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The Role of the Interstate Compact on the Placement of Children in Interstate Adoption

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I. INTRODUCTION

Adoption has evolved from a process designed to provide an heir to childless persons of means to a child-centered process in which the predominant concern is meeting the need of a child to have a nurturing family. This evolution has resulted in reevaluation, and sometimes reform, of laws designed to prevent adoptive placement across state lines. Where there are too few adoptive homes in a state, the desirability of placing a child in a suitable home in another state has been recognized. Interstate adoption is now encouraged by social work standards and, to a lesser extent, by the Interstate Compact on the Placement of Children ("ICPC")¹, which has been enacted into law in nearly all states.

The purpose of this Article is to consider the effect of the ICPC on interstate adoption. The ICPC was intended to facilitate interstate adoption, thereby increasing the pool of acceptable homes for children in need of placement. The ICPC should make interstate adoption easier and more certain. In other words, the ICPC should make interstate adoption as much like intrastate adoption as possible, while fully protecting the interests of the children to be placed. The thesis of this Article is that, while the provisions of the ICPC address many of the problems common to interstate adoption, a number of problems remain. Some of these problems have been resolved differently by the courts of various states. These conflicting decisions undermine the uniformity the ICPC was designed to achieve. Other problems operate as impediments to otherwise desirable interstate adoptions.

One external problem that impairs the effectiveness of the ICPC is lack of awareness of its existence, resulting in widespread noncompliance with its terms. Other problems include ambiguity in the definitional section, underinclusiveness in the conditions for placement, and the lack of adequate remedies for violations. This Article discusses

1. The INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN (Am. Pub. Welfare Ass'n) [hereinafter the ICPC] has been enacted in identical form in 49 states and the Virgin Islands. The full text of the ICPC is contained in the appendix. In these footnotes, citation to the ICPC is by article number. The ICPC also applies to most interstate placements for foster care, which are beyond the scope of this Article.

these problems, and then offers some suggestions for rethinking the content and implementation of the ICPC.

II. BACKGROUND: INTERSTATE COMPACTS GENERALLY

An interstate compact is an agreement between states that is both a contract binding the party states and a statute enacted by the legislature of each party state.² A compact has been described as an interstate agreement involving "formal interstate activity."³ In contrast, interstate associations, which engage in "informal cooperative activities," such as uniform laws, "are often the product of informal interstate cooperation without federal participation."⁴ According to this model, a compact may allocate decision competence to perform the functions of intelligence ("the gathering, processing and disseminating of information"), promotion ("agitation for the adoption of certain preferred policies as 'prescriptions' or as law"), and prescription ("the adoption of policies as authoritative or as law").⁵ Thus, some compacts are agreements to investigate and discuss shared problems, while others are agreements to act in a uniform manner to resolve those problems.⁶

The use of compacts in America predates the Constitution and the concept of statehood.⁷ The drafters of the Constitution included authorization for these agreements in the "compact clause," which provides in part that "[n]o State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State, or with a foreign power."⁸ This consent of Congress requirement has been held to apply only to those compacts that encroach upon federal powers.⁹ Thus, compacts that do not expand state powers vis-à-vis the federal government, such as those dealing with traditional state concerns, do not require congressional approval.¹⁰

The ICPC is an example of a compact that deals with a traditional

2. F. ZIMMERMAN & M. WENDELL, *THE LAW AND USE OF INTERSTATE COMPACTS* 1, 2 (1976). Some compacts have provided for interim approval by the governors of states, followed by legislative approval within a specified period of time. *See, e.g.*, M. RIDGEWAY, *INTERSTATE COMPACTS: A QUESTION OF FEDERALISM* 42 (1971).

3. Reisman & Simson, *Interstate Agreements in the American Federal System*, 27 *RUTGERS L. REV.* 70, 81-82 (1973).

4. *Id.*

5. *Id.* at 73.

6. *Id.* at 81.

7. P. HARDY, *INTERSTATE COMPACTS: THE TIES THAT BIND* 3-4 (1982). Nine compacts were catalogued during the colonial period, four under the Articles of Confederation. Frankfurter & Landis, *The Compact Clause of the Constitution—A Study in Interstate Adjustments*, 34 *YALE L.J.* 685, app. at 730-34 (1925).

8. U.S. CONST. art. I, § 10.

9. *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893).

10. *Id.* *See also* *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978).

state concern—child welfare. As such, it does not require congressional approval.¹¹ It should be noted, however, that the ICPC provides that the government of Canada or a Canadian province may join with the consent of Congress.¹² To date, congressional consent has not been sought to permit Canadian participation.¹³

III. ORIGIN OF THE ICPC: IDENTIFICATION OF PROBLEMS IN INTERSTATE ADOPTION

The impetus for the development of the ICPC came from an informal group of social service administrators on the East Coast in the 1950s.¹⁴ Their study of the problems of interstate placement for foster care and adoption led them to identify several concerns: (1) the failure of importation and exportation statutes to provide protection for children moved interstate; (2) the territorial limitation of a state's jurisdiction and the powerlessness of the state from which the child was sent to ensure that proper care and supervision were provided in another state; and (3) the absence of a means to compel the state to which the child was sent to provide services in support of the placement.¹⁵ In response to those concerns, the ICPC was drafted under the auspices of the New York State Legislative Committee on Interstate Cooperation and was approved by a twelve-state conference in 1960.¹⁶ In the same year, New York became the first state to enact its provisions.¹⁷ Since that time, forty-eight additional states and the Virgin Islands have adopted the ICPC.¹⁸ The ICPC has not been adopted in New Jersey, the District of Columbia, or Puerto Rico.¹⁹

11. See P. HARDY, *supra* note 7, at 16; F. ZIMMERMAN & M. WENDELL, *supra* note 2, at 24.

12. ICPC, *supra* note 1, at art. IX.

13. AMERICAN PUBLIC WELFARE ASSOCIATION, THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN: COMPACT ADMINISTRATORS' MANUAL 2.12 (Compact Provisions, An Interpretative Commentary) (1982) [hereinafter COMPACT ADMINISTRATORS' MANUAL].

14. THE SECRETARIAT TO THE ASSOCIATION OF ADMINISTRATORS OF THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, GUIDE TO THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN 3 (1985) [hereinafter GUIDE TO THE INTERSTATE COMPACT].

15. *Id.*

16. COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION PROGRAM FOR 1961-62 (1960). The draftsman of the ICPC was Dr. Mitchell Wendell, Research Consultant to the New York Joint Legislative Committee on Interstate Cooperation. R. HUNT, OBSTACLES TO INTERSTATE ADOPTION app. IV, part 3, at 44 (Draftsman's Notes, ICPC) (1972).

17. GUIDE TO THE INTERSTATE COMPACT, *supra* note 14, at 3.

18. COMPACT ADMINISTRATORS' MANUAL, *supra* note 13, at 5.00 (List of States in the Compact).

19. Telephone interview with Betsey Rosenbaum, Project Manager, Secretariat to the Association of Administrators of the Interstate Compact on the Placement of Children, American Public Welfare Association (Feb. 16, 1988).

In recommending the enactment of the ICPC to state legislatures in 1960, the Council of State Governments described the problems as follows:

At the present time, laws relating to interstate placement are inadequate or nonexistent. A number of states have interstate placement statutes, but they have been enacted unilaterally. Consequently, 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. Some states, either with or without placement laws, have informal arrangements for courtesy supervision of homes in which interstate placements are made. However, the state of origin loses jurisdiction over the child once it has left the state and, if the voluntary arrangements break down or are resisted, undesirable situations can develop.²⁰

The problems identified in the paragraph quoted above are manifestations of the limited jurisdictional reach of a state, which, despite the full faith and credit clause, can neither direct the care nor compel the return of a child beyond its borders. To invoke full faith and credit, the state of origin must have "jurisdiction over both the parties and the subject matter at the time it must act."²¹ The ICPC was intended to extend the jurisdictional reach of a party state into the borders of another party state for the purpose of investigating a proposed placement and supervising a placement once it has been made.²²

IV. PURPOSE AND POLICY OF THE ICPC: ARTICLE I

The statement of purpose and policy indicates that the ICPC was designed to accomplish four objectives: (1) maximization of opportunity for placement; (2) maximization of information for the receiving; (3) maximization of information for the state from which the child is sent; and (4) resolution of jurisdictional conflicts.²³ Each of these objectives addresses genuine problems that can and do occur in interstate placements.

Paragraph (a) of Article I addresses the problem that occurs when there is a shortage of available placements for children in a particular state.²⁴ Article I(a) calls for maximization of opportunity for desirable placement by removing the limitations ordinarily imposed by state boundaries, thereby expanding the pool of potential placements. This clearly indicates that the ICPC was intended to facilitate "good" place-

20. COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION PROGRAM FOR 1961, 49 (1960).

21. Callanan & Wendell, *The Interstate Compact on the Placement of Children*, 26 JUV. JUST. 41, 42 (May 1975).

22. ICPC, *supra* note 1, at art. I(c), (d).

23. ICPC, *supra* note 1, at art. I.

24. COMPACT ADMINISTRATORS' MANUAL, *supra* note 13, at 1.00 (Introduction).

ments, that is, placements which serve the best interests of the children, whether interstate or intrastate. In maximizing the opportunity for adoptive placement, the ICPC should serve to neutralize the effect that crossing state lines would otherwise have on the placement decision. The decisionmaker is then able to focus on the child's needs, not jurisdictional conundrums.

Paragraphs (b) and (c) of Article I address problems associated with the need to have sufficient knowledge to evaluate a proposed interstate placement before it occurs. A problem is created when a child is placed in a state without the knowledge of the authorities in that state, such as child welfare agencies or courts, who bear, or who may ultimately bear, responsibility for the child's well-being. Without prior knowledge of the placement, there is no opportunity to safeguard the interests of the child by assuring compliance with that state's child placement laws.²⁵

A similar problem exists from the perspective of a party charged with legal responsibility for the child in the sending state. The responsible party could be an individual, an agency, or a court. The responsibility to protect the interests of the child cannot be discharged properly when the responsible party is incapable of conducting a full investigation because the information sought is beyond the sending state's territorial reach.²⁶

Finally, paragraph (d) of Article I addresses the many problems related to jurisdictional conflicts regarding the supervision of and financial responsibility for interstate placements. These problems include the potential loss of jurisdiction over a child placed out of state, the inability to supervise a placement in another state, and the risk of shifting the financial responsibility to the receiving state.²⁷

V. SUMMARY OF PROVISIONS OF THE ICPC

The text of the ICPC consists of ten articles, which are identical in all member states.²⁸ In addition to the text of the ICPC, there is also suggested enabling legislation to "put the compact into effect and to relate its provisions to the organizational structure and operating procedure of the ratifying state."²⁹ The suggested enabling act has been adopted by all party states in substantially the same form as recommended.³⁰

25. See Oney, *Legal Aspects of Interstate Adoptions*, 38 J. MO. B. 428, 428-29 (1982).

26. *Id.*

27. COMPACT ADMINISTRATORS' MANUAL, *supra* note 13, at 1.02. Issues of financial responsibility relating to subsidized and special needs adoption have been addressed in the INTERSTATE COMPACT ON ADOPTION AND MEDICAL ASSISTANCE.

