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Helping Lawyers Help Kids

POLICY UPDATE

The Promise of the New Interstate Compact for the Placement of Children

by Judge Stephen W. Rideout (ret.)

“Change is good!” exclaims Dilbert on a sweatshirt I saw years ago. “You go first” is his directive to each of us. Changing the system for children in foster care who must move from one state to another is the promise of the proposed Interstate Compact for the Placement of Children (proposed ICPC). There is still much to do to achieve that goal.

The current Interstate Compact on the Placement of Children (ICPC or current ICPC) has been around for over 40 years. While it was enacted to ensure the safe movement of foster and adoptive children between states, it has not achieved that goal. Over the years, there have been many complaints about the ICPC with little done to make it work better. That is until recently. A new proposed ICPC promises to improve the interstate placement process by clarifying roles and responsibilities, setting timetables, ensuring greater oversight and accountability, and offering a dispute resolution process. These and other improvements are the focus of this article.

The basics of what the ICPC is and how it works are found in an excellent article by Cecilia Fiermonte, MA, JD, in the July 2002 *ABA Child Law Practice*. I urge you to read it along with this article for background on the ICPC and to understand the proposed changes.

As the ICPC exists today, judges can make a difference for children

in the interstate process by picking up the phone and speaking with their state’s ICPC administrator or the judge in the other jurisdiction where the child may be going. I have found my state’s ICPC administrator and judges in other states to be very helpful in moving an agency to complete its home study.

I have also received calls from judges who need help because of some delay in the process that needs an extra nudge. These calls are not to tell the agency what decision they are to make but rather to ask the agency to make a decision so that the judge can then try to take other steps toward permanency for a child in the event he/she is not allowed to move to the receiving state.

I have also heard judges say that they have ignored the ICPC and made the placement without the required home study. They seem proud that they were able to move the child quickly; and while prompt movement of children is important, safe movement of children is more important. We judges are able to

encourage the first and help ensure the second.

Reforming the ICPC: Key Steps

Four events have shaped the proposed ICPC changes:

- The American Bar Association (ABA), House of Delegates passed a resolution in August 2003 supporting timely disposition of requests for interstate placements and cooperation among state, local, and territorial officials responsible for seeking and granting such placements.¹ It urged improved laws, policies, procedures and practices on

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- interstate placement of children in juvenile or family court in cases involving child abuse, neglect, delinquency, adoption, or guardianship.²
- The National Council of Juvenile and Family Court Judges (NCJFCJ) passed two resolutions in July 2004. One supported proposed federal legislation relating to the ICPC and the other sought passage of a resolution regarding the current ICPC by the Conference of Chief Justices.³
 - The Conference of Chief Justices and the Conference of State Court Administrators passed Resolution 19 in late summer 2004. Resolution 19 supports increased judicial involvement in interjurisdictional movement of children through the Interstate Compact on the Placement of Children (ICPC).⁴
 - The new proposed ICPC⁵ was drafted by a group of experts on compacts and child welfare brought together by the American Public Human Services Association (APHSA) and led by Liz Oppenheim, JD. The proposed compact must be joined by the states. As of this writing, it has been enacted by Ohio and New York and is pending in the Oklahoma legislature.

The Proposed ICPC

The proposed ICPC has 18 Articles aimed to improve the current ICPC and to ensure a more effective, efficient, and fair process for the interstate movement of children.

Some notable improvements include:

- More detailed and precise definitions—Article II
- New ways to move children – provisional placements and only a notice requirement for residential placements—Article II

- Creation of the Interstate Commission, which will make and enforce rules governing the interstate movement of children—Articles II, VIII, and IX
- Clarification of when the proposed ICPC applies and when it does not—Article III

The current ICPC has good intentions, but is plagued by delays, lack of an enforcement mechanism, unclear mandates, and no review

The proposed changes to the ICPC seek to ensure a clear and swift process for practitioners to follow when placing children across state lines.

process to resolve disagreements. As a result, judges too often ignore it, states use it as a negotiating tool, and children may be moved with little attention to the ICPC's safeguards and procedures.

The proposed changes to the ICPC seek to ensure a clear and swift process for practitioners to follow when placing children across state lines. The Articles of the proposed ICPC described below resolve issues left open by the current ICPC so that children can truly begin to receive its benefits. The new proposed ICPC will take effect if and when the ICPC is joined by 35 states.

Jurisdiction over child. A major issue while drafting the proposed ICPC centered on what state would make decisions under the proposed ICPC. Would it be the state that sends the child to live in another state, or the state that is receiving a child for placement from another state? Article IV provides an answer.

Section A provides that the sending state retains jurisdiction over the

child, but allows sending and receiving state courts to confer in certain circumstances, such as when an issue of child protection or custody is brought before the court in the receiving state.

The sending state court may voluntarily end its jurisdiction over the child under Section C with the agreement of the receiving state. This may occur, for example, when the child is adopted, attains the age of majority under the laws of the sending state, becomes legally independent, a guardianship is created in the receiving state with the agreement of the court in the sending state, or for other reasons spelled out in that Section. The receiving state is also allowed to have jurisdiction over the child on other matters, such as truancy, crime, delinquency, and emergencies.

