

197. *See Jones v. City of Boston*, 752 F.3d 38, 53 (1st Cir. 2014).

198. *Jones*, 752 F.3d at 45.

199. *Id.* at 41.

200. David A. Kidwell et al., *Ethnic Hair Care Products May Increase False Positives in Hair Drug Testing*, 257 FORENSIC SCI. INT’L 160, 162 (2015).

201. *Id.*; Alanna Durkin Richer, *Case Alleging Racial Bias in Hair Testing Goes to Trial*, AP NEWS (Mar. 4, 2018), <https://apnews.com/article/49480cd11fcc4c858b988b83cd2a1451> [<https://perma.cc/4BD3-YGZA>].

202. *See Jones*, 752 F.3d at 53 (noting Black officers and cadets challenged Boston Police Department’s use of hair testing on employees due to the disparate impact based on race. Upon remand, the Court found that the proposed urinalysis program was not an adequate alternative because of the decreased sensitivity to drug detection and burden of frequent testing). *See Jones v. City of Boston*, 118 F. Supp. 3d 425, 443 (D. Mass. 2015).

2. Genetic and Diagnostic Testing

Genetic tests determine whether there is a high likelihood of the mother passing a disease or disorder to the baby.²⁰³ Although genetic testing is generally only recommended for pregnant women who have previously carried a genetically abnormal fetus or who report a familial history of a disorder,²⁰⁴ all birth mothers should be incentivized to undergo testing. The American Society of Human Genetics (ASHG) and the American College of Medical Genetics (ACMG) have both recommended genetic testing in the adoption process.²⁰⁵ The adoption process can invite untruthfulness and recall bias,²⁰⁶ and state adoption laws do not help the problem.²⁰⁷ Therefore, requiring participation in genetic tests – regardless of the familial history reported by the birth mother and adoption agency – is necessary to meet the goals of the proposal.

I propose that required testing entail certain tests in each trimester, described in further detail below, with additional testing only if the results of those tests indicate a need. Tests should be limited to the goal of the proposal: to provide medical information about risks and conditions that may manifest during the adoptee’s childhood and affect the adoptive family’s ability to provide a safe and healthy home. ASHG and ACMG agree with this goal, recommending that genetic testing be limited to that which aids in the timely provision of medical care to adoptees.²⁰⁸ Excessive testing for risk factors can “create” an unhealthy child by exaggerating the risk of medical problems and detecting variations in normal physical conditions that would not be material to the adoptee’s safety and health in her future adoptive home.²⁰⁹ Additionally, careful selection and limitation of tests ensures protection of the birth mother’s bodily autonomy and safety. For example, financial benefits should not be contingent upon every woman’s

203. Armando Fuentes, *Prenatal Genetic Counseling*, KIDSHEALTH, <https://kidshealth.org/en/parents/genetic-counseling.html> [https://perma.cc/AZC8-ULBC] (last visited Jan. 11, 2022).

204. *Common Tests During Pregnancy*, JOHNS HOPKINS MED. [hereinafter JHM, *Common Tests*], <https://www.hopkinsmedicine.org/health/wellness-and-prevention/common-tests-during-pregnancy#genetic> [https://perma.cc/RH7G-755J] (last visited Jan. 10, 2021).

205. *ASHG/ACMG Statement*, *supra* note 179, at 761.

206. *See* Miller & Tirella, *supra* note 15, at 449 (describing recall bias and limited paternal information in birth mother’s reports); *see also* Price et al., *supra* note 18 (describing pregnant women’s untruthfulness in reporting their drug usage).

207. *See supra*, Section II.

208. *ASHG/ACMG Statement*, *supra* note 179, at 761.

209. *Id.* at 762.

participation in an amniocentesis. Doctors do not recommend this procedure for all women due to its invasiveness and risks.²¹⁰

First Trimester.