28. COMPACT ADMINISTRATORS' MANUAL, *supra* note 13, at 2.1.

29. *Id.* at 1.08.

30. *Id.*

In essence, the ICPC requires that its procedures be followed in order to obtain the receiving state's permission for placement *before* the child is sent to the receiving state for purposes of foster care or adoption. Thus, the ICPC requires prospective, rather than retroactive, compliance. Articles II through X are briefly summarized below.

A. Article II: Definitions

Article II defines four key terms: "child," "sending agency," "receiving state," and "placement."³¹ "Child" is defined as "a person who, by reason of minority, is legally subject to parental, guardianship or similar control."³² "Sending agency" is defined to include an officer or employee of a party state or one of its subdivisions, a court of a party state, a private agency, an individual, corporation, association or other entity which sends, brings, or causes to be sent or brought any child to another party state.³³ "Receiving state" is defined as "the state to which a child is sent, brought, or caused to be sent or brought, whether by public authorities or private persons or agencies, and whether for placement with private agencies or persons."³⁴ Finally, "placement" is defined as "the arrangement for the care of a child in a family free or boarding home or in a child-caring agency or institution," excluding mental institutions, educational institutions, and medical facilities.³⁵ "Family free" home is not defined in the ICPC. Apparently, it means a family home in which a child lives without charge and is provided "the care which children usually receive from their parents as part of the process of upbringing."³⁶ A "family free" home may be contrasted with a boarding home in which a child lives in exchange for compensation to the substitute parents.

B. Article III: Conditions for Placement

Article III sets out four general requirements for a valid placement. First, paragraph (a) prohibits a sending agency from sending, bringing, or causing "to be sent or brought into any other party state any child for placement in foster care or as a preliminary to a possible adoption unless" the provisions of Article III and the placement laws of the receiving state are met.³⁷ Second, a sending agency must pro-

31. The term "sending state" is not defined by the ICPC. See *infra* notes 119-22 and accompanying text. However, for stylistic purposes, the term "sending state" is often used throughout this Article as if it were actually defined.

32. ICPC, *supra* note 1, at art. II(a).

33. ICPC, *supra* note 1, at art. II(b).

34. ICPC, *supra* note 1, at art. II(c).

35. ICPC, *supra* note 1, at art. II(d).

36. COMPACT ADMINISTRATORS' MANUAL, *supra* note 13, at 2.2 (Compact Provisions, An Interpretive Commentary).

37. ICPC, *supra* note 1, at art. III(a).

vide written notice of the proposed placement to the receiving state.³⁸ The written notice must include identifying information about the child, the child's parents or guardians, and the person, agency, or institution with whom the child is to be placed.³⁹ Additionally, the notice must contain a statement of reasons for the proposed placement and "evidence of the authority pursuant to which the placement is proposed to be made."⁴⁰ Third, an appropriate officer of the sending state, agency of the sending state, or the sending agency itself may be required to provide any additional information requested by the receiving state.⁴¹ Finally, the child cannot be "sent, brought, or caused to be sent or brought into the receiving state" until the receiving state notifies the sending agency in writing that "the proposed placement does not appear to be contrary to the best interests of the child."⁴²

C. Article IV: Penalties

Article IV prescribes two kinds of penalties for a placement made in violation of the ICPC. First, the violation of the ICPC is deemed a violation of the child placement laws of both the sending and receiving states and may be punished as such in either state.⁴³ Second, the ICPC violation constitutes grounds for the suspension or revocation of a license to place or care for children.⁴⁴

D. Article V: Jurisdiction

Article V provides that jurisdiction over a child placed in another state is retained by the sending agency to direct the child's custody and care.⁴⁵ The sending agency retains the same degree of control over, and responsibility for, the child as "if the child had remained in the sending agency's state."⁴⁶ Additionally, Article V provides that the sending agency remains financially responsible for the support and maintenance of the child during the period of placement.⁴⁷ However, Article V provides an exception to the retention of jurisdiction by the sending agency when a child commits a crime or a delinquent act in the receiving state. Then the receiving state has jurisdiction "suffi-

38. ICPC, *supra* note 1, at art. III(b).

39. ICPC, *supra* note 1, at art. III(b)(1)-(3).

40. ICPC, *supra* note 1, at art. III(b)(4).

41. ICPC, *supra* note 1, at art. III(c).

42. ICPC, *supra* note 1, at art. III(d).

43. ICPC, *supra* note 1, at art. IV.

44. *Id.*

45. ICPC, *supra* note 1, at art. V(a).

46. *Id.* The relationship between the Uniform Child Custody Jurisdiction Act and the ICPC is beyond the scope of this Article; however, where the sending agency is a court, a conflict of laws problem may exist.

47. ICPC, *supra* note 1, at art. V(a).

cient to deal with [the] act of delinquency or crime."⁴⁸

Article V also permits a sending agency that is either a public agency or a private charitable agency to arrange for an authorized agency in the receiving state to provide services on its behalf or to act as its agent in regard to a placement.⁴⁹ However, this provision for services or financial support by an agency in the receiving state does not relieve the sending agency from its responsibilities under Article V.⁵⁰

E. Article VI: Delinquent Children

Article VI provides for the placement of a delinquent child in an institution in another state.⁵¹ The purpose of Article VI was to fill a gap left by the Interstate Compact on the Placement of Juveniles, which appeared to prohibit out-of-state placement of juvenile delinquents in private institutions.⁵² However, that topic is beyond the purview of this Article.

F. Article VII: Compact Administrator

Article VII provides for the designation of an officer of the state to act as compact administrator with the responsibility of coordinating ICPC activities and, jointly with the other compact administrators, promulgating rules and regulations.⁵³

G. Article VIII: Limitations

The applicability of the ICPC is limited by two provisions in Article VIII. Paragraph (a) of Article VIII exempts placements made by a close relative or a guardian with a close relative or non-agency guardian.⁵⁴ Paragraph (b) of Article VIII exempts placements made pursuant to another interstate compact or similar agreement between states.⁵⁵

H. Article IX: Participation

Article IX provides that the ICPC may be joined "by any state, territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and, with the consent of Congress,

48. *Id.*

49. ICPC, *supra* note 1, at art. V(b), (c).

50. ICPC, *supra* note 1, at art. V(c).

51. ICPC, *supra* note 1, at art. VI.

52. Callanan & Wendell, *supra* note 21, at 43.

53. ICPC, *supra* note 1, at art. VII. *See infra* text accompanying notes 61-64.

54. ICPC, *supra* note 1, at art. VIII(a). *See infra* text accompanying notes 123-127.

55. The Interstate Compact on Juveniles is an example of a compact with the potential for overlapping coverage with the ICPC.

the Government of Canada or any province thereof.”⁵⁶ Thus, in most cases, the ICPC may be joined by enacting its provisions into law.⁵⁷ Article IX also provides for withdrawal from the ICPC by the enactment of a statute. However, such withdrawal cannot take effect for two years, and notice of the withdrawal must be given to all other party states.⁵⁸

I. Article X: Construction and Severability

Finally, Article X mandates liberal construction and severability of ICPC provisions.⁵⁹ Article X has been described as “a standard compact provision” intended to address improbable constitutional challenges to the ICPC.⁶⁰

VI. ADMINISTRATIVE STRUCTURE AND OPERATION OF THE ICPC

Pursuant to Article VII, each state that is a party to the ICPC has a compact administrator who is charged with the responsibility of coordinating ICPC activities within that state. The compact administrators of all the member states are authorized by Article VII to jointly issue rules and regulations. To that end, the Association of Administrators of the Interstate Compact on the Placement of Children (“Association of Administrators”) was established.⁶¹ The Association of Administrators is affiliated with the American Public Welfare Association, which provides the Secretariat for the Association of Administrators (“Secretariat”). The Secretariat performs certain coordinating functions on a national level, including record keeping, the compilation and dissemination of data, the maintenance of the Compact Administrators’ Manual, technical assistance, and other duties as contracted with by the Association of Administrators.⁶² One of the other functions of the Secretariat is to furnish advisory opinions to compact administrators. Those opinions are then included in the Compact Administrators’ Manual.⁶³ Although Secretariat Opinions do not have the force of law, they are often cited by courts as persuasive authority in ICPC matters.⁶⁴

56. ICPC, *supra* note 1, at art. IX.

57. *Id.*

58. *Id.*

59. ICPC, *supra* note 1, at art. X.

60. COMPACT ADMINISTRATOR’S MANUAL, *supra* note 13, at 2.12 (Compact Provisions, An Interpretative Commentary).

61. *Id.* at 4.1.

62. *Id.*

63. *Id.* at 3.1.

64. H. GITLIN, ADOPTIONS: AN ATTORNEY’S GUIDE TO HELPING ADOPTIVE PARENTS 116 (1987).

VII. BARRIERS TO THE EFFECTIVENESS OF THE ICPC

A. ICPC Often Violated Both Unintentionally and Intentionally

A major barrier to the effectiveness of the ICPC is lack of compliance with its terms. Courts have noted the magnitude of this problem of noncompliance,⁶⁵ and the Secretariat has acknowledged that "it often happens, through inadvertence or otherwise that children are placed from one Compact state into another without observing Compact procedures."⁶⁶ Although the Secretariat Opinion quoted is more than twelve years old, the problem of noncompliance continues and was noted recently in a 1987 opinion of the New York Surrogate's Court.⁶⁷

1. *Unintentional Noncompliance*

In some instances noncompliance is unintentional. Many persons, including attorneys, who are inexperienced in interstate adoptions are simply unaware of the existence of the ICPC and its provisions.⁶⁸ An attorney or layman who reads the requirements for an adoption as provided in statutes labelled "adoption" and who consults the index to state statutes for other provisions relating to adoption, is unlikely to discover that the state is a party to the ICPC.⁶⁹ The reasons for this are simple. The ICPC is not codified as part of the adoption statutes,⁷⁰ most state adoption statutes do not cross-reference the ICPC provisions,⁷¹ and nearly half of the indices to state codes do not refer to the ICPC provisions under the headings "adoption" or "interstate adoption."⁷² While most of the indices do refer to the ICPC under the

65. See, e.g., *In re Adoption of Baby "E"*, 104 Misc. 2d 185, 427 N.Y.S.2d 705 (Fam. Ct. 1980).

66. COMPACT ADMINISTRATORS' MANUAL, *supra* note 13, at 3.27 (Secretariat Opinion 16 (May 16, 1975)).

67. *In re Adoption of Baby Boy M.G. Anonymous*, 135 Misc. 2d 252, 515 N.Y.S.2d 198 (Sur. Ct. 1987).

