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WHY MASSACHUSETTS SHOULD NOT RELEGATE PARENTS TO “LEGAL STRANGERS”¹: A SURVEY OF THE MYRIAD INTERPRETATIONS OF THE ICPC

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ABSTRACT

The Interstate Compact on the Placement of Children (ICPC) is a well-intentioned statute that has led to anomalous and irrational results in courts across the country. The ICPC’s aim is to ensure that foster care placements by state agencies of children across state lines preliminary to adoption or placement in foster care are in the child’s best interests. However, certain courts have drastically expanded the ICPC’s reach to cover parental foster care placements. This Article discusses the split in case law, the reasons for limiting the ICPC in Massachusetts, and options for nervous courts, attorneys, and state agencies when sending a child across state lines. Ultimately, this Article argues that the ICPC is not the mechanism to utilize when placing a child with his or her parent across state lines.

INTRODUCTION

The Massachusetts Juvenile Court appointed you to represent a mother living in New Hampshire. The Massachusetts Department of Children and Families (DCF) removed her child from her custody while she was in New Hampshire. Over the summer, your client’s three-year-old daughter was living with her maternal grandmother in Massachusetts. Previously unknown to your client, the grandmother has

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1. The titular term “legal stranger” is attributed to Professor Vivek Sankaran. Vivek S. Sankaran, *Out of State and Out of Luck: The Treatment of Non-Custodial Parents Under the Interstate Compact on the Placement of Children*, 25 YALE L. & POL’Y REV. 63, 83 (2006-07) [hereinafter *Out of State and Out of Luck*].

become addicted to Vicodin following her heart surgery last year. She overdosed while the child was in her care. Neighbors found the child wandering the grandmother's apartment building. DCF took emergency custody of your client's daughter.

At the 72-hour hearing, you requested the child's immediate return to your client's home in New Hampshire since the unfitness is not based on your client. The judge stated that she cannot order this, because of the Interstate Compact on the Placement of Children (hereinafter "ICPC" or the "Compact"). It has now been eight months since your client, the biological parent, had custody of her daughter. You have frustratingly learned that fourteen steps need to be taken before the Massachusetts court can return your client's daughter home. Your client wants to know why this has taken so long and why her daughter is stuck in a foster home with a family of strangers.

The Interstate Compact on the Placement of Children is a statute that has led to anomalous results for natural parents across the country.² The ICPC's aim is to ensure that placements by state agencies of children across state lines preliminary to adoption, or placement in foster care, are in the child's best interests.³ However, a majority of courts have expanded the ICPC's reach to include parental placements, including the Massachusetts State Court of Appeals.⁴ Even if a child is returned to an out-of-state parent, that parent becomes a foster parent to their own child, funded by the state and constantly monitored by a social services agency.⁵

At this point, five states and one federal court have held that the ICPC does not cover parental placements.⁶ This Article will survey the split in courtrooms across the country, the reasons why Massachusetts must limit the ICPC, and alternative options for nervous courts, attorneys, and state agencies when sending a child across state lines. Ultimately, the ICPC is *not the appropriate mechanism to utilize* when placing a child with her parent across state lines.

I. WHAT IS THE ICPC? A HISTORICAL PRIMER

The ICPC is the regulation barring your client from regaining custody of her daughter. As her attorney, some history may prove beneficial at this point.

2. *See infra* Parts I and II.

3. *See infra* Parts I and II.

4. *See infra* Part II.A.

5. *See infra* Part II.A.

6. *See infra* Part II.B.

The ICPC establishes uniform legal and administrative procedures that govern the interstate placement of children in foster care.⁷ The ICPC was drafted in the 1950s to address growing concerns regarding interstate adoption and foster care placement of children.⁸ The increasing mobility of the American population and a rising divorce rate created the need for child protective agencies to safely place foster children in homes across state lines. The ICPC's purpose is to offer protection and services to children who are placed across state lines for foster care or preliminary to adoption.⁹ Furthermore, the ICPC extends the jurisdictional reach of a sending state into the borders of another party state for the purposes of investigating proposed foster care options.¹⁰ At this time, the Compact has been enacted by all fifty states, the District of Columbia, and the U.S. Virgin Islands.¹¹

7. See Bernadette W. Hartfield, *The Role of the Interstate Compact on the Placement of Children in Interstate Adoption*, 68 NEB. L. REV. 292, 297 (1989) [hereinafter Hartfield]. The ICPC was drafted to facilitate placements that "safeguard the interests of the child" and allow states to properly discharge their "legal responsibility . . . to protect the interests of the child." *Id.*

8. See Kimberly M. Butler, *Child Welfare—Outside the Interstate Compact on the Placement of Children—Placement of a Child with a Natural Parent*, 37 VILL. L. REV. 896, 896 (1992) (citing Hartfield, *supra* note 7, at 295). Concerns leading to the development of the Compact were threefold: (1) failure of existing statutes to provide protection to children moved interstate; (2) territorial limitations of states' jurisdiction that left states unable to ensure that children received proper care and supervision in a receiving state; and (3) lack of a means by which to compel a receiving state to provide necessary care. Hartfield, *supra* note 7, at 297.

9. TEXT OF INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN (Ass'n of Adm'rs of the Interstate Compact on the Placement of Children 1960), available at <http://icpc.aphsa.org/Home/articles.asp> [hereinafter TEXT OF ICPC].

10. See Hartfield, *supra* note 7, at 296. "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." *Id.* at 293.

11. See *Annotation, Construction and Application of the Interstate Compact on the Placement of Children*, 5 A.L.R. 6TH 193, 208 (2005). "Since compacts are a statute in each of the jurisdictions that are a party to it, the entire body of legal principles applicable to the interpretation of statutes also applies to the interpretation of compacts." *In re Alexis O.*, 959 A.2d 176, 180 (N.H. 2008) (quotations omitted). Thus, ICPC interpretation is a matter of state—not federal—law. *McComb v. Wambaugh*, 934 F.2d 474, 479 (1991); *In re Alexis O.*, 959 A.2d at 180. See generally ALA. CODE §§ 44-2-20 to -26 (LexisNexis 1991); ALASKA STAT. §§ 47.70.010 to -.080 (1990); ARIZ. REV. STAT. ANN. §§ 8-548 to -548.06 (1989); ARK. CODE ANN. §§ 9-29-201 to -208 (1991); CAL. FAM. CODE §§ 7900-13 (West 2004 & Supp. 2012); COLO. REV. STAT. ANN. §§ 24-60-1801 to -1803 (West 2008); CONN. GEN. STAT. ANN. §§ 17a-175 to -182 (West 2006); DEL. CODE ANN. tit. 31, § 381 (2009); D.C. CODE §§ 4-1421 to -1424 (LexisNexis 2009); FLA. STAT. ANN. §§ 409.401-.405 (West 2009); FLA. STAT. ANN. §§ 409.408-.4101 (West Supp. 2012); GA. CODE ANN. §§ 39-4-1 to 10 (1995); HAW. REV. STAT. ANN. §§ 350E-1 to -9 (LexisNexis 2010); IDAHO CODE ANN. §§ 16-2101 to -2107 (2009); 45 ILL. COMP. STAT. ANN. 5/0.01-15 (West 2005); IND. CODE ANN. §§ 1-28-4-1 to -8 (West 2008); IOWA CODE ANN. §§ 232.158-.168 (West 2006 & Supp.

