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Navigating the Interstate Compact on the Placement of Children: Advocacy Tips for Child Welfare Attorneys

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Helping Lawyers Help Kids

IN PRACTICE

Navigating the Interstate Compact on the Placement of Children: Advocacy Tips for Child Welfare Attorneys

by Vivek S. Sankaran

Samira's Case:

Seven-year-old Samira entered the District of Columbia foster care system after her mother allegedly used drugs in her presence. Immediately upon her removal, the child welfare agency placed her in an emergency shelter while family placements were being explored. Shortly thereafter, Samira's caseworker discovered the child's maternal aunt, who lived in a spacious townhouse at which Samira had spent summers and holidays, was interested in having Samira placed with her.

Samira was eager to leave the emergency shelter and live with her aunt. Everyone, including the judge, guardian *ad litem* (GAL) and agency caseworker, supported the move and wished it to occur immediately. Despite the consensus of these professionals, the placement could not occur because Samira's aunt lived in Maryland. Under the Interstate Compact on the Placement of Children ("ICPC" or "the Compact"),¹ a uniform law enacted in every state, before Samira could be moved, a home assessment needed to be conducted and the placement had to be approved by the agency in Maryland where Samira's aunt resided.² Until then, the Compact explicitly deprived the juvenile court judge authority to order the placement.³

Months passed and no home study had been completed. Samira's GAL consulted the Compact and was frustrated to learn it contained no deadlines for completing the home study and no mechanism to force the "receiving state"⁴ to undertake the assessment. Finally, after three months, the caseworker was informed the Maryland child welfare agency had completed the study and denied the placement because of concerns over the aunt's close relationship with Samira's birth mother, a concern shared by none of those working closely on Samira's case.

Disappointed and dismayed, Samira's GAL and others in the case again looked to the Compact to specify their options, but this inquiry proved fruitless. The Compact states the sole authority to determine whether the placement can occur rests with the receiving state and absent that state's approval, no judicial review is permissible. Samira would remain in foster care indefinitely.

Legal advocates across the country confront hundreds of cases like Samira's each year. Many of those cases end with arms raised in frustration due to what appears to be a lack of options after the receiving state either fails to complete a home study or denies a placement. That frustration is understandable given the absence of language in the Compact outlining any process to compel states to complete home studies or to permit judicial review of placement denials.

Yet, as advocates, we must move beyond this initial state of paralysis and develop creative ways to vindicate the rights of our clients, whether they are children, parents or relatives. This article provides strategies to overcome barriers to permanency created by the ICPC.

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Does the ICPC Apply?

When facing a potential interstate move of a child in foster care, the advocate must first determine whether compliance with the ICPC is required. The ICPC governs the interstate placement of “any child for placement in foster care or as a preliminary to a possible adoption.”⁵

The model regulations of the Compact, which have not been adopted by most jurisdictions and thus are not binding, broadly define “foster care” to include care “by a relative of the child, by a non-related individual, or . . . by the child’s parent(s) by reason of a court-ordered placement.”⁶ Courts have been reluctant to defer to the broad language in the nonbinding regulation and have independently examined the issue. Ultimately, most, but not all, courts have determined the Compact governs the interstate placement of children with relatives,⁷ whereas courts are split on whether compliance is required when the potential placement is with a birth parent.⁸ The ambiguity in the case law presents an opportunity for advocates to argue that the Compact does not apply, particularly if the placement were with a parent. Advocates must also remember that the Compact only applies to “placements” and thus visits between a child and an out-of-state relative or parent is not encompassed by the statute.⁹

If the advocate decides to argue that the Compact does not apply in a case, then he or she, in addition to constructing a legal argument justifying that conclusion, must also provide the court sufficient reassurances that the placement will be in the child’s best interest. Testimony from the proposed caregiver, along with evidence demonstrating his or her suitability (e.g., proof of employment, information regarding care of other children, pictures of where the child would reside, and criminal or child protection history), may provide the court with enough information to determine that the placement serves the child’s inter-

ests. Additionally, the advocate may have to show the court how the child would be monitored if the proposed placement were made and how the child would receive services, if necessary. Some courts have suggested that private child welfare agencies in the caregiver’s state could perform these functions if the local public agency is unwilling.¹⁰ Considering the current problems in administering the Compact, advocates should examine whether arguments that the Compact does not apply to a case are warranted.