According to the Johns Hopkins and Stanford medical websites, appropriate procedures for the first trimester are maternal blood testing and ultrasounds to determine the fetus's risk of a chromosomal abnormality or a genetic birth defect.²¹¹ Non-invasive prenatal testing (NIPT) examines placenta cells that have floated off into the birth mother's blood which are typically identical to the baby's DNA.²¹² Despite its name, NIPT is conducted as a blood test²¹³ which is technically invasive as it punctures the skin.²¹⁴ Nevertheless, NIPT provides a minimally invasive and low-risk way to detect abnormalities in the baby's DNA.²¹⁵ NIPT can detect a variety of intellectual disabilities including Down Syndrome²¹⁶ and Fragile X Syndrome.²¹⁷ Detection of Fragile X Syndrome can give helpful information about the child's behavior: approximately one third of those with Fragile X

-
210. *See Amniocentesis*, MAYO FOUND. FOR MED. EDUC. & RSCH. (Nov. 12, 2020), <https://www.mayoclinic.org/tests-procedures/amniocentesis/about/pac-20392914> [<https://perma.cc/2H4L-3TES>] (describing that amniocentesis is only medically appropriate for some pregnant women, such as those who have had an abnormal ultrasound, and involves retrieval of amniotic fluid and risks for the patient and baby).
211. JHM, *Common Tests*, *supra* note 204; *Common Tests During Pregnancy*, STANFORD CHILD. HEALTH [hereinafter STANFORD, *Common Tests*], <https://www.stanfordchildrens.org/en/topic/default?id=common-tests-during-pregnancy-85-P01241> [<https://perma.cc/T7CE-Z56U>] (last visited Jan. 10, 2021).
212. *What is Noninvasive Prenatal Testing (NIPT) and What Disorders Can it Screen for?*, MEDLINEPLUS (Nov. 9, 2020), <https://medlineplus.gov/genetics/understanding/testing/nipt/> [<https://perma.cc/8BV6-J9BY>].
213. *Id.*
214. *What is Considered Diagnostic Testing?*, INDEP. IMAGING, <https://www.independentimaging.com/what-is-considered-diagnostic-testing> [<https://perma.cc/3FB5-XWUC>] (last visited Mar. 10, 2021); *see also Invasive Tests and Procedures*, AM. HEART ASSOC. (July 31, 2015), <https://www.heart.org/en/health-topics/heart-attack/diagnosing-a-heart-attack/invasive-tests-and-procedures> [<https://perma.cc/5Y8S-A9G6>] (listing blood testing under “invasive tests and procedures”).
215. MEDLINEPLUS, *supra* note 212.
216. Kruti Acharya, *Prenatal Testing for Intellectual Disability: Misperceptions and Reality with Lessons from Down Syndrome*, 17 DEV. DISABILITIES RSCH. REV. 1, 6 (2011).
217. *Fragile X Syndrome (FXS)*, CTNS. FOR DISEASE CONTROL & PREVENTION (Oct. 23, 2020), <https://www.cdc.gov/ncbddd/fxs/facts.html> [<https://perma.cc/ZF8M-X7LV>].

Syndrome have autism, and the remaining two thirds often display autistic-like behaviors.²¹⁸

Second Trimester.

In the second semester, birth mothers should be required to participate in “multiple marker” blood tests. “Multiple marker” blood tests are recommended generally at this stage as they provide another opportunity to find fetal abnormalities.²¹⁹ The maternal serum AFP blood test, for example, detects abnormal levels of a specific protein that are associated with the development of potential behavioral issues in the adoptee.²²⁰ Multiple marker screening catches Down Syndrome with approximately 80% accuracy and Trisomy 18 with approximately 60% accuracy.²²¹ Knowledge of Trisomy 18 in the adoptee is important to the adoptive family because it is associated with heart defects and kidney problems, among other symptoms,²²² which will impact required care for the child.²²³