Structurally, the ICPC consists of ten articles, identical in all member states, and defines the types of foster care placements that are subject to the Compact.¹² For the purpose of your client's case, the Compact's most controversial term is "placement" within Article II(d) which is defined as:

[T]he 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 mental facility.¹³

It is important to note that Article VIII(a) *exempts* from the ICPC situations in which the child's "parent, step-parent, grandparent, adult brother or sister" sends or brings the child into the receiving state "and leav[es] the child with any such relative or nonagency guardian in the receiving state."¹⁴ Massachusetts's lower appellate courts have ruled that the ICPC does include foster placements with out-of-state parents; however, the Supreme Judicial Court has yet to rule on the Interstate

2011); KAN. STAT. ANN. §§ 38-1201 to -1206 (2000); KY. REV. STAT. ANN. §§ 615.030-.050, .990 (LexisNexis 2008); LA. CHILD CODE ANN. art. 1608-22 (2004); ME. REV. STAT. ANN. tit. 22, §§ 4191-247, 4251-69 (2004 & Supp. 2011); MD. CODE ANN., FAM. LAW §§ 5-601 to -611 (LexisNexis 2006); MASS. GEN. LAWS ANN. ch. 119, §§ 2-1 to -8 (West 2008); MICH. COMP. LAWS ANN. §§ 3.711-717 (West 2004); MINN. STAT. ANN. §§ 260.851-.91 (West 2007); MISS. CODE ANN. §§ 43-18-1 to -17 (2008); MO. ANN. STAT. §§ 210.620-.640 (West 2010); MONT. CODE ANN. §§ 41-4-101 to -109 (2011); NEB. REV. STAT. §§ 43-1101 to -1102 (2008); NEV. REV. STAT. ANN. §§ 127.320-.350 (LexisNexis 2010); N.H. REV. STAT. ANN. §§ 170-A:1-7 (2002); N.J. STAT. ANN. §§ 9:23-5 to -17 (West 2002); N.M. STAT. ANN. §§ 32A-11-1 to -8 (West 1989); N.Y. SOC. SERV. LAW § 374-a (McKinney 2010); N.C. GEN. STAT. §§ 7B-3800 to -3806 (2009); N.D. CENT. CODE §§ 14-13-01 to -08 (2009); OHIO REV. CODE ANN. §§ 5103.20-.23, 5103.231-.237 (West 2010); OKLA. STAT. ANN. tit. 10, §§ 571-77 (West 2009); OR. REV. STAT. §§ 417.200-.260 (2009); 62 PA. STAT. ANN. §§ 761-65 (West 2010); R.I. GEN. LAWS §§ 40-15-1 to -10 (2006); S.C. CODE ANN. §§ 63-9-2200 to -2290 (2010); S.D. CODIFIED LAWS §§ 26-13-1 to -9 (2004); TENN. CODE ANN. §§ 37-4-201 to -207 (2010); TEX. FAM. CODE ANN. §§ 162.101-.107 (West 2008); UTAH CODE ANN. §§ 62A-4-301 to -309 (LexisNexis 2011); VT. STAT. ANN. tit. 33, §§ 5901-27 (2001); V.I. CODE ANN. tit. 34, §§ 121-27 (1994); VA. CODE ANN. §§ 63.2-100, 63.2-1100 to -1105 (2007); WASH. REV. CODE ANN. §§ 26.34.010-.080 (West 2005); W. VA. CODE ANN. §§ 49-2A-1 to -2 (LexisNexis 2009); WIS. STAT. ANN. §§ 48.988-.999 (West 2011); WYO. STAT. ANN. §§ 14-5-101 to -108 (2011).

12. See TEXT OF ICPC, *supra* note 9; Hartfield, *supra* note 7, at 297.

13. TEXT OF ICPC, *supra* note 9, at art. II(d); See Hartfield, *supra* note 7, at 313 ("Unfortunately, placement is not clearly defined in the ICPC, making it difficult to determine whether the ICPC applies to a given situation."). "[S]ome of this uncertainty [of applying the ICPC] is also the result of ambiguity in the definitional sections of the ICPC." *Id.* at 303. See generally cases cited *infra* 31-75.

14. TEXT OF ICPC, *supra* note 9, at art. VIII(a) (emphasis added); see *In re Alexis O.*, 959 A.2d at 181 (highlighting relevant "placement" language within Compact).

Compact.¹⁵ Federal and state courts are currently split regarding the types of placements to which the Compact applies.¹⁶ This split is discussed more fully in Section III below.

The Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC) disseminates and promotes the provisions of the ICPC.¹⁷ The Association of Administrators is composed of each state's individual compact administrators; each is responsible for coordinating all ICPC activities within his or her state.¹⁸ While certain state courts, including Massachusetts' lower state courts, have ruled that the ICPC is indeed applicable to out-of-state foster placements with noncustodial parents, such a reading of the ICPC violates a parent's constitutional rights to family integrity and places a financial burden on the state that historically belongs with an individual parent.¹⁹

Specifically, requesting an ICPC placement is procedurally daunting for attorneys, their clients, and families. The method of obtaining a timely home study can be a tremendous headache. To properly place a foster child out of state, a state agency in the receiving state must evaluate the home and render a decision whether the proposed placement is in the child's best interests.²⁰ For a sending state court to place a child across state lines following an approved ICPC placement, *fourteen steps* must occur, averaging several months to complete.²¹

15. See *Adoption of Warren*, 693 N.E.2d 1021, 1024-25 (Mass. App. Ct. 1998) (holding the ICPC applicable to parental placements), *review denied*, 700 N.E.2d 268 (Mass. 1998); see also *In re Care and Protection of Xantha*, 957 N.E.2d 113, 113 (Mass. App. Ct. 2011) (requiring home study of mother before possible placement of child).

16. See cases cited *infra* notes 31-75 and accompanying text; see also Hartfield, *supra* note 7, at 303 ("Unfortunately, placement is not clearly defined in the ICPC, making it difficult to determine whether the ICPC applies to a given situation.").

17. For more information about the AAICPC and its role in applying the ICPC, see AM. PUB. HUMAN SERVS. ASS'N, ADM'RS OF THE ICPC, <http://icpc.aphsa.org> (last visited May 13, 2013).

18. AM. PUB. WELFARE ASS'N., COMPACT ADMINISTRATORS' MANUAL FOR THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN 2.12 (2003).

19. See cases cited *infra* notes 31-48 and accompanying text; see also *In re Alexis O.*, 959 A.2d at 182 (stating that applying the ICPC to parents leads to "anomalous results"). The court stated that it is the "traditional duty" of parents to support their children, not the state. *Id.* (quoting *State DYFS v. K.F.*, 803 A.2d 721, 727 (N.J. Super. Ct. App. Div. 2002)).

20. See Vivek Sankaran, *Perpetuating the Impermanence of Foster Children: A Critical Analysis of Efforts to Reform the Interstate Compact on the Placement of Children*, 40 FAM. L.Q. 435, 445 (2006) [hereinafter *Perpetuating the Impermanence of Foster Children*].