Get the Home Study Done Is it a priority placement?

If the court determines that compliance with the ICPC is necessary, then the focus of the advocacy shifts to ensuring a home study is completed promptly. The advocate should first determine whether the placement can be considered a “priority placement” under ICPC Model Regulation No. 7, which child welfare agencies and courts appear to follow even though it is not binding.

Under this regulation, a placement is considered a priority if:

- the proposed placement recipient is a relative; *and*
- the child is either under two years of age, resides in an emergency shelter *or* has spent a substantial amount of time in the home of the proposed placement recipient.

Additionally, if a completed home study request has been pending in the receiv-

ing state for over 30 days without a decision, then a priority request can be ordered. If either of these criteria can be met, the attorney should immediately file a motion requesting that the court order a priority placement request. In

that order, the court must specify the factual findings justifying the priority placement and detail what must occur as a result of the designation of the home study as a priority. Model Regulation No. 7 spells out the specific steps that must be followed once such an order is issued. In short, the regulation requires the sending state to provide the receiving state with the completed home study request within five business days and the home study must be completed within 20 business days thereafter. Clarity in the court order of what must occur may help speed the process.

Submit the home study paperwork

Regardless of whether the court orders a priority placement request, once the request for the ICPC home study is made, the next step is to ensure the sending state agency transmits the correct paperwork promptly. Advocates should work with the caseworker assigned to their client’s case along with the state ICPC office to determine whether all necessary documentation has been obtained and transmitted to the receiving state. If, for some reason, there are unnecessary delays in the transmission of the paperwork, the attorney should consider filing a motion with the juvenile court seeking an order that the sending state submit the request immediately. Failure to comply with such an order can be enforced through the contempt powers of the court.

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Contact receiving state administrators

Once the paperwork requesting the home study is transmitted to the receiving state, then the advocacy strategy becomes more complicated

since the juvenile court has no jurisdiction over the child welfare agency in the receiving state. Thus, the advocate should focus on informal advocacy with the administrators in the receiving state responsible for conducting the home study. Each state child welfare agency has an ICPC office and has an individual designated as the compact administrator.¹¹ That office should be able to provide you with information about the caseworker assigned to conduct the home study in the local office, who you should plan to contact as well.

Contact the receiving state's home study caseworker

Contacting the caseworker responsible for conducting the home study will humanize the client and remind the worker of the importance of conducting the study in a timely manner. Often, the worker performing the assessment will not have met the child and her only contact with the case will be paperwork from the sending state. He or she may not know the urgency of the situation. The advocate can bring these facts and stories to the worker's attention and can also provide information to ensure the study is completed quickly. The advocate should also work with the proposed caregiver to collect all necessary information, which may include proof of income, copies of the lease, and health certificates. Checklists of what is required by the home study worker to complete her assessment may be available. Missing information and incomplete paperwork is a leading cause for delay under the ICPC.

Address delays

If unnecessary delay in the home study process is occurring, which is common, the advocate should contact the ICPC compact administrator in the sending state to follow up with his or her counterpart in the receiving state to identify the causes for delay. Additionally, the attorney should request that the court order the sending state compact administrator to

file monthly reports detailing the status of the home study's completion and convene frequent hearings while the process is being completed. The ICPC model regulations also suggest that the judge in the sending state request assistance from a judge in the receiving state when the home study is being delayed,¹² although in practice, it is

processes to review ICPC denials.

