REFORMING THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN: A NEW FRAMEWORK FOR INTERSTATE ADOPTION

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INTRODUCTION

The Interstate Compact on the Placement of Children ("ICPC"), enacted in all fifty states, the District of Columbia and the Virgin Islands, has come under mounting scrutiny from adoption practitioners and policy makers. The ICPC, ostensibly designed to facilitate the interstate placement of children while assuring the suitability of the families with whom they are placed, increasingly is being viewed as a hindrance rather than a facilitator of adoption, and as a bureaucratic barrier rather than a tool to promote children's best interests. The role of the ICPC in adoption has not been examined extensively in legal or social work literature. While social work literature has largely ignored it, legal literature has tended to analyze the Compact and make recommendations to enhance its efficacy.[1]

This article will examine the ICPC in relation to the role it has played and could play in promoting permanency for children through adoption. It will consider the purpose of the ICPC, and the statutory language and implementation of the ICPC as it has actually occurred in the states. Finally, it will make recommendations regarding the regulation of interstate adoption, with an emphasis on timely and dependable facilitation of adoption of children by families who are able to provide them with the love and stability they need.

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1. *See, e.g.*, Bernadette W. Hartfield, *The Role of the Interstate Compact on the Placement of Children in Interstate Adoption*, 68 NEB. L. REV. 292 (1989).

I. WHY THE ICPC?

The ICPC is a compact[2] that focuses on child welfare -- both foster care and adoption. Enactment of the ICPC was prompted by concerns over the inadequacy of safeguards that would ensure that children placed with foster and adoptive families across state lines receive protection, appropriate care and supervision. States were aware of their inability to exercise jurisdiction over children placed outside their geographical boundaries and, as a result, they found that they could neither determine the appropriateness of placements nor ensure that children placed in other states receive needed services and supervision in their new foster or adoptive homes. Drafted in 1960 and enacted initially by New York that year, all states, the District of Columbia, and the Virgin Islands have now adopted the ICPC.[3] In essence, the ICPC mandates that certain procedural requirements be followed by a "sending agency" to obtain the permission of a "receiving state" prior to the interstate placement of a child for purposes of foster care or adoption. The system, as designed, is one of prospective compliance to ensure appropriate interstate placements.

Article I of the ICPC sets forth as the purpose and policy of the ICPC the cooperation of states with each other in the interstate placement of children. To that end, the Compact outlines four key objectives: determination of the suitability of the interstate placement; determination of any circumstances bearing on the protection of the

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2. A compact is "[a]n agreement or contract between persons, nations or states. Commonly applied to working agreements between and among states concerning matters of mutual concern." BLACK'S LAW DICTIONARY 281 (6th ed. 1990).

3. The genesis of the Interstate Compact on the Placement of Children can be traced to an informal group of social service administrators on the East Coast who met in the 1950s to study problems in the interstate placement of children in foster care. Subsequently, the ICPC was drafted under the auspices of the New York State Legislative Committee on Interstate Cooperation. A 12 state conference approved the Compact in 1960. Following New York's lead, other states enacted the Compact over the ensuing decades. *See* Hartfield, *supra* note 1, at 295; THE SECRETARIAT TO THE ASSOCIATION OF ADMINISTRATORS OF THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, GUIDE TO THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN 3 (1990) [hereinafter GUIDE TO THE INTERSTATE COMPACT].

child; obtaining of complete information on which to "evaluate a projected placement before it is made"; and promoting "appropriate jurisdictional arrangements for the care of the children placed."[4] The first three objectives address the approval process that is considered critical to ensuring the safety and well being of a child placed in another state. The fourth objective addresses the promotion of appropriate jurisdictional arrangements.

Underlying the stated purpose and policy of the ICPC is a recognition that certain custody matters regarding children must be addressed at an interstate level because they cannot be regulated adequately by a single state's law. There is an implicit recognition that, absent some level of interstate agreement, one state can avoid its responsibility for abused and neglected children within its jurisdiction by encouraging caregiving arrangements in another state. Without an agreement that spells out roles and responsibilities, a state could avoid its legal and financial responsibility for these children and potentially create a financial burden for another state. The ICPC is therefore designed both to promote interstate cooperation around these custody arrangements and to prevent the potential financial exploitation of one state by another.[5]

In view of the underlying rationale of the Compact, its stated purpose and policy, and, as will be discussed below, its substantive provisions and actual implementation, serious questions arise as to whether the ICPC is a regulatory system suitable for all forms of interstate adoption. Even in those cases in which the ICPC is appropriate, there are equally troublesome issues about the extent to which true interstate cooperation has been realized.

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4. INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN art. I (Am. Pub. Welfare Ass'n) [hereinafter ICPC].

5. Some proponents of the ICPC state this goal more starkly. *See, e.g.*, Mitchell Wendell & Betsey R. Rosenbaum, *Interstate Adoptions: The Interstate Compact on the Placement of Children, in* ADOPTION LAW AND PRACTICE Appendix 3-A at 3A-4 (Joan H. Hollinger ed. 1995) (writing that one of the purposes of the ICPC is "[t]o reduce the possibility of children without suitable persons or institutions to receive them being dumped into other states").

II. THE PROPER SCOPE OF THE ICPC

As with most statutory frameworks, the ICPC begins with definitions of some of its key terms -- "child," "sending agency," "receiving state," and "placement"[6] -- definitions that should provide clarity about the scope of the Compact. In the context of adoption, however, these definitions have created confusion and led to significant dispute over the extent of the Compact's reach. Equally at issue is the appropriateness of applying these definitions to the three major types of interstate adoption -- public-agency directed adoptions of children in the custody of a governmental agency at the state or county level, licensed private agency-assisted adoptions of children not in state or county custody, and adoptive placements of children by their parent(s). Although the definitions of "child"[7] and "receiving state"[8] are relatively clear and undisputed, the two remaining definitions set forth in Article II of the ICPC -- "sending agency" and "placement" -- when applied to interstate adoption, are at best problematic, and at worst detrimental to the best interests of children.

A. The Definition of "Sending Agency"

Perhaps most troublesome is the ICPC's use and definition of the term "sending agency." Although the overall scheme of the Compact refers to a "receiving *state,*" it does not utilize the concept of a "sending *state*." Instead, the ICPC refers to a "sending *agency*" which it defines as "a party state, officer, or employee thereof; a subdivision of a party state, or officer or employee thereof; a court of a party state; a person, corporation, association, charitable agency or other entity which sends, brings, or causes to be sent or brought any child to another party state."[9]

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6. *See* ICPC, *supra* note 4, art. II.

7. A "child" is defined as, "a person who, by reason of minority, is legally subject to parental, guardianship or similar control." *Id.*

8. A "receiving state" is defined as, "the state to which a child is sent, brought, or caused to be sent or brought, whether by public authorities or private persons or agencies, and whether for placement with state or local public authorities or for placement with private agencies or persons." *Id.* art. II(c).

9. *Id.* art. II(b).

This extremely broad definition includes virtually any individual or entity that plays any role in "sending" or "causing to be sent" a child into another state, potentially reaching multiple parties in any one interstate placement. The breadth of the "sending agency" definition is particularly important because it subjects a broad range of individuals and entities to additional mandates of the ICPC: the burden of compliance is put on the "sending agency," with penalties for non-compliance, and the ICPC requires that the "sending agency" retain jurisdiction over the child who is placed until the adoption is finalized.[10]

"Sending agency," as a structural concept in the ICPC, has minimal impact in the context of foster care because the possible "sending agencies" are clearly identifiable and generally limited in number. In virtually every instance, interstate foster care placements involve children who are in the custody of a state or county child welfare agency and/or family or juvenile court. The "sending agency" is a governmental entity with legal and financial responsibility for children and the activities are clearly within the purpose of the ICPC. In nearly every case, the "sending agency" is actually a "sending state."

In the context of adoption, however, the term "sending agency" impacts a broad range of circumstances that constitute interstate adoption, whether or not a state has custody of the child. ICPC regulation is appropriate in cases of adoptive placements by a state or county child welfare agency and/or court of jurisdiction involving children in foster care who are placed with adoptive families in another state. While problematic from other standpoints, as discussed below, the ICPC is a sound regulatory response designed to enhance interstate cooperation and avert interstate exploitation.[11] Such is not

10. *See id.* art. V.

11. *See, e.g.*, Newman v. Worcester County Dep't. of Soc. Serv., 659 N.E.2d 593 (Ind. Ct. App. 1995) in which the ICPC provided a mechanism for cooperative efforts between Maryland and Indiana. In this case, the pre-adoptive parents, with whom three siblings were placed, requested the removal of two of the siblings from their home -- which was done -- but then refused to obtain a psychological evaluation as part of the home study for the adoption of the third sibling. Both states concurred that the child should not remain in the home. Maryland, the sending state, obtained

the case, however, for direct adoptive placements by parents who are initiating placements on their own or with the help of an intermediary such as an attorney or physician, or for adoptions assisted by licensed private agencies that involve children who are not in publicly supported foster care.