-
218. Hannah Furfaro, *Fragile X Syndrome’s Link to Autism, Explained*, SPECTRUM (Oct. 10, 2018), <https://www.spectrumnews.org/news/fragile-x-syndromes-link-autism-explained/#:~:text=Fragile%20X%20syndrome%20is%20a,and%20difficulties%20in%20social%20situations> [https://perma.cc/88S4-JKH3].
219. JHM, *Common Tests*, *supra* note 204; STANFORD, *Common Tests*, *supra* note 211.
220. *See generally* JHM, *Common Tests*, *supra* note 204 (describing the maternal serum AFP’s ability to detect risk of Down syndrome and other chromosomal abnormalities).
221. *Multiple Marker Screening Test (MMS)*, PENN MED., [https://www.pennmedicine.org/for-patients-and-visitors/find-a-program-or-service/obstetrics/prenatal-genetic-diagnosis-and-screening/treatments-and-procedures/multiple-marker-screening-testmms#:~:text=Multiple%20Marker%20Screening%20\(MMS\)%20measures,\(spina%20bifida%20and%20ananencepha\)](https://www.pennmedicine.org/for-patients-and-visitors/find-a-program-or-service/obstetrics/prenatal-genetic-diagnosis-and-screening/treatments-and-procedures/multiple-marker-screening-testmms#:~:text=Multiple%20Marker%20Screening%20(MMS)%20measures,(spina%20bifida%20and%20ananencepha)) [https://perma.cc/RE4U-6XZV] (last visited Mar. 17, 2021).
222. *Trisomy 18 and 13 Symptoms & Causes*, BOSTON CHILD. HOSPITAL, <https://www.childrenshospital.org/conditions-and-treatments/conditions/t/trisomy-18-and-13/symptoms-and-causes> [https://perma.cc/LGU7-JSKD] (last visited Mar. 8, 2021).
223. *See generally* Ann M. Barnes & John C. Carey, *Care of the Infant and Child with Trisomy 18 or Trisomy 13*, SOFT, <http://trisomy.org/wp-content/uploads/2014/08/Carebook-updated-8-15-14.pdf> [https://perma.cc/NS3V-ZD2G] (last visited Jan. 11, 2022).

Third Trimester.

In the last trimester,²²⁴ doctors advise that all pregnant women have a Group B Strep Disease (GBS) test.²²⁵ This test consists of a vaginal and rectal swab.²²⁶ If the test is positive, the birth mother can be treated with antibiotics during labor to prevent infection of the baby.²²⁷ GBS is the leading cause of infections such as meningitis and pneumonia in newborns.²²⁸ GBS testing and treatment would be important for states to include as a prerequisite for receiving financial benefits due to the seriousness of the illnesses and ineffectiveness of other prevention strategies.²²⁹

3. Sexually Transmitted Infection (STI) Testing

The Centers for Disease Control and Prevention (CDC) recommend that women are tested for STIs, including an HIV test, during pregnancy.²³⁰ As discussed, STIs in the birth mother can cause debilitating illnesses in the adoptee.²³¹

Many STIs are treatable during pregnancy meaning that the baby can avoid suffering health complications.²³² Some STIs passed from the birth mother to the baby may not appear for months or years after delivery.²³³ Testing can therefore provide the adoption agency and prospective adoptive parents with information that otherwise would not be apparent at birth. While it is possible the birth mother could contract an STI between receiving negative STI test results and giving

224. *Group B Strep and Pregnancy*, AM. COLL. GYNECOLOGISTS (July 2019), <https://www.acog.org/womens-health/faqs/group-b-strep-and-pregnancy#:~:text=Yes%2C%20pregnant%20women%20are%20screened,from%20the%20vagina%20and%20rectum> [https://perma.cc/4W99-4UZL].

225. *Testing Pregnant Women*, CTNS. FOR DISEASE CONTROL & PREVENTION (July 16, 2020), <https://www.cdc.gov/groupbstrep/about/prevention.html> [https://perma.cc/DZV5-7UBK].

226. *Id.*

227. *Id.*

228. STANFORD, *Common Tests*, *supra* note 211.

229. *Testing Pregnant Women*, *supra* note 225.

230. CDC, *Fact Sheet*, *supra* note 50.

231. CDC, *Detailed Fact Sheet*, *supra* note 53.

232. *Id.* (noting that pregnancy-safe antibiotics are effective in curing chlamydia, gonorrhea, syphilis, and trichomoniasis).

233. *Sexually Transmitted Diseases (STDs): Fact Sheet*, CTNS. FOR DISEASE CONTROL & PREVENTION (Mar. 28, 2016), <https://www.cdc.gov/std/pregnancy/stdfact-pregnancy.htm> [https://perma.cc/R2U3-LFYD].

birth,²³⁴ continually subjecting her to STI tests until she gives birth is not recommended because it would be degrading. Rather, a birth mother with a negative STI test result should receive counseling about STI prevention, how to get retested if she thinks she may be at risk, and the treatment options available to her if she does contract an STI.