68. H. GITLIN, *supra* note 64, at 112. Some legal commentators and jurists also appear to be unaware of the ICPC. The author of a recent student note on independent adoption wrote about the problems of interstate placement without mentioning the ICPC. The note proposed the enactment of a model statute which incorporated ICPC provisions without indicating, or perhaps recognizing, that those provisions are law in the 49 states that are ICPC members. Note, *Independent Adoption: The Inadequacies of State Law*, 63 WASH. U.L.Q. 753 (1986). A recent Kentucky decision suggests that some judges are also unaware of the ICPC. In *Waters v. Cabinet for Human Resources*, 736 S.W.2d 365 (Ky. App. 1987), the trial court attempted to apply the Interstate Compact on Juveniles where the ICPC was clearly applicable.

69. H. GITLIN, *supra* note 64, at 112.

70. *Id.*

71. Apparently, no adoption statutes cross-reference the ICPC.

72. The ICPC is indexed under "adoption" or "interstate adoption" in only 27 of the

headings "compact" or "interstate compact," one would need to know of the existence of the ICPC to take advantage of those entries.

Unintentional noncompliance may also occur due to uncertainty as to whether the ICPC applies in a particular case. For example, a sending agency may resolve a question of the ICPC's applicability in a different manner than a compact administrator, and both may have substantial arguments in favor of their positions. While some of this uncertainty is the result of the impossibility of drafting a statute to cover all possible fact situations, some of this uncertainty is also the result of ambiguity in the definitional sections of the ICPC.⁷³ This unintentional noncompliance due to uncertainty is ordinarily addressed in one of two ways: by retroactive compliance or by litigation.

When litigation is chosen, even if the litigation proceeds to the highest state court, the uncertainty is resolved only in that jurisdiction. The same uncertainty may arise in the courts of another party state and may be resolved in a conflicting manner because the doctrine of stare decisis is inapplicable. Thus, an individual seeking to determine whether the ICPC applies in a particular jurisdiction which has no binding precedent is faced with uncertainty and the opportunity to argue for the interpretation that is consistent with the desired result. The problem is the same as that with the interpretation of any uniform act by various state courts—the desired uniformity may be lost if conflicting judicial interpretations are rendered.

2. *Noncompliance with the ICPC in Independent Adoptions*

Reported cases indicate that the problem of noncompliance is a significant one, particularly in those adoptions labelled "independent," "private," or "gray market" adoptions.⁷⁴ An independent, private, or gray market adoption is one in which the birth parents relinquish the child for adoption without the involvement of a licensed adoption agency.⁷⁵ The placement is made by the birth parents themselves or by an intermediary. The private adoption nomenclature is somewhat confusing because an adoption agency can be either public or private.⁷⁶ However, a private adoption is one which involves neither a public nor

49 ICPC member states. In the remaining 22 member states, the ICPC is indexed under various headings, including "minors" and "children."

73. See *infra* text accompanying notes 110-43.

74. See COMPACT ADMINISTRATORS' MANUAL, *supra* note 13, (Secretariat Opinion 16 (May 16, 1975)), at 3.27. See also, COMPACT ADMINISTRATORS' MANUAL, *supra* note 13, at 3.71-3.72 (Secretariat Opinion 38 (April 7, 1977)).

75. Howe, *Adoption Practice, Issues, and Laws 1958-1983*, 17 FAM. L.Q. 173, 179 (1983); Comment, *Independent Adoptions: Is the Black and White Beginning to Appear in the Controversy Over Gray-Market Adoptions?*, 18 DUQ. L. REV. 629, 630 (1980).

76. Comment, *supra* note 75, at 630 n.8.

private adoption agency. Private adoptions are also referred to as "private placements."

The term "gray market adoption" has been used to indicate that independent adoptions often fall into a gray area of the law, somewhere between the highly regulated agency adoptions and the patently illegal baby selling of blackmarket adoptions.⁷⁷ Some states prohibit anyone other than a parent or legally recognized parent substitute from making an independent adoption placement.⁷⁸ Other states permit intermediaries to arrange an independent placement, while imposing limitations on who may act as an intermediary and what fees they may collect, if any.⁷⁹

Although not involved in the placement, an agency may become involved in an independent adoption by investigating the adoptive home, either before or after the placement is made, as required by the state's adoption statutes.⁸⁰ Even in states that do not require it, an agency investigation may be ordered in the discretion of the court hearing the petition for adoption.⁸¹

A frequent criticism of independent adoptions is that they fail to protect the interests of the child because, in most states, the prospective adoptive home is not investigated by a licensed child placing agency *before* the placement occurs.⁸² Once the placement occurs, even if the post-placement investigation reveals deficiencies in the prospective adoptive parents or in the home environment, removal of the child is unlikely unless the deficiencies are severe.⁸³ Thus, it has been argued that the child is deprived of the best available placement to which he or she is entitled by the best interests standard which governs adoption.⁸⁴ Under this view, independent adoption allows a child to be placed with the highest bidder, rather than with the adoptive parents best able to fulfill all the child's needs—emotional as well as material.⁸⁵

Another criticism of independent adoption is that it fails to adequately protect the interests of the adoptive and birth parents. On the other hand, supporters of independent adoption dispute the notion

77. *Id.* at 629-30.

78. *Id.* at 637.

79. Note, *supra* note 68, at 756-57.

80. *Id.* at 758-59.

81. *Id.* at 758 n.48.

82. Comment, *supra* note 75, at 633-34. An interstate independent adoption placement, made in compliance with the ICPC, will ordinarily involve a pre-placement investigation as a prerequisite to ICPC approval.

83. See W. MEEZAN, S. KATZ & E. RUSSO, ADOPTIONS WITHOUT AGENCIES 27 (1978).

84. See generally *id.* See also Podolski, *Abolishing Baby Buying: Limiting Independent Adoption Placement*, 9 FAM. L.Q. 547, 551-52 (1975).

85. *Cf.*, Comment, *supra* note 75, at 646 (noting the concern that less affluent prospective adoptive parents might be disadvantaged in the competition for healthy white infants).

that independent placements create greater risks for the child⁸⁶ and cite a number of advantages to the child.⁸⁷ Independent adoption often permits direct placement of a newborn with the adoptive parents within a few days of birth.⁸⁸ This is advantageous because the bonding process can begin immediately between parents and child.⁸⁹ Independent adoption is also advantageous in that the child need not be placed in a foster home, only to have that relationship disrupted when the adoption placement occurs.⁹⁰ Further, independent adoptions are frequently, though not necessarily, more "open" than agency adoptions, allowing the birth parents and adoptive parents to know one another's identities and even to meet, should they desire.⁹¹ This additional information may be beneficial to the adoptive child in coming to grips with having been adopted and in reconciling his or her genetic and social identities.⁹²

The parties to an interstate independent adoption might inadvertently fail to comply with the ICPC for the reasons discussed in section VII(A) of this Article, or they might knowingly choose not to comply with the provisions of the ICPC for several reasons. First, one of the states might prohibit or impose greater restrictions on independent placements.⁹³ Second, complying with the ICPC may be time consuming, and time may be of the essence if placement of the infant with the adoptive parents directly from the hospital is desired. Third, the penalties for noncompliance may be insufficient to deter intentional noncompliance with the ICPC provisions by the parties to

86. Leavitt, *The Model Adoption Act: Return to a Balanced View of Adoption*, 19 FAM. L.Q. 141, 149 (1985). The most recent comprehensive treatment of independent adoptions appears in W. Meezan, S. Katz, and E. Russo's work, *supra* note 83, in which the authors concluded:

[T]he majority of the homes in which children were placed independently were rated by the agencies as being as good or better than agency homes in their physical and emotional care of the child . . . and almost all of the homes were rated positively by the trained personnel who interviewed the adoptive couple.

Leavitt, *supra*, at 149.

87. See generally *id.* at 141-54.

88. *Id.* at 149; Comment, *supra* note 75, at 647; Note, *Independent Adoptions: Regulating the Middleman*, 24 WASHBURN L.J. 327, 334 (1985).

89. CHILD WELFARE LEAGUE OF AMERICA, STANDARDS FOR ADOPTION SERVICE 37 (Rev. 1978).

90. Comment, *supra* note 75, at 644. Most agencies do not place infants with adoptive families until the parental rights of the birth parents have been terminated or relinquished. Note, *supra* note 88, at 334.

91. Some of the negative aspects of open adoption with extensive interaction between the birth and adoptive families are discussed in J. SMITH & F. MIROFF, YOU'RE OUR CHILD: THE ADOPTION EXPERIENCE 6-8 (1987) and in Schur, *The ABA Model State Adoption Act: Observations from an Agency Perspective*, 19 FAM. L.Q. 131, 132-33 (1985).