1. Direct Adoptive Placements and the "Sending Agency" Definition

The ICPC generally considers a parent to be a "sending agency" when she places her child, often a newborn, for adoption across state lines. Parents are required to conform to the ICPC provisions in the same manner as a governmental state or county child welfare agency or court seeking to adoptively place a child in foster care. Such a broad application of the ICPC produces some bewildering results. Leading proponents of the ICPC,[12] for example, argue that the following scenarios are subject to the ICPC:

> A pregnant woman leaves State A for the purpose of placing baby with an agency in State B. The baby is born in State B and relinquished to the agency. The mother returns to State A.
>
> A pregnant woman in State A delivers her child in State B and relinquishes the child to prospective adoptive parents living in State B. The mother returns to State A.
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> Prospective adoptive parents from State B enter State A for the purpose of taking custody of a child that has been born and relinquished in State A. The adoptive parents then return to State B with the child.[13]

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a court order mandating the return of the child, and Indiana enforced the order. When the pre-adoptive parents attempted to have the order dismissed, the Indiana court utilized the ICPC as the basis for Maryland's authority to require the return of the child.

12. *See generally* Wendell & Rosenbaum, *supra* note 5.

13. *Id.* at 3A-11 to 3A-12.

In none of these instances is there an issue regarding interstate cooperation, potential interstate exploitation, or jurisdictional authority. In each instance, the receiving state [State B] would have in place adoption and licensing laws that address the determination of the suitability of the adoptive family.[14] There is no need to impose additional ICPC mandates[15] and, given the extraordinary time delays and other implementation problems of the ICPC, discussed below, it is likely to be against children's best interests to do so.

2. *Adoptions Assisted by Licensed Private Agencies and the "Sending Agency" Definition*

The same issues related to the inadequate fit with the Compact's

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14. Questions may arise about the extent to which any one state's law sufficiently protects children and appropriately regulates adoption. There is considerable variation in states' adoption laws with widely varying approaches to relinquishment and consent, to the legality of independent adoption without agency involvement, and to the practice of adoption by for-profit agencies. Some proponents of the ICPC have argued that ICPC oversight is necessary in the case of states they view as having deficiencies in their adoption laws. Although it may be a correct observation that some states' laws provide minimal, or possibly inadequate protections, those laws nevertheless bind intrastate adoptions in those states and adoption decrees issued by any such state are entitled to full faith and credit in other states. *See* William M. Schur, *Adoption Procedure*, *in* ADOPTION LAW AND PRACTICE §4.02[6] at 4-47 to 4-51 (Joan H. Hollinger ed. 1995).

The issue is whether the ICPC, as a vehicle for promoting interstate coordination as stated in Article I, should be used to subject those states deemed deficient by those who administer the ICPC to procedures and standards that vary from those states' laws. Arguably, efforts to advance the quality of adoption law should take the form of a uniform adoption act or model adoption legislation, and not direction from a non-legislative, non-judicial entity such as the ICPC administrative structure.

15. There are valid concerns about interstate "baby brokering," that is, unethical practices that, in effect, provide infants in exchange for substantial sums of money. Some have argued that the ICPC functions to prevent such practices. There is, however, little indication that the ICPC, as substantively structured and as implemented, can or does play such a role. The extent and nature of "baby brokering" practices should be carefully assessed, the need for more effective monitoring and enforcement determined, and the most appropriate mechanisms to respond to this issue created or enhanced.

purpose also arise when the definition of "sending agency" is applied to licensed private agencies. These agencies assist both the sending and receiving states with the adoption of children who are not in the custody of a governmental entity. As it does with adoptive placements by birth parents, the ICPC layers a complex regulatory scheme on a process for which there is no possibility of state-to-state misconduct. The Compact inappropriately extends interstate adoption regulation to a matter that is adequately addressed by the law of a single state through the substantive state law governing adoption and licensing law that regulates agency practice.

3. Further Confusion As a Result of Attempts to Exempt Certain Adoptions

The ICPC includes virtually any person and entity within the definition of "sending agency;" it is inappropriately broad in scope, though very clear in meaning. And, the ICPC complicates matters by attempting to exempt from its reach some adoptive placements initiated by parents, certain relatives and guardians. Article VIII of the ICPC provides that "[t]his compact shall not apply to: (a) The sending or bringing of a child into a receiving state by his parent, step-parent, grandparent, adult brother or sister, adult uncle or aunt, or his guardian and leaving the child with any such relative or non-agency guardian in the receiving state."[16]

Apparently intended to limit its own reach in those cases in which the ICPC should not intervene, Article VIII has created uncertainty about which placements by parties ordinarily considered "sending agencies" are subject to the Compact. In practice, the exemption has tended to create distinctions that not only are difficult to comprehend but that complicate any attempt to predict ICPC applicability in future cases.

The impact of the Article VIII exemption can be seen in direct placements by parents and in adoptions assisted by licensed private agencies. Effectively, ICPC approval is not needed by a parent in State A who sends a child into State B to be adopted by an adult relative who has not had any prior contact with the child or, in the

16. ICPC, *supra* note 4, art. VIII(a).

worst case scenario, has maltreated the child. A parent from State A, however, who delivers her baby in State B and relinquishes the child for adoption to a couple in State B who have been approved by a licensed private adoption agency in that state must comply with the Compact. The distinction is apparently based on the ICPC's view that the biological connection in the specified relationships is significant enough, standing alone, to bypass the ICPC protections believed necessary in virtually every other interstate adoption. Ironically, the presumption of appropriateness because of the biological relationship exists only in the context of the *receiving* relative. The birth parent -- who has the most significant biological relationship with the child -- is, on her or his own, accorded no such presumption of fitness in decision making.

The Article VIII exemption is particularly problematic in its references to actions by "guardians." Because "guardian" is not defined in the Compact, it is unclear who or what qualifies as a guardian for ICPC purposes. Notwithstanding this oversight, Article VIII states that ICPC approval is not needed when the sending party is a guardian and the child is sent either to a relative specified in Article VIII or to a "non-agency guardian." Assuming that a sending state's law or policy would permit an agency to act as guardian, the guardian agency could avoid compliance with the ICPC by sending the child to a relative or to another person who simultaneously is serving as the child's guardian.

Recognizing the particular lack of clarity in connection with the references to "guardian" in Article VIII, the Association of Administrators of the Interstate Compact on the Placement of Children ["the Association"] and the American Public Welfare Association, acting as the Association's Secretariat,[17] issued Regulation III to outline those aspects of parenting or guardianship that must be met to avoid compliance with the ICPC. Regulation III states:

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17. The responsibilities of the Secretariat include coordinating ICPC activities at the national level, record keeping, compiling and disseminating data, maintaining the Compact Administrators' Manual, and providing technical assistance. Additionally, the Secretariat provides advisory opinions to compact administrators which are then included in the Compact Administrators' Manual. Hartfield, *supra* note 1, at 301.

> Article VIII(a) of this Compact applies only to the sending or bringing of a child into a receiving state to a parent or other specified individual by a parent or other specified individual whose full legal right to plan for the child has been established by law at a time prior to initiation of the placement arrangement, and has not been voluntarily terminated or diminished or severed by the action or order of any Court.[18]

Regulation III has confused rather than clarified the interpretation of the ICPC. One court, for example, concluded that the same standard that applies to a sending guardian -- that is, the full legal right to plan for a child, established prior to the initiation of the placement -- must also apply to a non-agency guardian who receives a child.[19] This interpretation requires equivalent legal rights to plan for the child on the part of two parties in two different states. The fact that at least one court has given Regulation III such a narrow construction suggests that any purported exception to ICPC applicability may have little relevance in actual practice. Even after the exemption attempt in Article VIII and the clarification attempt in Regulation III, the ICPC is likely to be held to apply to all interstate adoption cases, with much added confusion and uncertainty.

4. The Courts and the Interpretations of "Sending Agency"

Courts have evidenced the same confusion as practitioners concerning the reach of the ICPC. For example, several courts have held that the ICPC does not apply to adoptive placements by birth parents.[20] Other courts have insisted that because the definition of "sending agency" includes "person," the ICPC must apply to birth

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18. AMERICAN PUBLIC WELFARE ASSOCIATION, THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN: COMPACT ADMINISTRATORS' MANUAL at 1.23 (Regulation III(c)) (1982) [hereinafter COMPACT ADMINISTRATORS' MANUAL].

19. *See, e.g.*, In the Matter of Adoption of Baby "E", 427 N.Y.S.2d 705, 709 (N.Y. Fam. Ct. 1980) (concluding that "a non-agency guardian who receives the child must meet the same standards as the one who places the child . . . ").

20. *See, e.g.*, In re Adoption of Baby Boy W, 701 S.W.2d 534, 542 (Mo. Ct. App. 1985); In re Adoption of MM, 652 P.2d 974, 981 (Wyo. 1982).

parents.[21] If courts are unable to reach consensus regarding the scope of the ICPC, those attempting to comply with the Compact face ongoing uncertainty. The safer route has been to assume that all cases of interstate adoption are within the Compact's reach -- a result that has proven to be less than optimal for the children affected by it.