Placement assessments. Before a child may be moved, sent, or brought to a receiving state, an assessment must occur in the receiving state. Assessments are defined in Article V of the proposed ICPC and replace what is commonly referred to as home studies under the current compact. Once the proposed ICPC is enacted by at least 35 states, the Interstate Commission, which the proposed compact creates, must establish procedures for this process, including the time in which assessments must be done and uniform standards for the assessment of safety and suitability of the interstate placement. When the proposed placement is with a relative, the sending state can ask for a provisional placement as defined by Article II N of the compact.

Approval from receiving state. Under Article VI, no placement can occur without approval from the receiving state. This is consistent with the current law. However, under Article VI C of the proposed ICPC, if a receiving state denies a

placement, an interested party may seek administrative review of that decision, and court involvement will be possible in the receiving state, as specified by the laws of the receiving state.

Responsibility for ongoing support and maintenance. Article VII requires the sending state to continue to be responsible for ongoing support and maintenance of the child. This includes services for the child beyond those public services for which the child is eligible in the receiving state. The receiving state is financially responsible for the cost of the assessment and the ongoing supervision of the placement, unless the states agree otherwise. Once again this is consistent with the current ICPC.

Licensed private agencies and individuals can conduct the assessments and provide the supervision in the receiving state, and the receiving state is allowed to contract for those services. With private placements prior to adoptions, the private agency is responsible for the child and any financial requirements absent a contract to the contrary.

State coordinating board. Each state must create a coordinating board, either by establishing a new advisory council or using an existing board or council to coordinate the state branches of government regarding the compact. Having advisory council members, including judges and lawyers who know about child welfare and the importance of prompt movement of children to safe placements is critical if the proposed ICPC is going to differ from the current one.

Role of the Interstate Commission in rulemaking and enforcement.

There has not been consistent implementation of the ICPC across the country, and there has never been a process to uniformly enforce

the compact. Articles VIII and IX establish an Interstate Commission for the Placement of Children and an executive committee; detail how that is to happen; and lay out the powers and duties of the Interstate Commission. Among its duties, the Commission will establish rules, provide dispute resolution for the states, issue advisory opinions, and enforce compliance with the compact, in addition to other administrative and ministerial duties.

Essential to the success of the proposed ICPC is the work of the Interstate Commission, which will require effective rules and consistent enforcement of those rules. If those things do not happen, the promise of the proposed ICPC will fail the children in foster care who need to move between states.

Commission operation and oversight. Article X establishes how the Interstate Commission will organize and operate including a requirement that bylaws be adopted within 12 months of its first meeting and that there be open meetings.

Article XI requires that the rulemaking process comply with the Model State Administrative Act or similar administrative procedures act and details how the Interstate Commission will establish, publish, and finalize the rules. This includes a requirement that the Commission must listen to and consider the responses of others to the proposed rules. The final rules adopted will, under Article XI(D) of the proposed ICPC, "have the force and effect of statutory law and shall supersede any state law, rule, or regulation to the extent of any conflict."⁶

Article XII establishes how the Interstate Commission will oversee the interstate movement of children, dispute resolution for the states, and how the states will help enforce established rules and procedures. It also requires state courts to take judicial notice of the compact and any of its rules in any judicial or admin-

istrative proceeding in a member state.

Other important provisions. Each state must have a central compact office; border agreements are permitted with the consent of the Interstate Commission; and the sending state must ensure compliance with the Indian Child Welfare Act (ICWA) in cases involving a Native American child.

The remaining Articles establish how the Interstate Commission will be financed and how a state can withdraw or reenter the compact. It also directs that the provisions of the proposed ICPC be liberally construed to achieve its purpose, be binding on the states and supersede conflicting state laws, and that the Interstate Commission work with and make reasonable efforts to consult with Indian tribes to establish guidelines so they can use the compact.

Remaining Challenges

The challenges facing the proposed ICPC are genuine, including that it must be passed by at least 35 states. Beyond that, however, are greater challenges including effective bylaws for the Interstate Commission, rules that ensure an effective process, and proper oversight so the new ICPC will lead to substantive change rather than window dressing.

As of this writing, a resolution is pending before the Board of Trustees of the National Council of Juvenile and Family Court Judges that supports state enactment of the proposed ICPC while raising concerns about several issues not addressed in the language of the proposed ICPC. Most of these issues can be addressed as the ICPC rules are proposed, adopted, and implemented. Most importantly, the board resolution urges "that all participants involved in the ICPC process have a sense of urgency in their work and that all actions taken ... occur while

recognizing that delays in the ICPC process are harmful to children awaiting placement." This view is consistent with the plea of Judge William Byars, Jr., who urged attendees at the Delaware State Leadership Summit on the Protection of Children to perform their tasks not in adult time but in the child's time because children can't wait.⁷

Some remaining concerns include:

Establishing and enforcing deadlines. Clear, enforceable deadlines and high levels of efficiency are essential in the ICPC process. The rules established by the Interstate Commission must have legally binding deadlines for all stages of the process of interstate placements.

