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Perpetuating the Impermanence of Foster Children: A Critical Analysis of Efforts to Reform the Interstate Compact on the Placement of Children

VIVEK SANKARAN*

I. Introduction

Seven-year-old Tasha entered the Michigan foster care system along with her three older siblings due to drug use by their mother. Immediately upon their removal, the Department of Human Services (DHS) placed the children in an emergency shelter while family placements were being explored. Two relatives emerged and expressed their willingness to care for the children. The first, a maternal grandmother living in Michigan, had space for the three older children and the court quickly placed the children there after holding an emergency hearing. The other resource, Tasha’s paternal aunt, had a spacious four-bedroom townhouse at which Tasha had spent summers and holidays. Tasha was eager to leave the emergency shelter and live with her aunt, and everyone, including the judge, the lawyer-guardian ad litem,1 and the Michigan DHS caseworker, supported the move. Yet, five months after the older siblings had left, Tasha was still at the shelter, depressed and confused about why she remained away from her aunt. Her bags were packed, and she was ready to leave but no one could tell her when that would occur. Those working with her felt power-

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1. Under Michigan law, a lawyer-guardian ad litem (L-GAL) tasked with representing the best interests of the child is appointed in every child protective proceeding. Mich. Comp. Laws § 712A.17d (2006). The L-GAL’s duties include conducting an independent investigation, meeting with the child, and taking all steps necessary to protect the child’s best interest. Id.
less to expedite the placement, and her impermanence manifested itself in behavioral and academic problems.\textsuperscript{2} Tasha’s permanency was held hostage because her aunt lived in another state. Under the Interstate Compact on the Placement of Children (ICPC or the Compact), a uniform law enacted in every state, before Tasha could be moved, a home assessment needed to be conducted and the placement approved by the state in which Tasha’s aunt resided. Until that occurred, the little child’s future was simply placed on hold.

The importance of expediting the placement of foster children into permanent homes has emerged as a dominant theme in child welfare policy.\textsuperscript{3} Identifying and finalizing legally secure placements provides children with psychological stability and a sense of belonging, and limits the likelihood of future disruptions of familial relationships.\textsuperscript{4} Upon a child’s entry into foster care, child welfare agencies, under both federal and state laws, are compelled to develop a detailed plan to ensure a child’s prompt placement into such a home.\textsuperscript{5} If a parent is unable to rectify the conditions causing the child’s placement in foster care within a year, a court is required to consider other permanent options for the child.\textsuperscript{6} States are also permitted to develop concurrent placement plans to ensure that children achieve

\begin{itemize}
\item \textsuperscript{2} See Julian Libow, \textit{The Interstate Compact on the Placement of Children—A Critical Analysis}, 43 JUV. AND FAM. CT. J. 19, 22 (1992) (observing that “[i]n some cases children suffer gross detriment while waiting. The reasons can be manifold with many variables, including but not limited to: age, preexisting emotional problems, inadequate foster home, and feelings of abandonment. As the waiting time increases, the detriment becomes more aggravated.”).
\item \textsuperscript{3} The recognition that “all children need safe, permanent, loving families that nurture, protect and guide them,” was at the heart of the work conducted by the Pew Commission on Children in Foster Care, an independent, nonpartisan entity dedicated to developing effective and practical policy recommendations to improve the foster care system. In their comprehensive report titled, \textit{Fostering the Future: Safety, Permanency and Well-Being for Children in Foster Care}, the Commission outlined the devastating consequences for foster children of impermanence, including emotional, behavioral, and academic challenges. For example, one young foster child told members of the Commission that he checked his belongings every day in anticipation of another move. The report is available at http://pewfostercare.org/research/docs/FinalReport.pdf.
\item \textsuperscript{5} See 42 U.S.C. § 675 (1) (defining “case plan” to include an assurance that “the child receives safe and proper care and that services are provided to the parents, child, and foster parents in order to improve the conditions in the parents’ home, facilitate return of the child to his own safe home or the permanent placement of the child.”); Mich. Comp. Laws § 712A.13a (2006) (“If the court orders placement of the juvenile outside the juvenile’s home . . . the agency has the responsibility to prepare an initial services plan within 30 days of the juvenile’s placement.”); Mich. Comp. Laws § 712A.19a (2) (2006) (“The court shall conduct a permanency planning hearing within 30 days after there is a judicial determination that reasonable efforts to reunite the child and family are not required.”).
\item \textsuperscript{6} 42 U.S.C. § 675(5)(C) (2006) (“[N]o later than 12 months after the date the child is considered to have entered foster care, [the Court] shall determine the permanency plan for the
permanency even if their parents fail. The paramount need for permanency has created momentum to reexamine laws preventing children from forming permanent relationships with caring adults and impeding their exit from foster care. Unnecessary, protracted stays in foster care contravene the consensus view that the child welfare system is not suited to serve as a long-term surrogate parent for children.

One area in which the permanency needs of children remain subordinate to bureaucratic impediments is the interstate placement of foster children. The median time spent in the foster care system by children in
need of out-of-state placements is forty-three months, two full years longer than the average waiting time for a child with a potential placement in state. This disparity exists due to the application of the ICPC, which imposes significant obstacles for foster children like Tasha who have potential placements in another state. Under the ICPC, a state cannot send a foster child to another state without obtaining approval from the receiving state agency, which must determine whether the placement is contrary to the child's interests. If the agency denies approval, the Compact prohibits a family court from making the placement.

This process has created enormous delays and confusion surrounding the interstate placement of foster children. One court described the statute as a "well-intentioned" law "designed to help children, but whose net effect harms children by making it difficult . . . to issue orders which are in the . . . child's best interest." Yet, despite the serious consequences for children awaiting interstate placements, very few scholars have addressed the impact of the ICPC on foster children. A comprehensive

10. The Compact contains ten articles that define the types of placements and placers subject to the law, the procedures to be followed in making an interstate placement and the specific protections, services, and requirements established by the law. AMERICAN PUBLIC HUMAN SERVICES ASSOCIATION, GUIDE TO THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN 2 (2002) [hereinafter GUIDE TO THE ICPC]. The provisions of the Compact are available at http://icpc.aphsa.org/documents/Guidebook-2002.pdf. Article III of the Compact prohibits a court from sending a child to another 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." Guide to the ICPC at 10. See also In re T.M.J., 2005 D.C. App. LEXIS 381 at *9 ("As the ICPC dictates, Maryland's refusal to approve placement of the child with J.A. [a relative] barred the [District of Columbia] Superior Court from ordering that disposition.").
11. The impediments to permanency created by the ICPC have generated the criticism of a number of organizations, including the National Council of Juvenile and Family Court Judges, the American Academy of Adoption Attorneys, and the Steering Committee on the Unmet Legal Needs of Children of the American Bar Association, which have all passed resolutions recognizing the need to expedite the process. See Representative Tom Delay, Remarks Regarding the ICPC, (Mar. 29, 2004) available at http://tomdelay.house.gov/News/DocumentPrint.aspx?DocumentID=29120; see also Madelyn Freundlich, Reforming the Interstate Compact on the Placement of Children: A New Framework for Interstate Adoption, 4 HYBRID 15, 30-31 (1997) (recognizing that outcomes for children under the ICPC "have been at best troubling and at worst, dire").
13. Only four articles have been written analyzing the ICPC. Freundlich, supra note 11, at 15; Libow, supra note 2, at 19; Bernadette W. Hartsfield, The Role of the Interstate Compact on the Placement of Children in Interstate Adoption, 68 NEB. L. REV. 292 (1989); Kimberly Butler, Child Welfare—Outside the Interstate Compact on the Placement of Children-Placement of a Child with a Natural Parent, 37 VILL. L. REV. 896 (1992). Of these, two have specifically addressed the impact of the ICPC on interstate adoptions, Freundlich at 15;
analysis of the Compact, its provisions and its negative consequences is long overdue.

Recent events provide the impetus for conducting such an examination. For the first time in over forty years, serious attention is being given to reforming the statute. In the Summer of 2003, the American Public Human Services Association (APHSA), a nonprofit organization that represents a variety of state interests in the field of health and human services, formed an ICPC task force to examine the statute and to identify steps to improve the process of placing children across state lines. In March 2004, leadership in the APHSA directed that a national group be convened to rewrite the Compact. Recently, the group released a final draft of its proposal for consideration by state legislatures. These efforts compliment the recent passage of federal legislation to address delays in completing interstate home studies under the ICPC.

Unfortunately, neither of these initiatives offers the comprehensive change necessary to expedite the placement of foster children in a manner consistent with their permanency needs. This article critically examines the current efforts to reform the ICPC and proposes substantive changes to improve the interstate placement process of foster children. First, the article presents a brief overview of the Compact, including an analysis of the major problems that the uniform law currently poses to the interstate placement of foster children. Second is an analysis of current reform efforts on both the state and federal levels. Third, the article argues that

Hartsfield at 292, and one reviewed a specific case, Butler at 896. None have specifically focused on the barriers imposed by the ICPC on interstate placements of foster children.