Some of the more troubling outcomes are associated with holdings that birth parents are "sending agencies" within the meaning of the ICPC. In *Stancil v. Brock*,[22] for example, the North Carolina Court of Appeals relied upon the "sending agency" definition -- which it interpreted to include birth parents -- and broadened the right of birth parents to revoke consent to the adoption of their child.[23] In this case, birth parents in Kentucky agreed to place their child for adoption with a couple in North Carolina. The birth parents initiated an ICPC request through the Kentucky office and executed a consent to adoption that conformed with the laws of the receiving state, North Carolina. The prospective adoptive parents traveled to Kentucky when the child was born, took physical custody of the child, returned to North Carolina and filed a petition for adoption in North Carolina. Subsequently, the birth parents filed with the North Carolina court petitions to revoke their consent to adoption and to dismiss the adoptive parents' petition to adopt.[24]

The North Carolina court ruled that the birth parents were a "sending agency" and in an interpretation inconsistent even with that of the Association, held that the birth parents retained jurisdiction over the child until the adoption was finalized.[25] Having such jurisdiction,

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21. *See, e.g.*, Broyles v. Ashworth, 782 S.W.2d 31 (Tex. App. 1989); Cornhusker Christian Children's Home v. Department of Soc. Serv., 429 N.W.2d 359, 362 (Neb. 1988).

22. 425 S.E.2d 446, 450 (N.C. Ct. App. 1993).

23. *Id.* at 450.

24. *Id.* at 447-48.

25. *Id.* at 450. The court focused on the jurisdictional provisions of the ICPC which refer to the ongoing financial responsibility of the "sending agency" for the child until the adoption in the receiving state is finalized. The Association does not consider birth parents to be "sending agencies" in the jurisdictional [i.e., financial obligation] sense. Unlike other sending agencies, birth parents do not have responsibility for the financial support of the child pending finalization of the

the birth parents were empowered to demand return of the child to Kentucky. By relying on the jurisdictional provisions of the ICPC, the court permitted the birth parents to subvert state adoption law. This result undermines the stated purpose of the ICPC -- to promote interstate cooperation in adoption. Furthermore, the ruling highlights the problem of using the ICPC to disrupt approved adoptive placements, which in turn disrupt the stability and security to which children are entitled.

B. The Definition of "Placement"

"Placement" means, for purposes of the ICPC:

> the arrangement for the care of a child in a family free or boarding home or in a child-caring agency or institution but does not include any institution caring for the mentally ill, mentally defective or epileptic or any institution primarily educational in character, and any hospital or other medical facility.[26]

Terms within the definition such as "family free" and "boarding home" are not defined in the Compact. "Family free" apparently refers to a family home in which there is no charge for the child's care and the child is provided with "the care which children usually receive from their parents as part of the process of upbringing,"[27] and "boarding home" is apparently one in which there is a charge for the child's care. Both terms refer to foster care. In fact, the definition of "placement" contains no reference to adoption, suggesting that the ICPC was drafted more out of concern for interstate foster care arrangements than adoption.

The omission of a reference to adoption in the definition section of the ICPC understandably led a number of courts in the 1980s to question whether the ICPC had any application to pre-adoptive placements.[28] The issue ultimately was resolved in the affirmative through a reading of the definition of "placement" with the language

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adoption. *See* Wendell & Rosenbaum, *supra* note 5, at 3A-10 to 3A-11.

26. ICPC, *supra* note 4, art. II(d).

27. COMPACT ADMINISTRATORS' MANUAL, *supra* note 18, at 2.2 (Compact Provisions, An Interpretative Commentary); Hartfield, *supra* note 1, at 298.

28. *See* Hartfield, *supra* note 1, at 313.

of Article III of the Compact which requires ICPC approval for "placement in foster care or *as a preliminary to a possible adoption.*"[29] The Article III language is of particular interest because it suggests an intent to regulate activities that could lead to adoption rather than those activities clearly intended as permanent (not preliminary) steps to ensure an actual (not possible) adoption.

As with other aspects of the ICPC, the ambiguity of the definition has led to confusion and to attempts to include virtually any interstate activity within the scope of the Compact. And, as with the definition of "sending agency," the appropriateness of extending the reach of the ICPC to adoptive "placements" by birth parents has been an issue. One court held that a private adoption initiated by birth parents is a "positive, not potential act" and, therefore, not within the scope of the ICPC's definition of placement as "a preliminary to a possible adoption."[30] This interpretation, although a more reasoned construction of the ICPC, is in the minority. Most courts[31] and the Association[32] have determined -- consistent with what appears to be the prevailing approach of giving the broadest possible interpretation to the scope of the Compact -- that "placement" includes direct adoptive placements by parents across state lines.

The Association has expanded even further the reach of the ICPC by defining "placement" as including those situations in which a family moves from one state to another after the adoptive placement has occurred but before finalization of the adoption.[33] This interpretation transforms what starts as an intrastate adoption into an interstate "placement" (despite the fact that the child has already been "placed") subject to the provisions of the ICPC. The inclusion of these

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29. ICPC, *supra* note 4, art. III(b) (emphasis added).

30. In re Adoption of MM, 652 P.2d 974, 981 (Wyo. 1982).

31. *See, e.g.*, In re Adoption of C.L.W., 467 So.2d 1106 (Fla. Dist. Ct. App. 1985); In re Adoption/Guardianship No. 3598, 675 A.2d 170 (Md. Ct. Spec. App. 1996), *cert. granted*, 678 A.2d 1047 (Md. 1996); In re Baby Girl, 850 S.W.2d 64 (Mo. 1993); In re Adoption of Baby "E", 427 N.Y.S.2d 705 (N.Y. Fam. Ct. 1980).

32. *See* Hartfield, *supra* note 1, at 314; COMPACT ADMINISTRATORS' MANUAL, *supra* note 18, at 2.36 (Opinions of Interest).

33. COMPACT ADMINISTRATORS' MANUAL, *supra* note 18, at 1.20 (Regulation I).

adoptions within the scope of the Compact becomes understandable only from the perspective that there is an overriding interest in extending ICPC application to the largest possible pool of adoptions.

C. Summary and Recommendations

The broad scope of the ICPC as suggested by the definitions of "sending agency" and "placement" undermines the purpose of the Compact. Moreover, this broad scope does not promote the best interests of children placed for adoption across state lines. There is no legitimate policy or practice rationale for extending the reach of the ICPC to adoptive placements by birth parents or to adoptions assisted by licensed private agencies that involve children who are not in the custody of a state or county governmental entity. The application of the ICPC to these adoptions -- without adding any protections or benefits for children -- creates additional bureaucratic demands, prolonged time delays in authorizing the placement, confusion, and, in many instances, extremely poor outcomes for children.

The ICPC should be limited to interstate adoptive placements by public authorities of children who are the legal and/or financial responsibility of a governmental entity. To achieve that end, the concept of "sending agency" should be eliminated from the Compact and a new concept of "sending state" substituted. "Sending state" should be defined as a governmental entity that has legal and/or financial responsibility for children subject to the interstate placement. Through a modification of the current definition of "sending agency," "sending state" could be defined as "a party state, officer, or employee thereof; a subdivision of a party state, or officer or employee thereof; a court of a party state; any of which sends, brings, or causes to be sent or brought any child to another party state." Corresponding changes in the definition of "receiving state" should delete all references to placement by "private persons" and "private agencies."[34]

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34. "Receiving state" would be defined as "the state to which a child is sent, brought, or caused to be sent or brought by public authorities and for placement with state or local public authorities." *Compare* current definition of "receiving state," *supra* note 8.

Similarly, "placement" should be redefined to incorporate "the arrangement for adoption of a child" and the ambiguous language in Article III, "a preliminary to a possible adoption,"[35] should be eliminated entirely. That change would clarify that the ICPC applies to interstate adoption, and when read with the definition of "sending state," would provide practitioners and courts alike with an understanding of the public agency nature of the adoptions being regulated.

This approach would focus on the effective and efficient implementation of the Compact to serve the best interests of children who are in publicly supported foster care -- children for whom adoption is the pathway to permanent families who will provide them with the love, stability and security to which they are entitled. As the following section outlines, the ICPC, as currently construed and administered, largely has failed to provide these children with the permanency which they need and deserve. As is the case with the scope of the ICPC, the substantive provisions of the ICPC and its implementation require significant changes to better serve children in the public child welfare system.