The absence of due process is exacerbated by the seemingly unlimited discretion the receiving state has to determine whether to approve the placement. The Compact requires the receiving state to determine whether the proposed placement "does not appear to be contrary to the interests of the

Contacting the caseworker responsible for conducting the home study will humanize the client and remind the worker of the importance of conducting the study in a timely manner.

unclear what type of "assistance" is available since no cause of action or enforcement mechanism exists to force a state to complete the home study.

Because the Compact omits a specific time period for completing the home study and enforcement mechanisms, traditional litigation strategies may not be effective in expediting the process. Instead, the advocate should pursue the informal strategies described above. Additionally, recent federal legislation requires states, in order to receive federal child welfare funding, to complete interstate home studies within 60 days, absent extenuating circumstances.¹³ States will also receive a bonus for completing studies within 30 days.¹⁴ Although it is uncertain (and probably unlikely) that these federal provisions create an individual right that can be enforced through litigation, the threat of losing federal funds will hopefully create an incentive for states to comply with the provision.

Challenge Placement Denials

Once the home study is done, the next challenge advocates regularly face is the denial of consent for the placement by the receiving state. The ICPC states that the placement cannot take place without the consent of the receiving state and courts lack authority to order the interstate placement absent this consent. Additionally, most states do not have any administrative

child"¹⁵ but does not define that standard. Thus, many subjective factors, such as a caretaker's dated criminal history, health condition, living space, or lack of cooperation with the home study worker, have been used to deny placements. Again, under the Compact, once the receiving state makes this decision, no explicit judicial remedy is available.

Advocates faced with a placement denial must be creative in their strategies and be prepared to use advocacy techniques.

Address the issues underlying the denial

First, they should work with the ICPC offices in both states to see whether the issues that led to the denial can be addressed. For example, if the proposed caretaker's house was too small, perhaps the juvenile court could order the sending state agency to help the caretaker find a bigger place. If the caretaker has prior child protective history, the advocate can work with the caretaker to see whether the findings can be expunged. Often, the decisions denying placements are made by the receiving state with very limited information and providing more information about the placement to the home study worker may address any concerns. Key to this process is having an open, cooperative dialogue with those in the receiving state responsible for making this decision.

Explore administrative remedies

Next, the advocate should explore whether any administrative processes exist in the receiving state. If so, inform the caretaker how to navigate that process or locate counsel to represent him or her. For example, Massachusetts law permits “any person aggrieved by any action or inaction of the Department involving the placement of children across state lines” to have a fair hearing on the matter.¹⁶ Similar statutes may exist elsewhere. Even if state law in a jurisdiction does not explicitly provide this right, advocates should look at their state administrative procedures acts to determine whether an argument can be made that the acts encompass agency denials of home studies under the ICPC.

Request a placement hearing

Consider filing a motion with the dependency judge requesting a placement hearing to determine whether the child’s best interest will be served by the placement. Although the ICPC explicitly bars judicial review of placement decisions, advocates could argue the entire framework violates the constitutional rights of children and parents by depriving them of protected liberty interests without any opportunity to be heard.

Courts have repeatedly held that once children are placed in foster care, the state has a heightened obligation under the Fourteenth Amendment to protect them from physical and emotional harm which includes the responsibility to maintain familial relationships absent compelling circumstances.¹⁷ Certainly, forcing children to remain in temporary placements for months if not years while a home study is completed and then denying the placement without any opportunity to contest the decision implicates their liberty interests.

When the proposed placement is with a birth parent, additional constitutional interests arise since the parent, too, has a protected interest in maintaining his or her relationship with the

child.¹⁸ The ICPC, however, by divesting children and parents of the right to a hearing, fails to recognize these basic constitutional rights. To preserve the constitutionality of the statute, advocates could argue that courts must afford a hearing to those aggrieved by negative decisions and must have the authority after such a hearing to order the placement if it furthers the child’s best interest.

Advocates need not lose hope when confronted with a negative home study.