14. The American Public Human Services Association (APHSA), founded in 1930 as the American Public Welfare Association, is a bipartisan membership organization that represents all fifty state public human service agencies across the country and 200 local public agencies including New York City and Los Angeles. Its mission is to develop, promote, and implement public human services policies and practices that improve the health and well-being of families. The APHSA has eleven program affiliates who provide expert advice and consultation. The two affiliates relevant to the rewrite of the ICPC are the National Association of Public Child Welfare Administrators (NAPCWA) and the Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC). NAPCWA represents the “voice of child welfare” in national discussions and has two primary functions: (1) advancing the field of child welfare; and (2) improving child welfare organizational effectiveness. AAICPC works to improve practice and administration of the current Compact by providing training and technical assistance. APHSA & The Rewrite of ICPC (APHA 2006) at http://www.aphsa.org/Policy/Doc/APHSA%20&%20the%20Rewrite.pdf. More information about the APHSA and its affiliates can be found at www.aphsa.org.


16. Id.

these efforts do not address the permanency needs of foster children because they fail to alter the status quo in any significant way, preserving the elements of the current system—untimely home studies, poor decision-making and inadequate review procedures—that are harming children. Finally, this article will propose substantive changes to the structure of making interstate placement decisions that will honor the best interests of children. Specifically, the changes will mandate that home studies be completed in a time period consistent with the child’s needs and will empower courts to be the final arbiter of placement decisions.

II. Overview of the Interstate Compact on the Placement of Children

A. The Impact of the ICPC on Placement Decisions Involving Foster Children

Courts in child abuse and neglect cases possess the authority to determine a foster child’s placement and make these decisions pursuant to applicable legal standards. Guided by constitutional doctrine, federal and state laws, and policy concerns, courts utilize a hierarchy in determining where a foster child should live. For example, a biological parent’s relationship with her child is entitled to constitutional protection and a court may not separate a child from her parent without a finding of parental unfitness. If the child must be removed from the parent’s custody, federal and state laws express a preference for placing children with relatives. Only in situations in which the parents are unfit and relatives

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18. The liberty interest 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). The Court’s decisions “establish that the 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, 123–24 (1989). The autonomy of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment, the Equal Protection Clause of the Fourteenth Amendment, and the Ninth Amendment. Stanley v. Illinois, 405 U.S. 645, 651 (1972) (citing Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (due process clause), Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (Equal Protection Clause) and Griswold v. Connecticut, 381 U.S. 479, 496 (1965) (Ninth Amendment)). The law’s concept of the family rests on a presumption that the natural bonds of affection lead parents to act in the best interests of their children. The fact that some parents at times may act against the interests of the child has not convinced the Court to discard the presumption in favor of parents. “The statist notion that governmental power should supersede parental authority in all cases because some parents abuse and neglect children is repugnant to American tradition.” Parham v. J.R., 442 U.S. 584, 602–03 (1979).

19. See 42 U.S.C. § 671(a)(19) (2006) (“[T]he State shall consider giving preference to an adult relative over a nonrelated caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards”); MICH. COMP. LAWS § 722.954a (2006) (“Upon removal . . . the supervising agency shall, within 30 days, identify,
are unavailable are unrelated foster parents considered for placement. An unrelated foster parent has no cognizable legal right to the child.20

After ascertaining the applicable legal standard, which may vary depending on who is seeking to become the child’s caregiver, courts make placement decisions after considering evidence such as reports by social workers and hearing arguments made by all parties to the case, including the child. Although the time in which intrastate placement decisions are made vary by state law and local practice, parties in the proceeding have the ability to file emergency motions to request a court hearing if immediate placement is necessary. Aggrieved parties can utilize expedited appellate procedures to seek review of a trial court’s decision.21 An underlying theme in the decision-making process is the child’s need for decisions to be made expeditiously and for a permanent placement to be identified and finalized as quickly as possible. Child welfare agencies’ receipt of federal foster care funding is conditioned, in part, on promptly developing a permanency plan for each foster child, which is an exit strategy to ensure that the state will not permanently assume a parental role over a child.22

locate, and consult with relatives to determine placement with a fit and appropriate relative who would meet the child’s developmental, emotional, and physical needs as an alternative to foster care”). See also Moore v. East Cleveland, 431 U.S. 494, 499 (1977) (recognizing that familial relations between children and their extended family are protected by substantive due process); Rivera v. Marcus, 696 F.2d 1016, 1017 (2d Cir. 1982) (“[T]he constitutional concept of family has evolved, however, to include relationships among members of what has commonly become known as extended family”); Osborne v. County of Riverside, 385 F. Supp. 2d 1048 (C.D. Cal. 2005) (“It is this court’s view . . . that the parental liberty interest in familial integrity and association extends to close relatives in long-standing custodial relationships with related children”).

20. See Smith v. Organization of Foster Families for Equality & Reform, 431 U.S. 846-47 (1977) (“While the Court has recognized that liberty interests may in some cases arise from positive-law sources . . . in such a case, and particularly where, as here, the claimed interest derives from a knowingly assumed contractual relation with the State, it is appropriate to ascertain from state law the expectations and entitlements of the parties. In this case, the limited recognition accorded to the foster family by the New York statutes and the contracts executed by the foster parents argue against any but the most limited constitutional ‘liberty’ in the foster family”); Tallman v. Milton, 482 N.W.2d 187 (Mich. Ct. App. 1992) (denying standing to foster parents seeking custody of children in their care). But see D.C. CODE § 16-2304(b)(4)(B) (2006) (granting party status to foster parents caring for children for more than a year); MICH. COMP. LAWS § 712A.19b(1) (2006) (permitting foster parents to file petitions to terminate a parent’s rights in certain situations).


22. Foster care reimbursement to states under Title IV-E of the Social Security Act constitutes the largest federal expenditure to address child abuse and neglect issues. The funding covers state efforts to maintain the placement of children in foster care, train child welfare workers and foster parents, and administer the foster care system. To receive the funding, states must comply with a series of directives from the federal government, which include developing permanency plans for foster children and making reasonable efforts to effectuate those plans. The federal
When the potential caregiver, whether a parent, relative, or foster parent, resides out-of-state, the decision-making process is complicated due to the ICPC. The ICPC governs the interstate placement of foster children and requires the cooperation of child welfare agencies in both the states sending and receiving the child prior to an interstate placement. Agencies in the receiving state are then given the opportunity to investigate the proposed placement and, if satisfied, must notify the sending state that the placement does not appear to be contrary to the child’s interests. The law does not list any factors that agencies must consider when determining whether a placement furthers a “child’s interests.” In practice, when making this decision, states typically consider a multitude of factors including the caretakers’ income, preferred form of discipline, safety of the neighborhood, proposed sleeping arrangements of the children, housekeeping standards, and the school performance of the other children in the

government monitors compliance with these mandates through periodic audits. For a more detailed discussion on federal funding of the child welfare system, see Miriam Rollin et al., Federal Child Welfare Law and Policy: Understanding the Federal Law and Funding Process, in CHILD WELFARE LAW AND PRACTICE 143-83 (2005).

23. Interstate compacts provide a means through which states can resolve conflicts such as boundary disputes. McComb v. Wambaugh, 934 F.2d 474, 479 (3d Cir. 1991). Though Article I, Section 10 of the Constitution requires congressional approval prior to the formation of an interstate compact, the Supreme Court has interpreted the provision to require congressional approval only when a compact is “directed to the formation of any combination tending to increase the political power in the States, which may encroach upon or interfere with the just supremacy of the United States.” Virginia v. Tennessee, 148 U.S. 503, 519 (1893). Congressional consent of the ICPC, which has not been given, is not required because the Compact focuses wholly on adoption and foster care of children, areas of jurisdiction traditionally retained by the States. McComb, 934 F.2d at 479.

24. GUIDE TO THE ICPC, supra note 10, at 1.

25. Id. at 4-5. To initiate an ICPC request, a local caseworker in the sending agency submits a written ICPC request, known as an ICPC 100A, along with other information such as the child’s social history and case plan, medical and financial information, and any court orders, to the sending agency’s ICPC office. That office transmits the materials to the receiving state’s ICPC office that forwards the packet to a local public or private child welfare agency responsible for conducting a home study of the proposed placement. The home study is completed in accordance with the requirements of that state and upon its completion, the local worker in the receiving state prepares a written report that includes a recommendation approving or denying the placement and transmits the report to the sending state ICPC office. Based upon this recommendation, the receiving state’s ICPC office makes the final determination of whether to approve or deny the placement. If the placement is approved, the sending state can decide whether it still wishes to place the child; if denied, the placement cannot be made unless the problems causing the denial are remedied. AMER. PUB. HUM. SERVS. ASS’N, UNDERSTANDING DELAYS IN THE INTERSTATE HOME STUDY PROCESS 8 (2002) [hereinafter UNDERSTANDING DELAYS].