III. THE ICPC AND THE BEST INTERESTS OF CHILDREN IN THE PUBLIC CHILD WELFARE SYSTEM

The goal for children for whom public child welfare agencies have legal and financial responsibility should be permanency with families who can provide security, stability, love and nurture and who understand and can respond effectively to the special needs that many of these children have. To meet this goal, the ICPC should have in place an approval process that evaluates the prospective adoptive family and any circumstances that could affect the protection of the child. Further, an assessment of the appropriateness of the projected placement should be provided to the sending state.[36]

As with other aspects of the ICPC, the approval process has hindered the achievement of these aims. Article III prohibits any interstate foster care or adoptive placement on the part of any sending

35. ICPC, *supra* note 4, art. III(a).

36. *Id.* art. I.

agency "unless the sending agency shall comply with each and every requirement set forth in this article and with the applicable laws of the receiving state governing the placement of children therein."[37]

Problems arise in four areas: (1) inadequate attention to the requirements that the receiving state must meet in determining and issuing approval for interstate adoptive placements; (2) confusion regarding compliance with state law in addition to ICPC requirements; (3) jurisdictional uncertainty; and (4) untimely and unresponsive implementation of the approval process.

A. Inadequate Attention to Receiving State Mandates

The ICPC clearly mandates that the sending agency notify the receiving state of a potential interstate placement. Such notice must be in writing, it must be directed to "the appropriate public authorities" in the receiving state; and it must contain biographical data, a full statement of the reasons for the proposed placement, and "evidence of the authority pursuant to which the placement is proposed to be made."[38] The receiving state may request additional or supporting information that it considers necessary "to carry out the purpose and policy" of the ICPC.[39]

By contrast, the Compact mandates very little concerning the approval process that the receiving state must utilize, despite the explicit objectives regarding interstate placement approvals outlined in Article I. The only stated requirement is that the approval be "in writing."[40] Perhaps most striking and unsettling, the ICPC does not require that the proposed placement be in the child's best interests. Rather, the ICPC merely provides that the receiving state's communication to the sending agency be "to the effect that the proposed placement does not appear to be contrary to the interests of the child."[41]

The lack of specificity regarding the approval process suggests a

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37. *Id.* art. III(a).
38. *Id.* art. III(d).
39. *Id.* art. III(c).
40. *Id.* art. III(d).
41. *Id.*

surprising inattention to the explicit core function of the ICPC. The purpose of the Compact is, as stated in Article I, to assure that children "receive the maximum opportunity to be placed in a suitable environment and with persons or institutions having appropriate qualifications and facilities to provide a necessary and desirable degree and type of care."[42] The ICPC, however, in its substantive provisions, fails to set even minimal standards for the assessment of suitability, appropriateness, and desirability of care. The outcomes for children have been at best troubling, and at worst dire.

An example of a particularly poor outcome as a result of this inattention is seen in *In re Paula G.*[43] In this case, the public child welfare agency in Rhode Island learned that a child in state legal custody had been moved by her mother to Florida and was living with her mother's boyfriend. Rhode Island initiated an ICPC request with the Florida authorities, and the Florida office, upon finding that the boyfriend's home was inadequate and inappropriate, denied approval for the child's ongoing placement in the state. Because approval would not be granted, Florida would assume no responsibility for the child's safety and welfare. A Rhode Island Family Court justice then ordered that the child be placed temporarily in the home of the boyfriend that the Florida authorities had found to be an inadequate caregiver. The Rhode Island child welfare agency continued to object to the placement, but the child nonetheless remained in Florida until the boyfriend's home was severely damaged and became uninhabitable. At this point, the child was returned to Rhode Island where she entered a group home.[44]

The case illustrates a number of issues related to the ICPC that suggest that the best interests of children are not the focal point for the ICPC decision-making process. The Rhode Island Supreme Court, in its review of the circumstances of this case, focused on the impropriety of the Rhode Island Family Court justice's entry of an order for a placement that did not have Florida's approval. The rules

42. *Id.* art. I(a).

43. 672 A.2d 872 (R.I. 1996). This is a case that does not involve an interstate adoptive placement but which nevertheless illustrates the realities of the approval process in the context of a child's best interests.

44. *Id.* at 872-73.

created by the ICPC were found to be violated by the action of the Family Court justice, but no violation was noted with regard to the decision by the Florida authorities to do nothing when the child's placement in that state was found to be inappropriate.[45] Nor was there censure for the inaction that continued until a disaster destroyed the home and required that the public authorities intervene. Considerations other than the best interests of the child clearly drove the decision making process.

A key change needed in the ICPC is the addition of an explicit "best interest" standard. This would ensure that, in the case of each child for whom an interstate adoption is sought, the Article I objectives are met: determination of the qualifications and suitability of prospective adoptive parents; assessment of the circumstances, with particular attention to the protection of the child; and obtaining complete information on which to evaluate the projected placement.[46] Minimal standards for the approval process should be incorporated into the Compact, and concerns about violations of the ICPC -- traditionally focused on the improper "sending" of children into another state -- should be directed to the failure of states to provide quality services as part of the approval process. Receiving states must be held accountable for outcomes, both in terms of the substantive quality of the work being done on behalf of children and in terms of the timeliness of their response.

B. Confusion Regarding Compliance With State Law

Adding to the difficulties associated with the ICPC application in relation to interstate adoptions of children in foster care is the confusion regarding the relationship between the ICPC and state law governing the adoption of children. The ICPC states that compliance is required with the laws of the *receiving state* only[47] while the

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45. *Id.* at 874.

46. *See* ICPC, *supra* note 4, art. I(a)-(c). Implicit in this standard but outside the scope of the ICPC would be the expectation that the public authorities, based on their state-mandated child protection responsibilities, would intervene upon discovering that a child is in an inadequate, inappropriate and/or dangerous situation.

47. *See id.* art. III(a).

position of the Secretariat of the ICPC is that there must be compliance with the laws of the receiving state *and* the sending state.[48]

Article III requires that the sending agency comply "with each and every requirement" of the ICPC and "with the applicable laws of the receiving state governing the placement of children therein."[49] This mandated compliance with the laws of the receiving state recognizes that each state's law contains procedures designed to ensure that prospective adoptive families provide desirable homes for children. The mandate, however, fails to take into account the fact that certain aspects of adoption law -- particularly in the areas of voluntary relinquishment and consent to adoption and/or involuntary termination of parental rights -- may be more appropriately addressed by the laws of the sending state where the birth parent resides at the time the decision is made to free the child for adoption.

The Secretariat of the ICPC has addressed this issue by taking the position that the ICPC, irrespective of its explicit language, requires compliance with the laws of the sending state and the laws of the receiving state.[50] This position imposes two sets of laws -- which may or may not be the same or complementary -- on each interstate adoptive placement, further complicating an already cumbersome process. Some courts have questioned the validity of the Secretariat's position and have held, consistent with the express language of the Compact, that compliance must be only with the laws of the receiving state.[51]

The complexity of imposing compliance with the laws of both the sending and receiving states -- and the poor outcomes that can result from such a requirement -- are well illustrated by *In Re Adoption No.*

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48. COMPACT ADMINISTRATORS' MANUAL, *supra* note 18, at 2.2-2.3 (Compact Provisions, An Interpretive Commentary), 3.67 (Secretariat Opinion 37 (April 7, 1977)).

49. ICPC, *supra* note 4, art. III(a).

50. COMPACT ADMINISTRATORS' MANUAL, supra note 18, at 2.2-2.3 (Compact Provisions, An Interpretive Commentary), 3.67 (Secretariat Opinion 37 (April 7, 1977)).

51. *See, e.g.*, In the Matter of the Male Child born July 15, 1985 to L.C., 718 P.2d 660 (Mont. 1986). *See also* Hartfield, *supra* note 1, at 317.

10087.[52] In this case, the Maryland appellate court considered an adoption made directly by a mother in Virginia to a family in Maryland. The prospective adoptive parents had notified the Virginia and Maryland ICPC offices of the impending adoption but Virginia -- the sending state -- refused to give approval because the adoptive parents declined to provide information required by Virginia. The required form was to be completed by the biological mother and to contain the names and addresses of the adoptive parents. Both the biological parent and the adoptive parents, however, already had agreed not to disclose their identities to one another. Although Maryland had all necessary paperwork -- that is, all the requirements of the receiving state were met -- it nevertheless refused to act until it received a notice of approval from Virginia. The adoptive parents transported the newborn to Maryland, knowing that they did not have ICPC approval, and the next day notified both states that they had custody of the baby.[53] When the adoptive parents filed their adoption petition in a Maryland court, the court dismissed the petition solely on the basis of failure to comply with the ICPC. After a Court of Special Appeals affirmed the dismissal of the petition, the adoptive family appealed to the Maryland Court of Appeals. At that juncture -- two years after the adoptive family assumed custody of the child -- the court reversed the dismissal of the petition.[54]

Particularly noteworthy was the court's recognition that despite the underlying objectives of the Compact, neither ICPC office had contacted the adoptive family during the two year period to assess the child's placement.[55] Given the fact that the Maryland ICPC office was aware of the child's presence in its jurisdiction without ICPC approval, the court stated that "[t]he best interest of the child dictates that noncompliance with the ICPC in transporting a child into the state should be carefully investigated at the earliest opportunity, not ignored."[56] What the court did not state, but what is evident in the

52. 597 A.2d 456 (Md. 1991).
53. *Id.* at 459-60.
54. *Id.* at 460.
55. *Id.*
56. *Id.* at 464.

case, is that the bureaucratic insistence on compliance with the requirements of both the sending and receiving states overrode other important considerations in the case -- including any concerns about the well being of the child. Although this case involved a direct placement by a birth parent, its lessons apply even more significantly to interstate adoptive placements of children in foster care -- children whose histories include abuse and neglect and whose safety and well being with new adoptive families should be of paramount importance.