4. Payment for Tests

Exact costs of the proposed testing will fluctuate based on the healthcare provider.²³⁵ NIPT is the most expensive test in the proposal. Without insurance, prices for NIPT can reach \$1000.²³⁶ The price of a GBS vaginal or rectal swab ranges from \$30-\$75.²³⁷ A drug hair test performed in a clinical setting is expected to cost between \$100 and \$150.²³⁸ If the birth mother opts for a drug test via urinalysis, each test is expected to cost approximately \$50.²³⁹ The overall cost for the

-
234. CDC, *Detailed Fact Sheet*, *supra* note 53 (encouraging pregnant women to reduce their risk of contracting an STI by abstaining from these forms of sex or having a mutually monogamous relationship).
235. Greta Guest, *Sticker Shock: Why the U.S. Needs Price Tags on Health*, MEDICAL XPRESS (Jan. 31, 2019), <https://medicalxpress.com/news/2019-01-sticker-price-tags-health.html> [<https://perma.cc/G8XE-WCVR>].
236. *See, e.g.*, Thomas J. Musci & Aaron B. Caughey, *Clinical Utility and Cost of Non-Invasive Prenatal Testing With cfDNA Analysis in High-Risk Women Based on a US Population*, 26 J. MATERNAL-FETAL & NEONATAL MED. 1180, 1183 (2013) (reporting a price range of \$695–995); Bryan Jick, *NIPT (Non-Invasive Prenatal Testing)*, PREGNANCY CORNER (Aug. 2017), <https://www.pregnancycorner.com/being-pregnant/nipt.html> [<https://perma.cc/B6E2-VHLL>] (estimating the test at \$700–1000); Megan E. Benoy et al., *The Impact of Insurance on Equitable Access to Non-Invasive Prenatal Screening (NIPT): Private Insurance May Not Pay*, 12 J. COMMUNITY GENETICS 185 (2021) (reporting the cost for a self-paying patient to range from \$299–349).
237. Mark A. Turrentine et al., *Cost Effectiveness of Universal Prophylaxis in Pregnancy with Prior Group B Streptococci Colonization*, INFECTIOUS DISEASES OBSTETRICS & GYNECOLOGY, 2009, at 1, 6.
238. Sauer & Sullivan, *supra* note 196; *see also 5 Panel Hair Drug Test*, PEACE MIND DRUG TESTING SERVS., <https://store.pomdrugtestingservices.com/ProductDetails.asp?ProductCode=Hai%5F5> [<https://perma.cc/7CHT-DT5Y>] (last visited Mar. 16, 2021) (listing a 5-panel hair test at \$99.00); *Drug Testing Pricing*, ALA. MEDSCREEN INC., <https://www.alabamamedscreen.com/drug-testing-pricing> [<https://perma.cc/RMH8-7B3B>] (last visited Mar. 16, 2021) (listing a 5-panel hair test at \$150.00); *Hair Drug Test*, LAB TESTING SOLUTIONS, <https://labtestingsolutions.com/hair-drug-testing/> [<https://perma.cc/JC5C-FQMT>] (last visited Mar. 16, 2021) (listing a 5-panel hair test at \$120).
239. *See, e.g., 5-Panel Instant*, ANY LAB TEST NOW, <https://www.anylabtestnow.com/tampa-33609/tests/5-panel-instant/> [<https://perma.cc/L2ZJ-GEBH>] (Mar. 17, 2021) (listing 5-panel urine test around \$50 in Tampa, FL); *Urine 5-Panel Standard*, ANYLABTESTNOW, <https://www.anylabtestnow.com/medina-44256/tests/urine-5-panel->

urinalysis testing would depend on the length of time remaining until birth and frequency of randomized tests. For example, testing a birth mother at this price twice per month over the last 4 months of her pregnancy would cost approximately \$400.²⁴⁰

I propose that adoptive families pay for the testing. Given that adoptive families are already paying between \$20,000 to \$45,000 to adopt through private adoption,²⁴¹ it may seem counterintuitive to add to their bill. It is tempting to instead make adoption agencies pay for the tests since they profit from the transaction and should be responsible for creating an accurate medical record for the adoptive families. However, since private adoption agencies are businesses motivated by profits,²⁴² adoption agencies will pass the cost on to adoptive families by increasing the price of adoption. Therefore, requiring adoption agencies to pay for the testing has the same effect as requiring the adoptive family to pay.