21. See N. CAL. TRAINING ACAD., INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN (ICPC), 4-6 <http://academy.extensiondlc.net/file.php/1/resources/RM-ICPC-SW-Guide.pdf>. The steps outlined are as follows:

1. [The s]ending state's local child welfare agency sends required paperwork . . . to

Most troublesome for many parents is the fact that approval or denial decision for an ICPC placement is ultimately left to the subjective recommendation of an individual social worker.²²

The placement of a foster child under the ICPC's provisions is complicated not only by the multiple steps required, but also the failure of quick foster care placements due to overburdened child welfare agencies in both the sending and receiving states.²³ The current version

sending state's ICPC office . . . includ[ing] the social history of the child and the case plan. 2. Sending state's ICPC office sends required paperwork to the receiving state's ICPC office. 3. Receiving state's ICPC office sends required paperwork to receiving state's local child welfare agency. 4. Receiving state's local child welfare agency [performs home study and] sends [home study] results to receiving state's ICPC office. 5. Receiving state's ICPC office ensures the placement is safe and suitable and not contrary to the best interest of the child being placed and checks whether the placement may be made or shall not be made 6. Receiving state's ICPC office sends determination to sending state's ICPC office. 7. Sending state's ICPC office forwards the results of the local child welfare agency home study in receiving state to its local agency. 8. Sending state [court] determines whether or not placement in the receiving state is in the best interest of the child and whether or not the placement resource will be used 9. Receiving state's central ICPC office sends required paperwork to receiving state's local child welfare agency. 10. Receiving state's local child welfare agency sends results of the home study to receiving state's central ICPC office. 11. Receiving state's ICPC office makes a determination regarding whether or not placement is a safe, suitable placement in this child's best interest . . . and forwards [to sending state's ICPC office]. 12. Sending county's ICPC office forwards the results of the local child welfare agency home study in receiving state to its local office 13. Even if the receiving state says the placement may be made, the local sending agency or the local court can still decide not to use the placement resource if it feels the placement is not in the child's best interest or another placement is a better fit for the child 14. Once a request to place a child is approved by the receiving state, the sending agency and the receiving parties work together to complete the actual placement

Id. See also Julius Libow, *The Interstate Compact on the Placement of Children—A Critical Analysis*, 43 JUV. & FAM. CT. J. 19, 23 (1992) (“In California, prior to September 1991, the average turnaround time for cases originating in Los Angeles was 145 days.”). Mr. Libow suggests that, “[d]ue to a chronic shortage of personnel, each movement of documents can create a bottleneck ranging from weeks to months.” *Id.* at 22.

22. See *Perpetuating the Impermanence of Foster Children*, *supra* note 20, at 457 (“The combination of vague, undefined standards with inadequate review procedures perpetuates a system in which the exclusive authority to make placement decisions impacting a child’s future rests in the personal opinions and beliefs of a single caseworker.”). Troublingly, the caseworker’s evaluation “is the sole determinant of whether a child can be placed” with her family or will remain in the sending state. *Id.* at 447.

23. See *id.* at 445-46 and accompanying text. Professor Sankaran’s illuminating article highlights the troubling time issues surrounding placements. *Id.* See also *A.A. v. Cleburne Cnty.*, DHR, 912 So.2d 261, 268 n.5 (Ala. Civ. App. 2005) (stating ICPC home study would take a minimum of nine months to complete). OFFICE OF THE INSPECTOR GENERAL, DEP’T OF HEALTH AND HUMAN SERVS, INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN 6 (1999) (reporting that state ICPC administrators report waiting an average of three to four months for the entire home study to be completed); BRUCE BOYER, REPORT TO THE

of the ICPC does not contain time standards for home studies nor the placement decision.²⁴ Foster children are the exception, not the norm, if they are placed out-of-state *within six months* of an ICPC request.²⁵

Once the child is placed in foster care in the receiving state, the sending state retains financial responsibility over the child until the case ultimately closes.²⁶ The decision to close the case is left to the sending state's department of social services.²⁷ The sending state court renders the ultimate decision following an ICPC approval by the receiving state whether to send the child to the placement.²⁸ Additionally, the sending state may enter into a financial agreement with a public agency, like the state's social services agency, or a private agency in the receiving state to supervise the out-of-state placement.²⁹ Finally, it is the sending agency that retains jurisdiction over, and financial responsibility for, the

AMERICAN BAR ASSOCIATION 7 (2003), available at <http://www.americanbar.org/content/dam/aba/migrated/leadership/2003/journal/118.authcheckdam.pdf> (noting in a report to the ABA, "[a]s a result of all of the problems associated with the Compact, what should take days or weeks to accomplish often takes months, or, at times, over a year while children wait in temporary out-of-home placements for adults in charge of their futures to fulfill their professional obligations").

24. See *Perpetuating the Impermanence of Foster Children*, *supra* note 20, at 445. ("The Compact does not contain a timeframe by which a home study and a placement decision must be completed by the receiving state."); cf. AM. PUB. HUMAN SERVS ASS'N. INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN (ICPC): SIDE BY SIDE COMPARISON OF THE NEW AND CURRENT ICPC, <http://www.aphsa.org/Policy/ICPC-REWRITE/NewICPCSidebySide.pdf>. Article V of the proposed "New ICPC" requires the receiving state to complete and comply with self-imposed time frames. *Id.* at 3-5. The proposed ICPC suggests a six-week, or thirty business day, period. *Id.* at 5. At the time of this Article, twelve states have enacted the proposed ICPC; adoption of the "New ICPC" by 35 states will nullify the current incarnation of the ICPC. *Spotlight on Interjurisdictional Placement: The New Interstate Compact for the Placement of Children*, 12 Children's Bureau Express 6 (July/August 2011), <https://cbexpress.acf.hhs.gov/index.cfm?event=website.viewArticles&issueid=128&articleid=3227>.

25. See Libow, *supra* note 21, at 22 (noting that ICPC approval frequently takes between six months and a year). The ICPC approval process, the author notes, sometimes exceeds one year. *Id.*

26. See TEXT OF ICPC, *supra* note 9, at art. V ("The sending agency shall continue to have financial responsibility for support and maintenance of the child during the period of the placement."). Cf. *Dep't of Servs. for Children, Youth & Their Families v. J.W.*, 2004 Del. Fam. Ct. LEXIS 143, at *4 (Del. Fam. Ct. 2004) ("[A]pplication of the ICPC to placement created a financial obligation of the sending state which is inconsistent with the parent's primary obligation of support."). The *J.W.* court illustrated the predicament of state responsibility for a natural parent's financial obligation: "[I]f the Court would apply the ICPC to placement of a child with natural parents, the sending state assumes financial responsibilities for the child that should be the natural parent's responsibility." *Id.* at *9.

27. TEXT OF ICPC, *supra* note 9, at art. V.

28. *Id.*

29. *Id.*

child until the adoption is finalized under the ICPC.³⁰

II. REPRESENTATIVE CASE LAW UNDER THE ICPC

A. *Liberal Construction: Noncustodial Parents as Placements*

Several state courts have held that the ICPC, and the term “placement” within Article II(d), should be *liberally construed* to apply to noncustodial parents.³¹ Practitioners and scholars argue this broad interpretation more accurately serves the best interests of the child.³² The three leading cases holding this view are *Adoption of Warren*, *Arizona Department of Economic Security v. Leonardo*, and *Department of Children and Families v. Benway*.³³

In *Adoption of Warren*, the noncustodial father, based in New York, submitted his information for foster care placement following the biological mother’s voluntary termination of her parental rights to the Department of Social Services (DSS) in Massachusetts.³⁴ After New

30. *See id.*; *see also* Hartfield, *supra* note 7, at 309 (“[I]t is the sending agency that must comply with the requirements of the ICPC or be penalized for an illegal placement. . . . [I]t is the sending agency that retains jurisdiction over, and responsibility for, the child until the adoption is finalized.”) (citations omitted).