Help the caregiver file for custody/guardianship

In cases where evidence clearly shows the caretaker is a suitable long-term placement for the child, counsel could also encourage and assist the proposed caretaker to file for guardianship or custody of the child in either the receiving or sending state. Since the Compact only covers placements of children “in foster care or as preliminary to a possible adoption,” advocates could argue that placements made in guardianship or custody proceedings are not covered by the Compact. Therefore, the court, in those collateral proceedings, arguably has authority to grant the petition despite the negative home study. This option could be pursued in lieu of a pursuing a placement via the Compact. This argument may be more successful if the juvenile court judge is willing to dismiss the child protective case immediately upon the granting of the custody or guardianship petition.

If the custody or guardianship court determines the ICPC does apply to these proceedings, the attorney can still argue that the framework is unconstitutional and that a best interests hearing is required based on the arguments above. The common thread of all of these potential arguments is that

the Constitution, as a matter of due process, requires that children and parents be given the right to a placement hearing before the state can infringe upon their liberty interests.

Advocates need not lose hope when confronted with a negative home study. Through persistence and cooperation, state officials often reconsider their decisions, especially when presented with new evidence. The arguments described above protect basic due process rights of children and parents and are grounded in fundamental constitutional principles supported by case law. Advocates need only the courage to challenge a system that for 40 years, despite good intentions, has deprived their clients of basic procedural rights.

Seek Reform

Advocates looking to vindicate the rights of their clients can also work to reform the ICPC.

Contact your legislator

Discussions are occurring to revise the Compact. Recently the American Public Human Services Association (APHSA) issued a reform proposal which it has been lobbying state legislatures to enact.¹⁹ Significant disagreement exists among child advocacy organizations about the merits of the proposal.

The National Council of Juvenile and Family Court Judges and the American Academy of Adoption Attorneys have endorsed the reforms while the National Association of Counsel for Children along with a consortium of state child advocacy organizations and attorneys have opposed them. Those objecting to the proposal are concerned that the proposal does not contain any specific timeframes for completing home studies, any enforcement mechanism when a state ignores the Compact, or any due process rights for families.²⁰

Advocates can learn more about the proposed Compact at <http://icpc.aphsa.org/Home> and should voice any opinions about the proposal

to the APHSA and their state legislators. Time is of the essence.

Inform CIP coordinators

Additionally, the federal government has requested that each state, through its Court Improvement Program, assess the effectiveness of its interstate placement process and issue reports by June 2008. Advocates should report their experiences with the ICPC to their state CIP coordinators, whose names can be found on the website of the ABA Center on Children and the Law.²¹

Only through sustained advocacy, both on a case-specific and policy level, will the interstate placement system change to better address the need for children to be placed with their families in a timely and safe manner.

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Endnotes

¹ The Compact, the model regulations, and other relevant information are available on the website of the Association of Administrators of the Interstate Compact on the Placement of Children at <http://icpc.aphsa.org>

² Article III(d) of the ICPC states a "child shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child."

³ *Ibid.*

⁴ The "receiving state" refers to the state in which the proposed caregiver resides. Article II(c)

⁵ Article III(a) ("No sending agency shall send, bring, or cause to be sent or brought into any other party state any child for placement in foster care or as a preliminary to a possible adoption.").

⁶ Model Regulation No. 3 (5).

⁷ See, e.g., *In re* Petition of T.M.J., 2005 D.C. App. LEXIS 381 (D.C. 2005); *In the Matter of*

Ryan R., 2006 N.Y. App. Div. LEXIS 6494 (N.Y. Sup. Ct. 2006) (both finding that the ICPC applies to placements with parents). But see *Arkansas Dep't of Health and Human Services v. Jessica Jones*, 2007 Ark. App. LEXIS 46 (Ark. Ct. App. 2007); *N.J. Div. of Youth & Family Services v. K.F.*, 803 A.2d 721 (N.J. Super. Ct. App. Div. 2002) (both finding that the ICPC does not cover placements with relatives). A complete list of cases interpreting the ICPC is on file with the author.