There are obvious difficulties when a legislative act -- the ICPC -- explicitly states one rule of law and a non-judicial entity -- the Association, acting through its Secretariat -- construes that act in an entirely different manner.[57] If the ICPC were reconceptualized to apply only to the interstate adoptive placements of children in publicly supported foster care, the law of the sending state should control on issues related to birth parent rights, and the law of the receiving state should control on all other adoption related issues. If, for example, the child is legally free for adoption as a result of voluntary relinquishment or involuntary termination of parental rights, the law of the sending state should determine the validity of the relinquishment. The law of the receiving state should govern the procedures regarding the assessment of the adoptive family and the finalization of the adoption. In those rare cases in which the rights of only one parent have been terminated either voluntarily or involuntarily, the sending state should retain the responsibility to apply its own laws to terminate the rights of the remaining parent.[58] Such an approach would obviate the need to apply potentially conflicting state laws on the same matter and presumably expedite the adoption process. As observed by one commentator, it is not in children's best

57. Secretariat Opinions do not have the force of law, but courts often cite them as persuasive authority on issues related to the ICPC. Hartfield, *supra* note 1, at 301.

58. It seems preferable that the rights of both parents be legally resolved prior to the interstate adoptive placement. When the rights of both the birth mother and birth father have been voluntarily relinquished or involuntarily terminated, the placement is at less legal risk. Additionally, the sending state is likely to accord the matter a greater sense of urgency if the status of both birth parents' rights must be resolved prior to placement.

interests to "insist that the laws of both the sending and receiving state be followed in every detail. Without some flexibility in choosing the appropriate rule of law for different aspects of an adoption proceeding, the purported commitment of the ICPC to protecting the welfare of children threatens to become a nullity."[59]

C. Jurisdictional Uncertainty

Article I of the ICPC states that one of the key objectives of the Compact is that "appropriate jurisdictional arrangements for the care of children will be promoted."[60] Article V sets forth the rules for "retention of jurisdiction."[61] It states that the "sending agency" retains jurisdiction as to "all matters in relation to the custody, supervision, care, treatment and disposition of the child as it would have had if the child had remained in the sending agency's state until the child is adopted . . . ."[62] The sending agency also has the power to mandate the return of the child or the transfer of the child to another location.[63] Importantly, the sending agency continues to "have financial responsibility for the support and maintenance of the child during the period of the placement." [64] It is important to note that Article V discusses jurisdiction in a manner that does not comply with the usual understanding of jurisdiction in the legal sense -- that is, "jurisdiction" as the authority by which courts and judicial officers take and decide cases.[65] A "sending agency," as defined in the ICPC, cannot have jurisdiction in the traditional sense over any matter; however, it can, and under the ICPC does, have specified

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59. Joan H. Hollinger, *Interstate Adoptions: The Interstate Compact on the Placement of Children, in* ADOPTION LAW AND PRACTICE, Appendix 3-A at 3A-11 (Joan Hollinger ed., Supp. 1995) [hereinafter *Interstate Adoptions*].

60. ICPC, *supra* note 4, art. I(d).

61. *Id.* art. V.

62. *Id.* art. V(a).

63. *Id.*

64. *Id.*

65. BLACK'S LAW DICTIONARY 853 (6th ed. 1990).

responsibilities for a child who is placed in another state.[65] From this perspective, there are two issues that have furthered confounded the usefulness of the ICPC.

The first issue relates to the confusion caused by the mandated retention of "jurisdiction" by the "sending agency" and the inclusion of birth parents within the scope of "sending agency." Even the most ardent proponents of ICPC application to birth parents find that applying the "sending agency" definition to a biological parent in the Article V sense is not workable. Wendell and Rosenbaum, for example, state that a biological parent who has relinquished a child and consented to the adoption does not remain -- as Article V would mandate -- financially responsible for the child until the child's adoption is finalized.[67] This construction is certainly sensible, but it also creates a situation in which Article V -- despite its absolute language -- applies some of the time but not always -- once again raising confusion about the actual nature of the ICPC mandates.

The second issue is the ongoing conflict based on the questionable applicability of the ICPC or the Uniform Child Custody Jurisdiction Act ("UCCJA"). This conflict focuses on jurisdiction in the legal sense: a determination of which state's court has the authority to make decisions related to children in interstate adoptive placements. Proponents of the ICPC believe that the UCCJA applies only to "custody disputes" and should not be applied in the case of interstate adoptions. They argue that in those cases in which the ICPC and UCCJA conflict, the ICPC must prevail because an interstate compact is superior in status to any state statute with which it is inconsistent.[68] Many legal experts disagree. Joan Hollinger, for example, argues that the UCCJA sets out the overriding jurisdictional rules and when

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66. *See, e.g.*, In re Adoption of Zachariah K., 8 Cal. Rptr.2d 423, 431 (Cal. Ct. App.1992) (holding that the ICPC's conferring of "jurisdiction" on sending agencies is not tantamount to a grant of judicial authority and does not empower a court to exercise jurisdiction).

67. *See* Wendell & Rosenbaum, *supra* note 5, at 3A-10. This construction provides additional support for the position that birth parents should not be included within the scope of "sending agency."

68. *See id.* at 3A-16. The authors cite no judicial authority for this proposition, and research has revealed none.

conflicts occur, the UCCJA must prevail over the ICPC.[69]

Illustrative of the problems are the multiple opinions issued by Arizona courts as the case of *J.D.S. v. Superior Court*,[70] later entitled *J.D.S. v. Franks*,[71] proceeded through appeal. In this case, jurisdictional conflicts arose when a birth mother in Arizona placed her child for adoption with a couple in Florida, despite the objections of the birth father. The mother did not supply any information on the birth father. She signed the relinquishment and on the day the ICPC application was filed, turned her infant over to an attorney who was facilitating the adoption. Later that day, the mother contacted the attorney, stating that she had changed her mind and wanted the child returned; the attorney refused. The following day, the Arizona ICPC administrator approved the interstate placement and the child was transferred to the adoptive couple who then returned to Florida and filed the adoption petition. One week later, the birth mother notified the birth father of the events, and he immediately filed for custody in Arizona. In the course of this litigation, three differing opinions were issued by the courts that considered the case.[72]

The trial court considered the question whether the state of Arizona -- where the birth parents resided -- or the state of Florida -- where the child physically resided -- had jurisdiction over the case. The trial court held that the ICPC, not the UCCJA, applied, and that Florida had jurisdiction over the child.[73]

The birth father appealed and the Arizona Court of Appeals held that the UCCJA was the appropriate law to resolve the jurisdictional conflict. That court held that the ICPC does not apply to resolve jurisdictional conflicts but instead speaks to whether an interstate placement is appropriate. Applying the UCCJA, the court held that Arizona had jurisdiction to decide the case.[74]

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69. *See* Joan H. Hollinger, *The Uniform Adoption Act: Reporter's Ruminations*, 30 FAM. L.Q. 345, 369 (1996) [hereinafter *The Uniform Adoption Act*].

70. 893 P.2d 749 (Ariz. Ct. App. 1994).

71. 893 P.2d 732 (Ariz. 1995).

72. *Id.* at 735-36.

73. J.D.S. v. Superior Court, 893 P.2d at 752.

74. *Id.* at 753.

In the final and binding opinion issued in the case, the Supreme Court of Arizona agreed with the court of appeals that the UCCJA was the governing law, but upon applying the UCCJA, held that Florida, not Arizona, had jurisdiction.[75]

The three analyses reflect the confusion surrounding jurisdiction over interstate adoption. Although it is clear that application of the UCCJA can produce different results, it is also clear that the introduction of the ICPC into the mix only further confounds matters.

The jurisdictional problems plaguing interstate placements are further illustrated by the extremely troubling case of *Marion County Dep't. of Pub. Welfare v. Beard*.[76] There, jurisdiction was disputed in the context of significant issues regarding the child's best interests. Two children were placed in foster care in Indiana and then, after the mother completed the requirements in her service plan, the children were returned to her by the Indiana public child welfare agency. Shortly thereafter, one of the children died from a skull fracture, and the mother pleaded guilty to involuntary manslaughter. During the mother's probation, the remaining child was placed with her aunt and uncle in Tennessee. The mother, three years after this placement was made, requested that the uncle be required to petition for guardianship of the child and, in the event that he did not, that the child be returned to Indiana. Despite the fact that the Indiana authorities were satisfied with the child's placement in Tennessee for the preceding three years, the agency, noting that the uncle had not applied for guardianship, obtained an order from the Indiana county court ordering the child's return to Indiana for determination of her best interests. In point of fact, the uncle had petitioned for guardianship, and never received notice of the Indiana county court's order. The Tennessee court in which the uncle's petition was pending refused to return the child to Indiana until it could decide the jurisdictional question. Subsequently, the Tennessee court determined that it had jurisdiction and awarded guardianship of the child to her uncle.[77]

Over the ensuing two years, Indiana and Tennessee battled over

75. J.D.S. v. Franks, 893 P.2d at 743.

76. 616 N.E.2d 763 (Ind. Ct. App. 1993).