26. See ICPC Article III(d), reprinted in GUIDE TO THE ICPC, supra note 10, at 10.
home, though none of these factors are legally required.\textsuperscript{27} If the receiving state disapproves of the proposed placement, then the Compact prohibits the placement from being made and courts have no authority to review that decision.\textsuperscript{28}

If the placement is approved, the court may send the child to the receiving state, but the sending state retains the financial responsibility for support and maintenance of the child during the time of the placement.\textsuperscript{29} The sending agency may enter into a financial agreement with a public or private agency in the receiving state to supervise the child's out-of-state placement. This contracted agency can provide reports and assessments to the sending state court, which still retains jurisdiction to make decisions in the case.\textsuperscript{30}

The need for this statutory framework arose out of problems created by interstate placements of foster children, primarily involving assessing proposed placements, monitoring foster children in such placements and providing services to the children.\textsuperscript{31} In the 1950s, a group of social service administrators studied the problems of children moving out-of-state for foster care or preadoptive placements.\textsuperscript{32} Three difficulties were identified by the group: (1) the failure of statutes enacted by individual states to provide protection for children moved interstate; (2) the inability of state courts and agencies sending children to another state to ensure proper care and supervision in the receiving state; and (3) the absence of means to compel the receiving state to provide services in support of the foster child’s placement.\textsuperscript{33} The Council of State Governments,\textsuperscript{34} a nonprofit organization whose responsibilities include helping states address interstate issues, noted:

\begin{itemize}
\item \textsuperscript{27} These standards are listed in ICPC Model Form 102, which is available at http://www.dhr.state.md.us/ssa/icpc/pdf/102.pdf.
\item \textsuperscript{28} ICPC Article III(d) reprinted in Guide to the ICPC, supra note 10, at 20. See also Draftsmen's Notes on Interstate Compact on the Placement of Children, reprinted in Roberta Hunt, Obstacles to Interstate Adoption 45 (1972) [hereinafter Draftsmen's Notes] ("If the public authorities find positive reason to believe that the placement would be contrary to the interests of the child, they are empowered to prevent the placement by withholding their written notification"); Interstate Compact on the Placement of Children, Secretariat Opinion No. 43 (Mar. 12, 1981) ("Even if the state court disagrees with the determination of the receiving state Compact Administrator with respect to the making of a placement in the receiving state, the court does not have the jurisdiction or the power to act contrary to it").
\item \textsuperscript{29} ICPC Article V(a), reprinted in Guide to the ICPC, supra note 10, at 11. Article V(c), however, clarifies that the receiving state may discharge the sending state of financial responsibility for the support and maintenance of the child. Id.
\item \textsuperscript{30} ICPC Article V(a)(b), reprinted in Guide to the ICPC, supra note 10, at 11.
\item \textsuperscript{31} Guide to the ICPC, supra note 10, at 1.
\item \textsuperscript{32} Id.
\item \textsuperscript{33} Hartsfield, supra note 13, at 295.
\item \textsuperscript{34} More information about the Council of State Governments can be found at http://www.csg.org/about/default.aspx.
\end{itemize}
Supervision of the out-of-state source from which a child may be sent into the jurisdiction is difficult or impossible. When the state having a placement law is the originating point for the child, no legally binding control may be exercised once the placement has been made, unless a really bad situation develops in the other state, is discovered by its welfare authorities and is treated as a new case needing corrective action on a wholly local basis.\(^{35}\)

To address these limitations, proposed language was drafted for an interstate compact on the placement of children for each state to enact to enable participating states to extend their ability to make appropriate decisions for foster children beyond their borders.\(^{36}\) As its drafters noted, "[T]he Compact provides procedures for the interstate placement of children (either by public agencies or by private persons or agencies) when such placement is for foster care or as a preliminary to a possible adoption."\(^{37}\) The final draft of the Compact was approved by a twelve-state conference held in January 1960, and two months later, New York became the first state to ratify the ICPC.\(^{38}\) By 1990, every state, the District of Columbia and the Virgin Islands had passed legislation enacting identical versions of the Compact into law.\(^{39}\)

**B. Impediments to Permanency Created by the ICPC**

The ICPC creates a mechanism for child welfare agencies in different states to share information about the suitability of proposed placements and to continue monitoring children in those placements. While undoubtedly the Compact has enabled child welfare agencies and courts to access more information about potential interstate placements, it has created a system in which foster children awaiting interstate placements languish in temporary placements indefinitely. This occurs for three reasons. First, the child waits at a temporary placement while the bureaucracy responsible for administering the ICPC makes its decision. Second, the decision-making process is prone to errors because social workers, utilizing a vague and undefined legal standard, are empowered to make decisions without any judicial oversight. Finally, if an error is made, adequate administrative review procedures are unavailable. Under the ICPC, a child's opportunity to achieve permanency rests on the action or inaction of a single case-worker, who, in all likelihood, has very little connection to the child.

\(^{35}\) Hartsfield, *supra* note 13, at 296.
\(^{36}\) Id. at 295.
\(^{37}\) *McComb*, 934 F.2d at 480 (quoting Council of State Governments, Suggested State Legislative Program for 1961 49 (1960)).
\(^{38}\) Draftsmen's Notes, *supra* note 28, at 49.
\(^{39}\) GUIDE TO THE ICPC, *supra* note 10, at 1.
As noted above, to facilitate the interstate placement of a foster child, the state in which the proposed placement is located must conduct a home study and render a decision as to whether the proposed placement is contrary to the child's interests. Long delays in completing interstate home studies constitute a major problem with this process. The Compact does not contain a timeframe by which a home study and a placement decision must be completed by the receiving state. Reports suggest that home studies often take up to a year if not longer to complete.

A number of factors contribute to the delay. More than half of states responding to a 2002 study commissioned by the APHSA cited resolving financial and medical issues as a leading cause of delay. Nearly half of states also identified criminal background checks and missing information as other contributing factors. Finally, an overwhelming majority of states ranked bureaucratic issues, such as inadequate staff, lack of training, and high caseworker turnover rates, as significant contributors to the delay.

While this slow process takes place, children remain in temporary placements, typically in the form of a licensed foster home or an institutional setting such as a group home. Children wait in these placements for months. They may form emotional attachments with foster parents, group home staff, and other children in the facility, which may subsequently complicate placement decisions and inflict additional trauma on the children if they are removed from the temporary setting.

40. Bruce Boyer, in a report to the American Bar Association, writes, "As a result of all of the problems associated with the Compact, what should take days or weeks to accomplish often takes months or, at times, over a year while children wait in temporary out-of-home placements for the adults in charge of their futures to fulfill their professional obligations." See Bruce Boyer, Report to the American Bar Association (Mar. 2003) available at http://www.abanet.org/leadership/2003/journal/118.pdf. State Compact administrators report waiting an average of three to four months for the entire home study to be completed. Office of Inspector General, Department of Health and Human Services, Interstate Compact on the Placement of Children: Implementation 6 (1999). See also, A.A. v. Cleburne, 2005 Ala. Civ. App. LEXIS at *238 (Ala. Ct. App. 2005) (reporting social worker's belief that ICPC home study would take a minimum of nine months to complete).

41. See Libow, supra note 2, at 22 (observing that the ICPC approval process frequently takes between six months and a year and at times has exceeded one year).

42. See UNDERSTANDING DELAYS, supra note 25, at 15, for a comprehensive analysis of what causes delays in the approval process.

43. Id.
44. Id.
45. Id.
46. See In re L.H., P.H., 676 N.W.2d 212, 213 (Mich. 2004) (observing that "children are people, not property or pawns to be moved around and torn from those they know as their parents."); In re L.L., 653 A.2d 873, 883-84 (D.C. 1995) (acknowledging that "[e]ach time she [a child] is moved, she gets a scar and who knows whether if ever it will be healed."); Michael
process often eliminates viable alternatives from the court’s consideration and thus harms the child rather than helps the child."  