31. *See* Ariz. Dep’t of Econ. Sec. v. Leonardo, 22 P.3d 513, 518 (Ariz. Ct. App. 2001) (holding the ICPC applies to out-of-state, noncustodial parents); Green v. Div. of Family Servs., 864 A.2d 921, 928 (Del. 2004) (holding the ICPC applicable to noncustodial fathers); H.P. v. Dep’t of Children & Families, 838 So.2d 583, 585-86 (Fla. Dist. Ct. App. 2003) (holding ICPC applies to the placement of children with their non-custodial, out-of-state mother); Dep’t of Children and Families v. Benway, 745 So.2d 437, 438 (Fla. Dist. Ct. App. 1999) (holding ICPC should be “liberally construed” to include placement with out-of-state natural parents); Adoption of Warren, 693 N.E.2d 1021, 1024-25 (Mass. App. Ct. 1998) (holding the ICPC applies where DCF has temporary custody and noncustodial parent seeks custody); Custody of Quincy, 562 N.E.2d 94, 95 (Mass. App. Ct. 1990) (noting the ICPC should be observed when a child is placed out-of-state with noncustodial parent); Orsborn v. Mont. DPHHS, No. DV 04-30, 2004 Mont. Dist. LEXIS 3524, at *11 (19th Jud. Dist. Ct. of Mont., Lincoln Cnty. May 10, 2004) (holding application of the ICPC to proposed placement of a foster child with noncustodial biological parent); State *ex rel.* Juvenile Dep’t of Clackmas Cnty. v. Smith, 811 P.2d 145, 147 n.4 (Ore. Ct. App. 1991) (noting the ICPC applies when a child is sent by someone other than parent or relative to out-of-state father); *see also* Dep’t of Health & Rehab. Serv. v. J.M.L., 455 So.2d 571, 572 (Fla. Dist. Ct. App. 1984) (suggesting it would find the ICPC applicable to the out-of-state placement of a child with a natural parent).

32. *See* cases cited *supra* note 31 and accompanying text. *See generally* Butler, *supra* note 8, at 909 (arguing applying the ICPC to natural parents “would best ensure that a child is placed in a suitable environment”).

33. *Leonardo*, 22 P.3d 513; *Benway*, 745 So.2d 437; *Adoption of Warren*, 693 N.E.2d 1021.

34. 693 N.E.2d at 1023. The *Glens Falls Chronicle* provided notice of the care and protection proceeding involving the father’s son. *Id.* After receiving notice, the father contacted DSS to contest the petition and indicated that he would be interested in caring for his son. *Id.*

York DSS, pursuant to the ICPC, conducted a home study and notified Massachusetts in writing that the father's history of substance abuse and current crowded home environment were not in the child's best interests, New York denied the father's request.³⁵ The father appealed Massachusetts' insistence on an ICPC home study, but the court held that the ICPC *is applicable* to a noncustodial, out-of-state parent.³⁶ The court reasoned that because the Department of Social Services had custody of the child, he was not being placed in New York by his parent, but by a state agency, and thus the ICPC should be employed.³⁷ Currently, Massachusetts courts are confined by this ruling holding that the ICPC *is applicable* to biological parents.

In *Arizona Department of Economic Security v. Leonardo*, a noncustodial mother in Texas contested Child Protective Services' (CPS) request for an ICPC home study.³⁸ Following a care and protection proceeding involving the biological father, CPS gained custody of the children.³⁹ The Arizona Court of Appeals held that the ICPC is indeed applicable to the out-of-state placement of foster children with their noncustodial mother.⁴⁰ The court *liberally construed* "placement," as defined following the regulation adopted by the AAICPC in effect after April 30, 2000, to include "the arrangement for the care of a child in the home of his parent."⁴¹ While the court reasoned that the ICPC is inapplicable to a placing party with "full legal right" to plan for the child, the mother had a *diminished role* because of CPS's temporary custody order from the court.⁴² Rather, the ICPC only applies to parents whose rights have been voluntarily terminated, diminished, or severed by the court.⁴³

The Massachusetts Department of Social Services formally changed its name to the Massachusetts Department of Children and Families in 2008.

35. *Id.* at 1025 ("[T]he Department of Social Services in New York specifically recommended that Warren not be placed with his father.").

36. *Id.* at 1024-25.

37. *Id.* at 1025 ("The placement of Warren with his father in New York by DSS would constitute a placement under the Interstate Compact, thereby rendering the provisions of the Interstate Compact applicable to the present case.").

38. 22 P.3d at 516.

39. *Id.* at 515-17.

40. *Id.* at 516.

41. *Id.* at 517 (quoting ICPC Reg. 3).

42. *Id.* at 519 (stating that "[c]onstruing the ICPC liberally" better "effectuate[s] its policy and purpose"). The court also rejected the mother's denial of due process argument because the mother was only "deprived of her children for [a] relatively short period of time." *Id.* at 523.

43. *See id.* at 518.

Article VIII(a) of this Compact applies only to the sending or bringing of a child

Finally, in the *Department of Children and Families v. Benway*, the Department of Children and Families (DCF) denied a father's request to place his Florida-based child with the father in Vermont without ICPC approval.⁴⁴ The court cautiously held that the ICPC is applicable to a foster care placement with an out-of-state natural parent because "it would be negligent to relinquish that child to an out-of-state parent without *some indication* that the parent is able to care for the child appropriately."⁴⁵ The court reasoned that the ICPC should be liberally construed and the court rejected a strict interpretation and application of the Compact so that DCF may "maintain[] a watchful eye over the placement."⁴⁶ While many state courts have held that the ICPC is indeed applicable to natural parents, there is a decisional split among various courts across the country.⁴⁷

B. *Strict Construction of the ICPC: Noncustodial Parents Not Covered*

Five separate state courts and one federal court of appeals have notably held that the ICPC, and specifically the term "placement," should be carefully limited to apply only to substitute arrangements for natural parents, including foster care or pre-adoptive homes.⁴⁸ Courts

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.

Id.

44. 745 So.2d 437, 438-39 (Fla. Dist. Ct. App. 1999). Although Vermont disapproved of the child's placement in Vermont, the Florida court ordered the child placed with his father in direct contravention of the order. *Id.* at 438. DCF appealed the judge's order requiring it to send the dependent child to Vermont. *Id.*

45. *Id.* at 439 (emphasis added). "Additionally," the court held, "the provisions of the ICPC 'shall be liberally construed to effectuate the purposes thereof,' . . . which construction supports the application of the ICPC to the out-of-state placement of a dependent child with his or her natural parent." *Id.* at 438 (quoting FLA STAT. 409.40, Art. X).

46. *Id.* at 439. "[T]he ICPC should be interpreted to include the placement of a child with his natural parents to 'best ensure that a child is placed in a suitable environment, which, after all, is the main purpose of the Compact.'" *Id.* at 439 (quoting Butler, *supra* note 8, at 909).

47. Compare *supra* Part II.A. with *infra* Part II.B.

48. See *McComb v. Wambaugh*, 934 F.2d 474, 482 (3d Cir. 1991) (holding the ICPC only applies to substitute arrangements for parental care); *Ark. Dep't of Human Servs. v. Huff*, 65 S.W.3d 880, 888 (Ark. 2002) (holding ICPC does not apply to out-of-state, natural parent); *In re C.B.*, 116 Cal. Rptr. 3d 294, 296 (Cal. Ct. App. 2010) (holding the ICPC inapplicable to parental placements); *In re Kirsten T.*, No. JV42346, 2005 Cal. App. Unpub. LEXIS 8617, at *11 (Cal. Ct. App. Sept. 22, 2005) (holding the ICPC inapplicable to placement with out-of-state, natural parent); *In re Colin R.*, No. JV42346, 2004 Cal. App. Unpub. LEXIS 11492, at *14 (Cal. Ct. App. Dec. 16, 2004) (holding the ICPC inapplicable to placement with out-of-state, natural parent); *In re Markelle T.*, No. J181602, 2003 Cal. App.

hold this interpretation comports with the ICPC's statutory language, prevents blocking a child's placement with his natural parents, and does not misplace financial responsibility for a biological child with a state agency.⁴⁹ The four leading cases upholding a strict interpretation are *McComb v. Wambaugh*, *Arkansas Department of Human Services v. Huff*, *In re Alexis O.*, and, most recently, *In re Emoni W.*⁵⁰

In *McComb v. Wambaugh*, the United States Court of Appeals for the Third Circuit held the ICPC and, specifically Article II(d)'s term "placement," does not apply where the child is placed with a natural parent residing in another state.⁵¹ The Third Circuit strictly interpreted "placement" to apply "only to *substitutes for parental care* such as foster care or arrangements preliminary to adoption."⁵² Additionally, the court relied on the ICPC's detailed draftsmen's notes, which specifically exempted "close relatives" from the purview of the ICPC.⁵³ The court said that the necessity of ongoing monitoring of a parental foster placement can be addressed by a request to the receiving state's court,

Unpub. LEXIS 5676, at *17 (June 11, 2003) (holding the ICPC inapplicable to out-of-state, non-offending parent); *In re Johnny S.*, 47 Cal. Rptr. 2d 94, 95, 100 (Cal. Ct. App. 1995) (holding the ICPC limited to situations where proposed placement is foster care or preliminary to possible adoption); *In re Emoni W.*, 48 A.3d 1, 6 (Conn. 2012) (holding the ICPC does not apply to parents); Dep't of Servs. for Children Youth & Their Families v. J.W., No. 04-01939, 2004 Del. Fam. Ct. LEXIS 143, at *4 (Del. Fam. Ct. 2004) (holding the ICPC inapplicable to natural parents); Fla. Dep't. of Children & Family Servs. v. L.G., 801 So.2d 1047, 1050 (Fla. Dist. Ct. App. 2001) (holding the ICPC inapplicable to biological parent's relocation with child to another state); *In re Alexis O.*, 959 A.2d 176, 182 (N.H. 2008) (holding the ICPC intended only to govern placement of children in substitute arrangements for parental care); N.J. Div. of Youth & Family Servs. v. K.F., 803 A.2d 721, 729 (N.J. Super. Ct. App. Div. 2002) (holding the ICPC does not apply to relative placements); *In re Mary L.*, 778 P.2d 449, 453 (N.M. Ct. App. 1989) (holding ICPC does not apply to out-of-state natural parent); *In re Rholetter*, 592 S.E.2d 237, 243-44 (N.C. Ct. App. 2004) (holding the ICPC only applies to placement in foster care or as preliminary to possible adoption, not biological mother).

49. See cases cited *supra* note 48 and accompanying text.

50. *Wambaugh*, 934 F.2d 474; *Huff*, 65 S.W.3d 880; *Emoni W.*, 48 A.3d 1; *In re Alexis O.*, 959 A.2d 176.

51. *Wambaugh*, 934 F.2d at 482.

52. *Id.* at 480 (emphasis added). The Third Circuit stated, "[w]e are persuaded that read as a whole the Compact was intended only to govern placing children in substitute arrangements for parental care." *Id.* at 482. This interpretation "avoid[ed] entanglement with the natural rights of families [and] is consistent with the limited circumstances that justify a state's interference with family life." *Wambaugh*, 934 F.2d at 481.

53. *Wambaugh*, 934 F.2d at 481 ("The detailed draftsmen's notes, supplied by the Council of State Governments, reinforce the notion that the Compact does not apply to parental placements. The notes state that Article VIII 'exempts certain close relatives. This was done in order to protect the social and legal rights of the family'" (quoting Roberta Hunt, *Draftsmen's Notes on the Interstate Compact for the Placement of Children* (reprinted in *OBSTACLES TO INTERSTATE ADOPTION* 44 (1972))). See generally *Butler*, *supra* note 8, at 908.

not by the ICPC.⁵⁴

In *Arkansas Department of Human Services v. Huff*, an Arkansas mother lost custody of her children due to homelessness and subsequently moved to Colorado to gain financial stability.⁵⁵ She then sought a return of custody.⁵⁶ The Arkansas Chancery Court ordered an ICPC home study, which Colorado denied; however, the Arkansas judge disregarded the ICPC result and placed the foster children with their natural mother.⁵⁷ The Arkansas Department of Human Services (ADHS) appealed the decision to the Arkansas Supreme Court.⁵⁸ The state supreme court, relying on *Wambaugh*, held that the ICPC is intended only to govern placing foster children in “substitute arrangements” for parental care and not to an out-of-state, natural parent.⁵⁹ The court further reasoned that, financially speaking, allowing the ICPC to apply to natural parents would result in the “anomalous situation of imposing a financial obligation” on the sending state that improperly usurps a parent’s duty to support their children.⁶⁰

In *In re Alexis O.*, the New Hampshire Supreme Court ruled against New Hampshire’s Division of Children, Youth and Families (DCYF) holding the ICPC is inapplicable where an Arizona-based natural parent requested to bring her daughter home from New Hampshire.⁶¹ The court

54. See *Wambaugh*, 934 F.2d at 482.

55. *Huff*, 65 S.W.3d at 882. The Arkansas Department of Human Services (ADHS) had custody of the children while the mother resided in her mother and aunt’s homes in Colorado. *Id.* During their separation, the mother obtained stable income and housing in Colorado while her children remained in foster care in Arkansas. *Id.* ADHS requested a study of the mother’s Colorado home and officials found the home to be “inappropriate,” ultimately denying placement under the ICPC. *Id.* at 883.

56. *Id.*

57. *Id.* at 882 (describing procedural posture of the case before Arkansas Supreme Court).

58. *Id.* at 883.

59. *Id.* at 888. The Arkansas court relied on *McComb v. Wambaugh* throughout the opinion. *Id.* “This court held that subsection (a) of Article III of the [C]ompact ‘makes it clear that it is meant to deal with children who are sent from a sending state into a receiving state for placement in foster care or as a preliminary to a possible adoption.’” *Id.* at 887 (quoting *Nance v. Ark. Dep’t Human Servs.*, 870 S.W.2d 721, 725 (Ark. 1994)) (internal quotations omitted).

60. *Huff*, 65 S.W.3d at 888 n.2 (quoting *McComb v. Wambaugh*, 934 F.2d 474, 480 (3d Cir. 1991)).

61. *In re Alexis O.*, 959 A.2d 176, 178 (N.H. 2009). Procedurally, the lower “trial court ruled that because the ICPC applied, it could not allow the mother to [bring] her daughter [home] to Arizona until [DCYF indicated that the] placement did not appear to be contrary to the child’s interests.” *Id.* The child’s biological father had brought the children to New Hampshire and DCYF filed a care and protection petition against the father based on neglect. *Id.* at 179. The applicability of the ICPC issue was one of first impression before the New Hampshire Supreme Court, which compared *Wambaugh*, 934 F.2d at 482, with *Ariz. Dep’t of*

evaluated the ICPC's legislative history to aid its analysis given the ambiguous "placement" terminology.⁶² The court mentioned Article X's "liberal construction" language, however, it cited Article VIII(a)'s specific exemption of "parent, step-parent, grandparent."⁶³ The court held that the "limited" ICPC cannot apply to parents.⁶⁴ The court reasoned that applying the ICPC to natural parents infringes on the traditional notion of a parent's financial duty to support her children, and disregards the recognized legislative history behind the Compact.⁶⁵ Thus, Arizona, like the United States Court of Appeals for the Third Circuit, and the Arkansas Supreme Court, ruled that the ICPC is inapplicable to natural parents.

Most recently, the Connecticut Supreme Court held that the ICPC does not apply to parental placements of children in foster care.⁶⁶ In *Emoni W.*, the state removed the children from their mother, and their father, who lived in Pennsylvania and shared custody of the children, came forward requesting custody.⁶⁷ The Connecticut trial court refused, even though there were no allegations against the father, and held the ICPC must be followed before the father could obtain custody.⁶⁸ On appeal, Connecticut's highest court held that the ICPC's plain language,

Econ. Sec. v. Leonardo, 22 P.3d 513, 522 (Ariz. Ct. App. 2001). *In re Alexis O.*, 959 A.2d at 179-80.

62. *In re Alexis O.*, 959 A.2d at 180 ("We will review legislative history, however, to aid our analysis where the statutory language is ambiguous or subject to more than one reasonable interpretation. We [will] construe all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result.") (internal citations omitted).

63. *Id.* at 181-82.

64. *Id.* (citing *Wambaugh*, 934 F.2d at 482); *see also* cases cited *supra* note 48 and accompanying text (discussing ICPC as not intended to apply to sending state placement with natural parents).

65. *In re Alexis O.*, 179 A.2d at 182-84. The court discusses the constitutionally protected right to family integrity in its analysis of the drafters' intent. *Id.* at 182 (citing *Out of State and Out of Luck supra* note 1, at 70-71). "To apply the ICPC to the return of a child to her natural parent would lead to anomalous results," the court said. *Id.* "[F]or instance, the sending state would continue to have a duty to support the child, notwithstanding the 'traditional duty of natural parents to support their children.'" *Id.* (quoting *State DYFS v. K.F.*, 803 A.2d 721, 727 (N.J. Super. Ct. 2002)). The court discusses "[t]he detailed draftsman's notes, supplied by the Council of State Governments," to buttress the opinion "that the ICPC does not apply to parental placements." *In re Alexis O.*, 179 A.2d at 183 (quoting *Wambaugh*, 934 F.2d at 481) (internal quotation marks omitted).

66. *In re Emoni W.*, 48 A.3d 1, 2 (Conn. 2012).

67. *Id.* The mother lost custody for various allegations of neglect, including operating a drug factory out of the family's home. *Id.* The father came forward upon hearing of the removal and offered that "he had been responsible for the children's care for extended periods of time during school holidays." *Id.* (internal citation omitted).

68. *Id.* at 3. Advising that the father may be entitled to placement "on the condition that the court order six months of protective supervision." *Id.* (internal citation omitted).

which says it applies only to “placement in foster care or as a preliminary to possible adoption,” renders the Compact *inapplicable* to natural parents.⁶⁹ The court further reasoned that Connecticut’s child protection agency and the trial court had mechanisms to quickly evaluate the father’s fitness and to temporarily supervise the children to ensure their safety with their father.⁷⁰ Finally, the court held that it was “highly unlikely” that the ICPC’s drafters intended state child welfare agencies to retain financial responsibility of a child when placed with a custodial parent.⁷¹

The Compact provides that it *only applies* to foster children sent by a state agency across state lines for placement in foster care or prior to a possible adoption.⁷² Furthermore, the federal terminology of “foster care” does not include placement in the legal custody or guardianship of a minor with her biological parents.⁷³ When a child is returned to her biological parent, the child is in the 24-hour care and legal custody of a parent. There is no need for substitute care in any form since a biological parent is willing and able to care for the child. As outlined in *McComb v. Wambaugh*, the Compact applies only to substitutes for parental care and applying the Compact to parents is “contrary to the plain language of the statute.”⁷⁴

III. INTENT OF THE DRAFTERS: THE ICPC IS INAPPLICABLE TO PARENTAL PLACEMENTS

A careful examination of the legislative history of the Interstate Compact reveals the drafters’ intent to exclude parental placements.⁷⁵ The ICPC spares certain close relatives from its control, reinforcing the constitutional notion of family integrity illustrated in the landmark cases

69. *Id.* at 8-9 (“If the drafters had intended §17a-175, article III, to apply to placements with *all* ‘persons,’ including parents, they easily could have used that language in that article.”) (internal quotation omitted).

70. *Id.*

71. *Id.* at 9 (“It seems highly unlikely that the drafters would have intended that agencies, like the petitioner in the present case, would ‘continue to have financial responsibility for support and maintenance of the child during the period of placement’ when a parent obtains custody of [a] child.”) (quoting CONN. GEN. STAT. § 17a-175, article V (a)).

72. TEXT OF ICPC, *supra* note 9.

73. Federal law defines “foster care” as “24-hour substitute care for children placed *away from their parents or guardians* and for whom the State agency has placement and care responsibility.” 45 C.F.R. § 1355.20(a) (2011) (emphasis added).

74. *McComb v. Wambaugh*, 934 F.2d 474, 480 (3d Cir. 1991); *see* Ark. Dep’t of Human Servs. v. Huff, 65 S.W.3d 880, 888 & n.3 (Ark. 2002).

75. *See In re Alexis O.*, 959 A.2d 176, 182 (N.H. 2008); *Wambaugh*, 832 F.2d at 481. “The detailed draftsman’s notes, supplied by the Council of State Governments, reinforce the notion that the ICPC *does not apply to parental placements.*” *Id.* at 481 (emphasis added).

of *Stanley v. Illinois* and *Meyer v. Nebraska*.⁷⁶ The relationship between a parent and a child is a constitutionally protected and significant right.⁷⁷ Massachusetts, the state with the oldest functioning constitution in the United States, is a beacon for national courts and legislatures in recognizing fundamental constitutional rights.⁷⁸ The time has arrived for Massachusetts to join the Third Circuit and states like New Hampshire and Connecticut in limiting the ICPC. Additionally, the ICPC and its regulations are necessary “*only* in the absence of adequate family control,” which in the case of natural parents is not at issue.⁷⁹ Ultimately, the ICPC should govern *substitutes for parental placement*. To apply the ICPC to fit natural parents violates the legislative intent and taxes the already thinly-spread child welfare system.

As noted above, state child welfare agencies are nationally overburdened and this bottleneck results in delayed placements of foster children under the ICPC.⁸⁰ Such delays increase the trauma endured by

76. See *id.*; *Stanley v. Illinois*, 405 U.S. 645, 651 (1975) (holding unwed father has liberty interest in companionship, care, custody, and management of children); *Meyer v. Nebraska*, 262 U.S. 390, 399-401 (1923) (holding the right to conceive and raise one’s children is “essential”). See also *Stanley*, 405 U.S. at 651 (citing *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (applying Due Process Clause to familial rights)); *Griswold v. Connecticut*, 381 U.S. 479, 496 (1965) (Goldberg, J., concurring) (Ninth Amendment); *Skinner v. Oklahoma ex rel. Williams*, 316 U.S. 535, 541 (1942) (Equal Protection Clause).

77. See *Quilloin v. Walcott*, 434 U.S. 246, 255 (1977) (“We have recognized on numerous occasions that the relationship between parent and child is constitutionally protected.”); *Stanley*, 405 U.S. at 651; *Wisconsin v. Yoder*, 406 U.S. 205, 231-33 (1972); *Meyer*, 265 U.S. at 399-401. “It is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.” *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

78. LEONARD LEVY, SEASONED JUDGMENTS: THE AMERICAN CONSTITUTION, RIGHTS, AND HISTORY 307 (Transaction Publishers 1995). The Massachusetts Constitution was the model for the federal constitution, which was drafted seven years after Massachusetts’ in 1780. See also *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941, 961 (Mass. 2003) (holding the denial of marriage licenses to same-sex couples violates the state constitution); 4 ALBERT B. HART, ED., COMMONWEALTH HISTORY OF MASSACHUSETTS, 37-38 (1930) (describing *Commonwealth v. Nathaniel Jennison* where the Supreme Judicial Court held slavery unconstitutional).

79. See *In re Alexis O.*, 959 A.2d at 788 (citing *Wambaugh*, 934 F.2d at 481) (discussing draftsmen’s notes which exempt close relatives). The court stated the notes explain that the ICPC “exempts certain close relatives. This was done in order to protect the social and legal rights of the family and because it is recognized that regulation is desirable only in the absence of adequate family control or in order to forestall conditions which might produce an absence of such control.” *Wambaugh*, 943 F.2d at 481 (quoting DRAFTSMAN’S NOTES ON INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, reprinted in R. HUNT, OBSTACLES TO INTERSTATE ADOPTION 44 (1972)).

80. Libow, *supra* note 21, at 22. “Due to a chronic shortage of personnel, each movement of documents [under the ICPC] can create a bottleneck ranging from weeks to months.” *Id.*

children who have been removed from their homes.⁸¹ State Compact administrators report that home studies routinely take between 90 and 120 days to complete, while other administrators report upwards of a year.⁸² The system lacks judicial oversight: there are no repercussions for agencies that do not conduct timely home studies.⁸³ Rather, the entire administration of the ICPC relies on the voluntary participation of out-of-state agencies and out-of-state social workers.⁸⁴

ICPC decisions are not based on set guidelines or regulations, so the out-of-state social worker's decision to approve or deny the

81. See *id.* and accompanying text. Children suffer gross detriment while waiting and as the waiting time increases, the "detriment becomes more aggravated." *Id.* at 23; see *Out of State and Out of Luck*, *supra* note 1 (describing the ICPC's "irreparably damaging" effect on the "child's relationship with his parent"). See also Ellen L. Bassuk et al., *Determinants of Behavior in Homeless and Low-Income Housed Preschool Children*, 100 PEDIATRICS 92, 98 (1997); Peggy Cooper Davis & Gautam Barua, *Custodial Choices for Children at Risk: Bias, Sequentiality, and the Law*, 2 U. CHI. L. SCH. ROUNDTABLE 139, 141 n.14 (1995). "Most children thrive in parental care and suffer harm if that care is significantly interrupted." *Id.* at 141. Such an experience may cause the child "grief, terror and feelings of abandonment" and may also compromise a child's "capacity to form secure attachments." *Id.* More detailed discussion on the harm caused by separating children from their parents, even for short periods of time, can be found in JOSEPH GOLDSTEIN ET AL., BEYOND THE BEST INTERESTS OF THE CHILD 32-34 (1973).

82. See Vivek Sankaran, *Judicial Oversight Over the Interstate Placement of Foster Children: The Missing Element in Current Efforts to Reform the Interstate Compact on the Placement of Children*, 48 CAP. U. L. REV. 385, 397-98 (Winter 2009); see also BOYER, *supra* note 23 ("As a result of all of the problems associated with the Compact, what should take days or weeks to accomplish often takes months or, at times, over a year while children wait in temporary out-of-home placements for the adults in charge of their futures to fulfill their professional obligations."); OFFICE OF INSPECTOR GENERAL, DEP'T OF HEALTH AND HUMAN SERVS., INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN 6 (1999) (reporting that state ICPC Compact administrators wait an average of three to four months for entire home study completion); *A.A. v. Cleburne Cnty. Dep't of Human Res.*, 912 So.2d 261, 268 n.5 (Ala. Ct. App. 2005) (noting social worker's belief that ICPC home study would take minimum of nine months to complete).

83. See *Out of State and Out of Luck*, *supra* note 1, at 82-87 (describing the failure of judicial review and repercussions for state agencies who perform delayed ICPC home studies).

84. See *In re Markelle T.*, Nos. A099841, A100016, 2003 Cal. App. Unpub. LEXIS 5676, at *19 (June 11, 2003) (proposing where ICPC inapplicable states can reach agreement for voluntary services); *In re Colin R.*, No. F045842, 2004 Cal. App. Unpub. LEXIS 11492, at *15 (Cal. Ct. App. Dec. 16, 2004) (suggesting that where the ICPC is inapplicable, receiving state agencies voluntarily agree to provide services); *In re Johnny S.*, 47 Cal. Rptr. 2d 94, 101 (Cal. Ct. App. 1995) ("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."); *In re Alicia F.*, No. E036318, 2005 Cal. App. Unpub. LEXIS 10587, at *56 (Cal. Ct. App. Nov. 18, 2005) (calling for voluntary agreements in place of strict application of the ICPC).

placement is inherently flawed.⁸⁵ The decision to approve or deny an ICPC request is based on the *subjective decision* of a single caseworker; there is no uniform set of regulations governing the inspection process.⁸⁶ Can we honestly guarantee objective decision making if our client says or does something that rubs the assigned social worker the wrong way? In other words, because the determination is based on the subjective decision of a single social worker and there are no set criteria in studying a home, the study is inherently flawed.

Furthermore, there is no framework for appealing an erroneous ICPC decision.⁸⁷ While certain scholars have criticized the current version of the ICPC and provided suitable suggestions for reforming the statute, no national reforms have taken place.⁸⁸ Thus, the flawed ICPC arguably still applies to out-of-state foster care placements in Massachusetts, including placement with biological parents, in direct violation of the Constitution.⁸⁹

Commentators on the broadened application of the ICPC have expressed constitutional concerns regarding such application, specifically as a violation of a parent's procedural due process rights.⁹⁰ Such concern has not yet been raised in the appellate case law. The argument is that leaving the decision to approve or deny a placement in the hands of a single caseworker, and the denial of any appellate opportunity to such aggrieved parents, is constitutionally unsound.⁹¹ This issue is compounded by the delays of the overburdened child welfare system.

The Supreme Court of the United States has recognized the fundamental, private interest of a parent to raise his or her child.⁹²

85. See *Out of State and Out of Luck*, *supra* note 1, at 69 (“While a state can consider any of the above [suggested factors], none of these factors must be considered, nor is there any uniform, codified set of regulations governing the inspection process.”) (emphasis omitted).

86. *Id.* at 76. “The caseworker’s assessment, thus, is often the sole determinant of whether a child will be placed in his parent’s care. Despite the impediment created for biological parents, courts have, for the most part, deferred to state agencies and their broad interpretations of the Compact.” *Id.*

87. *Id.* at 80.

88. See Hartfield, *supra* note 7, at 309; *Out of State and Out of Luck*, *supra* note 1, at 76; *Perpetuating the Impermanence of Foster Children*, *supra* note 20, at 445.

89. See sources cited *supra* note 78 and accompanying text.

90. See *Out of State and Out of Luck*, *supra* note 1, at 80.

91. *Id.* at 84 (“[T]here is no established administrative process to review an ICPC denial. The Compact itself contains no description of the process, if any, that a state must create for a parent to appeal a negative decision.”).

92. See, e.g., *Troxel v. Granville*, 530 U.S. 57, 68-69 (2000) (“[S]o long as a parent adequately cares for his or her children (*i.e.*, is fit), there will normally be no reason for the

Specifically, where a parent has a recognized bond to his or her child, the state may not interfere without providing adequate due process.⁹³ The denial of the ICPC by a single caseworker may effectively terminate a parent's rights to the custody of her child, all without the opportunity for a fair hearing or an appeal of that caseworker's decision.⁹⁴ Such a procedure stands on very imbalanced constitutional grounds.

IV. SUGGESTIONS FOR REVISING THE ICPC: TIME FOR CHANGE

It is clear from the ongoing national debate regarding the ICPC that change is needed; the current ICPC, and its manifold judicial interpretations, display the ICPC's fundamental flaws.⁹⁵ Some may argue that because the ICPC is currently under revision with the drafting of the "New ICPC," that concerns will be answered given this legislative initiative and new draft created in November 2005.⁹⁶ However, the

State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."); *Parham v. J.R.*, 442 U.S. 584, 602 (1979) ("Our jurisprudence historically has reflected Western civilization concepts of the family as a unit with broad parental authority over minor children. Our cases have consistently followed that course . . ."); *Quilloin v. Walcott*, 434 U.S. 246, 255 (1978) ("We have recognized on numerous occasions that the relationship between [a] parent and child is constitutionally protected."); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *May v. Anderson*, 345 U.S. 528, 534 (1953). *See generally Perpetuating the Impermanence of Foster Children*, *supra* note 20, at 455 (noting the constitutional requirement that children be placed with their biological parents); *Libow*, *supra* note 21, at 22 ("The United States Supreme Court has consistently recognized the constitutional right to family integrity and the rights of parents to raise their children free of state intervention.").

93. *See Out of State and Out of Luck*, *supra* note 1, at 82 ("When, however, the parent has established such a relationship, the Court has prevented states from infringing upon that intact parent-child bond without providing adequate process.").

94. *See id.* at 84, n.106. Professor Sankaran notes, "ICPC offices in every state were surveyed [for his article] concerning the existence and extent of procedures available to review home inspection denials." *Id.* According to the author, "thirty-five states responded that *no process existed* to appeal an ICPC denial." (emphasis added). *Id.* Additionally, "[t]welve state[s] . . . stated that some such process existed. In three states, workers did not know the answer to the question." *Id.* Results of this survey are on file with Vivek Sankaran. *Id.*

95. *See* Erik Eckholm, *Waits Plague Transfers of Children to Relatives' Care*, N.Y. TIMES, June 27, 2008, at A11; Megan O'Matz & Sally Kestin, *Foster Kids Get Lost in Out-of-State Paperwork*, ORLANDO SENTINEL, June 16, 2002, at B5; Megan O'Matz & Sally Kestin, *Children Lost Despite Pact Among States*, S. FLA. SUN-SENTINEL, June 9, 2002, at 1A; Rita Price, *Couple Fights for Abused Grandson*, COLUMBUS DISPATCH, Aug. 17, 2009, at A1.

96. *See* SIDE BY SIDE COMPARISON, *supra* note 24; *see also* AAIC homepage, *supra* note 17. For more information about efforts of the American Public Human Services Association to reform the Compact, *see generally* HISTORY OF THE ICPC, http://www.aphsa.org/Policy/icpc_rewrite.htm (listed under "Resource Materials").

“New ICPC” has only been adopted by twelve states.⁹⁷ ICPC “regulations” are merely recommendations issued by the AAICPC, a group founded more than a decade after the ICPC originated.⁹⁸ “Regulation No. 3” of the “New ICPC” states that the ICPC *might apply* to parental placements.⁹⁹ However, Regulation No. 3 has not been formally proposed by a majority of states. Thus, *it has no legal effect*.

Sound recommendations from a number of California courts and Connecticut have involved either monitoring by the sending state agency or voluntary monitoring agreements by the receiving state agency, thus filling the void of the ICPC.¹⁰⁰ In *In re Johnny S.*, a California court placed children with a Texas-based parent without complying with the ICPC.¹⁰¹ The court held similarly to the Third Circuit in *McComb v. Wambaugh* and stated that the ICPC is limited to foster care and possible adoption, neither of which would involve natural parents.¹⁰² Additionally, the court said that because California Department of Family and Children Services (DCFS) can monitor the Texas placement

97. See PROPOSED ICPC: FREQUENTLY ASKED QUESTIONS, http://www.aphsa.org/Policy/icpc_rewrite.htm (listed under “Resource Materials”). “Once the 35th state adopts the ‘new’ compact, none of those states will be party to the ‘old’ compact and their contractual relationship with other states will be limited to states who have also passed the new compact.” *Id.* at 4.

98. See *Out of State and Out of Luck*, *supra* note 1, at 71-72 (noting the Association lacks the authority to issue authoritative regulations).

99. See “Regulation No. 3” available at <http://healthandwelfare.idaho.gov/Portals/0/Children/AdoptionFoster/ICPC%20Regulations.pdf>. It defines “foster care” as:

The term “foster care” as used in Article III of ICPC, except as modified in this paragraph, means care of a child on a 24-hour a day basis away from the home of the child’s parent(s). Such care may be by a relative of the child, by a non-related individual, by a group home, or by a residential facility or any other entity. In addition, if 24-hour a day care is provided by the child’s parent(s) by reason of a court-ordered placement (and not by virtue of the parent-child relationship), the care is foster care.

Id. As of the date of this writing, only Alaska, Delaware, Florida, Indiana, Louisiana, Maine, Minnesota, Missouri, Nebraska, Ohio, Oklahoma, and Wisconsin have adopted the New ICPC.

100. See *In re Alicia F.*, No. E036318, 2005 Cal. App. Unpub. LEXIS 10587, at *55 (Nov. 18, 2005); *In re Colin R.*, No. F045842, 2004 Cal App. Unpub. LEXIS 11492, at *15 (Ct. App. Dec. 16, 2004); *In re Markelle T.*, No. A099841, A100016, 2003 Cal App. Unpub. LEXIS 5676, at *19 (Ct. App. June 11, 2003); *In re Johnny S.*, 47 Cal. Rptr. 2d 94, 100 (Ct. App. 1995). Each of the California appellate cases calls for voluntary agreements in place of strict ICPC adherence.

101. See *Johnny S.*, 47 Cal. Rptr. 2d at 95-96. “We hold that compliance with the ICPC is not mandatory when a California court places a child with a parent residing in another state.” *Id.*

102. *Id.* at 99 (citing *Tara S. v. Superior Court*, 17 Cal. Rptr. 2d 315, 318 (Cal. Ct. App. 1993)). The court reasoned that “the ICPC’s overall design [is] to protect children in placements that are substitutes for parental care.” *Id.* at 99-100.

by electronic mail, facsimile, and telephone, there is no necessity for invoking the ICPC.¹⁰³ Furthermore, if California DCFS decided it cannot adequately monitor the out-of-state natural parent, it may choose to enter into an agreement for such services.¹⁰⁴

Such agreements are specifically outlined in Article V, subdivision (b) of the ICPC “[w]hen 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 an agent for the sending agency.”¹⁰⁵

Moving forward, Massachusetts courts should encourage such agreements between state agencies in lieu of the ICPC. Broadly applying the ICPC to all foster care placements, including with natural parents, violates parents’ constitutional rights to raise their children and spreads thin valuable state agency resources for every contemplated placement.¹⁰⁶

CONCLUSION

As discussed throughout this Article, the ICPC provides a constitutional nightmare to state agencies, attorneys, and, most important, natural parents seeking their child’s placement in their homes. One California Court of Appeals stated that, “the resulting lack of uniformity is dysfunctional, that courts and rule makers have not been able to fix it, and hence that it may call for a multistate legislative response.”¹⁰⁷ Massachusetts cannot wait for a “New ICPC” to be adopted by twenty more states while children languish in foster care. The sad state of affairs confronting our introductory hypothetical caretaker and her drug-addled grandmother confronts thousands of families each year. The ICPC is ill-equipped to handle the current dilemma. Massachusetts attorneys dealing with the ICPC should invoke California’s cases, *In re Alexis O.*, *In re Emoni W.*, and *Wambaugh*, and continue to argue for a strict construction of the ICPC. Additionally, raising the previously unmentioned constitutional issues is essential to

103. *Id.* at 100-01 (describing DCFS’s appellate arguments regarding constant monitoring).

104. *Id.* at 101.

105. See TEXT OF ICPC, *supra* note 9, at art. V(b).

106. See sources cited *supra* notes 86-96 and accompanying text.

107. *In re C.B.*, 116 Cal. Rptr. 3d 294, 296 (Cal. Ct. App. 2010) (describing the lack of uniformity in ICPC application). While five states and one federal circuit court have held the ICPC is inapplicable, seven states have held the ICPC applicable to parents. *Id.*

creating further judicial scrutiny of the ICPC. Together, we can limit the ICPC and ensure more efficiency in interstate foster care placements.