Collecting data. Data on all parts of the process must be collected and reported including compliance by states with established deadlines. The Children's Bureau at HHS and Congress will need to collaborate with and assist the Interstate Commission as it develops an automated data collection system to track the interstate movement process and its timeliness. Data must be provided to the Children's Bureau at HHS at least annually so it can consider how to improve the process, support the Interstate Commission, and report its findings to Congress.

Supporting border agreements. Consistent and liberal support of border state agreements is needed to speed movement of children across state lines when needed. It is important to empower staff of the Interstate Commission to work with states that wish to create such agreements.

Providing a review process. Another real concern is whether the state Administrative Procedures Acts will apply to cases and, if so, their effectiveness. A related issue is whether there will be any appellate

process when a receiving state objects to a decision.

Supporting judicial communication. Under the current ICPC, more judges are becoming involved with interstate placement cases and are working to move them along. The rules developed by the Interstate Commission need to allow judges in the sending state overseeing a child's case to speak with and work with the judges in the receiving state where the child's potential place-

If this new compact is going to succeed, judges will need to comply with the law.

ment is to occur to help ensure effective and swift movement of these cases.

Permitting interstate hearings and testimony. Another area that the rules need to address involves the need for interstate testimony and hearings where judges in both jurisdictions cooperate through video or telephone conferencing, and where lawyers, who may not be admitted to practice in both states, are permitted to participate in the hearings without becoming licensed in both states.

Providing a process for transferring jurisdiction. A clear, workable process is needed to transfer jurisdiction of a case from the sending state to the receiving state. This includes the ability to register orders from the sending state so the receiving state may obtain jurisdiction over the child and the case. In that regard, states need to give full faith and credit to other state courts' findings of abuse and neglect and

allow transfer of the court proceedings to the other state. This includes establishing more explicit guidelines for the transfer of guardianships from one state to another.

Holding judges accountable. Under the current ICPC, some judges choose, usually out of frustration, to ignore the requirements of the compact. If this new compact is going to succeed, judges will need to comply with the law. Judges and others will also need to notify appropriate officials when judges from other states fail to follow the compact's requirements.

Providing a dispute resolution process. The Interstate Commission needs to establish a procedure that allows for binding resolution of disputes of interstate placement decisions either by the Commission or by a body established by the Commission.

Encouraging Interstate Commission involvement. The proposed ICPC allows for associate nonvoting members to be appointed to the Interstate Commission. It is vital that there be representatives of the ABA, NCJFCJ, Child Welfare League of America, National Association of Counsel for Children, Conference of State Court Administrators, and Conference of Chief Justices, as well as representatives of other national organizations, included as associate nonvoting members of the Interstate Commission.

Conclusion

The proposed ICPC promises the foster children of this country more effective interstate collaboration when they are being placed across state lines. Early enactment of the compact by the required 35 states is the critical first step in the process. Thereafter the Interstate Commission, its executive committee, and national organizations and individuals interested in this issue must work

to ensure an effective, fair, and efficient process is implemented. With that, the promise of the Interstate Compact for the Placement of Children will be realized, and we all can know we have followed Dilbert's admonition that "Change is good! You go first."

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Endnotes

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RESEARCH IN BRIEF

Substance Abuse Services Often Not Delivered to American Indian Caregivers

American Indian caregivers with alcohol, drug, or mental health problem are less likely to receive services, according to a new study. Researchers at the University of Colorado, Health Sciences Center, used national data involving children in the child welfare system to compare American Indian caregivers with White, Black, and Hispanic caregivers in their need for and receipt of alcohol, drug, and mental health treatment. Caregivers were evaluated at the time of the initial child welfare investigation for the following risk factors:

- serious alcohol or drug problems
- serious mental health or emotional problems
- physical impairment
- impaired parenting
- active and current domestic violence

These caregivers were evaluated again at 18 months to determine if they received assessments, referrals, and services for identified alcohol, drug, and mental health problems.

Among caregivers identified at investigation with alcohol, drug, and mental health problems, only 15% of the American Indian caregivers received a formal assessment; 25% were referred to services; and only 12% received services. American Indian caregivers were much less likely to receive services than Hispanic caregivers, although not significantly less likely than White or Black caregivers.

The researchers linked the disparity in treatment of American Indian caregivers to the complexity surrounding oversight of Indian child welfare matters between tribal and state authorities. The researchers called for better education efforts for nontribal service providers and technical assistance to tribes for improving existing service systems in this area.

The researchers also found the age of the child affected whether caregivers received services. Caregivers of younger children (3-5 years) received more services. Researchers attributed this trend to the concern that younger children would suffer greater harm from a caregiver's substance use. However, they noted that older youth are also vulnerable, since untreated alcohol, drug, and mental health problems increase the chance that older youth will engage in risk-taking behaviors and experiment with substance use.

Another noteworthy trend is that the co-occurrence of alcohol, drug, and mental health problems increased the odds that the caregiver would receive services by more than double.

Finally, the study found that, nationally, most caregivers with identified alcohol, drug, or mental health problem do not receive treatment services. This suggests that child welfare agencies and related organizations need to improve efforts to ensure quality service delivery for these caregivers.

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