77. *Id.* at 765-66.

jurisdiction while the child remained in Tennessee. Ultimately, the Indiana county court issued an order that the child be returned to Indiana and, at the mother's request, ordered the public child welfare agency to pay the legal expenses the mother had incurred in seeking to have the child returned to her. The court agreed with the mother that the Indiana child welfare agency, under the ICPC, had jurisdiction and, therefore, financial responsibility. It rejected the public child welfare agency's contention that under the UCCJA, Tennessee had jurisdiction.[78]

The county court's orders were appealed and the Indiana Court of Appeals considered the jurisdictional question. The court attempted to resolve the dilemma by reading the UCCJA and the ICPC together "to produce a harmonious system of legislation."[79] The court's analysis was as follows: under the ICPC, Indiana retained jurisdiction as the sending agency and thus Tennessee lacked jurisdiction to order the uncle's guardianship.[80] Furthermore, there was error in failing to give notice to the uncle of the Indiana county court's order that the child be returned to Indiana -- notice to which he was entitled under Indiana law.[81] Finally, the uncle in Tennessee was in the best position to provide information relevant to the child's best interests -- a concept recognized under the UCCJA as relevant to the determination of which state has jurisdiction.[82] Therefore, the order requiring the child to be returned to Indiana required reversal.[83]

Quite aside from the unsettling practice issues,[84] this case, like

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78. *Id.* at 766.

79. *Id.* at 768.

80. *Id.*

81. *Id.* at 769-70.

82. *Id.* at 769.

83. *Id.* at 770.

84. It is difficult to understand how this case evolved to the point at which the appellate court became involved. Among the key practice issues is why neither voluntary relinquishment nor termination of parental rights was pursued in relation to the mother, particularly in light of the fact that her children had previously been in foster care and were returned to her, and that she was responsible for the death of one of her children. The mother was apparently given the power, some three years after the child returned to foster care for the second time and after the death

the Arizona cases, illustrates the complexity that is created unnecessarily by attempts to incorporate ICPC directives into an analysis of a true jurisdictional issue. While courts may reach different outcomes when they apply the UCCJA, as illustrated in the Arizona case, the UCCJA, nevertheless, is designed to address specifically the jurisdictional issues inherent in interstate child custody matters.[85] The ICPC clearly is not so designed, and, in reality, it introduces extraneous considerations that only further confound jurisdictional determinations.

Jurisdictional issues related to interstate adoptive placements should be resolved solely by application of UCCJA principles. The ICPC should be amended so that references to "jurisdiction" are deleted, and language that relates to ongoing responsibility for children prior to finalization of adoption is utilized. Article I(d) of the ICPC should be modified to delete reference to "appropriate jurisdictional

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of her sibling at her mother's hands, to place conditions on the child's placement with her uncle. The agency appeared willing to disrupt a three-year placement with which it had been entirely satisfied. Allowing the mother to exercise such influence in the process precipitated a two-year court battle, leaving the child in a state of uncertainty and a stable placement in jeopardy.

85. The UCCJA does not expressly include adoptions within its definition of "custody determination" or "custody proceeding" although many courts have ruled that it does indeed apply to adoptions. Courts have recognized the importance of the UCCJA's goal of having child custody proceedings heard in the forum with the closest connections to and the most significant evidence about the prospective adoptive family. The UCCJA preference for a "home state" basis for jurisdiction, however, has been problematic in the context of many interstate adoptions and the majority of infant adoptions because the child generally has not lived with the adoptive parents from birth. As discussed by Hollinger, courts have often resorted to rather convoluted analyses to fit adoptions within UCCJA categories. The Uniform Adoption Act ("UAA"), recently proposed by the National Conference of Commissioners on Uniform State Laws, would change the UCCJA "home state" provision to include the state in which a child has lived with a birth parent or a prospective adoptive parent for the requisite six or more consecutive months or, if the child is an infant, the state in which the child has lived since shortly after birth. For those adoptions that do not occur "soon after birth," the UAA permits adoptive parents to file in the state where they have lived for six or more months even if the child was recently placed with them. *See* Hollinger, *The Uniform Adoption Act*, *supra* note 69, at 369-70.

arrangements"[86] and to state, instead, that the Compact is designed to clarify and enforce responsibility for the ongoing support of children in care. Article V should be entitled "Responsibility for Children in Interstate Placement" and Article V(a) should read:

> The sending state shall retain responsibility for the child and shall determine all matters in relation to the supervision, care, treatment and disposition of the child which it would have had if the child had remained in the sending state, until the child is adopted, becomes self-supporting, or is discharged with the concurrence of the appropriate authority in the receiving state. Such responsibility, subject to the provisions of the Uniform Child Custody Jurisdiction Act, shall also include the power to affect or cause the return of the child or the child's transfer to another location. The sending state shall continue to have financial responsibility for support and maintenance of the child during the period of placement. Nothing contained herein shall affect the jurisdiction of the receiving state to deal with an act of delinquency or crime committed therein.

D. Untimely and Unresponsive Implementation of the Approval Process

Perhaps the most consistently troublesome aspect of the ICPC is the untimely and unresponsive implementation of the approval process. The difficulties in attaining the cooperative system contemplated by the Compact are exacerbated by implementation of the ICPC on a state by state basis. Even if the ICPC were appropriately construed to encompass only public agency-directed adoptions of children in the state's custody and were unambiguous in its application, the purpose and policy of the Compact would be thwarted by the current realities of its implementation.

Timeliness and responsiveness to the needs of children awaiting adoption are not identified by the ICPC as core objectives of the system which the Compact creates. Nonetheless, courts have criticized the bureaucratic mishandling that has impeded adoptive

86. ICPC, *supra* note 4, art. I(d).

placements,[87] and in some cases, expressed dismay at the ICPC's failure to keep abreast of state law bearing on ICPC interstate placement approvals.[88] In other instances, the delays due to cumbersome processes have led to frustrations and efforts to work around the ICPC simply to achieve a needed adoptive placement for a child in foster care.[89] The issue of serious and protracted delays and administrative mismanagement in adhering to the procedural mandates of the ICPC have become a key basis for questioning the value of the ICPC as a regulatory tool.

The enormity of the implementation problems associated with the ICPC is best illustrated by examples drawn from actual case files.[90] The following cases illustrate some of the key problem areas, including what is perhaps the most frequently cited obstacle, delay in conducting and completing evaluations, as well as administrative mismanagement, complexities associated with the public-private agency relationship, and policies that fail to take into account children's individualized needs.

1. Delay in Conducting and Completing Evaluations

Case: In 1993, State A placed two sisters with their grandmother in State B after obtaining State B's approval for the foster care placement. In 1994, State A decided to pursue adoption with the grandmother and requested that

87. *See* Hollinger, *Interstate Adoptions*, *supra* note 59, at 3A-11. *See also* In re Adoption No. 10087, 597 A.2d 456 (Md. App. 1991).

88. *See, e.g.*, In re Adoption of Male Infant A., 578 N.Y.S.2d 988 (N.Y. Fam. Ct. 1991).

89. *See, e.g.*, In re Eli F., 260 Cal. Rptr 453 (1989). In this case, a social worker submitted a report to the California court with jurisdiction over a child in foster care, describing futile attempts to obtain information from the Interstate Compact on the Placement of Children authorities in another state about the suitability of placement in the aunt's home. She wrote, "[u]nfortunately, Interstate Compact on the Placement of Children is a cumbersome process and there has been no communication as yet . . . regarding this matter." *Id.* at 458.

90. The events in each case example are factual. The names assigned to children and families are solely for the purpose of enhancing the readability of the cases.

State B conduct an adoption home study. More than one year later, State B still had not responded. State A sent two letters, requesting information on the status of the request, but received no response. Six months later, it was discovered that State A had sent the incorrect request forms. One month later, State A sent the correct forms and finally, in November 1995, the home study was initiated. In January 1996, State B decided that it could not approve the home because there was no copy of the divorce decree from the step-grandparent's first marriage. Four months later, the step grandfather found a copy of the divorce decree. On April 24, 1996 -- more than two years after the request for adoption approval for a family already approved for foster care -- State B approved the home as an adoptive resource. The adoption was finalized in September 1996.

2. Administrative Mismanagement

Case: State A requested approval of a placement of two siblings with relatives in State B. State B approved the placement, and Johnny was placed in November 1994 and Jimmy in December 1995. State B agreed to supervise these placements and provide State A with progress reports. In March 1996, the children were freed for adoption, and in April 1996, State A requested an adoption home study of the relatives. Shortly thereafter, State B [where the children were residing] wrote State A, requesting information on the children's current status. State A advised State B that State B should have the relevant information: the children were in State B and State B had been [allegedly] supervising the placement. State A discovered at that point that State B had never forwarded a progress report to State A on the children's status. State B then assigned the home study required by the ICPC, but as of October 1996, State B had provided no information to State A.