Yet, no mechanism exists to force a state to complete a home study in a timely manner. Article IV of the Compact states that a violation "shall constitute a violation of the laws respecting the placement of children of both the state in which the sending agency is located or from which it sends or brings the child and of the receiving state." No specific penalties, however, are set forth in the statute or in state laws. If a state refuses to complete a home study within a reasonable amount of time, what measures can the sending state, the proposed caregiver or the child take to expedite the process? Are financial penalties an option to coerce compliance? Who has standing to litigate these issues? No answers are provided in the statute and no court has imposed a penalty on a state for failing to comply with its terms. State agencies have no incentive to complete placement decisions in a timely manner and foster children must wait indefinitely until the bureaucracy responds. The problems created by the lengthy delays are exacerbated by the high level of subjectivity in the decision-making process. Under the ICPC, the child welfare agency in the receiving state possesses the sole authority to decide whether the interstate placement should be made. The statute, however, offers very little guidance for workers making this decision. The only standard set forth in the Compact is that the receiving state shall determine if the placement "does not appear contrary to the interests" of the child. Nowhere in the statute are the child's interests defined. Consequently, the standards used by agencies governing placement decisions vary from state to state, are unwritten, and often depend on the personal biases of individual caseworkers. Evidence of a prior arrest or physical evidence, the vague definition of neglect is highly susceptible to biased evaluations of harm based on the parents' race or class or on cultural differences in child rearing".  

Wald, State Intervention on Behalf of "Neglected" Children: A Search for Realistic Standards, 27 STANFORD L. REV. 985, 995 (1975) ("[N]o child can grow emotionally while in limbo. He cannot invest except in a minimal way . . . if tomorrow the relationship may be severed").  


48. ICPC Article IV, reprinted in GUIDE TO THE ICPC, supra note 10, at 10.  

49. See Freundlich, supra note 11, at 30–31 ("[T]he Compact mandates very little concerning the approval process that the receiving state must utilize. . . . The ICPC . . . in its substantive provisions, fails to set even minimal standards for the assessment of suitability, appropriateness, and desirability of care").  

50. Article III(d), reprinted in Guide to the ICPC, supra note 10, at 10.  

51. Racial, cultural, and sexist prejudices often inject themselves in these determinations. See DOROTHY ROBERTS, SHATTERED BONDS 55–59 (2002). ("Vague definitions of neglect, unbridled discretion, and lack of training form a dangerous combination in the hands of caseworkers charged with deciding the fate of families. . . . Unlike child abuse that can at least be substantiated with physical evidence, the vague definition of neglect is highly susceptible to biased evaluations of harm based on the parents’ race or class or on cultural differences in child rearing"). Racially based decision-making may explain why a disproportionate number of children of color
an old criminal conviction may be enough to fail the State’s assessment.\textsuperscript{52} A house may be “dirty” or “too small” or a caretaker may lack the “expertise” to care for his child.\textsuperscript{53} If the prospective caretakers cannot prove to a caseworker at the receiving state agency that the proposed placement is not contrary to the child’s interest, then the agency will disapprove the placement. The caseworker’s assessment is the sole determinant of whether a child can be placed in the new home.

The caseworker possesses this unlimited discretion regardless of whether the potential placement is with a parent, relative, or foster parent. Although the explicit language in the statute limits the Compact’s scope to placements of children in foster care and preadoptive homes, most courts and child welfare agencies apply the ICPC to all situations in which a child may cross state lines, including placements of children with their biological parents and relatives.\textsuperscript{54} The Compact, however, fails to differ-
entiate between parents and other caregivers and does not incorporate the constitutional presumption that children remain placed with their parents absent a finding of parental unfitness. A parent must undergo the same scrutiny as an unrelated foster parent, and the caseworker has unlimited discretion to deny a placement based solely on what she perceives is in the child’s best interest, regardless of whether the parent is fit. A parent, who may be legally entitled to custody if living in the same state as his child, may be denied placement of his child under the ICPC based on the subjective decision of a caseworker. The ICPC similarly fails to incorporate a preference, which is recognized by both statutes and case law, to place children with relatives. Instead, the statute treats all classes of potential caregivers in an identical manner, regardless of their legal status.

The ICPC also frustrates the resolution of permanency decisions for a child because remedies to reverse an agency’s erroneous placement decision are unavailable. The Compact provides no process for an aggrieved individual to seek review of an agency’s placement decision. If a placement is denied by the agency, then the potential caretaker is not given the opportunity to challenge the decision in court. The Compact delegates the out-of-state placement decision exclusively to the administrative agency that assessed the home in the receiving state. Administrative review procedures are largely unavailable and inadequate where they exist. Most states have not established administrative

See supra note 19.

See supra note 10.
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processes to review denials of the ICPC, and those that have, place a high burden on litigants to demonstrate that the administrative agency’s decision was erroneous. Utilizing state administrative procedures acts to challenge denials of ICPC approval also poses problems. First, some states do not permit administrative challenges to decisions where the substantive statute does not explicitly grant litigants the right to a hearing, which the ICPC does not. Even if such challenges are permissible, litigants face a nearly insurmountable burden to demonstrate that the agency’s decision was erroneous because the standard set forth in the ICPC to deny a home study—whether a placement would be contrary to the interests of the child—is subjective and is based largely on the personal opinion of the caseworker. Hearing officers will be reluctant to reverse such decisions since the decision is based on an inherently subjective standard. In addition, the unavailability of the tools typically available to litigants in court proceedings to develop a factual record, such as discovery and subpoena power, pose additional procedural obstacles for caretakers attempting to rebut an agency’s factual findings at an administrative hearing. Relaxed evidentiary rules also make it difficult to keep out unreliable information. The permanent placement of foster children.

57. As part of this paper, researchers surveyed the ICPC office in every state to inquire about procedures to review denials of ICPC approval. In 35 states, workers in the offices stated that no process existed to appeal an ICPC denial. Twelve state offices stated that such a process existed and in three states, workers did not know the answer to the question.

58. Massachusetts is one of few states that specifically grants an individual aggrieved under the ICPC a legal right to an administrative hearing. 110 MASS. CODE REGS. 7.523 (2005). The procedures governing this hearing, however, demonstrate the illusory nature of this right. In the hearing, the aggrieved party bears the burden of proving by a preponderance of evidence that the “[d]epartment or provider acted without a reasonable basis or in an unreasonable manner which resulted in substantial prejudice to the aggrieved party.” Id. at §10.05. The rules of evidence do not apply, and the hearing officer “shall not recommend reversal of the clinical decision made by a trained social worker if there is a reasonable basis for the questioned decision.” Id. at §§ 10.21 (1); 10.05. In addition, if an “area director” or a “clinical review team” made the ICPC decision, the hearing officer lacks the authority to reverse the decision without the approval of the Commissioner of the Department of Human Services. Id.

59. See, e.g., MICH. COMP. LAWS § 24.203(3) (2006) (defining “contested case” to mean a proceeding . . . in which a determination of the legal rights, duties or privileges of a named party is required by law to be made by an agency after an opportunity for an evidentiary hearing”) (emphasis added).

60. By analogy, appellate courts have deferred to trial courts’ best interests determinations. See, e.g., Francois v. Leon, 834 So. 2d 1109, 1114 (La. 2002) (“In cases involving the custody of children, the trial court is vested with a vast amount of discretion. The trial court is in a better position to evaluate the best interests of a child”); In re A.H., 748 N.E. 2d 183, 194 (Ill. 2001) (“The trial court is vested with wide discretion in its determination of the best interests of the minor in temporary custody hearings”); Rutledge v. Harris, 263 A.2d 256, 257 (D.C. 1970) (recognizing limited scope of revisiting a trial court’s determination of a child’s best interests).

61. See, e.g., MICH. COMP. LAWS § 24.275 (2006) (“[A]n agency may admit and give pro-
children is often in limbo until the potential caregivers navigate a complicated bureaucracy to get the placement decision reviewed, if that possibility exists at all under state law. In reality this rarely occurs, and when a child welfare agency denies ICPC approval, courts are forced to place a child’s permanency on hold indefinitely until the caregiver decides to move, the receiving state unilaterally reverses its decision, or another long-term placement option becomes available.

The impediments the statute has created for foster children seeking permanency in their lives helped create momentum to reform the Compact, which has remained unchanged since its drafting over forty years ago. A major reform proposal initiated at the state level has been submitted to legislatures for public consideration. This complements recent federal legislation enacted to address the timeliness of interstate home studies. A close analysis of the proposals, however, illustrates their failure to offer comprehensive solutions to the delays in achieving permanency for foster children created by the Compact.

III. Current Reform Initiatives

A. State Efforts

State and federal lawmakers have developed different legislative proposals to address the problems created by the Compact. The most comprehensive effort has been undertaken at the state level. In July 2003, the APHSA formed an ICPC task force to examine the statute and to draft legislation to reform the Compact. Members included state commissioners, state child welfare directors, ICPC administrators, and a representative from the American Association of Public Welfare Attorneys. The task force met regularly over the three-year period and publicly released its proposed revisions to the law on March 31, 2006. These revisions will become effective and binding upon the legislative enactment of the proposal into law by at least thirty-five states. To date, no state has enacted the new version of the Compact.