92. See Leavitt, *supra* note 86, at 78-79.

93. See *supra* text accompanying notes 78-79.

an independent adoption.⁹⁴

Consider, for example, a typical scenario involving ICPC party States A and B. A pregnant woman who wishes to place her child for adoption (birth mother) resides in State A, where independent placements with nonrelatives are prohibited. If the birth mother prefers an independent placement, she might contact an attorney or other intermediary in State B, where independent placements are permitted. The intermediary would identify a prospective adoptive family in State B and begin to make arrangements for the adoption. To avoid the appearance, if not the actuality, of an interstate adoption, the birth mother might be advised to relocate to State B until the child is born and relinquished to the adoptive parents. If the birth mother delivers the child in State B, has a State B address, and relinquishes the child to the adoptive parents in accordance with the laws of State B, there may be no reason to suspect that an interstate adoption has occurred. Indeed, some would argue that there has been no interstate adoption under these facts.⁹⁵ However, the position taken by the compact administrators in both states is apt to be that an interstate placement has occurred and that the ICPC has been violated.⁹⁶

Whether the interstate aspect of the placement is discovered and brought to the attention of the compact administrators or a court depends upon the type of investigation that State B conducts prior to finalization of the adoption. This discovery is most likely in a jurisdiction that requires interviews with the birth parents and an investigation of the adoptive home, less likely in a jurisdiction that mandates an investigation of the adoptive home only, and unlikely in a jurisdiction that does not require an investigation at all.⁹⁷

If the interstate nature of the placement is discovered, the court has three options (assuming the adoption is otherwise in the best interests of the child): (1) grant the petition to adopt without ICPC approval; (2) deny the petition to adopt; or (3) require retroactive

94. See *infra* text accompanying notes 156-83.

95. Kan. Op. Att'y Gen. 88-174 (Dec. 28, 1988), *reprinted in* 15 Fam. L. Rep. (BNA) 1243 (Mar. 21, 1989).

96. COMPACT ADMINISTRATORS' MANUAL, *supra* note 13, at 3.105 (Secretariat Opinion 49 (June 30, 1986)).

Where the expectant mother crosses a state line as part of the placement plan and arrangement, the transaction should be viewed as an interstate placement. In enacting the Compact, the intent of the state legislatures was not to make the protections of placements depend on mechanical manipulations of the delivery point. Such logistic calculations are nothing more than subterfuges and studied efforts to avoid the intended and normal consequences of the law.

Id. at 3.106. See also *id.* at 3.67-3.70 (Secretariat Opinion 37 (April 7, 1977)); *id.*, at 3.71 (Secretariat Opinion 38 (April 7, 1977)).

97. Cf. Note, *supra* note 68, at 757-58 (discussing variations in the investigative process).

compliance with the ICPC. As discussed later in this Article, several courts have upheld the finalization of adoptions without ICPC approval.⁹⁸ Rarely has a court denied the petition to adopt and required that the child be returned to the birth mother for failure to comply with the ICPC.⁹⁹ The option most frequently chosen by the courts, with the apparent encouragement of the Secretariat, is retroactive compliance.¹⁰⁰

However, retroactive compliance undermines the purposes of the ICPC in at least two ways. First, a post-placement investigation, rather than a pre-placement investigation, may provide less protection for the interests of the child; and second, the jurisdiction of State A over the child has been subverted. Clearly, the child has received no less protection than any State B child who is placed independently. However, it is arguable that the child has received less protection than a State A child, and one of the goals of the ICPC is to prevent forum shopping which might benefit the adopting parents, birth parents, or intermediaries at the expense of the child.¹⁰¹ Nonetheless, retroactive compliance may be the preferred alternative when the child has been integrated into the adoptive family and would be adversely affected by removal.¹⁰²

Even if the laws of States A and B were similar in permitting independent adoption, the parties might seek to circumvent the ICPC if an immediate placement were desired. The length of time required to obtain ICPC approval could negate the benefits of early bonding and continuity associated with independent adoption. "Six weeks—30 working days—is the maximum recommended processing time from

98. See *infra* notes 171-182 and accompanying text.

99. See *infra* notes 164-170 and accompanying text.

100. See COMPACT ADMINISTRATORS' MANUAL, *supra* note 13, at 3.27 (Secretariat Opinion 16 (May 16, 1975)).

In most instances it is desirable to cover [sic] the placement into the Compact even though its initiation was improper. This can be done by notifying the sending agency, the home . . . in which the child is placed, and the Compact Administrators in the sending and receiving states. Appropriate documents can then be sent and approval given. Of course, this should not be done if it is found that the environment into which the child has been placed is not satisfactory.

Id. See also COMPACT ADMINISTRATORS' MANUAL, *supra* note 13, at 3.71-3.72 (Secretariat Opinion 38 (April 7, 1977)).

101. ICPC, *supra* note 1, at art. I.

102. COMPACT ADMINISTRATORS' MANUAL, *supra* note 13, at 3.27 (Secretariat Opinion 16 (May 16, 1975)).

If the placement is preliminary to a possible adoption, it would be possible for a court to refuse the final adoption decree on the ground that the child was unlawfully in the adoptive home. However, if the placement is otherwise satisfactory, and if it appears that the adoption is desirable, it would be a severe remedy to impose. Moreover, the principal victim probably would be the child.

Id.

the date the receiving state Compact office receives the notice of the proposed placement until the date that the placement is approved or denied."¹⁰³ However, an average interstate placement delay of three months has been reported in at least one location.¹⁰⁴

If the parties agree to an independent placement well before the birth of the child, an immediate placement in compliance with the ICPC would be feasible, but improbable. The application for ICPC approvals could be submitted in advance and the investigation of the adoptive home could be completed.¹⁰⁵ However, final approval is unlikely prior to the birth because proof of surrender of parental rights is required, and, ordinarily, parental rights may not be surrendered until after the birth of the child.¹⁰⁶ Furthermore, in some states approval would take even longer because a judicial termination of parental rights is required.¹⁰⁷ Thus, a placement approved by the ICPC shortly after birth is difficult to arrange even in the most advantageous circumstances. In less advantageous circumstances, as where the birth mother decides after she delivers to place the child for adoption and the prospective adoptive parents reside in a state that requires judicial termination of parental rights, an ICPC-approved interstate placement within a few days of birth is virtually impossible.¹⁰⁸ However, in most jurisdictions that permit independent placements, an intrastate placement is feasible within a few days of birth because no prior approval is required.¹⁰⁹

One might argue that the impediments to independent placement created by the ICPC are desirable in that a hasty placement may fail to protect the best interests of the child. However, if the placement is likely to be made anyway, in contravention of the ICPC, and if the penalties for noncompliance are unlikely to affect the finalization of the adoption, it might be preferable to have a system that would, at a minimum, encourage early notification of the authorities in the affected states.

103. GUIDE TO THE INTERSTATE COMPACT, *supra* note 14, at 7.

104. Leavitt, *supra* note 86, at 150 (this estimate is attributed to the Los Angeles County Counsel).

105. COMPACT ADMINISTRATORS' MANUAL, *supra* note 13, at 3.106-3.107 (Secretariat Opinion 49 (June 30, 1986)).

106. H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES 878-79 (2d ed. 1988).

107. Leavitt, *supra* note 86, at 150.

108. One possible exception would be the circumstance in which the prospective adoptive home had been investigated and the report of the investigation was acceptable to the compact administrators.

109. See *supra* note 82 and accompanying text.

B. Definitional Section Inadequate

1. *Definition of Sending Agency Is Too Broad*

A recurring problem has been determining who is a sending agency for purposes of requiring compliance with ICPC provisions. Paragraph (b) of Article II provides:

"Sending agency" means a party state, officer or employee thereof; a subdivision of a party state, or officer or employee thereof; a court of a party state; a person, corporation, association, charitable agency or other entity which sends, brings, or causes to be sent or brought any child to another party state.¹¹⁰

Thus, a sending agency need not be an agency, nor must it have *sent* a child from one party state to another. The definition of sending agency is broad enough to include any individual or entity, including a parent¹¹¹ or a court, that causes a child to be moved interstate. In a given placement arrangement, a number of individuals and agencies could be deemed the sending agency. Furthermore, there is nothing in the language of the ICPC to suggest that only one party to a placement can be a sending agency. In addition to the obvious sending agency, the parent or entity which places the child, the recipient of a child may also be a sending agency if it *causes* a child to be brought or sent from one party state to another party state.¹¹² Indeed, the definition of a sending agency is so broad that a party having custody of a child for purposes of adoption who moves with the child from one party state to another party state, before the adoption is finalized, may be a sending agency.¹¹³ This issue of who is the sending agency has been problematic in the few reported cases dealing with the ICPC and adoption.¹¹⁴ The determination of who is the sending agency is paramount to all interstate adoption cases for two reasons. First, it is the sending agency that must comply with the requirements of the ICPC or be penalized for an illegal placement.¹¹⁵ Second, it is the sending agency that retains jurisdiction over, and responsibility for, the child until the adoption is finalized.¹¹⁶

While the broad definition of sending agency may be advantageous because at least one of the "sending agencies" may be expected to seek

110. ICPC, *supra* note 1, at art. II(b).

111. It should be noted, however, that some parent-initiated placements are exempted from the ICPC by Article VIII. See *infra* text accompanying notes 123-127.

112. *In re Adoption of C.L.W.*, 467 So. 2d 1106 (Fla. Dist. Ct. App. 1986)(per curiam); See *In re Adoption of T.M.M.*, 186 Mont. 460, 608 P.2d 130 (1980).

113. Cf. COMPACT ADMINISTRATORS' MANUAL, *supra* note 13, at 1.20 (Regulation I).

114. See *In re Adoption of C.L.W.*, 467 So. 2d 1106 (Fla. Dist. Ct. App. 1986)(per curiam); *In re Male Child Born July 15, 1985 to L.C.*, 718 P.2d 660 (Mont. 1986); *In re Adoption of T.M.M.*, 186 Mont. 460, 608 P.2d 130 (1980).

115. See ICPC, *supra* note 1, at art. III, IV. See also COMPACT ADMINISTRATORS' MANUAL, *supra* note 13, at 2.2 (Compact Provisions, An Interpretive Commentary).

116. ICPC, *supra* note 1, at art. V.

compliance with the ICPC, the existence of multiple sending agencies might make private enforcement of the ICPC more difficult. In at least one case, a natural mother who sought to use a violation of the ICPC as the basis for blocking an adoption was unsuccessful due, in part, to the fact that she, like the adoptive parents, was a sending agency who had failed to comply with the ICPC.¹¹⁷ Thus, if all parties to the transaction can be characterized as sending agencies and charged equally with the responsibility of ICPC compliance, private enforcement becomes improbable.

