Proposed New Interstate Compact for the Placement of Children

MEMORANDUM IN OPPOSITION

- This document raises key concerns about the proposed Interstate Compact for the Placement of Children ("ICPC") which the American Public Health Services Association ("APHSA") has begun to present to all state legislatures in 2006.
- Members of the American Academy of Adoption Attorneys ("///A")-a non-for-profit organization of about 320 expert adoption lawyers from every state- have voted unanimously to oppose the proposed ICPC.
- While there are good things in the proposed ICPC, it will have a greater negative impact on children and adoptions than the existing ICPC because of increased delays, bureaucracy, and financial burdens on both states and adoptive families.

What is the existing ICPC?

- The existing ICPC was drafted in 1960 and has been adopted in all 50 states, DC, and US Virgin Islands.
- It establishes supposedly uniform legal and administrative procedures governing the interstate placement of children
- It is intended to ensure protection and services to children who are placed across state lines for foster care or adoption
- It also addresses legal and financial responsibility for those involved in placements

Why a replacement ICPC?

The existing ICPC has come under criticism for various reasons

- It is sometimes applied inconsistently and arbitrarily by the various states' compact administrators
- Placements are not always timely and adoptive parents are sometimes left hanging, possibly for weeks and occasionally a month or more
- Best interests of the child sometimes takes a backseat to other issues

APHSA Task Force

- Because of growing dissatisfaction with the existing ICPC, APHSA convened a task force to rewrite the ICPC
- The APHSA administers the existing ICPC and billed the efforts to rewrite the ICPC as a cooperative effort by the states and other "stakeholders"
- This process has been underway for about three years and has gone through several drafts, resulting in the proposal now being presented to the states
- ///A agreed that something needed to be done to fix the existing ICPC, but ///A cannot support the proposed ICPC for reasons set forth here

Private adoptions.

- This summary focuses on placements by "*private child placing agencies*" as defined in the proposed ICPC
- Much of the criticism about the existing ICPC that spawned the rewriting efforts was directed at how it deals with private agency and independent adoptive placements, and most ///A members deal primarily with these kinds of placements
- Thus, this summary does not discuss residential placements or adoptive placements of children in state custody

Proposed ICPC and Private Adoptions

The proposed ICPC applies to the "interstate placement of any child by a … *private child placing agency* … as a *preliminary step to a possible adoption.*" Article III.A.3.

"Private child placing agency"

This term is broadly defined as "any private corporation, agency, foundation, institution, or charitable organization, or *any private person or attorney* that facilitates, causes, or is involved in the placement of a child from one state to another . . ." Article II.M.

"Public child placing agency"

This is opposed to a "public child placing agency" which is "any governmental child welfare agency or child protection agency or private entity under contract with such an agency, . . . and which facilitates, causes, or is involved in the placement of a child from one state to another." Article II.O.

Exceptions to ICPC applicability:

- Placements with a non-relative not intended to effectuate an adoption. Article III.B.1.
- Placements by one relative directly with another relative. Article III.B.2.
- Inter-country adoptions. Article III.B.5.
- Sending by a private child placing agency for a "visit" as yet to be defined. Article III.B.7.
- U.S. citizen child living overseas with family, where a parent is a member of the U.S. Armed Services stationed overseas, and the child is "removed and placed in a state." Article III.B.6.

Problems that make the proposed ICPC worse than the existing ICPC

- Creates a national adoption super-legislature called the "Interstate Commission" made up of appointed commissioners that will have power to override state law.
- Leaves far too many unanswered questions to be decided by the "Interstate Commission."
- Creates an "assessment" process that is mostly undefined and that likely will make interstate placements slower, more burdensome, and more costly than they currently are, something that is not good for adoptions or for kids.

Interstate Commission

- Comprised of one "commissioner" from each member state *appointed* by the head of the state human services administration over child welfare. Article VIII.B.
- No statement of qualifications for commissioners, and no guarantee they will be individuals who have ever had any real adoption experience.

Why is this bad?

These people will have power to set national adoption policy and fund their own operations through "rules" that will be binding on all member states, yet they don't have to be adoption experts or have any special attachment to adoption.

"Rule"

A "rule" is "a *written directive, mandate, standard or principle* issued by the Interstate Commission . . . that is of general applicability and that *implements, interprets or prescribes* a policy or provision of the compact. *'Rule' has the force and effect of statutory law in a member state*, and

includes the amendment, repeal, or suspension of an existing rule." Article II.S.

Rules supersede state law

But, even worse, "[r]ules promulgated by the Interstate Commission . . . *shall supersede any state law*, rule or regulation to the extent of any conflict." Article XI.D.

What are some policies and provisions of the compact?