⁸ See, e.g., *Green v. Div. of Family Services*, 864 A.2d 921 (Del. 2004); *C.K. v. Dep't of Children and Families*, 2007 Fla. App. LEXIS 2729 (Fla. Ct. App. 2007); *Ariz. Dep't of Econ. Sec. v. Leonardo*, 22 P.3d 513 (Ariz. Ct. App. 1999) (finding that the ICPC covers placements of children with their out-of-state birth parents). But see, *McComb v. Wambaugh*, 934 F.2d 474 (3d Cir. 1991); *Ark. Dep't of Human Servs. v. Huff*, 65 S.W.3d 880 (Ark. 2002); *In re John M.*, 2006 Cal. App. LEXIS 1257 (Cal. Ct. App. 2006) (finding that placements with birth parents are outside the scope of the ICPC). More information about the application of the ICPC to birth parents can be found in Vivek S. Sankaran, "Out of State and Out of Luck: The Treatment of Non-Custodial Parents Under the Interstate Compact on the Placement of Children," *Yale Law and Policy Review* 25, 2006, 63.

⁹ Model Regulation No. 9 explicitly states that "[a] visit is not a placement within the meaning of the Interstate Compact on the Placement of Children." The regulation, however, presumes that a visit longer than 30 days is a placement unless certain factors are met. Note that most jurisdictions have not adopted the model regulations of the ICPC.

¹⁰ See, e.g., *In re Johnny S.*, 40 Cal. App. 4th 969, 979 (Ct. App. 1995) ("If DFCS determines that monitoring by an agency in Texas is needed, it may choose to enter into an agreement for

such services.").

¹¹ A list of state ICPC offices and names of Compact Administrators can be found at <http://icpc.aphsa.org/Home/states.asp>

¹² See Model Regulation No. 7 (5)(a).

¹³ 42 U.S.C. § 671(a)(26)(A)(1).

¹⁴ 42 U.S.C. § 673(d)(1); 42 U.S.C. § 73(g)(3).

¹⁵ Article III(d).

¹⁶ 110 Mass. Code Regs. 7.523.

¹⁷ See, e.g., *Marisol A. v. Giuliani*, 929 F. Supp. 662, 677 (S.D.N.Y. 1996) (finding that the Fourteenth Amendment obligates the state to protect foster children's associational rights with their family).

¹⁸ The right of parents in the care, custody, and control of their children is perhaps the oldest of the fundamental liberty interests recognized by the Supreme Court. *Troxel v. Granville*, 530 U.S. 57, 65 (2000). "[T]he Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition." Michael H. v. Gerald D., 491 U.S. 110, 123-124 (1989). Numerous Supreme Court decisions have reaffirmed the importance of this right.

¹⁹ Reforms were issued in 2006 and more recently in 2008. For more information about the reforms, please visit: <http://icpc.aphsa.org>.

²⁰ More information about this author's views on the proposed reforms to the Compact can be found in Vivek S. Sankaran, "Perpetuating the Impermanence of Foster Children: A Critical Analysis of Efforts to Reform the Interstate Compact on the Placement of Children," *Family Law Quarterly* 40, 2006, 435.

²¹ This information can be found at www.abanet.org/child/cipcatalog/cipcontactlist.html

Federal Child Welfare Laws Available Online

The 2008 update of *Major Federal Legislation Concerned with Child Protection, Child Welfare, and Adoption* is now available online at: www.childwelfare.gov/pubs/otherpubs/majorfedlegis.cfm.

This publication summarizes the major provisions of key federal laws regarding child protection, child welfare, and adoption and includes a timeline of federal child welfare legislation. Laws date from the 1970s to the present. New features this year include links to the full-text of each act and the *Major Federal Legislation Index and Search*, which allows users to browse or search the acts included in this publication.