3. Complexities in the Relationship Between Public and Private Agencies

Case: In December 1994, State A identified a family in

State B as a pre-adoptive family for Tommy. A licensed private adoption agency in State B conducted a home study and approved the adoptive placement. In May 1995, State A placed Tommy with the family and asked State B to supervise the placement for six months. State B refused because a private agency -- and not the public agency -- had conducted the home study. State A suggested that State B conduct its own home study and then monitor the placement, offering to place Tommy elsewhere during the home study process. State B refused.

4. Policy Mandates that Override Individualized Assessments of Children's Needs

Case: While in State A, Ms. Jones was a foster parent, approved by State A, for Jimmy. Jimmy had entered foster care in 1992, had four psychiatric hospitalizations, and had a history of fire-setting and aggressive and self-abusive behaviors. Jimmy was legally freed for adoption in March 1995 and State A decided to pursue the adoption with Ms. Jones because she had shown a strong ability to meet Jimmy's needs when she was his foster parent and she was very interested in adopting him. Ms. Jones had moved to State B and State A requested an adoption home study by State B. State B conducted the home study and refused to approve the placement because Ms. Jones was a homosexual. State B had a regulation that prohibited placements with homosexuals.

These case studies illustrate the extraordinary delays and other barriers that the ICPC poses to interstate adoption. Efforts to address these barriers, however, have been quite limited.[91]

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91. *See, e.g.*, Memorandum from Mike Chapman, President of the Association of Administrators of the Interstate Compact on the Placement of Children, and Sam Ashdown, Chairperson of the Judicial Relations Committee to the Joint Committee on ICPC Improvement on the Joint Committee's Recommendations to Improve the Placement of ICPC Children (May 14, 1996) (on file with author). The Joint Committee on ICPC Improvement is comprised of representatives from the National Council of Juvenile and Family Court Judges, the National Association of Public

Serious reform of the ICPC requires, in addition to the substantive changes already outlined, significant improvements in the implementation of the ICPC approval process. First, thirty working days from the date of the receiving state's receipt of the request to the date of the approval or denial[92] should be a mandatory time line. The time frame should apply to all children in the foster care system for whom interstate placements are sought. Any attempt to create a "special priority" category within the population of children in foster care who are awaiting adoption should be rejected.[93] Each child in foster care awaiting an interstate placement has special priority by virtue of the disruptions and trauma in his or her life and the overwhelming need the child has for stability, security and safety. While triaging of children in foster care may be appealing in light of the current inefficiencies and undue complexities in the system, it neither serves the best interests of children nor solves the inherent problems of a heavily bureaucratic structure that is not performing in a credible manner. By contrast, if the ICPC were reformed to eliminate coverage of direct adoptive placements by parents and licensed private agency-assisted adoptions, the system would be able

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Child Welfare Administrators, and the Association of Administrators of the Interstate Compact on the Placement of Children. The Committee's efforts have focused on improving the delays in processing ICPC requests. The report of the Committee sets forth certain recommendations that "may help reduce delays": improved interstate communication, including the use of facsimile transmissions and judge to judge communication when there has been undue delay; a national format for ICPC home studies that could be "used for some cases"; new methods at the local level to handle ICPC request processing; a national computer data network for state ICPC offices; and continuation of the Joint Committee as a national forum on the ICPC. The report does not recommend enforceable time frames for the approval process. It outlines, instead, a special "priority placement" designation that could be developed and implemented by sending courts. The recommendation is that procedures be developed to allow sending courts to find, for some children, that a placement must be made on an expedited basis to meet the special needs of a child and note this special designation in the court order.

92. *See* GUIDE TO THE INTERSTATE COMPACT, *supra* note 3, at 7 (suggesting 30 working days as "the maximum recommended processing time from the date the receiving state compact office receives the notice of the proposed placement until the placement is approved or denied").

93. *See* discussion *supra* note 91.

to focus its resources on meeting a thirty working day standard of efficiency for all children in foster care -- the children that the system is designed to serve. Efficiency is far more likely to be achieved under a mandated time frame that sets a standard of accountability for all children than under a policy that attempts to determine which children should be served in a relatively better way.

Second, the ICPC approval process should be critically examined and redesigned so that the current technocratic process is replaced by an individualized assessment based on children's best interests. The case examples demonstrate the troubling degree to which adoptions currently are denied or significantly delayed because of administrative mismanagement, unreasonably complex documentation requirements, and mechanistic application of regulatory mandates that fail to consider the circumstances of the individual child. These factors have significantly contributed to the delays consistently experienced in ICPC implementation while in no way improving the information gathered in the evaluation process, enhancing home studies, or expanding services that respond to the needs of children and families. The goal of enhanced efficiency must be combined with a goal of quality individualized assessments that focus on those issues that are relevant to determining whether a prospective adoptive family is appropriate for a particular child.

Third, the administrative structure of the ICPC should be examined in light of quality management principles. The strengths and weaknesses of the current structure should be considered prior to adding new procedures and processes and pressing other systems, such as the judicial system, to take on additional responsibilities in relation to interstate placements.[94] A reconsideration of the structure and the respective roles and responsibilities of the ICPC administrators, local offices, and other system components may well reveal opportunities to streamline the current processes in a way that achieves significant efficiencies.

IV. ENFORCEMENT OF THE ICPC

In Article IV, the ICPC provides penalties for "illegal

94. *Id.*

placement." Article IV states that any violation of the Compact's terms constitutes a violation of the laws of both the sending and receiving states and "may be punished or subjected to penalty in either jurisdiction in accordance with its laws."[95] The only specific penalty for a violation is "suspension or revocation of any license, permit, or other legal authorization held by the sending agency."[96] As with other substantive provisions of the ICPC, the focus is on child-placing agencies and the emphasis is on the actions of the sending party, not the receiving state.

The absence of any specific guidance in the ICPC regarding other sanctions for violation of the ICPC has presented courts with the challenge of determining the impact of an ICPC violation on the petition to adopt. Complicating their struggle in resolving this question is uncertainty about the extent to which the "best interest of the child" standard should be applied in deciding whether to grant or deny the petition in the face of an ICPC violation. Courts have developed various approaches and reached conflicting decisions on this issue.

Courts have tended to proceed in one of three ways when a violation of the ICPC has occurred: (1) they disregard the ICPC and grant the petition to adopt without ICPC approval; (2) they deny the petition to adopt because ICPC approval has not been obtained; or (3) they require retroactive compliance with the ICPC. A few courts have opted to grant adoption petitions without any ICPC approval whatsoever.[97] These courts seem to hold the view that ICPC compliance makes no difference at all in the validity and appropriateness of the adoption. On the other hand, at least two courts[98] have refused to finalize an adoption, at least partially because of a violation of the ICPC. These cases seem to suggest a view that ICPC compliance has a significant inherent value that transcends other

95. ICPC, *supra* note 4, art. IV.

96. *Id.*

97. *See, e.g.*, In the Adoption of C.L.W., 467 So.2d 1106 (Fla. Dist. Ct. App. 1985); In the Matter of Baby "E", 427 N.Y.S.2d 705 (N.Y. Fam. Ct. 1980).

98. *See, e.g.*, In re Adoption/Guardianship No. 3598, 675 A.2d 170 (Md. Ct. Spec. App. 1996), *cert. granted*, 678 A.2d 1047 (Md. 1996); In the Matter of the Adoption of T.M.M., 608 P.2d 130 (Mont. 1980).

considerations, including the best interests of the child.

Many courts have required retroactive compliance with the ICPC,[99] a trend that strongly suggests the view that a child's best interests should be paramount and that those interests are served by preserving the integrity of the adoptive family of which the child is a part. It also suggests a view that ICPC prospective compliance, in reality, makes relatively little difference in terms of the well being of the adopted child. This position has been condemned by ICPC proponents who have argued that "in order to improve compliance with child protective laws and because of the superior legal force of the compact, the sounder law is that ICPC requirements should be strictly enforced."[100]

Such a rule would elevate compliance with the technical, often ambiguous provisions of the ICPC above all other considerations. Such a result is well illustrated by In re Adoption/Guardianship No. 3598,[101] in which the court set aside a finalized adoption based on what the court characterized as the birth mother's and the adoptive parents' "knowing violation" of the ICPC.[102]

In this case, the unmarried birth mother, a New York resident, surrendered her child for adoption. She did not identify the birth father on the ICPC application for interstate adoption approval. The birth father had appeared at the hospital when the baby was born but had been turned away by the mother's family. Two days after the child's birth, he petitioned for an order declaring him to be the father of the baby. He apparently was never given notice of the court proceeding in which the mother formally surrendered the child. When the infant was two weeks old, the adoptive parents took the child home

99. *See, e.g.*, In re Adoption No. 10087, 597 A.2d 456 (Md. 1991) (using best interests of child as standard for requiring retroactive compliance); In re Adoption of Calynn, M.G., 523 N.Y.S.2d 729 (N.Y. Sur. Ct. 1987) (using best interests of child standard to permit adoption petition to go forward and reducing attorney's fees as sanction against attorney who persistently violated ICPC).