The new version of the law (the proposed Compact) attempts to address many of the concerns noted above. First, several provisions in the probative effect to evidence of a type commonly relied upon by reasonably prudent men in the conduct of their affairs. . . . [A]n agency, for the purpose of expediting hearings and when the interests of the parties will not be substantially prejudiced thereby, may provide in a contested case or by rule for submission of all or part of the evidence in written form.”); D.C. Code § 2-509(b) (2006) (“Any oral and documentary evidence may be received”).

63. Id.
posed Compact emphasize the importance of making placement decisions in a timely manner. Article I articulates that a key purpose of the law is to ensure that “children are placed in safe and suitable homes in a timely manner.” Article V states that “the public child placing agency in the receiving state shall complete or arrange for the completion of the assessment within the timeframes established in rules promulgated by the Interstate Commission,” a new regulatory body established in Article IX of the proposed Compact. The duties of the Interstate Commission include, among other things, promulgating rules, providing for dispute resolution, and issuing advisory opinions. Article VII reiterates the concern surrounding delays in the process by stating that a “public child placing agency in the receiving state shall provide timely assessments” as provided for by the Interstate Commission. The proposed Compact also expedites the placement of children with relatives by permitting “provisional placements” to be made once the receiving state receives assurances that the proposed placement is safe and suitable, even if the standards or requirements otherwise applicable to prospective foster or adoptive parents have not been met.

Second, the proposed Compact attempts to clarify the legal standard governing the receiving state’s decision to approve or deny a proposed placement. Article II defines an “approved placement” to mean that “the receiving state has determined after an assessment that the placement is both safe and suitable for the child and is in compliance with the applicable laws of the receiving state governing the placement of children therein.” The Article further explains that an “assessment” is “an evaluation of a prospective placement to determine whether the placement meets the individualized needs of the child, including but not limited to the child’s safety and stability, health and well-being, and mental, emotional and physical development.” Finally, the proposed Compact permits the Interstate Commission to develop uniform standards to assess the safety and suitability of interstate placements. These proposals reflect the ICPC task force’s intent to define the standard that currently governs the approval process.

Third, the proposed Compact offers increased protection for familial relationships, primarily between biological parents and their children. Placements made by parents or relatives with legal authority over the

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65. Proposed Compact, Article I(A).
66. Id. at Article V(F).
67. Id. at Article VII(D).
68. Id. at Article II(L).
69. Proposed Compact, Article II(A)
70. Id. at Article II(B)
71. Id. at Article V(G)
child with other relatives and placements made by parents with nonrelatives without the intention of effectuating an adoption are explicitly outside the scope of the law as are visits between children and out-of-state individuals.\textsuperscript{72} Placements of foster children with noncustodial parents are exempted from the statutory requirements if (a) the parent proves to the court in the sending state that he has a "substantial relationship" with the child; (b) the court makes a finding that the placement is in the child's best interest; and (c) the court in the sending state dismisses its jurisdiction over the case.\textsuperscript{73}

Fourth, the proposed Compact attempts to create mechanisms to enforce these new measures through the Interstate Commission. If the Commission determines that a member state has violated the law, it has the power to (a) provide remedial training and technical assistance; (b) provide written notice to the defaulting state and means by which the default can be cured; (c) by majority vote of members, initiate legal action against a defaulting member in federal court; and (d) avail itself of any other remedies available under state law.\textsuperscript{74} The proposed Compact also requires the Commission to promulgate rules providing for mediation and binding dispute resolution for disputes among compacting states.\textsuperscript{75}

Finally, the proposed Compact addresses the rights of individuals aggrieved by decisions made pursuant to the ICPC. The legislation explicitly provides any interested party or person with standing to seek administrative review of the receiving state's determination.\textsuperscript{76} The review shall be conducted in the receiving state pursuant to its applicable administrative procedures.\textsuperscript{77} The proposed Compact also ratifies the current interpretation that the Compact prohibits courts in the sending state from reviewing decisions made by the receiving state agency to deny a proposed placement.\textsuperscript{78}

\textbf{B. Federal Reforms}

Recent federal legislation, the Safe and Timely Interstate Placement of Foster Children Act of 2006, signed into law on July 3, 2006, focuses on the timeliness, or lack thereof, of the completion of ICPC home studies. The law conditions states' receipt of federal foster-care funds under Title IV-E of the Social Security Act on completing interstate home studies

\textsuperscript{72} Id. at Article III(B)(1); Article III(B)(7).
\textsuperscript{73} Id. at Article III(B)(4).
\textsuperscript{74} Id. at Article XII(C).
\textsuperscript{75} Proposed Compact, Article XII(B)(2).
\textsuperscript{76} Id. at Article VI(C).
\textsuperscript{77} Id.
\textsuperscript{78} Proposed Compact, Article VI(B).
within sixty days.79 In addition, for each home study a state completes within thirty days after receipt of the request, it will receive an incentive payment of $1,500.80 To fulfill these mandates, the legislation permits states to utilize private agencies.81 Timeliness of home studies is the only aspect of the ICPC addressed by the federal legislation.

IV. Shortcomings of Current Proposals

While federal and state governments deserve credit for recognizing the need to reform the ICPC, current efforts fall short of the massive overhaul needed to ensure that decisions furthering the best interests of children are made. Instead, these reforms present modest solutions that fail to address the core concerns with the ICPC—lengthy delays in completing interstate home studies, poor decision-making, and inadequate review procedures.

Federal legislation is limited in its scope since it only addresses the timeliness of interstate home studies. The federal effort may expedite the completion of home studies through financial incentives and penalties, but the benchmark in the legislation for how quickly home studies must be completed—sixty days—is too long and does not take into account a child’s sense of time. A child’s sense of time focuses exclusively on the present and precludes meaningful understanding of "temporary" versus "permanent" or anticipation of the future.82 For young children, periods of weeks or months are not comprehensible. Disruptions as short as a day may be stressful.83 The younger the child and the more extended the period of uncertainty or separation, the more detrimental it will be to the child’s well-being.84 Any intervention that separates a child from a potential permanent caregiver who could provide the child with psychological support should be treated as a matter of urgency and profound importance. Two months, while significantly shorter than the current time it takes to complete home studies, is still too long a period for children to wait.85

Though appearing to be comprehensive, little substance lies beneath the language in the proposed Compact developed by the states. For example, although numerous provisions require assessments to be done in a "timely"

82. American Academy of Pediatrics: Committee on Early Childhood, Adoption and Dependent Care, Developmental Issues for Young Children in Foster Care, 106 PEDIATRICS 1145, 1146 (2000).
83. Id.
84. Id.
85. It is unclear as to whether states will complete interstate home studies within thirty days to receive the $1,500 bonus offered in the statute. This will depend largely on whether the costs of expediting the study will be covered by the bonus payment.
manner, the statute does not define “timely” and it fails to set forth specific
time limits for the completion of interstate home studies. Under the pro-
posal, nothing would prevent a state from taking years to complete a home
study. Instead, the proposed Compact simply acknowledges that time limits
should be determined at a later date and delegates that decision to the
Interstate Compact Commission, which is comprised of the very states
that have failed for years to complete timely home studies.

Similarly, the “provisional placement” language in Article II lacks
sufficient detail to create any meaningful change in the system. The lan-
guage gives states the option to provisionally place children with relatives
when the receiving state determines that the home is “safe and suitable”
but does not give the child or relative an enforceable right for expedited
consideration. The statute does not specify what factors a state must use to
determine if a relative’s home is “safe and suitable,” how quickly provi-
sional placement home studies must be conducted, and whether a state must
colorful all relative home studies in an expedited manner. None of these
provisions create an obligation for state agencies to ensure that the interstate
placement of foster children with family is conducted in a timely manner.

The proposed Compact fails to remedy the high level of subjectivity
pervasive in current ICPC decision-making. The new standard requires
states, when conducting home assessments, to consider the “individual-ized
needs of the child, including but not limited to the child’s safety and
stability, health and well-being, and mental, emotional and physical
development.”86 These vague terms are left undefined in the statute.
Consequently, what one worker considers a safe and stable home, another
may find objectionable. A dated criminal conviction may cause one
worker, but not another, to question the mental health of a proposed care-
taker. A worker may be able to deny a placement based exclusively on an
instinct that a caretaker cannot care for a child without factual support for
her position. Under this new standard, placement decisions will continue
to hinge on the personal opinions and biases of individual caseworkers.
The new standard provides no additional guidance for caseworkers than the
current “contrary to the interest” standard. It merely adds more undefined,
conclusory terms to an already vague and subjective statutory scheme.