- Indian Child Welfare Act ("ICWA") compliance in interstate adoptions
- Definition and determination of "safe" and "suitable" interstate placements
- Standards, procedures, and formats for conducting "assessments" in interstate adoptions
- Compliance with sending state laws and receiving state laws
- Determining which laws must be complied with when taking birth parent consents
- Timeframes for completing "assessments" for interstate adoptions
- Legal and financial responsibility in interstate adoptions

Example: The Indian Child Welfare Act

- The Indian Child Welfare Act ("ICWA") is a federal law governing the placement of Indian children, and is very complex and difficult for even lawyers and judges to understand.
- The proposed ICPC delegates to the "public child placing agency in the sending state" the responsibility to "*oversee compliance with the provisions of the [ICWA]* for placements subject to the provisions of this compact, prior to placement." Article VII.I.
- As a "policy" or "provision" of the compact, the Interstate Commission would be empowered to fill in the gaps with "rules."
- As a federal law, ICWA should not be a target of this rule-making process.

Another example: financing

- The Interstate Commission is required to pay its expenses, and it "may levy on and collect an annual assessment from each member state to cover the cost of the operations and activities of the Interstate Commission and its staff . . . ." Article XIII.A. and B.
- A budget is required to be approved each year, and assessments from member states are to be collected based on an allocation that is required to be set by "rule," meaning the allocation will be binding as statutory law in each member state. *Id.*

Is this rule-making power constitutional? Probably not.

As a trusted Legal Treatise states:

"… it is a cardinal principle of representative government … that … *the legislature cannot delegate its power to make laws to any other authority or body*…. The legislature may not in any degree abdicate its power; . . . and certainly *it may not delegate to another the power to enact a law*, whether in form or effect."
Volume 16A, American Jurisprudence Second, Constitutional Law § 293

In another section, that Treatise states also:

"… the legislature *may not delegate its power to enact, suspend, or repeal laws*… The legislature may not delegate such essential elements of its lawmaking power as its power to *declare principles and standards*, or general public policy."
Volume 16A, American Jurisprudence Second, Constitutional Law § 295

Litigation is certain.

- While provisions of the proposed ICPC that are held unconstitutional in a state are severable and ineffective in that specific state, *see* Article XVII.B.3., it will take litigation to determine constitutionality in each state.
- Litigation is virtually certain in many member states to have the rule-making power of the Interstate Commission found unconstitutional.
- This is an added cost legislatures and the Interstate Commission must be prepared for.

No veto power

- Unlike laws passed by Congress or state legislatures, "rules" adopted by the Interstate Commission are not subject to any checks and balances, such as a veto power.
- Yet, these "rules" have the "force and effect" of statutory law.
- The only ways a "rule" can be thrown out are by "judicial review," meaning litigation, in federal court or if the states "reject" a rule, a lengthy process that is likely not feasible.

Rejecting rules will not be feasible

- States may only reject a rule outright if a majority of member states adopt a law to reject the rule. Article XI.F.
- In other words, it could take years to "reject" a rule that is not liked.
- The only real alternatives may be having the rule-making power declared unconstitutional, challenging specific rules in court, ***or not adopting the new ICPC at all***

The "assessment" process will be lengthy, burdensome, and costly

- Prior to a child being placed in another state, a private child placing agency must do four things:

First, show that the "applicable laws of the *sending state* have been complied with" Article V.B.1.

But, an "approved placement" is one where the laws of the "*receiving state*" must be complied with, which is also what the existing ICPC requires. *See* Article II.A. and Current ICPC Art. III(1).

Another new layer of cost . . .

Second, the agency must certify that the "consent or relinquishment is in compliance with applicable law of the *birth parent's state of residence* or, where permitted, the laws of the state where the finalization of the adoption will occur" Article V.B.2.

Consents now are typically done according to the laws of the sending or receiving state.

This will add new costs to adoptions.

Suppose the birth mother *at her choosing or out of necessity* delivers in a state other than her state of residence?

Suppose the birth father lives in yet another state and his consent or relinquishment is required by his state.

Suppose the adoptive family lives in one state, the birth mother from a second state, the birth father in a third state, and the agency the birth mother contacted is in a fourth state.

The baby is born in the agency's state at the birth mother's choosing, but you may need to comply with the laws of all four states!

What if the laws of these states are in conflict?

Under the existing ICPC, while there can be confusion, you don't have to comply with the laws of four states.

Finally, you can request an assessment.

<u>Third</u>, an agency must request “through the <u>*public child placing agency*</u> in the sending state <u>*an assessment to be conducted*</u> in the receiving state.” Article V.B.3.

Under the existing ICPC, no “assessment” is requested or done. <u>Notice</u> of a proposed placement is sent, along with a home study and other documents about the placement. The compact administrator evaluates the placement as to whether it is contrary to the interests of the child based on the submissions. Current ICPC Art. III(2).