Having the adoptive parents pay for the birth mother's testing directly, rather than paying a higher total price to the adoption agency, may have benefits.²⁴³ This structure of payment increases transparency. Adoptive families will understand exactly how much of their money is going towards learning crucial information about their potential future child's health, potentially increasing their receptiveness to the cost. If the costs of the medical tests instead come to the adoptive families as a higher overall price tag on adoption, the adoptive families may perceive private adoption as too expensive.

C. Concerns Raised by the Proposal

1. Adoptive Families Will Forgo the Medical Tests (Preventing Birth Mothers from Receiving Compensation).

If adoptive families must pay for medical testing on top of all the other costs of adoption, they may choose to forgo the medical testing, viewing it as too expensive. An adoptive family may choose to take the risk and adopt from a birth mother without the proposed genetic, STI, and drug tests, rendering the birth mother ineligible to receive compensation. This would defeat the purpose of the proposal because 1) the adoptive parents would not have test results to inform their

standard/ [<https://perma.cc/6HK2-PPZN>] (Mar. 17, 2021) (listing a 5-panel urine test at \$49 in Medina, OH).

240. A birth mother who decides to surrender her child earlier or later in the pregnancy would likely have more or fewer tests, respectively.

241. Child Welfare Information Gateway, *Planning for Adoption*, *supra* note 161, at 3.

242. *See supra* Section III.B.

243. If the birth mother has her own health insurance, she would file for reimbursement. Then, the adoptive parents would pay the remaining cost of her testing so it is ultimately free to the birth mother.

adoption decisions, and 2) the adoptee would not be afforded the health benefits associated with birth mother compensation.

Ultimately, however, adoptive families are motivated to compensate birth mothers for the health of their future babies.²⁴⁴ As explained previously, transparency can be accomplished by shifting the cost directly onto adoptive families (rather than on adoption agencies who will inevitably pass the cost on to adoptive families).²⁴⁵ It is foreseeable that some adoptive families will have less funds to allocate to birth mother compensation after covering the medical tests. However, this is an acceptable trade off, and adoptive families will likely still compensate birth mothers to the best of their abilities in order to protect the health of the babies.

One workaround to this problem is to create an exemption to the proposed legislation so that birth mothers who are willing to participate in testing are not deprived of compensation because the adoptive family refuses to pay for testing. Under this exemption, adoptive families could submit to the state agency their reason for declining testing. If the reason is acceptable to the state, such as a sincerely held religious belief that prohibits the testing, the birth mother would be allowed to receive compensation from the adoptive family without participating in testing.

2. Fewer Babies Will Be Adopted.

A possible effect of the proposal may be that, once uncovered, medical information about the adoptees will lead to fewer adoptions. Prospective adoptive families may be less inclined to welcome a baby with known medical conditions than they would be to gamble on a baby with an unknown background. This argument has been brought up in court before as an argument against imposing a duty to investigate.²⁴⁶

However, this must be weighed against the alternative: the adoption of babies with special needs into homes that are ill-equipped to meet those needs. This can lead to the annulment of adoptions²⁴⁷ which can be harmful for both the adoptee and the family.²⁴⁸ In

244. *Do Adoptive Parents Provide Financial Support for a Birth Mother?*, ADOPTION NETWORK, <https://adoptionnetwork.com/adoptive-parents/how-to-adopt/about-birth-parents/financial-support-for-a-birth-mother/> [https://perma.cc/ZVS3-YTR8] (last visited Jan. 11, 2022).

245. *See supra* Section IV.B.d.

246. *See* M.H. v. Caritas Family Services, 488 N.W.2d 282, 287 (Minn. 1992).

247. *See, e.g.*, WIS. STAT. ANN. § 322.09(1) (West 1951).