Even if the existence of multiple sending agencies has the desired effect of increasing the likelihood of compliance, the question remains whether the likelihood of compliance would be increased even more by limiting the number of possible sending agencies and thereby facilitating additional private enforcement. The risk that one of the parties to the adoption arrangement might block the adoption on the grounds of noncompliance with the ICPC would interject a degree of uncertainty into the adoption process. That uncertainty could make noncompliance with the ICPC a far less attractive alternative to prospective adoptive parents and their attorneys.¹¹⁸

2. *Sending State Is Not Defined*

The concept of the sending state was omitted from the definitional section and from the overall scheme of the ICPC. A state may be a sending agency as that term is defined, but the state's role remains undefined if it is not the sending agency. This omission is cured somewhat by the implementing regulations adopted in most states¹¹⁹ and by the "Suggested Procedures" promulgated by the Secretariat.¹²⁰ The regulations and the procedures provide that an application for ICPC approval ("Interstate Compact Placement Request" Form ICPC-100A) be submitted first to the compact administrator in the sending agency's state. The sending state thus acquires a role in receiving the application and forwarding it to the compact administrator in the receiving state. Only if the compact administrator in the sending state approves the proposed placement, and so indicates by signing the Form ICPC-100A, will the application be forwarded to the receiving state's compact administrator for the approval required by Article III.¹²¹ Because the role for the compact administrator was created by

117. *In re Adoption of C.L.W.*, 467 So. 2d 1106, 1111 (Fla. Dist. Ct. App. 1986)(per curiam).

118. See *infra* text accompanying note 182.

119. GUIDE TO THE INTERSTATE COMPACT, *supra* note 14, at 6.

120. COMPACT ADMINISTRATORS' MANUAL, *supra* note 13, at 1.40.

121. COMPACT ADMINISTRATORS' MANUAL, *supra* note 13, at 1.42 (the portion of the form which provides a space for the sending state compact administrator's signature is entitled "Services Requested" and does not specifically indicate sending state approval of the proposed placement).

the adoption of procedures and not by the terms of the ICPC, there is no provision in the ICPC to indicate the basis upon which an application may be approved or denied by the compact administrator in the sending state. The compact administrator in the receiving state is required to make a determination "that the proposed placement does not appear to be contrary to the best interests of the child."¹²² Presumably the same criterion would guide the determination by the compact administrator in the sending state.

3. *Guardian and Non-Agency Guardian Are Not Defined*

While the definition of sending agency is expansive enough to include a parent who sends or brings a child to another state for adoptive placement, Article VIII of the ICPC exempts from its reach some placements initiated by a parent, relative, or guardian:

This compact shall not apply to: (a) The sending or bringing of a child into a receiving state by his parent, step-parent, grandparent, adult brother or sister, adult uncle or aunt, or his guardian and leaving the child with any such relative or non-agency guardian in the receiving state.¹²³

Thus, an interstate placement made by a specified relative or a guardian is beyond the reach of the ICPC if the recipient of the child is a specified relative or a non-agency guardian. However, the individual placing the child and the individual receiving the child must have one of the specified relationships with the child. The only difference in the specified relationships is that with respect to "guardians." Any "guardian" may place a child, but only a "non-agency guardian" may be a recipient. Presumably then, if an agency has been appointed guardian, the agency may place the child in another state with a grandparent without ICPC approval. However, a grandparent may not place the child with an agency guardian in another state without ICPC approval.

Neither "guardian" nor "non-agency guardian" is defined in the ICPC. However, by regulation, the Association of Compact Administrators has delineated the characteristics that a parent, relative, or guardian must possess in order to place a child without ICPC approval pursuant to the Article VIII(a) exemption. Regulation III(c) provides:

Article VIII(a) of this Compact applies only to the sending or bringing of a child into a receiving state to a parent or other specified individual by a parent or other specified individual *whose full legal right to plan for the child has been established by law at a time prior to initiation of the placement arrangement*, and has not been voluntarily terminated, or diminished or severed by the action or order of any Court.¹²⁴

One court has concluded that the rationale for the standard im-

122. ICPC, *supra* note 1, at art. III(d).

123. ICPC, *supra* note 1, at art. VIII.

124. COMPACT ADMINISTRATORS' MANUAL, *supra* note 13, at 1.23 (Regulation III(c))(emphasis added).

posed by Regulation III on a guardian who places a child impels that the same standard be applied to a non-agency guardian who receives a child. In *In re Adoption of Baby "E,"*¹²⁵ the court found that the purpose of Regulation III was to ensure "that only one whose legal relationship towards the child has been independently and legitimately established will have the right to effect such a drastic change as an interstate placement without the oversight and supervision of the contracting states."¹²⁶ Therefore, according to the court, a non-agency guardian who receives a child must possess the pre-existing right to plan for the child.

The court's imposition of the same standard on guardians who "receive" as that imposed on guardians who "place" would appear to preclude most placements that the Article VIII(a) exemption would otherwise permit. In most cases only the individual or agency placing the child will have a previously established right to plan for the child. The individual receiving the child is likely to obtain the right to plan for the child concurrently with the transfer of custody or subsequently, as in an adoption proceeding. The effect of the court's construction of "non-agency guardian" in *Baby "E"* is to further narrow the exemption of Article VIII(a) to so few circumstances that it becomes meaningless.

Although the facts of *Baby "E"* did not involve a placement with relatives, the reasoning of the court leads to the conclusion that a placement with any of the relatives named in Article VIII(a) would require that the receiving relative have a prior right to plan for the child. This conclusion is inescapable because Regulation III, upon which the court relied, refers to "a parent or other specified individual" who sends or brings a child and is not limited to guardians. Therefore, if *Baby "E"* were applied to a relative-to-relative placement, ICPC approval would be required unless both relatives possessed the legal right to plan for the child—a most unlikely circumstance. If the right to plan exists in one relative or guardian, it is unlikely that it exists concurrently in another relative or guardian. Ordinarily, the existence of the right to plan in one would negate the existence of the right to plan in another. Exceptions would include circumstances of shared responsibility, such as the coexistent rights of parents or joint guardians.

An example of one of the few circumstances that would satisfy the standards set out in *Baby "E"* would be a transfer of custody from one parent to the other parent for purposes of a step-parent adoption, where neither parent's rights have been diminished by a court. This could occur if the child were born to an unmarried mother and a fa-

125. 104 Misc. 2d 185, 427 N.Y.S.2d 705 (Fam. Ct. 1980).

126. *Id.* at 190, 427 N.Y.S.2d at 709.

ther married to a woman other than the mother. The mother could bring or send the child from State A to the father in State B to permit the child to be adopted by the father's wife without receiving ICPC approval. Of course, this assumes that the father's paternity has been established, as Regulation III requires that the "full legal right to plan for the child [be] established by law" prior to placement. Neither the language of Regulation III, nor that of Article VIII(a), requires that the right to plan be established by court order — only "by law." Thus, a question could arise as to which state's law should apply in determining whether a right to plan exists in the father.

Finally, a Secretariat Opinion that predates the promulgation of Regulation III states that the purpose of the Article VIII(a) exemption is:

to carve out a group of persons who so positively stand in a close familial or equivalent relationship with the child that the arrangements made for care and protection are obviously of a family character rather than of a kind in which the public agencies and officials of the state should become concerned.¹²⁷

However, neither the ICPC nor Regulation III requires an interpretation consistent with that purpose.

4. *Placement Is Not Clearly Defined*

An essential term to the interpretation and operation of the ICPC is "placement." Unfortunately, placement is not clearly defined in the ICPC, making it difficult to determine whether the ICPC applies to a given situation. Placement is defined in Article II(d) as follows:

"Placement" means the arrangement for the care of a child in a family free or boarding home or in a child-caring agency or institution but does not include any institution caring for the mentally ill, mentally defective or epileptic or any institution primarily educational in character, and any hospital or other medical facility.¹²⁸

As noted in Section V(A) of this Article, neither "family free" nor "boarding" is defined in the ICPC.¹²⁹ Because the definition of placement does not refer to adoption specifically, the question has been posed whether the ICPC applies when a child is permitted to live with prospective adoptive parents in another state.¹³⁰ Although that question cannot be answered by reference to the definition alone, it can be answered affirmatively by reading the definitional section together with paragraph (a) of Article III, which requires ICPC approval for

127. COMPACT ADMINISTRATORS' MANUAL, *supra* note 13, at 3.75-3.76 (Secretariat Opinion 39 (April 15, 1977)).

128. ICPC, *supra* note 1, at art. II(d).

129. See *supra* text accompanying note 36.

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

"placement . . . preliminary to a possible adoption."¹³¹ Article III(a) prohibits a sending agency from sending, bringing, or causing a child to be sent or brought into another party state "for placement in foster care or as a preliminary to a possible adoption" unless the provisions of Article III and the child placement laws of the receiving state have been met.¹³² Thus, reading the two sections together, the ICPC would seem to apply when a child is permitted to live with prospective adoptive parents.¹³³ This interpretation is supported by the legislative history of the ICPC.¹³⁴ Of course, questions may still arise as to whether a placement is "preliminary" or permanent, and as to whether an adoption is "possible" or actual.

Just such a question was posed in *In re Adoption of M.M.*,¹³⁵ where the Supreme Court of Wyoming held that "'placement' preliminary to a 'possible' adoption" did not include the relinquishment of a child by her natural mother to the adopting parents.¹³⁶ The court stated that "[t]he terminology [of the ICPC] lacks cohesion with and is not adaptable to an adoption arranged privately between the consenting natural parent and the adopting parents."¹³⁷ In the court's view, the mother's relinquishment could not be revoked under Wyoming law absent a showing of fraud or duress;¹³⁸ thus, it was "a positive, not [a] potential act."¹³⁹ However, this interpretation is at odds with the position taken by other courts¹⁴⁰ and the Secretariat,¹⁴¹ all of which have

131. ICPC, *supra* note 1, at art. III(a).

132. ICPC, *supra* note 1, at art. III.

133. *But see* Leavitt, *supra* note 86, at 149 (ICPC intended to protect children in foster care).

134. "The 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." COUNCIL OF STATE GOVERNMENTS, SUGGESTED STATE LEGISLATION PROGRAM FOR 1961, 49 (1960). The Draftsman's Notes for the ICPC indicate that the definition of placement in Article II was intended to exclude from ICPC placements arrangements for temporary or specialized care, while including arrangements for the general upbringing of children. R. HUNT, OBSTACLES TO INTERSTATE ADOPTION app. 44 (1972).

135. 652 P.2d 974 (Wyo. 1982).

136. *Id.* at 981.

137. *Id.*

138. *Id.* at 978.

139. *Id.* (The court attempted to distinguish relinquishment to an agency for the purpose of adoption and relinquishment to adoptive parents directly).

140. *See, e.g., In re Adoption of C.L.W.*, 467 So. 2d 1106 (Fla. Dist. Ct. App. 1985); *In re Adoption of Baby "E"*, 104 Misc. 2d 185, 427 N.Y.S.2d 705 (Fam. Ct. 1980).