The proposed Compact also continues to treat most biological parents
as legal strangers to the child. Although more limited than its current
form, the proposal will continue to encompass most placements of chil-
dren with their parents. Placement of children with noncustodial parents
are only exempted from the purview of the statute if (1) the parent has a

86. Proposed Compact, Article II(B).
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“substantial relationship” with the child, (2) the placement is in the child’s best interest, and (3) the court determines that the dependency case should be dismissed immediately after the placement is made. This three-part test will rarely be met in dependency proceedings. Courts often require that the dependency case remain open after placing a child with the non-custodial parent to monitor the placement, ensure that the child receives appropriate services, and protect the child and the noncustodial parent from the abusive parent through appropriate court orders. In addition, the statute does not define “substantial relationship” or the “best interests of the child” and leaves it up to the sending state court, without any guidance, to determine when these factors have been met. The proposed Compact also continues to encompass placements of children with their custodial parents. In reality, the proposed Compact will continue to be applied to most placements of foster children with their parents.

When parents fall within the ambit of the statute, the proposed Compact continues to treat them as legal strangers to the child and fails to recognize the protection the Constitution affords their relationship with their children. The process to review a potential placement with a parent is identical to the scrutiny received by any other potential caregiver. Nowhere does the statute incorporate the constitutionally required presumption that children be placed in the custody of their biological parents absent evidence of parental fitness. Out-of-state parents are not guaranteed an expedited placement decision. The proposed Compact completely overlooks the protected legal status held by parents with respect to the custody of their children.

87. Id. at Article III(B)(4).
88. Take for example a situation in which a child is living with his father. His mother lives out-of-state. Child Protective Services removes the child from his father’s home after the child is severely beaten. The social worker, the lawyer–guardian ad litem, and the judge want to place the child with his mother, who no one is alleging is unfit, but the court wishes to keep the case open to provide the family with services, including counseling for the child and parenting classes to teach the mother how to address issues of physical abuse with her son. In addition, the court wants the case to remain open to preserve the temporary custody order and to protect the mother and child through a stay away order against the father. If the case is closed, the temporary custody order would dissipate and the father could go pick up the child. Under the proposed Compact, the ICPC would apply in this situation and the child would be separated from his mother until interstate approval was received.
89. See supra note 18 (listing cases defining constitutional protections afforded to parents with respect to raising their children).
90. See Troxel v. Granville, 530 U.S. 57, 68–69 (2000) (“[S]o long as a parent adequately cares for his or her children (i.e., is fit), there will normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent’s child”). See also Tenenbaum v. Williams, 193 F.3d 581, 593 (2d Cir. 1999) (“As a general rule . . . before parents may be deprived of the care, custody or management of their children without their consent, due
Newly proposed enforcement mechanisms for ICPC violations are insufficient. Take, for example, a situation in which a member state refuses to complete a home study within a specific time period. The proposed Compact vests the exclusive authority to determine whether corrective measures, including litigation, need to be taken with the Interstate Commission, which is comprised of the states that have violated the Compact. Only if a majority of member states determines that legal action should be initiated can the Commission file suit in federal court. Many reasons having nothing to do with the particular ICPC violation may influence a member state’s vote to pursue legal remedies against another state for a violation. A state may want to preserve its relationship with the violating state so that its business on other matters is not affected. A state may be concerned that the violating state may deny future interstate placements in response to the legal action, a real concern due to the subjectivity of the placement standard and the lack of adequate review procedures. The possibility of collusion constitutes another concern with vesting the enforcement decision solely in the member states. States, which traditionally have taken months to complete ICPC home studies, may be worried about suing another state when it, itself, has not abided by the statute in other cases. The proposed Compact provides no right for individuals to compel a State to fulfill the statutory requirements in the ICPC.

Finally, the proposed Compact fails to create a process to review placement decisions made by agency caseworkers. It only provides individuals with rights they already have—the right to seek review of placement deci-

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91. Proposed Compact, Article XII(C).
92. Id. at Article XII(C)(1)(c).
93. In 2002, the state of Maryland threatened to return more than a thousand foster children to the District of Columbia due to violations of the ICPC by the D.C. Child and Family Services Agency. Many of these children were living with relatives in Maryland. In July 2002, the two states reached a temporary agreement that preserved the placements of those children and allowed the placement of foster children with Maryland families. Since that time, the two states have attempted to negotiate a border agreement, as required by the District of Columbia Family Court Act of 2001, to expedite the placement of children across state lines, but to date, no such agreement has been reached. See Sewell Chan, D.C., Md. Reach Deal on Foster Children, WASH. POST, July 11, 2002, at A11; Sewell Chan, Judge Scolds Md., D.C. on Foster Care, WASH. POST, Apr. 20, 2002 at B3; Sewell Chan, Md. Threatens to Return D.C. Foster Children: Officials Cite District’s Paperwork Backlog, Failure to Track Youngsters Placed in Homes in State, WASH. POST, Apr. 18, 2002, at B2; Sewell Chan, Md. Threatens to Return Foster Children to District: Paperwork Backlog, Failure to Track Youths Cited, WASH. POST, Apr. 18, 2002, at B5.
sions through administrative processes already established under state law. For aggrieved individuals in states where no such administrative process exists, the proposed Compact is silent. The proposed Compact also codifies the current interpretation of the statute that courts have no authority to review interstate placement decisions. The combination of vague, undefined standards with inadequate review procedures perpetuates a system in which the exclusive authority to make placement decisions impacting a child’s future rests in the personal opinions and beliefs of a single caseworker.

Unfortunately, much effort has been invested in creating a proposal that offers few substantive improvements to the current version of the ICPC. Home studies will continue to be completed in an unreasonably lengthy time period and the flawed decision-making process will be continued. The development of this modest proposal reflects a willingness of states to tolerate the current problems with the ICPC and to perpetuate a system in which children’s lives are indefinitely placed on hold due to unnecessary bureaucratic delays and poor decisions. More drastic reforms that will expedite a child’s exit from foster care may disrupt the status quo, create additional obligations on states, and add financial burdens that the states are unwilling to accept. But, this is precisely the type of massive overhaul that is needed to create an interstate decision-making process that honors the best interests of the child.

V. Reform Proposal

A new model for making interstate placement decisions regarding foster children must balance a child’s interest in promptly resolving placement decisions with the need to access important information about the proposed placement to make a considered decision. The current system has failed children in many respects but its greatest flaw has been vesting overburdened child welfare agencies in receiving states, which have few resources to invest in the ICPC process, with the exclusive authority to approve or deny proposed placements. Any proposal that perpetuates this allocation of responsibility will fail because receiving state agencies have no incentive to expedite the interstate placement of children and if anything, have a disincentive to approve placements if they fear that additional obligations will be imposed on them. If these receiving state agencies fail to fulfill their obligations under the ICPC, jurisdictional issues and lack of enforcement mechanisms shield them from any accountability. The mandated cooperation between beleaguered child welfare agencies in sending and receiving states has proven to be unworkable, and a new system, primarily relying on private resources, is necessary.
My proposed reforms restore timeliness, accountability, and oversight to the interstate placement process. The crux of my solution is as follows. First, child welfare agencies in the sending state will bear the responsibility of ensuring that interstate home studies are completed by private or public child welfare agencies no later than thirty days of a request. Second, courts in the sending state will retain the authority to make interstate placement decisions. Third, after the placement is made, agencies in the sending state must arrange for a private or public child welfare agency to monitor the placement. As is currently the case under the Compact, the sending state will continue to maintain full financial responsibility for the child and any services she receives after the placement is made.\textsuperscript{94}

How will this new system work? If an out-of-state placement is proposed for a child, the sending state must immediately arrange and pay for a home study to be completed by either a private or public child welfare agency in the receiving state. The sending state agency must ensure that the agency conducting the home study can complete the assessment within thirty days of the request. A thirty-day time period has been endorsed by the APHSA and federal legislation as the benchmark for how quickly home studies should be completed.\textsuperscript{95} The home study must ascertain objective facts about the proposed caregiver and her living situation similar to facts required in intrastate home studies. For example, specific information about the caretaker’s home, past relationship with the child, her criminal record, and any child protective history would be particularly relevant. The caseworker conducting the evaluation should include a statement about whether the potential placement would violate any laws in the receiving state and may include a recommendation about whether the placement is in the child’s best interests.

Once completed, the home study must be transmitted to the court in the sending state. The sending state court shall retain the authority to decide whether the child shall be placed with the proposed caregiver unless the placement would violate the child placement laws in the receiving state. The procedures for making this decision shall mirror those for intrastate placement decisions, except the receiving state agency shall be provided notice of the hearing and an opportunity to be heard prior to the making

\textsuperscript{94} See Article V of the ICPC, reprinted in Guide to the ICPC, supra note 10, at 9 ("The sending agency shall continue to have financial responsibility for support and maintenance of the child during the period of the placement").