248. *See* Jon Bergeron & Robin Pennington, *Supporting Children and Families When Adoption Dissolution Occurs*, NCFCA (Aug. 1, 2013), https://www.adoptioncouncil.org/images/stories/NCFCA_ADOPTION_ADVOCATE_NO62.pdf [https://perma.cc/W8W8-GH4G] (“All of the parents we have dealt with have expressed unimaginable guilt and shame for being unable to fulfill their promise to provide a loving home for their child forever.”); *see also* *Adoption Disruption and Dissolution*, NORTH AM. COUNCIL ON ADOPTABLE CHILD., <https://www.nacac.org/advocate/>

Youtuber Myka Stauffer's failed adoption, the four-year-old boy given up due to his behavioral issues will again have to adjust to a new family and home, which is very challenging for a child on the autism spectrum.²⁴⁹ Additionally, it is reported that special needs adoptions have in fact increased in recent years. In 2007 only 42.4% of adoptions involved a physically or emotionally disabled child while that number rose to 88.5% in 2014.²⁵⁰ This rise is attributable to increases in public funding for children with special needs,²⁵¹ suggesting that other changes in the special needs adoption arena may prevent a decrease in adoptions.

3. Wealthier Adoptive Families Will Get the Healthiest Babies.

If this proposal were to be implemented, the result may be that wealthier families have an advantage in filtering out unhealthy or at-risk babies because they can afford the birth mother's medical tests and compensation. They will adopt the healthiest children because they will be able to adopt from a mother who has undergone more testing. In theory, these wealthier families would be better financially equipped than middle-class families to raise a child with special needs. Families that cannot afford both the medical tests and compensation will have to adopt through a less expensive route: perhaps through private infant adoption without the benefit of medical test results and birth mother compensation, or through another avenue altogether such as foster care.

However, this is already how the current system operates: wealthier families pursue methods of adoption that give access to younger, healthier children.²⁵² This proposal does not create that problem. The alternative to the proposal is that babies with unknown backgrounds will be adopted by families who are unable to care for them when their health conditions emerge.

nacacs-positions/adoption-disruption-and-dissolution/ [https://perma.cc/LGE3-DRWE] (last visited Feb. 21, 2022) (recommending strategies to make a failed adoption as minimally traumatic for the child as possible, including giving therapeutic support).

249. *Happy at Last: Adopted Son Dumped by Influencer Myka Stauffer Finds New Home*, NZ HERALD (July 1, 2020), <https://www.nzherald.co.nz/lifestyle/happy-at-last-adopted-son-dumped-by-influencer-myka-stauffer-finds-new-home/NZYCCGRGRCL6PY6FYDSRIVHMGY/#:~:text=Four%2Dyear%2Dold%20Huxley%20was,his%20%22prospective%20adoptive%20parents%22> [https://perma.cc/LXG9-4J44].

250. Jo Jones & Paul Placek, *Adoption by the Numbers*, NAT'L COUNCIL FOR ADOPTION, <https://indd.adobe.com/view/4ae7a823-4140-4f27-961a-cd9f16a5f362> [https://perma.cc/MVP2-VUCM] (last visited Jan. 11, 2022).

251. *Id.*

252. See Child Welfare Information Gateway, *Planning for Adoption*, *supra* note 161, at 3.

4. Increased Burden on Adoption Agencies.

Opponents of the proposal may argue that it will place an unrealistic burden on adoption agencies to perform tests, manage results, and conduct investigations. In *Caritas*, the court explained that policy considerations militate against a finding that adoption agencies have a duty to investigate adoptees' health.²⁵³ The information uncovered in an adoption may discourage adoptions or stigmatize adoptees, and the cost of testing for genetic disorders may be unreasonable for adoption agencies to take on.²⁵⁴

The burden of medical testing, however, does not need to fall on adoption agencies. Testing will occur in health care facilities, not at adoption agencies, so adoption agencies will only be responsible for organizing testing to comply with state laws. Adoption agencies have already demonstrated their ability to organize medical tests because they already conduct intensive investigations of prospective adoptive parents.²⁵⁵ In fact, some adoption agencies even coordinate medical testing of birth mothers already.²⁵⁶ While the proposal will demand additional time from the adoption agencies to organize a greater volume of information and communicate it to the adoptive families, this is not an unreasonable burden. It does not drastically change the type of work with which the agencies will be tasked.