141. *See* COMPACT ADMINISTRATORS' MANUAL, *supra* note 13, at 2.36 (Opinions of Interest). In a curious interpretation of *In re Adoption of M.M.*, 652 P.2d 974 (Wyo. 1982), the assertion is made that the Wyoming court "applied the Compact to a private placement." However, this conflicts with the language of the case: "We hold the compact inapplicable." COMPACT ADMINISTRATORS' MANUAL, *supra* note 13, at 2.39.

concluded that the ICPC applies to an independent adoption.

The Association of Administrators has expanded the definition of "placement" to include the circumstance of a move from one state to another by the family after a child has been placed, but before the adoption has been finalized. Regulation I provides that "an intrastate placement not subject to the Compact may become an interstate placement subject thereto if, at some subsequent time prior to the consummation of the adoption . . . , the home is moved to another state."¹⁴² Thus, in the view of the Secretariat and the Association of Administrators, the adoption is "possible" until it has been finalized.¹⁴³

D. Compliance with Child Placement Laws of the Sending State Not Specifically Required

Article III prescribes what must be done to effect a valid interstate placement, and, as might be expected, it requires compliance with the child placement laws of the receiving state;¹⁴⁴ but nowhere does the ICPC contain a parallel requirement of compliance with the child placement laws of the sending state.¹⁴⁵ This would suggest that the child placement laws of the sending state need not be complied with to have a valid placement under the ICPC. The ICPC might then be interpreted as encouraging the placement of children in violation of the placement laws of the sending state or as repealing the placement laws of the sending state in cases of interstate placement. Neither interpretation reflects the likely intent of the ICPC.

The problem created by this lack of symmetry has become more theoretical than practical. In usual practice, the compact administrator in a receiving state is unlikely to approve a placement that is violative of the sending state's laws. Most party states have enacted regulations that require the involvement of the compact administrator in the sending state before an ICPC placement request can be forwarded to the receiving state.¹⁴⁶ It is significant to note that without such regulations, the involvement of the compact administrator in the sending state would not be required, and the sending agency could forward an ICPC placement request to the receiving state's compact office directly. Article III requires only that the sending agency provide notice to, and obtain approval from, the compact administrator in the receiv-

142. COMPACT ADMINISTRATORS' MANUAL, *supra* note 13, at 1.20 (Regulation I).

143. It should be noted that Secretariat Opinion 1, which suggests that such a move would not make the placement subject to the ICPC, has been overruled by Regulation I. COMPACT ADMINISTRATORS' MANUAL, *supra* note 13, at 3.2 n.1.

144. ICPC, *supra* note 1, at art. III(a).

145. As discussed in the text accompanying notes 119-22, the ICPC does not embrace the concept of a sending state. "Sending state" is not defined in the ICPC and the text of the ICPC does not include a role for the sending state.

146. COMPACT ADMINISTRATORS' MANUAL, *supra* note 13, at 1.40 (Suggested Procedures I(b)).

ing state. If she deems it necessary, the compact administrator in the receiving state may also request the involvement of the compact administrator in the sending state for the purpose of providing more information.¹⁴⁷

Several reasons may exist for the apparent omission of compliance with the laws of the sending state as a condition for placement. For example, despite the inclusion of individuals and other entities in the definition of sending agency, the ICPC was drafted as if the sending agency would in fact be an agency or court, not an individual.¹⁴⁸ Licensed child placing agencies and courts could reasonably be expected to have knowledge of, and to comply with, the child placement laws in their state. In the case of licensed agencies, the threat of the loss of license could be expected to ensure a reasonable level of compliance. Even so, individuals and other child placing entities may lack knowledge of, or may not be inclined to comply with, the laws of the sending state without a more specific directive.

The Secretariat has provided such a specific directive by taking the position that the ICPC requires compliance with the laws of the sending state.¹⁴⁹ The Secretariat apparently relies on Article III(b)(4), which requires that the notice submitted to the compact administrator in the receiving state include "evidence of the authority pursuant to which the placement is proposed to be made,"¹⁵⁰ and Article IV, which provides that violation of the compact is deemed a violation of the child placement laws in both the receiving state and the sending state.¹⁵¹

The requirement of Article III(b)(4) that the sending agency provide "evidence of authority" to make the proposed placement is susceptible to at least two interpretations. First, it may be interpreted to require evidence that the placement is authorized by the laws of both the sending and receiving states. This construction is consistent with the position of the Secretariat.¹⁵² Second, it may be interpreted to require evidence that the placement is authorized only by the laws of the receiving state. This construction is consistent with the position

147. ICPC, *supra* note 1, at art. III(c).

148. *See, e.g.,* COMPACT ADMINISTRATORS' MANUAL, *supra* note 13, at 1.40 (Suggested Procedures I(b)) ("A person intending to place a child in another compact state will *necessarily* enlist the help of an agency or court in the sending state.")(emphasis added).

149. *See* COMPACT ADMINISTRATORS' MANUAL, *supra* note 13, at 3.67 (Secretariat Opinion 37 (April 7, 1977)). *See also* COMPACT ADMINISTRATORS' MANUAL, *supra* note 13, at 2.2-2.3 (Compact Provisions, An Interpretive Commentary).

150. ICPC, *supra* note 1, at art. III(b)(4).

151. ICPC, *supra* note 1, at art. IV.

152. *See* COMPACT ADMINISTRATORS' MANUAL, *supra* note 13, at 3.67 (Secretariat Opinion 37 (April 7, 1977)).

taken by courts in several reported cases.¹⁵³

In *In re Male Child Born July 15, 1985 to L.C.*,¹⁵⁴ a child born in Montana was relinquished by his mother in Montana to an Idaho adoption agency for placement with an Idaho family. Because the mother desired immediate placement of the child with the adoptive family, the child was placed after ICPC approval was sought, but before it was granted. Three days after the placement, when the child was six days old, the mother changed her mind and sought to compel his return. While the mother was pursuing her action to revoke her consent in the Montana courts, ICPC approval was granted in Idaho, and the adoption was finalized there.

In her appeal of the trial court's decision denying her petition, the mother argued that the adoption agency's failure to secure a judicial termination of her parental rights before placing the child for adoption, as required by Montana law, rendered the placement illegal. In rejecting that argument, the court held that inasmuch as Idaho law required only parental consent to the adoption, the adoption agency "had authority to place the child in Idaho under Article V of the Compact," and the adoption in Idaho was proper.¹⁵⁵ Thus, failure to comply with the child placement laws of the sending state did not affect the right of the sending agency under the ICPC to place the child in accordance with the laws of the receiving state.

Article IV discloses even less support for the Secretariat's position than Article III(b)(4). Article IV addresses the issue of penalty for an ICPC violation, not the threshold issue of what constitutes a violation of the ICPC. Therefore, the effect of Article IV is not to engraft the law of the sending state onto the compact in the same manner that Article III engrafts the law of the receiving state. Instead, Article IV outlines, in general terms, the nature of the penalty that will result if the ICPC is violated, and provides that the violation may be punished in either state in the same manner as if there had been a violation of a child placement law in that state. For example, if a child were sent from State A to State B by X, and X failed to comply with the ICPC, X could be punished for the violation according to the child placement laws of either jurisdiction. On the other hand, if X had complied with Article III in making the placement (i.e., had sought and received the approval of State B prior to placement and had complied with the child placement laws of State B), Article IV would have no effect.

153. See *In re Male Child Born July 15, 1985 to L.C.*, 718 P.2d 660 (Mont. 1986). Cf. *In re Adoption of Baby Boy, M.G.*, Anonymous, 135 Misc. 2d 252, 254-55, 515 N.Y.S.2d 198, 199, 201 (Sur. Ct. 1987) (sending state compact administrator withheld approval as violative of the sending state's laws, but a court in the sending state had given permission for removal of child to the receiving state).

154. 718 P.2d 660 (Mont. 1986).

155. *Id.* at 664-65.

This is true regardless of whether the placement violated State A's laws. Because the approval of the receiving state was obtained, it is not the ICPC, but some other provision of State A's child placement laws that would have been violated. Of course, X could be punished in State A for that violation, but not in State B unless State B, by statute other than the ICPC or by regulation, required compliance with State A's laws as a condition of placement.

Clearly, while the ICPC was designed to facilitate interstate placements, it was not intended to facilitate the evasion of a sending state's laws. In some instances the ICPC does override provisions of a state's laws;¹⁵⁶ however, it does so explicitly and for reasons that are consistent with the purpose of the ICPC. While the practical problem of noncompliance with the sending state's laws may have been overcome by regulation, the regulations need not be adopted in all states and need not be uniform in their content. Therefore, it would have been preferable for the ICPC to require definitively that the sending agency comply with the applicable laws of both the sending state and the receiving state.

D. Sanctions for Failure to Comply with ICPC are Inadequate to Discourage Violation

While the ICPC does not detail specific sanctions for noncompliance, except the suspension or revocation of the sending agency's license,¹⁵⁷ it does, as discussed above, provide that violation of its terms constitutes violation of the child placement laws of both the sending state and the receiving state.¹⁵⁸ Accordingly, the violation may subject the sending agency to prosecution in either state, and the sanctions that may be imposed are the same as those available for illegal child placement in that state.¹⁵⁹ In most states, a violation of child placement laws is a misdemeanor,¹⁶⁰ but in a few states, such a violation is a felony.¹⁶¹

The failure of the ICPC to specify sanctions other than the loss of a sending agency's license has prompted speculation that the intended scope of the ICPC is limited to child placing agencies.¹⁶² While the

156. For example, a receiving state's jurisdiction over a child is limited by Article V, which provides for the retention of jurisdiction by the sending agency. *See supra* text accompanying note 45.

157. ICPC, *supra* note 1, at art. IV.

158. *Id.*

159. *Id.*

160. *E.g.*, ALA. CODE § 38-7-16 (1975); ALASKA STAT. § 47.70.070 (1962); COLO. REV. STAT. § 26-6-112 (1973); IDAHO CODE § 39-1220 (1985); ME. REV. STAT. ANN. tit. 22, § 3800 (1979); MINN. STAT. ANN. § 245.803 (1975); NEV. REV. STAT. § 127.310 (1986).

161. *E.g.*, FLA. STAT. § 63.212 (1985); GA. CODE ANN. § 19-8-19 (1982).