100. Wendell & Rosenbaum, *supra* note 5, at 3A-14.

101. 675 A.2d 170 (Md. Ct. Spec. App. 1996), *cert. granted*, 678 A.2d 1047 (Md. 1996). As of the time of this writing, no decision had been issued.

102. *Id.* at 183.

to Maryland.[103] They later testified that their attorney told them that they had been given verbal approval by the ICPC to take the child from Maryland to New York, but, in reality, neither the New York nor the Maryland ICPC office had approved the application. One month later, the adoptive parents filed a petition for adoption in which they acknowledged that the birth father had not consented to the adoption. The court awarded the family temporary custody. The birth father, in the meantime, obtained an order declaring him to be the father of the baby, and he filed an objection to the adoption petition.[104] Some two years later, the case was tried and the Maryland court issued a final decree of adoption. The birth father appealed.[105]

The Maryland Court of Special Appeals concluded that the adoption must be set aside because the parties had knowingly violated the ICPC -- the birth mother by deliberately failing to identify the birth father and failing to provide him with notice of the adoption, and the adoptive parents by wrongfully removing the child to Maryland, knowing they did not have ICPC approval.[106] Although the court acknowledged that the child, now four years old, had bonded with the adoptive family and would be traumatized by any separation, it found that upholding the adoption would disempower the ICPC and

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103. *Id.* at 173-74.

104. *Id.* at 175.

105. *Id.* at 176.

106. *Id.* at 183. This case presents significant issues related to unwed birth father's rights, both on constitutional grounds as well as, possibly, on state statutory grounds. *See, e.g.,* Caban v. Mohammed, 441 U.S. 380 (1979) (unwed father may not be denied by state law the right to consent to or to veto his child's adoption where father has manifested a significant paternal interest in the child); Stanley v. Illinois, 405 U.S. 645 (1972) (state law presuming unfitness of unwed fathers as a class found to violate Constitution on due process and equal protection grounds). Some states allow men who are not married to the child's mother, but who have formally established paternity, to veto the child's adoption. *See, e.g.,* IND. CODE § 31-3-1-6.1 (1992). This analysis takes issue with the basis for the court's decision -- the violation of the ICPC. It is not clear why the birth father in this case based his legal arguments on the ICPC, rather than on what would appear to be stronger constitutional or, perhaps, state statutory grounds -- either of which may have mandated the ultimate outcome.

encourage future violations.[107] In response to the adoptive parents' pleas to recognize the best interests of the child, the court stated that the ICPC must be strictly enforced in order to protect the best interests of children everywhere.[108]

The cases that have considered the appropriate sanction for a violation of the ICPC often involve a birth parent who is seeking to revoke an adoption.[109] Although some of the cases raise issues related to the validity of consent and the rights of birth fathers, the alleged violations often relate to adoptive parents' bringing a child into the receiving state without the express approval of the ICPC offices in both the sending and receiving states. These violations often take the form of failures to comply with the technical requirements of the ICPC or refusals to wait the extended periods of time required for obtaining such approvals,[110] neither of which results in any harm except possibly presenting an affront to the ICPC itself. Interestingly, enforcement issues have not surfaced in relation to children in publicly supported foster care.

Enforcement of the ICPC should be re-conceptualized in a manner that is consistent with the recommended changes to the scope of the Compact and with the recommended changes in the substantive provisions. Enforcement should be viewed in terms of the rights of children who are being served by the interstate approval process, not in terms of the narrow "illegal placement" concept that focuses on technical and procedural compliance and the activities of the sending party. The key issue related to enforcement should be whether, in a timely way, the receiving state makes a determination of the

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107. In re Adoption/Guardianship No. 3598, 675 A.2d at 183-84.

108. *Id.* at 187.

109. *See, e.g.*, In re Adoption of C.L.W., 467 So.2d 1106 (Fla. Dist. Ct. App. 1985); In re Adoption/Guardianship No. 3598, 675 A.2d 170 (Md. Ct. Spec. App. 1996), *cert. granted*, 678 A.2d 1047 (Md. 1996); In the Matter of the Adoption of TMM, 608 P.2d 130 (Mont. 1980); Stancil v. Brock, 425 S.E.2d 446 (N.C. Ct. App. 1993).

110. *See, e.g.*, In re Adoption/Guardianship No. 3598, 675 A.2d 170 (Md. Ct. Spec. App. 1996), *cert. granted*, 678 A.2d 1047 (Md. 1996); Stancil v. Brock, 425 S.E.2d 446 (N.C. Ct. App. 1993); In the Matter of Baby "E", 427 N.Y.S.2d 705 (N.Y. Fam. Ct. 1980).

qualifications and suitability of prospective adoptive parents, including an assessment of the circumstances that bear on the child's safety and well being. At the same time, the sending state should remain responsible for providing the receiving state with accurate and timely information about the child and the whereabouts of the family for whom the evaluation is sought.[111]

Enforcement should take the form of financial incentives that reward timely, quality assessments and financial penalties that result when the mandatory time lines are not met, approvals are arbitrarily withheld, or evaluations are inadequate to permit the sending state to determine the appropriateness of the proposed placement. There may be any number of possible ways to structure such a system. One approach would be to develop a fee schedule whereby the sending state pays a fee to the receiving state for the evaluation, with the full fee paid for a quality, timely product and a reduction in fee if time lines or minimal standards are not met. A second alternative would be a charge-back system, in which the receiving state is charged for the foster care payments made by the sending state during the additional period of time occasioned by the receiving state's delay in producing a timely and quality evaluation. Other approaches to promoting an efficient and quality interstate adoption process and enforcing standards of quality should be explored by practitioners and policy makers alike. Such a process may well reveal creative solutions to what has been a perennial problem in maximizing the effectiveness of the ICPC.

At the same time, there must be a legal avenue of enforcement that is available when, because of ICPC delay or mismanagement, the stays of children in foster care are extended. One approach would be to give standing to the child's foster parents and attorney and/or guardian ad litem in the sending state and to the prospective adoptive parent(s) in the receiving state to file an action against the public child welfare agency in the receiving state when there is inaction or

111. Receiving states, for example, have experienced frustration when sending states provide incorrect addresses for prospective adoptive families, making it extremely difficult for staff in the receiving state to initiate the evaluation. Personal communication with Ann Sullivan, Adoption Program Director, Child Welfare League of America.

administrative mismanagement. Relief might take the form of a specific remedy (e.g., an order that the agency make the approval determination immediately), damages (based on the emotional harm to the child caused by the undue delay), and attorney's fees. Although there may rarely be a need to resort to litigation, the knowledge that there is legal recourse on behalf of waiting children would create an additional incentive for timely and quality determinations.

V. IMPLEMENTATION OF REFORM

As the range of proposed modifications to the ICPC is considered, one of the critical issues is the method that should be utilized to promote the implementation of the needed reforms. By virtue of its current status as a compact, the ICPC can be modified only with the consensus of all parties -- the fifty states, the District of Columbia, and the Virgin Islands. It is highly unlikely that this large and diverse group of governmental entities will easily reach agreement on substantive changes in the Compact, re-engineering of the ICPC implementation process, and imposition of new measures to ensure enforcement of the needed reforms. In particular, the enforcement recommendations related to financial incentives and penalties and legal recourse suggest that reform of the ICPC may be best accomplished through a mechanism other than attempting to amend the Compact itself.

Federal legislation that supplants the existing compact is a more realistic alternative to reform of the interstate placement process. Federal laws -- in the form of Titles IV-B and IV-E of the Social Security Act[112] and the Child Abuse Prevention and Treatment and Adoption Reform Act[113] -- already address critical aspects of child welfare. The inclusion of interstate placements of children in publicly supported foster care within the ambit of federal law would be consistent with the existing nature and scope of federal oversight of child welfare practice and policy. It is likely to be the only realistic alternative to true interstate placement reform.

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112. 42 U.S.C. §§ 620-629(d), 670-679(a) (1994).

113. 42 U.S.C. §§ 5101-5119(c) (1994 and Supp. 1996).

VI. CONCLUSION

A commentator recently wrote that "the ICPC and its implementation ought to be reconsidered from the perspective of whether it facilitates, unnecessarily delays, or frustrates desirable placements."[114] An analysis of the ICPC suggests that it more frequently delays and frustrates desirable interstate placements of children in the foster care system, including interstate adoptive placements. The Compact plays a necessary and desirable regulatory role, but its effectiveness and relevance have been sorely compromised by the overly broad definition of its scope, problems in many of the Compact's substantive provisions, and extreme implementation difficulties. None of these problems is insurmountable. A newly designed ICPC can play the role it was originally intended to serve: promoting interstate cooperation with the ultimate goal of achieving permanency for all children in foster care.

114. Hartfield, *supra* note 1, at 324-25.