5. Limited Information from Testing.

Information obtained from testing results will be limited. Because a drug test via hair captures only drug use in the most recent 90 days, illicit drugs used in the first trimester would not be detectable in a test in the third trimester.²⁵⁷ It is also possible for a birth mother to “cheat”

253. *M.H. v. Caritas Family Services*, 488 N.W.2d 282, 287 (Minn. 1992) (calling various arguments “legitimate policy concerns”).

254. *Id.*

255. See, e.g., GRACEFUL ADOPTIONS, *We Pre-Screen*, *supra* note 178 (requiring both state and federal criminal background checks, sex offender registry checks, and child abuse background checks, among other things); *Tips and Questions About the Adoptive Parents Screening Process*, ADOPTION NETWORK, <https://adoptionnetwork.com/tips-and-questions-about-the-adoptive-parents-screening-process> [https://perma.cc/PK7G-4KU6] (last visited Oct. 20, 2020) (requiring criminal background checks, employment history, “extended family trees,” etc.).

256. See *ADOPTION & SURROGACY*, *supra* note 132 (describing the medical tests Adoption & Surrogacy adoption agency coordinates during the adoption process, including standard HIV and drug testing and any additional tests the adoptive family may request).

257. *QUEST DIAGNOSTICS*, *supra* note 190; see also *Hair Follicle Drug and Alcohol Testing*, INT’L TRAVEL VACCINATION CENTRE, <https://travelvaccines.com.au/hair-follicle-drug-and-alcohol-testing.html> [https://perma.cc/SYX3-ZQNZ] (last visited Jan. 30, 2021).

by treating her hair to achieve a false negative result.²⁵⁸ With regard to STIs, the birth mother might contract an undetected STI between receiving a negative test and delivering the baby despite counseling her on risk factors.²⁵⁹

Despite the limitations, states need to prioritize the health and well-being of adopted children. Although the information might be limited, it will still be an improvement over the status quo, shedding more light on an adoptee's background.

6. Lack of Information from the Biological Father.

The proposal will not ensure a complete record of the adoptee's background because it does not require participation by the biological father. This is by design. There are many reasons a birth mother may pursue adoption without the knowledge of the biological father, including that news of the pregnancy might anger a violent partner and bring harm to the woman or fetus.²⁶⁰ The birth mother may be unable to contact the biological father if she does not know his identity.²⁶¹ The biological father may also be unwilling to participate since there is no financial benefit to his time and effort spent participating.

CONCLUSION

The harmful consequences of incomplete and inaccurate medical records of adoptees demand the attention of state legislation. While presumably well-intentioned, the current system through which birth mothers receive money from adoptive parents incentivizes the production of incomplete and inaccurate medical records. States' laws list the information that must be disclosed to adoptive parents so they can make an informed decision about adopting a child. But all too often, these laws' mandates are hollow, since they do not require agencies to work to obtain the information. Current legislation only requires adoption agencies to provide parents with information that is available and provided by the birth mother. This standard does not require adoption agencies to investigate or fact-check the information. Moreover, successful adoptions produce financial benefit for adoption agencies and birth mothers. This incentivizes willful ignorance about adoptees' health problems.

258. See Lisa Eisenbeiss et al., *Cheating on Forensic Hair Testing? Detection of Potential Biomarkers for Cosmetically Altered Hair Samples Using Untargeted Hair Metabolomics*, 145 ANALYST 6586, 6586 (2020).

259. See CDC, *Detailed Fact Sheet*, *supra* note 53 (noting the potential to contract an STI during pregnancy after an initial negative test).

260. See generally AMERICAN ADOPTIONS, *Unsupportive*, *supra* note 17 (describing turbulent and abusive relationships between the birth mother and birth father).

261. *Id.*

Legislation changes are necessary for the production of accurate and more thorough data about adoptees. Because the payment of certain expenses by the adoptive family to the birth mother is important for both parties, conditioning this transaction on the participation in medical tests will provide large incentives for participation. The results of incentivized genetic, STI, and drug testing are an important start to building accurate and informative background reports on adoptees. With more complete histories of birth mothers' and adoptees' health, adoptive families will be able to make more informed adoption decisions and seek medical care for their adopted children more promptly. This will re-center the adoption process on the health, safety, and well-being of the adoptee.