162. *See, e.g., In re Adoption of M.M.*, 652 P.2d 974, 981 (Wyo. 1982)(on the basis of the

Article II definition of "sending agency" and the potential for criminal sanctions caution against limiting the application of the ICPC to public and private child placing agencies, the absence of other specified sanctions supports the view that those agencies comprise the group at which the ICPC is directed.¹⁶³ When this view influences a sending agency's decision of whether to seek ICPC approval, or worse, controls a court's enforcement of ICPC provisions, the ICPC is rendered far less effective.

Perhaps the more unfortunate result of the failure to either specify or rule out other sanctions has been the confusion in the courts as to whether violation of the ICPC should result in the denial of a petition to adopt. Because the ICPC is silent on the precise issue, the courts have developed various approaches and reached conflicting results in analyzing this problem. As a consequence, the ICPC goals of certainty and uniformity have been hindered. The predicament which the courts face is whether to allow the best interests of the child standard to control when the ICPC has been violated. If the best interests standard controls, then the adoption may be granted despite violation of the ICPC. Alternatively, if the violation of the ICPC is fatal to an otherwise desirable adoption, then a child may be deprived of the only family he has ever known, returned to a natural parent who is marginally capable of providing adequate care, or placed in foster care to await an uncertain future. Undoubtedly, it is the potentially harsh result, contrary to the best interests of the child, that has caused the compact administrators, the Secretariat, and the courts to countenance retroactive compliance with the ICPC and, where that is not possible, finalization of adoptions despite noncompliance. Moreover, the circularity of the problem is evident: both retroactive compliance and finalization of adoptions despite ICPC violations encourage subsequent violations. In at least one jurisdiction, the courts have developed what may prove to be an effective remedy—the denial or reduction of attorney fees when the ICPC has been violated.¹⁶⁴

In only one reported case has a violation of the ICPC blocked finalization of the adoption. In *In re Adoption of T.M.M.*,¹⁶⁵ the Supreme Court of Montana held that an adoption placement made in violation

available sanctions, the court concluded that the ICPC "is applicable only to those engaged in the governmental or private service of placing children for adoption."). *But see In re Adoption of C.L.W.*, 467 So. 2d 1106 (Fla. Dist. Ct. App. 1985); *In re Adoption of Baby "E,"* 104 Misc. 2d 185, 427 N.Y.S.2d 705 (Fam. Ct. 1980).

163. *But see Matter of Adoption of T.M.M.*, 186 Mont. 460, 608 P.2d 130 (1980), discussed *infra* at notes 165-171.

164. *See In re Adoption of Calynn, M.G., An Infant*, 137 Misc. 2d 1005, 1008, 523 N.Y.S.2d 729, 731 (Sur. Ct. 1987)(attorney fees reduced from \$2664 to \$1500 for violation of ICPC and rules of court).

165. 186 Mont. 460, 608 P.2d 130 (1980).

of the ICPC was an illegal placement, the sanction for which was the revocation of the natural mother's consent and the return of the child to the natural mother.¹⁶⁶ The court noted that Article IV provides for the penalty of "suspension or revocation of any license, permit, or other legal authorization held by the sending agency which empowers or allows it to place or care for children."¹⁶⁷ From this the court reasoned that the prospective adoptive parents were the sending agency and that the mother's consent was the legal authorization held by the sending agency, within the meaning of Article IV. Consent having been revoked, the adoption proceeding was dismissed. The court rejected the prospective adoptive parents' argument that, although the "technical procedures" of the ICPC were not followed, they had "acted in the best interests of the child" and should be permitted to adopt.¹⁶⁸

The starting point of the court's analysis in *T.M.M.* was the following language in Article IV: "In addition to liability [for violation of the child placement laws], any such violation shall constitute full and sufficient grounds for the suspension or revocation of any license, permit, or other legal authorization held by the sending agency which empowers or allows it to place, or care for children."¹⁶⁹ The court interpreted this language to mean that the violation of the ICPC, which occurred when the child was brought into the state without the approval of the ICPC administrator, established grounds for the revocation of the mother's consent to the adoption. The mother's consent, according to the court, was the legal authorization which allowed the prospective adoptive parents "to place" the child, that is, to bring the child into their home for purposes of adoption.

By implication, the court rejected the argument that the language in Article IV should be limited to agencies and other third party intermediaries who are licensed or authorized by the state to place "children" generally and that such language should not be extended to prospective adoptive parents for whom the mother's consent authorizes only their adoption of a specific child. In this regard, the court's interpretation of this portion of Article IV appears broader than, though not necessarily in conflict with, that of the Secretariat. The Secretariat's interpretation does not mention the possible extension of the revocation language to consent executed in favor of unlicensed individuals; it focuses exclusively on the suspension or revocation of the license of an agency by the licensing state.¹⁷⁰

166. *Id.*

167. ICPC, *supra* note 1, at art. IV.

168. *In re Adoption of T.M.M.*, 186 Mont. 460, 463, 608 P.2d 130, 132 (1980).

169. ICPC, *supra* note 1, at art. IV (emphasis added).

170. Since the Compact becomes part of the law in each party state, the language of this Article makes interstate placement contrary to Compact requirements unlawful. This is important of [sic] itself because many

It may be more instructive to consider what *T.M.M.* did not hold, rather than what it held. It did not hold that dismissal of the petition to adopt was an appropriate remedy for violation of the ICPC. The petition to adopt was dismissed as the indirect result of the ICPC violation; the remedy for the ICPC violation was the revocation of the mother's consent. Thus, while *T.M.M.* is the only one of the cases in which the adoption was blocked, it is also the only one of the cases in which the issue of ICPC noncompliance was reached at a procedural juncture where the best interests standard was not considered.¹⁷¹

Unlike four other cases dealing with the possible denial of an adoption petition for noncompliance with the ICPC, *T.M.M.* involved a child who was five years old at the time of placement and was seven years old when the case was decided. All of the other cases involved children who had been in their adoptive homes since early infancy, and whose adoptive parents were the only parents they had ever known.

The court in *T.M.M.* apparently rejected or failed to consider the argument that the mother, like the adoptive parents, was a sending agency charged with the responsibility of complying with the ICPC. However, that argument was persuasive to the Florida Court of Appeals in *In re Adoption of C.L.W.*¹⁷² In a per curiam opinion, the court affirmed a trial court decision finalizing the adoption of a child over the objection of the natural mother who had revoked her consent to the adoption, and who had obtained a decree awarding her custody of the child in Pennsylvania.¹⁷³ The child had been relinquished by the mother to the adoptive parents in Pennsylvania soon after birth. The mother then changed her mind, but the child was brought by the

persons and agencies will avoid conduct merely because it is unlawful. A further question relates to affirmative action to punish violators. If the violator is a licensed child placing or child caring agency, the explicit reference to suspension or revocation of licenses makes it possible that such a penalty may be imposed by the licensing authority or by whatever procedures are appropriate in the licensing state. It is a general principle of law that only the jurisdiction which issues a license may suspend or revoke. Consequently this remedy cannot be applied in any state other than the state which has issued the license. What other specific penalties are applicable at any given time depends on whether the laws of a party state provide any. . . .

COMPACT ADMINISTRATORS' MANUAL, *supra* note 13, at 2.3-2.4 (Compact Provisions, An Interpretive Commentary)(emphasis added).

171. In other contexts not involving the ICPC, some courts have considered the best interests standard to be controlling, despite the invalidity of parental consent. See, e.g., *Lemly v. Barr*, 343 S.E.2d 101 (W. Va. 1986).

172. 467 So. 2d 1106 (Fla. Dist. Ct. App. 1986).

173. The mother's efforts to have the Pennsylvania custody award enforced in Florida under the Uniform Child Custody Jurisdiction Act were unsuccessful, both in a Florida habeas corpus proceeding and in the instant adoption proceeding. *Id.* at 1108-10.

adoptive parents to Florida, their domicile, where an adoption was sought. In objecting to the proposed adoption, the mother asserted that because the ICPC had been violated, the petition to adopt should be denied. The trial court found that the ICPC did not apply. The Florida Court of Appeals disagreed with the trial court, concluding that the ICPC had been violated, but that "no harm was suffered by the failure to comply" with the ICPC. Therefore, the court concluded that "the compact [was] not available to nullify the adoption proceedings."¹⁷⁴ The court noted that the same kind of investigation had been completed as would have been required under the ICPC, and that the state agency charged with responsibility of administering the compact was not complaining, having found that the adoption would not be contrary to the best interests of the child.¹⁷⁵ "Further, [the mother], as well as [the adoptive parents], had a duty as a 'sending agency' under the compact to notify [the compact administrator] and she should not now be allowed to complain of such failure by the [adoptive parents] to do so."¹⁷⁶

Three other cases dealing with the possible denial of an adoption petition for noncompliance with the ICPC are reported from New York, where the courts are showing increased dissatisfaction with attorneys who fail to observe the requirements of the ICPC when representing clients in private adoptions. Unlike *T.M.M.* and *C.L.W.*, the New York cases did not involve opposition to the adoption by the birth mother. All of the New York cases were reported at the trial court level and there are no reported appeals of those decisions. The New York cases may provide a good indication of how courts are attempting to grapple with both ICPC noncompliance and the best interests of the children.

The earliest of the three New York cases, *In re Adoption of Baby "E,"* was decided in 1980 and was the first reported case to consider "what court action is appropriate on an adoption petition in which an interstate placement does not comply with the [ICPC] . . . but the child, now three years old, has lived all his life in an adoptive home that clearly meets his best interests."¹⁷⁷ The court concluded that the best interests of the child should prevail when the "essential ingredients of a sound adoption have been met" and when "only the failure to comply" with the ICPC, or possible attorney misconduct, stands in the way of the adoption.¹⁷⁸ In arriving at this conclusion, the court noted its duty to the party states of the ICPC to uphold the law, but recog-

174. *Id.* at 1111.

175. *Id.*

176. *Id.*

177. *In re Adoption of Baby "E,"* 104 Misc. 2d 185, 186, 427 N.Y.S.2d 705, 706 (Fam. Ct. 1980).

178. *Id.* at 186, 427 N.Y.S.2d at 709.

nized its paramount duty as that of *parens patriae* to protect the best interests of the child.¹⁷⁹

Following the same line of reasoning as the court in *Baby "E,"* the court in *In re Adoption of Baby Boy M.G., Anonymous* granted a petition for adoption where ICPC approval was sought, but denied by the compact administrators of both the sending and receiving states, Tennessee and New York, respectively.¹⁸⁰ The basis for the denial of compact approval by the compact administrator in Tennessee was a Tennessee law, since changed, which prohibited third party placements. His refusal then formed the basis for the refusal of his New York counterpart. Both compact administrators maintained their positions despite the fact that both the natural mother and the adoptive parents appeared before a Tennessee court and obtained court permission to remove the child from Tennessee. After concluding that the court permission in Tennessee did not confer guardianship status on the adoptive parents within the meaning of the Article VIII exemption, the court concluded that the substantial compliance with the ICPC, coupled with the best interests of the child, warranted granting the adoption petition.