\textsuperscript{95} The Secretariat to the Association of Administrators of the Interstate Compact on the Placement of Children recommends that ICPC requests be processed within thirty days. Guide to the ICPC, supra note 10, at 5. In addition, the recently enacted federal legislation defines a timely home study as one completed within thirty days. 42 U.S.C. § 673(g)(3) (2006).
of a placement. The caseworker who drafted the home study may testify in the proceeding by telephone if necessary, and the court shall issue its decision after considering the home study, any additional evidence, and arguments by the parties and the receiving state. All parties to the child protective proceeding and the receiving state, aggrieved with the court’s placement decision, can appeal the decision in any manner authorized by the law in the sending state.

If the sending state agency fails to arrange for the completion of the home study within thirty days, then the individuals affected by the non-compliance, including the child and the proposed caretaker, shall have standing to seek a judicial remedy. Possible compliance mechanisms may include a finding of contempt, financial penalties, orders to reimburse private agencies to complete home studies, and other forms of equitable relief, including ordering the interstate placement without a home study if the court possesses enough information to make a determination that the best interests of the child necessitate an immediate placement of the child. This last remedy may be applicable in many situations due to the ease at which information relevant to evaluating a caretaker’s parenting abilities,

96. Members of the ICPC Development and Drafting Team recommended that judges be empowered with the ultimate authority to make interstate placement decisions, even over the receiving state’s objection. “[T]he general consensus that the judge in the sending state should be able to override a recommendation by the receiving state with regard to safety and suitability of a placement based on the best interests of the child. The judge should also be able to rule that an out-of-state parent is fit, and to close the case. However, the receiving state should have a right to be heard in the case if the judge places the child in their state and intends to keep the case open.” American Public Human Services Association, ICPC Development and Drafting Team First Meeting Summary 8 (July 20–22, 2004), available at http://www.aphsa.org/Policy/Doc/Summary%20ICPC%20DDT%20Meeting%201—Rewrite%20Universe.pdf. It is unclear why this proposal was ultimately rejected.


98. See Freundlich, supra note 11, at 51–52. Freundlich suggests that one approach to enforce the ICPC 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 administrative mismanagement. Id. at 52. “[T]he knowledge that there is legal recourse on behalf of waiting children would create an additional incentive for timely and quality determinations. Id.

99. The ultimate responsibility of dependency courts is to protect the best interests of the child. As such, a number of courts have overlooked violations of the ICPC when the best interests of the child warrant such a result. See In re Adoption No. 3598, 701 A.2d 110, 124 (Md. 1997) (“Certainly, the best interest of the child remains the overarching consideration and the needs of the child should not be subordinate to enforcement of the ICPC.”); State of Florida v. Thornton, 396 S.E.2d 475, 481–82 (W.Va. 1990) (“[W]e certainly do not mean to denigrate the ICPC or its importance. We merely recognize that when the facts of a case . . . compel the
such as previous criminal or child protective history, can be obtained electronically. Testimony by the potential caretakers at a placement hearing conducted in the sending state could also yield enough information to satisfy any concerns the court may have regarding the placement.

After the placement is made, the sending state agency shall arrange for a private or public child welfare agency to monitor the placement and provide periodic reports to the court with updates on the child’s status. As in the current system, the sending state will retain financial responsibility for the child after the placement is made. The child’s need for expedited decisions about his permanency will trump any bureaucratic or financial obstacle created by state agencies, and these agencies will be responsible for any delays in the process.

Under this system, the sending state agency shall bear the sole responsibility for ensuring that the home study is completed within the specified timeframe. Prior to transmitting the request for a home study, it must locate an agency in the receiving state that can conduct the assessment within thirty days. If a public agency cannot complete it within the timeframe, then the sending state agency must locate a private agency that can do so. The plethora of private child welfare agencies such as Catholic Charities, Lutheran Social Services, and Bethany Christian Services that routinely conduct home studies when licensing foster parents can fill this void and can also monitor the placements after the children have been placed across state lines.

States may resist my proposal for several reasons. The proposal eliminates the absolute dominion currently held by state agencies over inter-


100. See In re Lisa B., 2006 N.Y. Misc. LEXIS 1735 at *6 (“Today, so many records are computerized and the local New York State agency through computer searches and telephone interviews can obtain almost as much information about the interested relatives as the out-of-state agencies locate where the relatives reside”).

101. See id. at 7 (describing how “the maternal grandfather and his wife traveled to present themselves to this Court, voluntarily testified before the Court and subjected themselves to cross-examination. All parties had an opportunity to judge the maternal grandfather’s and his wife’s credibility and character in person”).
state placement decisions. Under both the ICPC and the proposed Compact, the local agency in the receiving state possesses the exclusive authority to determine whether the child can be placed in that state. Courts have been divested of any such authority. My reforms strip the agency of that power and instead invest sending state courts with the power to control placement decisions. Although my proposal entitles the receiving state to notice and an opportunity to be heard prior to the placement decision being made, the agency no longer controls the process.

This transference of decision-making power makes sense for a number of reasons. First, under the current Compact, and the proposed Compact, the receiving state is not financially responsible for the care or supervision of the child unless the two states explicitly reach an agreement on the issue.\textsuperscript{102} If no such agreement is reached, the sending state retains full financial responsibility for the child's maintenance. Since additional obligations are not being imposed on the receiving state, no policy reasons exist to provide them with the exclusive power to veto placements.

Second, transferring decision-making power from individual caseworkers in the receiving state to state courts, a forum in which all parties will have the opportunity to be heard, increases the likelihood that good decisions for children will be made. The traditional information gathering tools available to litigants in civil cases—subpoena power and discovery—will ensure that all relevant information is presented to the court.\textsuperscript{103} Adhering to the rules of evidence will ensure that the judge bases her decision on credible and reliable information. Zealous advocacy, including rigorous cross-examination, will test the veracity of competing allegations.\textsuperscript{104} Most importantly, by being presented with various arguments and counterarguments regarding where a child should be placed, the court will have a better understanding

\textsuperscript{102} See Article V of the ICPC, reprinted in GUIDE TO THE ICPC, supra note 10, at 9 ("When the sending agency is a public agency, it may enter into an agreement with an authorized public or private agency in the receiving state providing for the performance of one or more services in respect of such case by the latter as agency for the sending agency").

\textsuperscript{103} See Goldberg v. Kelly, 397 U.S. 254, 271 (1970) ("Where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue").

\textsuperscript{104} See Perry v. Leeke, 488 U.S. 272, 283 n.7 (1989) ("The age-old tool for ferreting out truth in the trial process is the right to cross-examination. For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law"); Idaho v. Wright, 497 U.S. 805, 819 (1990) ("The theory of the hearsay rule . . . is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination"); Goldberg, 397 U.S. at 269 ("In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses").
of its options and will make a more informed decision. All of these factors are missing in the current system and in the proposed Compact, in which a caseworker, relying on potentially unreliable and untested information, possesses complete discretion to veto a placement. Though state agencies will lose power under my reforms, better outcomes for children will result.

States may also resist any change to the status quo that increases their financial obligations. Completing a home study within thirty days would radically accelerate the interstate placement of children into permanent homes, a process which currently takes months, if not years. Undoubtedly, the change would be costly. Most child welfare agencies already suffer from a shortage of staff and a limited budget.105 Completing ICPC home studies is a low priority compared to other pressing needs such as conducting child abuse investigations.106 To comply with the new time limits, public agencies would have to hire more ICPC caseworkers or contract with private social work agencies to complete the studies.107 States would also have to contract with out-of-state agencies to monitor the child after the placement is made. These requirements would impose a significant financial burden on child welfare agencies, particularly in those areas such as the District of Columbia that have large numbers of foster children placed in other jurisdictions. The costs of this reform would create a disincentive for states to comply with the new mandates.

105. Caseworkers burn out and leave the profession in very high numbers. Ninety percent of state child welfare agencies report difficulty in recruiting and retaining workers. Sandra Stukes Chipungu and Tricia B. Bent-Goodley, Meeting the Challenges of Contemporary Foster Care, 14 FUTURE OF CHILDREN 83 (2004). The annual turnover rate in the child welfare workforce is twenty percent for public agencies and forty percent for private agencies. THE ANNIE E. CASEY FOUNDATION, THE UNSOLVED CHALLENGE OF SYSTEM REFORM: THE CONDITIONS OF THE FRONTLINE HUMAN SERVICE WORKFORCE (2003). Not surprisingly, federal audits of the foster care system conducted in 2001 and 2002 found that the majority of states were “not in substantial conformity” with federal child welfare laws. See Ben Kerman, What Is the Child and Family Service Review? (2003), available at http://www.caseyfamilyservices.org/pdfs/casey_whatis.pdf. Id. One-third of the states did not have an adequate case review system as required by federal law. Id. Only five states met the criteria for protecting children from abuse and neglect. Id. Ultimately, not one state passed the audit.

106. Child protective agencies receive millions of reports of suspected abuse or neglect each year, which state laws require be investigated in a specified time period. According to the National Child Abuse and Neglect Data System, in 2002, individuals made a total of 2.6 million referrals to child protective services, involving 4.5 million children. Child protective services received more than 50,000 referrals alleging child abuse or neglect on a weekly basis. Of those referrals investigated by child welfare agencies, 26.8% resulted in a substantiated report of child maltreatment. Children’s Bureau, U.S. Dep’t of Health and Human Services, Child Maltreatment 2002, at 5, available at http://www.acf.dhhs.gov/programs/cb/publications/cm02/cm02.pdf.

107. A number of courts have suggested that states utilize private agencies to complete interstate home studies in a timely manner. See In re Johnny S., 47 Cal. Rptr. 2d 94, 101 (Ct. App.
This disincentive could be eliminated if federal funding became available to reimburse states for the costs associated with the interstate placement process, mainly the completion of home studies and monitoring of out-of-state placements. These funds could be administered through Title IV-E of the Social Security Act, the pool of funds that is used to reimburse states for the costs of children in foster care, and the money could be conditioned on states complying with the specific proposals outlined above. The federal government has utilized this approach repeatedly to reform state child protection systems on issues such as providing services to parents, expediting permanency decisions, and finalizing adoptions. The success of this approach would hinge on the willingness of federal lawmakers to allocate enough funds to cover the costs of the placement process.

Many of these financial costs would be offset by accelerating the placement of children into permanent homes. Currently, while children await interstate placements with parents or relatives, they languish in temporary foster homes and institutional settings, costly placements funded by the state with substantial reimbursement from the federal government. Once the children are placed with their family, however, the expenditures on foster care would diminish because many relatives are not licensed and are therefore ineligible to receive a subsidy. In addition, expediting the child’s interstate placement will move the child closer to permanency and once a permanency option such as adoption or guardianship is finalized, the federal government will see savings by reducing the sending state’s claims for foster care expenses under the IV-E program.

1995); In re Markelle T., 2003 Cal. App. Unpub. LEXIS 5676 at *19 (Ct. App. Cal. 2003) (both observing that California could enter into contracts with out-of-state agencies to conduct home studies in lieu of the ICPC process); see also 42 U.S.C. § 671 (a)(26)(A)(3)(a) (recognizing that “[i]t is the sense of Congress that each State should use private agencies to conduct home studies”).

108. See 42 U.S.C. § 671 et seq. for a list of conditions imposed by federal law on states seeking to receive federal foster care funding.

109. See Congressional Budget Office Cost Estimate, H.R. 5403: Safely and Timely Interstate Placement of Children Act of 2006 (May 19, 2006) (observing that the placement of foster children in permanent homes out-of-state may result “in savings to the federal government by reducing the sending state’s claims for foster care expenses under the IV-E program”).

110. Each year, states disburse approximately $10 billion in federal and state funds to pay for housing and support services for children in foster care. See Rob Geen, Anna Sommers, and Mindy Cohen, Medicaid Spending on Foster Children, 2 CHILD WELFARE RES. PROGRAM 1 (Urban Institute, Aug. 2005); Urban Institute, The Cost of Protecting Vulnerable Children, 1 CARING FOR CHILDREN 1 (Nov. 2002). States spend an additional $1.8 billion on administering the child welfare system. Id. The costs of placements vary by state and by type of placement. For example, in New York City, it costs roughly $28 a day for the city to keep a child in foster care. See Leslie Kaufman, Bill to Save Foster Care Costs Is Stalled in the Legislature, N.Y. TIMES, July 21, 2004 at B2. A North Carolina study revealed the following costs for children’s foster care placements: $12.01 (family foster care); $66.30 (specialized foster care); $132.86 (small group home); $129.93 (large group home); and $148.17 (emergency and other placements). Barth et al., A Comparison of the Governmental Costs of Long-Term Foster Care and Adoption, 80 SOC. SERV. REV. 127, 136 (2006). After a child is placed with an extended family member, these costs would disappear.
the child protective case can be closed. At that point, the costs associated with funding caseworkers, attorneys, and the court system would disappear. In the long run, moving children from short-term licensed placements into permanent homes with their families would lessen the financial burden on the child welfare system.

Regardless of the costs of this system, financial considerations cannot serve as an excuse to perpetuate the impermanence of foster children. The importance of permanency for foster children is a double-edged sword imposing obligations on both parents and state agencies. The law is clear that parents have a very limited time to reunify with their children before other permanent options are pursued. In most situations, parents must prove their rehabilitation within this time frame even if the agency fails to provide them with needed services. Equally important, however, is the state’s responsibility to move children out of temporary settings and into long-term, stable, family-like settings that could serve as a permanent home should the parent fail to meet her goals. The most important consideration for the dependency court is the child’s sense of time, not the difficulty of the parties in accessing or providing needed services in the

111. Approximately 5.5 percent of foster children reside in a state other than the one responsible for their care and protection. UNDERSTANDING DELAYS, supra note 25, at 3. While some of these children are placed in foster and adoptive homes, the largest proportion is placed with close relatives in other states. Id. Statistics indicate that most of these interstate placements lead to permanency for children. Id. Two-thirds of children placed in another state remain with the families with whom they were placed. Id.

112. The Supreme Court has consistently rejected a state’s interest in financial savings as a justification for depriving children of familial relationships. See, e.g., Lassiter v. Dep’t of Soc. Servs., 452 U.S. 18, 29 (1981) (“But though the State’s pecuniary interest is legitimate, it is hardly significant enough to overcome private interests as important as those here”); Boddie, 401 U.S. at 381 (finding that State’s financial considerations are not sufficient to overcome plaintiff’s interest in dissolving a marriage); M.L.B. v. S.L.J., 519 U.S. 102, 122 (1996) (minimizing importance of State’s financial interests when compared to right of parent to preserve relationship with her child).

113. See 42 U.S.C. § 675(5)(E) (2006) (requiring States to file petitions to terminate parental rights if the child has been in foster care for fifteen of the most recent twenty-two months subject to several exceptions); 42 U.S.C. § 675(5) (2006) (mandating that a permanency planning be held no later than one year after a child’s entry in foster care.).

114. See In re L.L., 653 A.2d 873, 882 (D.C. 1995) (“We reiterate that the overriding consideration is the best interest of the child, which may compel the filing of a motion to terminate parental rights regardless of the defaults of public agencies in seeking reunification of the family”); In re L.W., 613 A.2d 350, 355 (D.C. 1992) (“[E]ven if, as [the judge] suggested in her order denying the TPR, the social workers might have been more cooperative, ... the remedy cannot be to prohibit an adoption which is demonstrably in [the child’s] interest; the child cannot be punished for the alleged wrongs of the bureaucracy”). But see 42 U.S.C. § 675(5)(E)(iii) (2006) (permitting States to postpone filing of termination petition if services have not been provided to the parents).

115. See supra notes 4–6 and accompanying text for a discussion on the importance the law places on children achieving permanency.
Without legally enforceable deadlines, states will continue to impede the placement of children into permanent homes and instead children will continue to suffer in temporary foster homes or institutional placements.

How would Tasha, the child described at the outset of this article, fare under my system? First, a home study of her aunt would have been completed within thirty days. Second, if the study was not completed within the timeframe, Tasha, through her lawyer-guardian ad litem or her paternal aunt, could have filed a motion to compel the sending state agency to comply with the statute or pay a private agency to complete the home study. Finally, if Tasha's best interests warranted an immediate placement without compliance with the ICPC—as it did—then the court would have had the authority to order the placement. Tasha would not have languished in an institutional setting for six months due to bureaucratic delays. Her best interests would have dictated her long-term placement.

The straightforward proposal outlined above can serve as a guide to revamp the ICPC. This new system comprised of timely home studies, judicial decision-making, and accountability will ensure that expedited placement decisions are made for foster children living in temporary placements. This system will also honor the rights of the parties to the proceeding, who will be given an opportunity to be heard prior to the issuance of interstate placement decisions, and recourse through appellate review should they disagree with the decision. Providing litigants with these procedural rights will only bolster their faith in the decision-making process and enhance the legitimacy of the child welfare system. At a time when public confidence in the system is waning, these important considerations cannot be minimized.

VI. Conclusion

Benign motives, primarily the need for child welfare agencies and courts to access information about potential placements in other states, led to the passage of the ICPC. Over time, however, the benefits of the statute have been corrupted by bureaucratic impediments, poor decision-making and a lack of accountability that have resulted in children unnecessarily remaining in temporary foster homes or institutional placements. Drastic
change to this system is needed, but unfortunately the reform proposals generated by the states and the federal government fall short. Instead, a new cooperative framework is needed in which home studies are conducted in a timely manner consistent with the developmental needs of children and decisions are made by courts after considering evidence submitted by all parties. These changes will expedite the placement of children into permanent homes.