What is an “assessment”?

An “assessment” is “an evaluation . . . to determine whether the placement meets the <u>*individualized needs of the child*</u>, including but not limited to the child’s safety and stability, health and well-being, and mental, emotional and physical development.” Article II.B.

This appears more subjective and open to interpretation and abuse than the “notice” and submission of other documents required under the existing ICPC. *See* Current ICPC, Article III(2).

Rules still have to be issued setting:

- <u>*Standards*</u> for conducting “assessments”
- <u>*Procedures*</u> and <u>*forms*</u> for making requests for assessments
- <u>*Information*</u> that will be required to be submitted
- <u>*Timeframes*</u> for conducting “assessments” Article V.C. and F.
- In other words, we don’t know anything about what these “assessments” will involve. We don’t even know what constitutes a “safe” and “suitable” placement.

Public adoptions?

- The receiving state’s <u>*public child placing agency*</u> does the “assessment” for a placement by a private child placing agency “to determine its safety and suitability.” Article V.D.
- This is similar to ICPC assessments done currently for the placement of children in public custody, and these currently can take months.
- Adoptive families doing private agency and independent adoptions cannot afford months for an assessment to be done.

Complexity coupled with uncertainty counsel against the proposed ICPC

- The "assessment" process in the proposed ICPC is more complicated than the current notice process under the existing ICPC
- No one knows how the "assessments" will be conducted, what will be required, or how timely they can be done
- While the existing ICPC process is frustrating, the proposed process appears to be much worse and likely will be more lengthy, and place greater burdens and costs on adoptive families

We finally get around to "approval"!

Fourth, "[u]pon *completion of the assessment*, [the agency may] obtain the approval of the public child placing agency in the receiving state." Article V.B.4.

What is an "approved placement"?

A placement can be approved if "the receiving state has determined ***after an assessment*** that the placement ***is both safe and suitable*** for the child and is in **compliance** with the applicable laws ***of the receiving state*** governing the placement of children therein." Article II.A.

You can't go home until approved.

- No child can be placed into a "receiving state" "until approval for such placement is obtained." Article VI.A.
- Adoptive parents usually take custody of the child in the sending state before submission of ICPC paperwork so that bonding and attachment can begin immediately.
- It is detrimental to the child if the child must be placed in interim foster care for any length of time.
- The adoptive parents will either have to wait through the unknown assessment and approval process in the sending state, or place the child in foster care until approval is received.

To get approval you must have:

- complied with the laws of the *sending state*
- complied with the laws of the *receiving state*
- complied with the laws of the *birth mother's state* of residence for her consent or relinquishment if her state is different
- complied with the laws of the *birth father's state* of residence for his consent or relinquishment if one is needed from him
- *requested* through the sending state that the receiving state conduct an assessment
- had that *assessment conducted* pursuant to currently unknown standards and procedures

This is no small task and could take enormous amounts of money and time away from home. Most of this is new to the proposed ICPC.

This is worse than current law.

- The existing ICPC usually only requires compliance with the laws of the sending or receiving state.
- The lengthy "assessment" process, coupled with what is ***not*** known about it, is worse than the current "notice" process because we simply don't know what's involved, and we won't know until the Interstate Commission issues its rules.
- Add to this the bureaucracy of the Interstate Commission and its veto-proof power to make "rules" that have the effect of statutory law in all member states, including the power to "levy" and "assess" a fee to fund its operations, and it is easy to see the proposed ICPC is not good for children, families, or the states.

What if placement is denied?

- A person may seek "administrative review" and "any further judicial review" of the decision "in the receiving state pursuant to its applicable administrative procedures." Article VI.C.
- All this while the adoptive parents, who are from the receiving state, wait out the appeals in a hotel room in the sending state, bathing their newborn in a sink.

Other issues:
Legal and financial responsibility

- A "private child placing agency," remains "legally responsible for the child during the period of placement as provided for in the law of the sending state until the finalization of the adoption," and "[f]inancially responsible for the child absent a contractual agreement to the contrary." Article VII.B.
- This includes birth mothers and attorneys who do independent placements not involving an actual agency. See the definition of "private child placing agency." *See* Article II.M.

Children and Families Deserve Better

- ***The proposed ICPC will make delays and burdens families face in interstate adoptions worse, not better***

- ***The proposed ICPC will make the already high costs of adoptions even higher, further straining the budgets of our families***

- ***The proposed ICPC creates an unprecedented powerful bureaucracy—paid for by the states—that will be able to set binding national adoption policy with the force of law in the member states***

- ***The APHSA can do better than this and the States need to send that message by rejecting the proposed new ICPC***

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