The third New York case, *In re Adoption of Calynn, M.G.*, also involved a placement from Tennessee without ICPC approval.¹⁸¹ When the petitioners' attorney was directed by the court to seek approval by serving a citation on the New York compact administrator, the response from the New York compact administrator asserted the belief, based on past contacts with the attorney over a period of several years, that the attorney had knowingly disregarded the ICPC. Once again, the best interests of the child prevailed. The court noted the uncertainty that would result for the child if the adoption were not finalized, because the whereabouts of the natural mother was then unknown and the child had been in the custody of the petitioners.¹⁸² After expressing concern about "repeated circumvention," the court republished guidelines for private adoptions first published in *Baby "E."* The court stated that "[f]ailure to adhere to these rules or those [of the ICPC] may result in a petition for adoption being rejected, the denial or reduction of the attorney's fee, or civil or criminal sanctions as may be appropriate."¹⁸³ The court then reduced the attorney's fees from \$2,664 to \$1500, as a sanction for failure to comply with the court rules and the ICPC.

179. *Id.* at 193, 427 N.Y.S.2d at 711.

180. *In re Adoption of Baby Boy M.G., Anonymous*, 135 Misc. 2d 252, 515 N.Y.S.2d 198 (Sur. Ct. 1987).

181. *In re Adoption of Calynn, M.G.*, 137 Misc. 2d 1005, 523 N.Y.S.2d 729 (Sur. Ct. 1987).

182. *Id.* at 1006, 523 N.Y.S.2d at 730.

183. *Id.* at 1007, 523 N.Y.S.2d at 731.

The imposition of sanctions against attorneys who violate the ICPC may be the most effective and fairest way to enforce the ICPC and encourage compliance with its terms, especially in cases where the adoption is otherwise desirable and there is no objection from the birth parent. The innocent child would continue to be protected by the best interests standard, and the expectations of the adoptive and birth parents would be given effect.

VIII. RECOMMENDATIONS AND CONCLUSIONS

The ICPC would better accomplish its mission if it were widely known. Where practicable, adoption statutes should cross-reference the ICPC. At the least, the indices to state statutes should cross-reference the ICPC under "adoption" and "interstate adoption." Efforts should be made to inform the bench and bar of the existence of the ICPC and of its provisions through continuing legal education publications and programs and practice oriented publications.

The definitional section of the ICPC might be improved to remove ambiguities in the definitions of "sending agency" and "placement." A hierarchy of sending agencies might be created to fix responsibility for ICPC compliance. "Guardian" and "non-agency guardian" should be defined. The concept of "sending state" ought to be incorporated into the ICPC, as should the requirement that the laws of both the sending and receiving states be followed.

Some consideration should be given to developing different procedures for differing kinds of placements. A system of notice to the compact administrators in adoptive placements, followed by an investigation and a report, might eliminate unnecessary delays while providing equivalent protection to children. To the extent that delays can be avoided, one of the greatest incentives for noncompliance would be removed.

Finally, more effective sanctions should be developed to enforce the ICPC without penalizing innocent children and families. The imposition of sanctions against attorneys who fail to comply with the ICPC should be included as a possible penalty. The question of whether an adoption petition should be denied for failure to comply with the ICPC ought to be addressed in the ICPC to ensure uniformity from state to state.

The laudable goal of maximizing available information for informed decisionmaking before an adoption placement occurs cannot be permitted to overshadow the ultimate goal of facilitating desirable interstate adoption placements. The functions of information gathering and dissemination are important only to the degree that they enhance the decisionmaking process and thereby improve the quality of life for children. They are not ends unto themselves. Bearing that in mind, the ICPC and its implementation ought to be reconsidered from

the perspective of whether it facilitates, unnecessarily delays, or frustrates desirable placements.

APPENDIX
INTERSTATE COMPACT ON THE PLACEMENT
OF CHILDREN

ARTICLE I. Purpose and Policy

It is the purpose and policy of the party states to cooperate with each other in the interstate placement of children to the end that:

(a) Each child requiring placement shall receive the maximum opportunity to be placed in a suitable environment and with persons or institutions having appropriate qualifications and facilities to provide a necessary and desirable degree and type of care.

(b) The appropriate authorities in a state where a child is to be placed may have full opportunity to ascertain the circumstances of the proposed placement, thereby promoting full compliance with applicable requirements for the protection of the child.

(c) The proper authorities of the state from which the placement is made may obtain the most complete information on the basis of which to evaluate a projected placement before it is made.

(d) Appropriate jurisdictional arrangements for the care of children will be promoted.

ARTICLE II. Definitions

As used in this compact:

(a) "Child" means a person who, by reason of minority, is legally subject to parental, guardianship or similar control.

(b) "Sending agency" means a party state, officer or employee thereof; a subdivision of a party state, or officer or employee thereof; a court of a party state; a person, corporation, association, charitable agency or other entity which sends, brings, or causes to be sent or brought any child to another party state.

(c) "Receiving state" means the state to which a child is sent, brought, or caused to be sent or brought, whether by public authorities or private persons or agencies, and whether for placement with private agencies or persons.

(d) "Placement" means the arrangement for the care of a child in a family free or boarding home or in a child-caring agency or institution but does not include any institution caring for the mentally ill, mentally defective or epileptic or any institution primarily educational in character, and any hospital or other medical facility.

ARTICLE III. Conditions for Placement

(a) No sending agency shall send, bring, or cause to be sent or brought into any other party state any child for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this article and with the applicable laws of the receiving state governing the placement of children therein.

(b) Prior to sending, bringing or causing any child to be sent or brought into a receiving state for placement in foster care or as a preliminary to a possible adoption, the sending agency shall furnish the appropriate public authorities in the receiving state written notice of the intention to send, bring, or place the child in the receiving state. The notice shall contain:

(1) The name, date and place of birth of the child.

(2) The identity and address or addresses of the parents or legal guardian.

(3) The name and address of the person, agency or institution to or with which the sending agency proposes to send, bring, or place the child.

(4) A full statement of the reasons for such proposed action and evidence of the authority pursuant to which the placement is proposed to be made.

(c) Any public officer or agency in a receiving state which is in receipt of a notice pursuant to paragraph (b) of this article may request of the sending agency, or any other appropriate officer or agency of or in the sending agency's state, and shall be entitled to receive therefrom, such supporting or additional information as it may deem necessary under the circumstances to carry out the purpose and policy of this compact.

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

ARTICLE IV. Penalty for Illegal Placement

The sending, bringing, or causing to be sent or brought into any receiving state of a child in violation of the terms of this compact 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. Such violation may be punished or subjected to penalty in either jurisdiction in accordance with its laws. In addition to liability for any such punishment or penalty, any such violation shall constitute full and sufficient grounds for the suspension or revocation of any license, permit, or other legal authorization held by the sending agency which empowers or allows it to place, or care for children.

ARTICLE V. Retention of Jurisdiction

(a) The sending agency shall retain jurisdiction over the child sufficient to determine all matters in relation to the custody, supervision, care, treatment and disposition of the child which it would have had if the child had remained in the sending agency's state, until the child is adopted, reaches majority, becomes self-supporting or is dis-

charged with the concurrence of the appropriate authority in the receiving state. Such jurisdiction shall also include the power to effect or cause the return of the child or its transfer to another location and custody pursuant to law. The sending agency shall continue to have financial responsibility for support and maintenance of the child during the period of the placement. Nothing contained herein shall defeat a claim of jurisdiction by a receiving state sufficient to deal with an act of delinquency or crime committed therein.

(b) 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 agent for the sending agency.

(c) Nothing in this compact shall be construed to prevent a private charitable agency authorized to place children in the receiving state from performing services or acting agent in that state for a private charitable agency of the sending state; nor to prevent the agency in the receiving state from discharging financial responsibility for the support and maintenance of a child who has been placed on behalf of the sending agency without relieving the responsibility set forth in paragraph (a) hereof.

ARTICLE VI. Institutional Care of Delinquent Children

A child adjudicated delinquent may be placed in an institution in another party jurisdiction pursuant to this compact but no such placement shall be made unless the child is given a court hearing on notice to the parent or guardian with opportunity to be heard, prior to his being sent to such other party jurisdiction for institutional care and the court finds that:

1. Equivalent facilities for the child are not available in the sending agency's jurisdiction; and
2. Institutional care in the other jurisdiction is in the best interest of the child and will not produce undue hardship.

ARTICLE VII. Compact Administrator

The executive head of each jurisdiction party to this compact shall designate an officer who shall be general coordinator of activities under this compact in his jurisdiction and who, acting jointly with like officers of other party jurisdictions, shall have power to promulgate rules and regulations to carry out more effectively the terms and provisions of this compact.

ARTICLE VIII. Limitations

This compact shall not apply to:

- (a) The sending or bringing of a child into a receiving state by his parent, step-parent, grandparent, adult brother or sister, adult uncle or aunt, or his guardian and leaving the child with any such relative or non-agency guardian in the receiving state.

(b) Any placement, sending or bringing of a child into a receiving state pursuant to any other interstate compact to which both the state from which the child is sent or brought and the receiving state are party, or to any other agreement between said states which has the force of law.

ARTICLE IX. Enactment and Withdrawal

This compact shall be open to joinder by any state, territory or possession of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and, with the consent of Congress, the Government of Canada or any province thereof. It shall become effective with respect to any such jurisdiction when such jurisdiction has enacted the same into law. Withdrawal from this compact shall be by the enactment of a statute repealing the same, but shall not take effect until two years after the effective date of such statute and until written notice of the withdrawal has been given by the withdrawing state to the Governor of each other party jurisdiction. Withdrawal of a party state shall not affect the rights, duties and obligations under this compact of any sending agency therein with respect to a placement made prior to the effective date of withdrawal.

ARTICLE X. Construction and Severability

The provisions of this compact shall be liberally construed to effectuate the purposes thereof. The provisions of this compact shall be severable and if any phrase, clause, sentence or provision of this compact is declared to be contrary to the constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this compact and the applicability thereof to any government, agency, person or circumstance shall not be effected thereby. If this compact shall be held contrary to the constitution of any state party thereto, the compact shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters.