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ASSESSMENT OF THE  
INTERSTATE COMPACT  
ON THE PLACEMENT OF  
CHILDREN

THE TEXAS COURT IMPROVEMENT PROGRAM  
(CIP)

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JUNE 30, 2008



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## INTRODUCTION

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An analysis of the current system for the interstate placement of children shows that there is a great deal of confusion and frustration with the process. The Interstate Compact on the Placement of Children (ICPC) is the statutory mechanism to ensure protection and services to children who are placed across state lines for foster care or adoption.<sup>1</sup> The law was originally established with the purpose of creating orderly procedures for the interstate placement of children and fixing financial responsibility for placing the children.<sup>2</sup> However, some judges and caseworkers involved in ICPC placements report that in practice efforts to comply with the ICPC actually lead to longer delays in placement.<sup>3</sup> In the decades since the ICPC was first drafted, families have become much more mobile and technology has drastically improved, and thus, the ICPC has become antiquated as it does not speak to some issues with the necessary clarity. Many of the factors that complicate the interstate placement of children are the underlying struggles in the child welfare system, specifically the issues of capacity, staffing, training, and resources. Also, the unique interplay of laws adds an additional layer of complexity.

This report will provide an analysis of the current law, actual practices and procedures utilized by the referring agency and courts, and the legal and practical barriers to safe and timely placement. The purpose is to pinpoint specific problems in the system and consider possible resolutions. This report will evaluate possible alternatives and the feasibility of implementing those practices in the State of Texas.

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<sup>1</sup> See TEX. FAM. CODE § 162.102 (codifying the ICPC).

<sup>2</sup> See *id.* (Article I).

<sup>3</sup> Texas CIP Judicial Survey (Apr. 2008). Judges who hear CPS cases for the State of Texas were surveyed in Spring 2008 and the results were compiled in April 2008. The survey questions were those proposed by the ABA and the federal CIP.

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## OVERVIEW OF INTERSTATE PLACEMENT ASSESSMENT REQUIREMENT

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### **SAFE AND TIMELY INTERSTATE PLACEMENT OF FOSTER CHILDREN ACT OF 2006**

The Safe and Timely Interstate Placement of Foster Children Act of 2006 (Safe and Timely Act) was adopted to amend sections of the Social Security Act.<sup>4</sup> The Safe and Timely Act conditions the receipt of federal funding on the timeliness of the completion of out-of-state home study requests. The Program Instructions for the Court Improvement Program (CIP) require that states review their interstate placement system as part of their CIP grant application.<sup>5</sup> Thus, in addition to the four categories of assessments previously listed in Section 438(a)(1) of the Social Security Act, state courts that receive the Basic CIP grant are required to assess their role, responsibilities and effectiveness in the interstate placement of children, and must implement strategies to expedite these placements.

The Safe and Timely Act specifies that state courts should assess the effectiveness of their laws and strategies for state courts sharing information with out-of-state courts, developing methods to obtain information and testimony from agencies and parties in other states without requiring interstate travel by the agencies and parties, and permitting parents, children, other necessary parties, and attorneys to participate in cases that involve interstate placement without requiring those parties to travel interstate.

The state court's interstate assessment must also examine the current strengths and challenges of interstate placement throughout the state by analyzing what is allowed under current state and federal law. At a minimum, this assessment should determine whether state laws (including the state's version of the Uniform Child Custody and Jurisdiction Enforcement Act) and/or state

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<sup>4</sup> Safe and Timely Interstate Placement of Foster Children Act of 2006, Pub. L. No. 109-239, 120 Stat. 508.

<sup>5</sup> Social Security Act, 42 U.S.C. § 438(a)(1).

court rules permit the forms of interstate information sharing and participation described above. Additionally, states are to analyze whether there are any legal barriers that prevent timely and thorough judicial decision-making regarding interstate placement.<sup>6</sup>

In making the assessment, states are required to study current court practices in cases involving interstate child placement through a variety of methods (e.g., surveys, individual and group interviews, administrative data, review of case files), as appropriate, in order to help state courts review the typical circumstances and how often interstate placement occurs throughout the state. The assessment must also study the overall practical barriers to timely information-sharing in judicial proceedings, and the timeliness of the proceedings to obtain and review evidence from another state, including the judicial decisions regarding approval of an interstate placement.

Finally, the report should establish what state law, state court organization, or state court practice changes are needed to expedite interstate placement cases, based on the legal analysis and facts that the state courts have collected in this assessment. It also identifies strategies for improvements in state courts to expedite these cases and makes recommendations to implement these improvements.

### **2007 CIP APPLICATION**

Program Instruction ACFY-CB-PI-07-03 required courts to assess their effectiveness in carrying out various state laws that would facilitate the interstate placement of children, including:

#### **1. State laws that require courts in other states to cooperate in sharing information.**

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<sup>6</sup> Safe and Timely Interstate Placement of Foster Children Act of 2006, Pub. L. No. 109-239, § 9, 120 Stat. 508.

There is no Texas law that requires the sharing of information with regard to the ICPC between state courts. The provisions of the ICPC encourage the cooperation and sharing of information between states courts, but there is no real means of enforcing the provision against another state.

## **2. State laws that authorize courts to obtain information and testimony from agencies and parties without requiring interstate travel by the agencies and parties.**

Texas law requires a reviewing court to obtain information specific to the children and families involved (pursuant to Texas Family Code Sections 263.306,<sup>7</sup> 263.501,<sup>8</sup> and 263.503<sup>9</sup>), irrespective of the geographic placement intended for the child. Information from other agencies and parties involved can be transmitted through the in-state caseworker appearing before the court holding the hearing, as well as other parties such as the attorney ad litem, volunteer advocate, therapist, foster parent, or relative care giver. Information can be conveyed to the court through oral testimony, letters, a written report, a court report from the caseworker or a volunteer

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<sup>7</sup> Texas Family Code Section 263.306 discusses the procedures for permanency hearings, and subsection (b) discusses the necessary factors for the court to review regarding the service plan, permanency report, and other information concerning the safety and placement of the child. Subsection (b) conforms to 42 U.S.C.A. § 675(5)(B), to ensure that all federal permanency review requirements of the Adoption and Safe Families Act of 1997 are brought to the attention of the court and addressed. *See* SAMPSON & TINDALL'S TEX. FAM. CODE ANN. § 263.306 cmt. by Charles G. Childress (17th ed., West 2007).

<sup>8</sup> Texas Family Code Section 263.501 discusses placement review after final order naming the department as a child's managing conservator. This encompasses situations where parental rights are not terminated, and also where parental rights are terminated but the child has not yet been adopted. This provision instructs the court to hold placement review hearings at least once every six months until the child becomes an adult or is adopted. The statute requires at least 10 days notice to adults having regular contact or ongoing relationships with the child, which ensures that the department is not the only potential source of information for the court. Federal law requires these reviews be held at least once per year as a condition of federal funding for the substitute care. *See* SAMPSON & TINDALL'S TEX. FAM. CODE ANN. § 263.501 cmt. by Charles G. Childress (17th ed., West 2007).

<sup>9</sup> Texas Family Code Section 263.503 addresses the procedure for placement review hearings. Federal statutes and regulations refer to these continuing hearings as *permanency hearings*. Both state and federal law recognize that long term foster care is a poor solution for the child. The department must assess, and the court must review at each hearing, whether the current placement is the best available and whether reasonable efforts have been made by the department to finalize the permanency plan (*i.e.*, achieve a stable and permanent placement). A final order does not preclude efforts to locate an adoptive home for an eligible child or to seek a stable permanent placement. *See* SAMPSON & TINDALL'S TEX. FAM. CODE ANN. § 263.503 cmt. by Charles G. Childress (17th ed., West 2007).

advocate, or a sworn affidavit. There is no rule that prohibits a court from considering a written document or oral testimony other than an objection pursuant to the Rules of Evidence, a final ruling of which is within the reviewing court's discretion.

**3. State laws that permit the participation of parents, children, other necessary parties, and attorneys in ICPC cases without requiring interstate travel.**

Texas Family Code Section 263.501 authorize the following parties to participate in hearings to review a placement: parents, children, foster parents, pre-adoptive parents, the agency, a relative providing care, the director of a group home or institution in which the child resides, a possessory conservator or guardian, and if appointed, the child's attorney ad litem and guardian ad litem. Other parties or any other person (in the relevant sending or receiving state) can participate in the hearing if they have an interest in the child per Section 263.501(d)(6). Interstate travel is not required in any situation, if a judge allows evidence as described in section 2 above.

**2008 CIP APPLICATION**

CIP committed to undertake the effort to assess whether, and to what extent, the methods outlined above are being employed by courts and to identify other barriers to successful ICPC placements. And, as part of its CIP Grant Application, this report details CIP's assessment of Texas courts' current practices, strategies, and challenges in implementing the ICPC. Further, the report makes recommendations for improvements, as well as a proposal on how to implement the suggested improvements.

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## CURRENT LAW

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An obvious problem hindering the timely placement of children through the ICPC is the lack of understanding of the law and its relationship with other acts. There are many related statutes, which are frequently confused or misinterpreted in conjunction with the ICPC.

### **OVERVIEW OF PROVISIONS AND RELATIONSHIP BETWEEN THE ICPC, UCCJA, UCCJEA, PKPA AND THE HAGUE CHILD ABDUCTION CONVENTION**

The Interstate Compact on the Placement of Children (ICPC or Compact),<sup>10</sup> the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA),<sup>11</sup> its predecessor the Uniform Child Custody Jurisdiction Act (UCCJA),<sup>12</sup> the Parental Kidnapping Prevention Act (PKPA),<sup>13</sup> and the Hague Child Abduction Convention<sup>14</sup> might all be applicable in a situation involving the interstate placement of a child. It is necessary to have an understanding of how these acts interplay, as looking to one act in isolation may likely lead to an incorrect result.

#### INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN

The ICPC establishes a system of cooperation between states to ensure that children placed across state lines are afforded the same protections and services as if they were placed in state.<sup>15</sup> New York was the first state to adopt the ICPC in 1960, and by 1990, all fifty states, the District of Columbia, and the Virgin Islands had become members of the Compact.<sup>16</sup>

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<sup>10</sup> See TEX. FAM. CODE §§ 162.101-.107.

<sup>11</sup> See *id.* at §§ 152.001-.317.

<sup>12</sup> See Uniform Child Custody Jurisdiction Act, 9 U.L.A. 261 (1968).

<sup>13</sup> See Parental Kidnapping Prevention Act, 28 U.S.C. § 1738A (1980).

<sup>14</sup> See Convention on the Civil Aspects of International Child Abduction, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89.

<sup>15</sup> See NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES & AM. PUB. HUMAN SERVS. ASS'N, THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN: A MANUAL AND INSTRUCTIONAL GUIDE FOR JUVENILE AND FAMILY COURT JUDGES 3 (Barbara Seibel ed., 2001).

<sup>16</sup> *Id.* at 10.

The ICPC establishes orderly procedures for the placement and fixes responsibility of those involved in making the placement. Generally, the law *requires* that a juvenile or family court follow the ICPC any time the court sends or causes a child to be sent to another state.<sup>17</sup> Even though the ICPC includes provisions regarding judicial power and responsibility, it should not be construed as the basis on which state courts could determine custody of children placed across state lines.<sup>18</sup> The ICPC was actually intended to extend jurisdictional reach into borders of the receiving state solely for the purpose of investigating a proposed placement & supervising a placement once made.<sup>19</sup> The ICPC's "jurisdictional basis" language was never meant to confer authority to adjudicate a custody case or otherwise modify orders.<sup>20</sup> The ICPC is procedural and its governance extends to placements only.

In contrast, the uniform acts on child custody jurisdiction, such as the UCCJEA and its predecessor the UCCJA, are intended to provide the jurisdictional bases for a court's authority to decide child custody matters.

#### UNIFORM CHILD CUSTODY JURISDICTION ACT

The UCCJA was the first major attempt to provide uniform rules of subject matter jurisdiction in child custody cases. The UCCJA was promulgated by the National Conference of Commissioners on Uniform State Laws (NCCUSL) in 1968, and was ultimately adopted by all fifty states, the District of Columbia, and the Virgin Islands. However, many states varied the text of provisions, resulting in widely varying applications and interpretations by state courts.

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<sup>17</sup> *Id.* at 3.

<sup>18</sup> See Bernadette W. Hartfield, *The Role of the Interstate Compact on the Placement of Children in Interstate Adoption*, 68 NEB. L. REV. 292, 296 (1989).

<sup>19</sup> *Id.*

<sup>20</sup> See Robert G. Spector & Cara N. Rodriguez, *Jurisdiction Over Children in Interstate Placement: The UCCJEA, Not the ICPC, is the Answer*, 41 FAM. L.Q. 145, 148 (2007).

## UNIFORM CHILD CUSTODY JURISDICTION AND ENFORCEMENT ACT

In 1997 the NCCUSL promulgated the UCCJEA. The UCCJEA made revisions to the UCCJA, which was inconsistent with PKPA when determining proper jurisdiction for custody determinations. The UCCJEA has been adopted by forty-six states,<sup>21</sup> the District of Columbia and the U.S. Virgin Islands. The UCCJEA is much broader than its predecessor; in addition to covering jurisdiction, the UCCJEA also provides for enforcement mechanisms and cooperation between states.

## PARENTAL KIDNAPPING PREVENTION ACT

In 1980, the federal government enacted PKPA to address the jurisdictional and enforcement problems that followed interstate placement after the adoption of the UCCJA. PKPA mandates that state authorities give full faith and credit to the state's custody determinations, so long as those determinations are made in line with PKPA.

## THE HAGUE CHILD ABDUCTION CONVENTION

Lastly, the Hague Child Abduction Convention may also be implicated in inter-country custody disputes. The Hague Convention seeks “to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for the rights of access.”<sup>22</sup> The Convention aims to preserve the status quo child custody arrangement that existed immediately before the alleged wrongful removal or retention, thus deterring a parent

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<sup>21</sup> The only states that have not adopted the UCCJEA are Missouri, Massachusetts, New Hampshire, and Vermont. Additionally, Puerto Rico has also not adopted the Act. Massachusetts, Missouri and New Hampshire each introduced bills to adopt the UCCJEA during their 2008 Legislative Sessions, none of which passed. *See* National Conference of Commissioners on Uniform State Laws Website, available at <http://nccusl.org> (for listing of state enactments under “NCCUSL Acts – List” > “Child Custody Jurisdiction and Enforcement Act”).

<sup>22</sup> Convention on the Civil Aspects of International Child Abduction, Preamble, Oct. 25, 1980, T.I.A.S. No. 11,670, 1343 U.N.T.S. 89.

from crossing international boundaries in search of a more favorable court. The Convention applies only to children under the age of sixteen.<sup>23</sup>

When a case comes before a juvenile or family court, the issue of jurisdiction will always precede the question of whether the ICPC applies. Thus, the UCCJA, UCCJEA, and PKPA must be applied to every case to determine whether the court and child welfare agency have continuing jurisdiction over child custody, which is precedent to the question of authority to place a child out-of-state. Case law is uniform in standing for this proposition. *J.D.S. v. Franks* was the first case to clearly differentiate between the jurisdictional components of the UCCJA and the purview of the ICPC.<sup>24</sup> In *Franks*, the Supreme Court of Arizona explained that the compliance with the ICPC is not a prerequisite for exercising jurisdiction because the ICPC merely establishes a procedure to follow when a placement is made.<sup>25</sup> More specifically, the validity of a court's exercise of jurisdiction depends on the UCCJA (or UCCJEA) and PKPA.<sup>26</sup> Thus, *Franks* spells out that the ICPC governs procedure, where as the UCCJA (or UCCJEA) & PKPA govern jurisdiction. Likewise, in *White v. Adoption of Baby Boy D.*, the Supreme Court of Oklahoma held that the ICPC does not negate subject matter jurisdiction.<sup>27</sup>

The UCCJEA (or the older UCCJA) and PKPA, when appropriately applied, yield consistent results in establishing jurisdiction and means for enforcement regarding custody determinations.<sup>28</sup> As discussed, the ICPC does not apply to establishing jurisdiction. In theory the acts work together nicely; however, lack of understanding and problems in implementing the procedures can often lead to confusion.

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<sup>23</sup> *Id.* at art. 4.

<sup>24</sup> *J.D.S. v. Franks*, 893 P.2d 732 (Ariz. 1995).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 745.

<sup>27</sup> *White v. Adoption of Baby Boy D.*, 2000 OK 44, 10 P.3d 212 (Okla. 2000).

<sup>28</sup> Robert G. Spector & Cara N. Rodriguez, *Jurisdiction Over Children in Interstate Placement: The UCCJEA, Not the ICPC, is the Answer*, 41 FAM. L.Q. 145, 146 (2007).

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## THE ICPC

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### PURPOSE

The ICPC's stated purpose is to facilitate cooperation and uniformity among jurisdictions in the placement of children outside of the home state, and to promote appropriate care for the children.<sup>29</sup> As discussed, the ICPC provides procedures to make an interstate placement and fixes financial responsibility for providing services to the child once he or she is placed. The compact is necessary to ensure that a child placed out-of-state receives the same protections and services that would be provided if the child remained in his or her home state. The ICPC also ensures that children will be returned to the original jurisdiction should placement prove not to be in their best interest or should the need of out-of-state services cease.

The Compact contains ten articles, which define what placements are subject to the law and the specific procedures required of each placement. Article VII of the ICPC gives the executive head of each jurisdiction that is party to the Compact the authority to act jointly with the other party jurisdictions to promulgate rules and regulations. The Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC) was established in 1974 to serve this purpose.

### REGULATIONS

There are currently eleven regulations in effect that were promulgated by the AAICPC pursuant to the power granted in Article VII of the ICPC. Once adopted by the AAICPC, the regulations automatically become law and do not have to be individually adopted by the states. This section will highlight several of the regulations.

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<sup>29</sup> ICPC Art. I; *codified at* TEX. FAM. CODE § 162.102 (Art. I).

## REGULATION NO. 0.01 FORMS

Regulation No. 0.01 establishes standardized forms and provides that all parties shall use the forms. The forms shall be uniform in format and substance, and each state shall make available a reference to where the forms may be obtained by the public. The mandatory forms currently in effect are the following:

1. ICPC-100A “Interstate Compact Placement Request”;<sup>30</sup>
2. ICPC-100B “Interstate Compact Report on Child’s Placement Status”;<sup>31</sup>
3. ICPC-100C “Quarterly Statistical Report: Placements into an ICPC State”;
4. ICPC-100D “Quarterly Statistical Report: Placements Out of an ICPC State”; and
5. ICPC-101 “Sending State’s Priority Home Study Request”.<sup>32</sup>
6. Form ICPC-102 “Receiving State’s Priority Home Study Request” is an *optional* form that is available for use.

## REGULATION NO. 1

Regulation No. 1 addresses the situation of when a placement that was initially intrastate in character becomes interstate because the family has moved during the placement process. This provision provides new procedures and timetables for the placement.

## REGULATIONS NO. 3, 4, 9, & 10

Regulations 3, 4, 9, & 10 were enacted in response to creative arguments made by parties in an effort to fall under one of the exceptions of the ICPC and thus escape the applicability of the Compact. Regulation 3 & 4 more clearly define what falls under the close relatives exemption and the exemptions for certain residential placements, respectively. Regulation 9 more clearly

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<sup>30</sup> Texas refers to this form as “Form 2260.” *See* TEXAS DEP’T OF FAMILY AND PROTECTIVE SERVS., INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN: BUSINESS PROCESSES, STANDARD FORMS, PROCEDURES (Casey Family Programs, Version 1.00 2006).

<sup>31</sup> Texas refers to this form as “Form 2261.” *See id.*

<sup>32</sup> Texas refers to this form as “Form 2276.” *See id.*

defines what constitutes a “visit,” so as to prevent the misuse of this exception for “extended visits” rather than going through the procedures for placement. Regulation 10 more clearly defines who can be a “guardian,” such that the child may be placed with that individual without having to comply with the ICPC procedures.

#### REGULATION NO. 6 PERMISSION TO PLACE CHILD: TIME LIMITATIONS, REAPPLICATION

Per Regulation 6, approval to make the placement of a child is valid for six months after the receiving state administrator gives written approval of the placement.<sup>33</sup> If the placement is to be made after the six month period, the sending agency must reapply.<sup>34</sup>

#### REGULATION NO. 7 PRIORITY PLACEMENT

Regulation 7 is cited as being one of the most commonly misused and misunderstood provisions of the ICPC.<sup>35</sup> Regulation 7 was adopted by the AAICPC in 1996, and was revised in 2001 to specifically exclude from priority placement applicability any placement in which the request is for:

1. placement of a child for licensed or approved foster family care or adoption; or
2. a child already in the receiving state in violation of the ICPC.<sup>36</sup>

A Regulation 7 priority placement is only appropriate when a court makes a finding of entitlement to a priority placement and includes in the order the express finding that one or more

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<sup>33</sup> NAT’L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES & AM. PUB. HUMAN SERVS. ASS’N, *supra* note 15, at 56.

<sup>34</sup> The receiving state may require that documents be updated, but shall not require a new home study unless the laws of the receiving state provide that the previously submitted home study is too old to be currently valid. If a foster care license, institutional license, or other license, permit, or certificate held by the proposed placement recipient is still valid and in force, or if the proposed placement recipient continues to hold an appropriate license, permit, or certificate, the receiving state shall not require that a new license, permit, or certificate be obtained in order to qualify the proposed placement recipient to receive the child in placement. *See id.* at 57.

<sup>35</sup> Texas CIP Judicial Survey (Apr. 2008).

<sup>36</sup> ICPC Regulation 7 (2). *See also* NAT’L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES & AM. PUB. HUMAN SERVS. ASS’N, *supra* note 15, at 61.

of the following circumstances applies, setting forth the facts on which the court bases the findings:

1. The proposed placement recipient is a parent, stepparent, grandparent, adult brother or sister, adult uncle or aunt, or guardian; *and*
  - a. the child is under two years of age; or
  - b. the child is in an emergency placement; or
  - c. the court finds the child has spent substantial time in the home of the proposed placement recipient.
2. The receiving state has had a completed ICPC-100A (“Request for Placement”) with supporting documentation for over 30 business days, but the sending agency has not received notice determining whether or not the child may be placed.<sup>37</sup>

An order is not valid unless it contains the express finding and facts which support issuance of the order.<sup>38</sup> Thus, when the express findings and facts are not included, the receiving state agency processes the order under the non-priority timeframes unless the judge renders a new Regulation 7 order, both of which cause setbacks. Another cause for delay is when the Regulation 7 priority order is made within the order issued as a result of the review hearing (in Texas, these are referred to as permanency or placement hearings). To reduce setbacks, a Regulation 7 priority order should be a stand-alone order. Tips for drafting a proper Regulation 7 priority order and the proper procedure for sending out the order are included in the “Best Practices” section of this report.

### **CONDITIONS FOR PLACEMENT**

Article III of the ICPC states that 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 complies with all requirements of the ICPC and

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<sup>37</sup> *Id.* at 61-62.

<sup>38</sup> ICPC Regulation 7 (6).

applicable laws of the receiving state governing the placement of children therein. Before it may send or bring any child into a receiving state for placement in foster care or as preliminary to a possible adoption, a sending agency must provide written notice of its intent to the appropriate public authorities in the receiving state.<sup>39</sup> Art III(b) provides that the notice must contain the following information:

1. The child's name and the date and place of its birth.
2. The identity and address or addresses of the child's parents or legal guardians.
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 the child is being sent and evidence of the authority for making the placement.<sup>40</sup>

The child may not be sent or brought into the receiving state until after the appropriate public authorities in the receiving state have responded to notice of the sending agency in writing that the proposed placement does not appear to be contrary to the best interests of the child.<sup>41</sup> Additionally, when Texas is the receiving state, the Texas executive director may not approve the placement of a child from outside Texas without the concurrence of the individual or institution with whom the child is proposed to be placed.<sup>42</sup>

After a child has been brought into Texas, the sending agency retains its jurisdiction over the child until the child is adopted, reaches majority, becomes self-supporting, or is discharged with the concurrence of the appropriate authority in Texas.<sup>43</sup> In addition to jurisdiction, the sending

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<sup>39</sup> TEX. FAM. CODE § 162.101(1) (providing that “appropriate public authorities,” means the executive director of the Department of Family and Protective Services).

<sup>40</sup> *Id.* at § 162.102, Art. III(b).

<sup>41</sup> *Id.* at § 162.102, Art. III(d).

<sup>42</sup> *Id.* at § 162.104. Note that this is not part of the articles of the ICPC; this provision was added by Texas in addition to the adoption of the ICPC Articles. *See id.* Thus, this rule is not uniform across all states (as it is not part of the ICPC), but even in states which have not included this express provision, obtaining the consent of the proposed placement (home or institution) is implicit in every case.

<sup>43</sup> *See id.* at § 162.102, Art. V(a).

agency also retains financial responsibility for support and maintenance of the child during the period of the placement, which does not end until one of the events occurs that terminates jurisdiction.<sup>44</sup>

### **TIMEFRAMES FOR COMPLIANCE WITH THE ICPC**

The ICPC sets timeframe expectations for the completion of placement procedures. All ICPC correspondence should be processed as quickly as possible, as a child's perception of time, especially when apart from family and away from home, is very different than that of an adult.<sup>45</sup> The Compact's timeframes are commonly an area of confusion for courts and agencies and are a challenge in the successful implementation of the Compact.<sup>46</sup> The ICPC proscribes timeframes in three areas: routine processing of referrals, home studies, and Regulation 7 Priority Placements. When discussing the ICPC timeframes, all "days" are counted in business days, which excludes Saturdays, Sundays, and legal holidays.<sup>47</sup>

#### **ROUTINE PROCESSING OF REFERRALS**

The AAICPC has agreed that agencies should process all ICPC requests in a timely manner.<sup>48</sup> If at all possible, the state ICPC administrator should process referrals *within three working days* of receipt from either the local sending office, the sending state ICPC Office, or the local receiving office. This expectation applies to all referrals except Regulation 7 Priority Placements.

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<sup>44</sup> See *id.* at §§ 162.102, Art. V(a) & .103 (responsibility of sending agency in case of default).

<sup>45</sup> See NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES & AM. PUB. HUMAN SERVS. ASS'N, *supra* note 15, at 55 (citing AM. PUB. HUMAN SERVS. ASS'N, TRAINING MANUAL FOR ADMINISTRATORS AND LIAISONS OF THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN (2000)).

<sup>46</sup> Texas CIP Judicial Survey (Apr. 2008).

<sup>47</sup> See NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES & AM. PUB. HUMAN SERVS. ASS'N, *supra* note 15, at 58.

<sup>48</sup> See *id.* at 56.

## HOME STUDIES

It is generally agreed among ICPC member states that a home study is to be completed within 30 working days from the date the caseworker receives the request.

The Safe and Timely Placement Act sets federally mandated timeframes, and conditions funding on timeliness. The law requires that states complete, report, and return the results of a home study within 60 days.<sup>49</sup> There is one exception to the 60 day requirement: If the reporting state's failure to complete the home study within 60 days is due to circumstances beyond the state's control (e.g. delays in receipt of Federal agency criminal records checks or the failure by any entity to provide completed medical forms requested by the state at least 45 days before the end of the 60 day period). The reporting state must document the circumstances involved in the delay and certify that completing the home study is in the best interest of the child. This exception gives the reporting state 15 additional days (i.e., 75 calendar days total) to complete the home study. This 15-day extension is permissible only for a home study begun on or after October 1, 2006 but before September 30, 2008.<sup>50</sup> Presumably, after September 30, 2008, the 15-day extension is no longer available. The time period begins when the state that is to conduct the home study receives the home study request.<sup>51</sup> The parts of the home study involving education and training of prospective foster and adoptive parents do not have to be completed within the same 60 (or 75) day timeframe.<sup>52</sup> Additionally, the requirement for an interstate "home study" does not encompass the Federal provisions for criminal background checks and child abuse registry checks as is required in Section 471(a)(20) of the Act; thus, completion of these

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<sup>49</sup> See Social Security Act § 471(a)(26)(A)(i).

<sup>50</sup> See *id.* at § 471(a)(26)(A)(ii).

<sup>51</sup> SUSAN ORR, U.S. DEP'T OF HEALTH AND HUMAN SERVS., SAFE & TIMELY: HHS RESPONSE LETTER 1 (2007), available at [http://icpc.aphsa.org/Home/Doc/HHS\\_Response\\_Letter\\_Re\\_Safe\\_and\\_Timely.pdf](http://icpc.aphsa.org/Home/Doc/HHS_Response_Letter_Re_Safe_and_Timely.pdf).

<sup>52</sup> Social Security Act § 471(a)(26)(A)(iii).

requirements is not required within the 60 day time period.<sup>53</sup> One area of confusion with regard to the timeframes set out by the Safe and Timely Act is that the days are stated in calendar days, rather than business days (the way timeframes are discussed in the ICPC).<sup>54</sup>

Following issuance of the home study report, the sending state must accept the home study report received from the receiving state within 14 days unless reliance on the report would be contrary to the child's welfare.<sup>55</sup>

The Act adds additional time pressure by tying federal funds to timeliness of completion of home studies. The Act authorized grants for timely interstate home study incentive payments to states that have completed a home study and sent a report on the results within 30 days after the receipt of the request.<sup>56</sup> Consistent with the definition of interstate home study in Section 473B(g)(2) of the Social Security Act, only home studies that facilitate an adoptive or foster placement of a child in foster care under the responsibility of the state are eligible for incentive payments.<sup>57</sup> Thus, placements with parents are not eligible to receive the incentive payment. However, the incentive payments are available for home studies completed for non-IV-E eligible children.

There is some confusion in interpreting the ICPC in conjunction with the Safe and Timely Act. Article III Subsection (d) of the ICPC provides that a placement cannot be made until the appropriate authorities in the receiving state notify the sending agency, in writing, to the effect

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<sup>53</sup> See ADMINISTRATION FOR CHILDREN AND FAMILIES, U.S. DEP'T OF HEALTH AND HUMAN SERVS., ACF UPDATES 01-29-071 QA ON SAFE AND TIMELY ADAM 1 (2007), available at [http://icpc.aphsa.org/Home/Doc/ACF\\_Updates\\_01-29-071\\_QA\\_on\\_Safe\\_and\\_Timely\\_Adam.pdf](http://icpc.aphsa.org/Home/Doc/ACF_Updates_01-29-071_QA_on_Safe_and_Timely_Adam.pdf).

<sup>54</sup> See SUSAN ORR, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 51, at 1.

<sup>55</sup> Social Security Act § 471(a)(26)(B).

<sup>56</sup> See Social Security Act § 473B.

<sup>57</sup> See SUSAN ORR, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 51, at 3.

that the proposed placement does not appear to be contrary to the interests of the child.<sup>58</sup> Thus, the ICPC timeframes provide the permissible time for an agency to approve or deny placement. In contrast, the Safe and Timely Act's timeframes set out the deadlines by which the report detailing the results of the home study must be sent to the sending state.<sup>59</sup> The Safe and Timely Act does not state that the report is synonymous with the receiving state's approval of a placement. Additionally, the Safe and Timely Act expressly provides that the provisions are not to be construed to require states to complete the parts of the home study involving education and training of prospective foster or adoptive parents within the timeframes.<sup>60</sup> As a result, the home study might be conducted and completed as contemplated by the act within the assigned timeframe, but the family will not be licensed and placement will not be made until they complete the required training. Thus, these timeframes are not particularly effective, as they do not necessarily ensure a timely placement.

As mentioned in the discussion of Regulation 6, following the home study, approval to make the placement of a child is valid for six months after the receiving state administrator gives written approval of the placement, and if the placement is not made within those six months, the sending state must reapply.<sup>61</sup>

#### TIMELINES FOR NON-PRIORITY PLACEMENTS

There are two different timelines for non-priority placements: those that involve foster home licensing or adoption and those that do not. When a placement is made that does not fall under Regulation 7 priority and does not involve a foster home licensing or adoption, courts can expect

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<sup>58</sup> See TEX. FAM. CODE § 162.102, Art. III(d).

<sup>59</sup> See Social Security Act § 471(a)(26)(A)(i).

<sup>60</sup> See *id.* at § 471(a)(26)(A)(iii).

<sup>61</sup> See NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES & AM. PUB. HUMAN SERVS. ASS'N, *supra* note 15, at 56-57,

an answer on whether a placement is approved in three months according to the reasonable expectations that have been set forth by the ICPC and the AAICPC.<sup>62</sup>

When a placement involves foster home licensing or adoption, the placement becomes subject to the Adoption and Safe Families Act (ASFA).<sup>63</sup> ASFA has two requirements that can significantly extend the amount of time required for ICPC approval and placement. First, ASFA requires that anytime a Title IV-E eligible child is to be placed in a Title IV-E subsidized foster or relative care, the state's foster home licensure process must be completed. Previously, there was a less stringent approval process for subsidized placements with relatives. Because most interstate placements are with relatives, a significant number of ICPC placements are now requiring the relative to complete the same training and other licensing requirements as any foster parent. This process takes at least two to four months.<sup>64</sup>

The second ASFA requirement is that all prospective foster parents and prospective adoptive parents must undergo a criminal background check. A 2001 report issued by NCJFCJ and APHSA, reported that criminal background checks can take as long as three to four months.<sup>65</sup> But, with the enactment of the Adam Walsh Act,<sup>66</sup> the criminal background check process has become more streamlined, allowing for the possibility of quicker background checks. Thus, for a placement involving foster home licensing or adoption, the required training and criminal

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<sup>62</sup> See NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES & AM. PUB. HUMAN SERVS. ASS'N, *supra* note 15, at 59.

<sup>63</sup> In November 1997, the Adoption and Safe Families Act was signed into law. ASFA provisions are aimed at increasing the safety of children placed in foster or adoptive homes and shortening the amount of time children stay in foster care. ASFA's provisions also significantly amended Title IV-E of the Social Security Act regarding funding. See Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115 (1997).

<sup>64</sup> The two month timeframe can only be reached if the state has defensible grounds to waive the training requirement. A state cannot waive the requirement solely on the basis that the placement is with a relative. Training can only be waived if the state has a set of criteria for any foster parent that allows training to be waived and the relative meets the criteria. See NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES & AM. PUB. HUMAN SERVS. ASS'N, *supra* note 15, at 59-60.

<sup>65</sup> See NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES & AM. PUB. HUMAN SERVS. ASS'N, *supra* note 15, at 60.

<sup>66</sup> See Social Security Act § 471(a)(20)(A).

background check (if run concurrently) will take three to four months to complete. When compared to the placements that do not involve foster home licensing or adoption, which only require a home study (a timeframe of 30 days), the licensing process takes two to three months longer. Using this calculation, the ASFA requirements extend the timeframe for the approval and placement process to five to six months.

One option to expedite placement involving licensing or adoption is if the relative agrees to forego subsidized payment on a temporary basis, the placement can be made under the procedure for placements that do not involve foster homes or adoption if permissible under the receiving state's laws.<sup>67,68</sup> As discussed previously, when a placement involves foster home licensing or adoption, the placement approval process involves training and a criminal background check, in addition to the home study. Thus, once the home study has been completed and the placement has been approved, the child could be placed in the home while the licensing process (training and criminal background check) proceeds without foster home board payments. Then, once the required training and background checks are completed to satisfy the requirements for the Title IV-E funds, the relative can begin receiving the payments. If, however, the relative cannot become licensed because of criminal background checks or training issues, Title IV-E funds will not be available.

Another alternative, if the relative is unable to forego payment until the licensing process is complete, is for the sending state to identify a non-Title IV-E funding source for foster care

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<sup>67</sup> Some states require licensing for all placements.

<sup>68</sup> See NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES & AM. PUB. HUMAN SERVS. ASS'N, *supra* note 15, at 100-01.

payments until the home is licensed.<sup>69</sup> Examples of non-Title IV-E funding include state funding sources and Temporary Assistance for Needing Families (TANF).<sup>70</sup>

#### REGULATION 7 PRIORITY PLACEMENTS

Regulation 7 sets out timeframes for the processing of a priority placement based on the grounds for entitlement. There are two separate grounds for entitlement to Regulation 7 Priority Placement:

1. The proposed placement recipient is a parent, stepparent, grandparent, adult brother or sister, adult uncle or aunt, or guardian; *and*
  - a. the child is under two years of age; or
  - b. the child is in an emergency placement; or
  - c. the court finds the child has spent substantial time in the home of the proposed placement recipient; Or
2. The receiving state has had a completed ICPC-100A (“Request for Placement”) with supporting documentation for over 30 business days, but the sending agency has not received notice determining whether or not the child may be placed.<sup>71</sup>

In the first instance, following the finding of entitlement to priority placement, the court has two business days to send the signed order to the sending agency. The sending agency has three days to forward the referral to the sending state ICPC Office, and the sending state ICPC Office has two days to transmit the priority request to the receiving state ICPC Office. The receiving state will be considered out of compliance with ICPC procedures if it fails to either approve or disapprove the placement within twenty business days of the receipt of the request.<sup>72</sup>

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<sup>69</sup> *See id.* at 101.

<sup>70</sup> *See id.*

<sup>71</sup> ICPC Regulation 7 (6).

<sup>72</sup> *See* NAT’L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES & AM. PUB. HUMAN SERVS. ASS’N, *supra* note 15, at 62.

In the second situation, an ICPC request had already been made and the receiving state failed to timely respond, and thus, is out of compliance. In determining whether a receiving state is out of compliance, it is important for courts to factor in seven to eight business days for the documentation to reach the receiving state.<sup>73</sup>

A receiving state cannot be deemed out of compliance if:

1. Within two business days of receipt of the ICPC priority placement request, the receiving state Compact Administrator notifies the sending state Compact Administrator that further information is necessary, specifically detailing the information needed. The twenty business day period for the receiving state to complete action shall be calculated from the date of the receipt of the requested information.<sup>74</sup>
2. Or, extraordinary circumstances make it impossible to comply with the timeframes, and the receiving state, within two business days, notifies the sending state of the problem, including identification and explanation of the extraordinary circumstances and a date on or before which the receiving state will provide its response to the placement request.<sup>75</sup>

If a court has met its obligation, and if a receiving state is out of compliance, the court may then communicate directly with the receiving state court to request assistance in completing the home study and recommendation regarding the possible placement.<sup>76</sup> Of course, there is no rule prohibiting a sending court from communicating with a receiving state court from the beginning, and perhaps a practice of identifying the receiving state court appropriate for contact should be considered. To avoid potential conflicts regarding ex parte communication, the judge should inform all parties of the intent to contact the receiving state court.<sup>77</sup> If possible, the judge should use telephone conference call in which all parties may participate, or following the conversation

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<sup>73</sup> *See id.*

<sup>74</sup> ICPC Regulation 7 (5)(b).

<sup>75</sup> ICPC Regulation 7 (8).

<sup>76</sup> *See* NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES & AM. PUB. HUMAN SERVS. ASS'N, *supra* note 15, at 63.

<sup>77</sup> *See id.*

the judge should share all information with the parties.<sup>78</sup> Similarly, when possible, judges should allow all parties and their attorneys to be present during any communications with agency personnel or judges in the sending or receiving state.<sup>79</sup>

Regulation 7 requires all transmission of documents for priority placements to be made by fax or overnight mail to expedite the process.<sup>80</sup> Additionally, the Regulation requires that interstate cases be processed in the same manner and no less quickly than a state processes their own intrastate cases (not subject to the ICPC).<sup>81</sup> Because of the reduced timeframes, judges may be inclined to render a priority order in a case where the requirements of Regulation 7 have not been met, but doing so will actually cause greater delay because the agency will be required to send the case back to the court for modification.<sup>82</sup>

Regulation 7 extends a Judge's power to expedite placement procedures to some extent. Regulation 7 gives a judge some power to control the processing of a placement out-of-state. While normally, a state judge has no power to control the operations of an out-of-state agency, Regulation 7 provides for an expedited timeframe for certain cases and requires that the out-of-state agency complete the home study in a timelier manner.

However, even where the sending state fully complies with the ICPC procedures in requesting a home study, there is no way for the sending state to enforce the proscribed time frames (both in the priority and non-priority context).<sup>83</sup> A state judge in the sending state does

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<sup>78</sup> *See id.*

<sup>79</sup> *See id.*

<sup>80</sup> *See id.*

<sup>81</sup> ICPC Regulation 7 (8)-(9).

<sup>82</sup> *See* NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES & AM. PUB. HUMAN SERVS. ASS'N, *supra* note 15, at 64-65.

<sup>83</sup> *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, 446 (2006).

not have the jurisdictional authority to compel compliance by another state with the ICPC.<sup>84</sup> Because the ICPC was adopted by each state, it has the force of state law, and thus, the judge from the sending state has no authority to compel the receiving state agency to comply with the receiving state law. Although the Compact states that a violation shall constitute a violation of the laws of both the sending and receiving state,<sup>85</sup> neither the AAICPC nor the agency has enforcement powers.<sup>86</sup> For discussion of suggestions to remedy this problem, see the “Policy Changes” section of this report regarding “Enforceability” on page 60.

### APPLICABILITY IN TEXAS

Every adoption involving a child being placed outside of Texas must comply with the ICPC.<sup>87</sup> Under the ICPC, no sending agency may send or bring a child into another state, as a preliminary to a possible adoption without complying with all requirements in the ICPC and state statutes in both the sending and receiving state.<sup>88</sup> A *sending agency* is any entity that sends or brings a child into Texas, or causes a child to be sent or brought into Texas, whether the entity is a governmental agency or officer, a court, a person, or an organization.<sup>89</sup> The *receiving state* is the state to which the child is sent or brought for placement.<sup>90</sup> The compact is limited to placements made by state or private agencies and does not include private out-of-state placements made by immediate relatives.<sup>91</sup>

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<sup>84</sup> For further discussion of judges’ subpoena power, see the section in this report titled “Subpoena Power in Other States” on page 45.

<sup>85</sup> See TEX. FAM. CODE § 162.102, Art. IV.

<sup>86</sup> See Sankaran, *supra* note 83, at 446.

<sup>87</sup> See TEX. FAM. CODE §§ 162.101-.107.

<sup>88</sup> *Id.* at § 162.102, Art. III(a).

<sup>89</sup> *Id.* at § 162.102, Art. II(b).

<sup>90</sup> *Id.* at § 162.102, Art. II(c).

<sup>91</sup> Only those relative placements specifically enumerated (parent, stepparent, grandparent, adult brother or sister, and adult uncle or aunt) are exempt. Other relatives (e.g. cousins, great grandparents, etc.) are not exempt. Further, the exempt parties must be on *both sides* of the placement transaction. See TEX. FAM. CODE § 162.102, Art. VIII(a).

## ICPC ILLEGAL PRACTICES

One of the difficulties in comparing child welfare systems between states is that they are organized so differently. However, survey data involving judges and caseworkers both in Texas and out-of-state elicited some common results.<sup>92</sup> Overall, participants seemed to think that the ICPC at times serves its purpose, but frequently ends up causing significant delays in the placement of children.<sup>93</sup> Some participants noted loopholes to get around the system through extended visits or naming the future placement as guardian of the child to escape the requirements of the ICPC.<sup>94</sup> Survey results showed that some judges felt taking such action was justified in some instances (such as where there is an out-of-state non-custodial parent or relative about whom there are no safety concerns), and that ICPC procedures were not necessary and only served to delay the placement of children.<sup>95</sup>

### EXTENDED VISITS

The NCJFCJ and the APHSA identified in their fall 2001 guide that the ICPC is sometimes circumvented by judges granting consecutive “visits.”<sup>96</sup> In an effort to place a child in a home quickly, some judges grant extended visits so that a child can stay at an out-of-state home without having to fully comply with the ICPC requirements for a “placement.”<sup>97</sup> While many of the judges engage in this practice to try to achieve the best result for the child, granting extended

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<sup>92</sup> National Child Welfare Resource Center on Legal and Judicial Issues, American Bar Association Center on Children and the Law, *Impact of Safe and Timely Interstate Placement Act: Results from Questionnaire* (Apr. 2008); Texas CIP Judicial Survey (Apr. 2008).

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> See NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES & AM. PUB. HUMAN SERVS. ASS'N, *supra* note 15, at 85-86.

<sup>97</sup> *See id.*

“visits” is deemed an illegal placement in violation of the ICPC.<sup>98</sup> Several of the judges who responded to the April 2008 CIP survey indicated that, while they had not engaged in the practice of granting extended visits to evade complying with the ICPC, they were aware of or had heard of judges who used the practice as a loophole to avoid the ICPC requirements.<sup>99</sup> Thus, the practice may continue to be used to escape the requirements of the ICPC.

ICPC Regulation 9 defines a “visit” as follows:

**Regulation No. 9: Definition of a Visit**

1. A visit is not a placement within the meaning of the ICPC. Visits and placements are *distinguished on the basis of purpose, duration, and the intention* of the person or agency with responsibility for planning for the child as to the child's place of abode.
2. The *purpose* of a visit is to *provide the child with a social or cultural experience of short duration*, such as a stay in a camp or with a friend or relative who has not assumed legal responsibility for providing child care services.
3. It is understood that a visit for twenty-four (24) hours or longer will necessarily involve the provision of some services in the nature of child care by the person or persons with whom the child is staying. The provision of these services will not, of itself, alter the character of the stay as a visit.
4. If the child's stay is intended to be for no longer than thirty (30) days and if the purpose is as described in Paragraph 2, it will be presumed that the circumstances constitute a visit rather than a placement.
5. A stay or proposed stay of longer than thirty (30) days is a placement or proposed placement, except that a stay of longer duration may be considered a visit if it begins and ends within the period of a child's vacation from school as ascertained from the academic calendar of the school. A visit may not be extended or renewed in a manner which causes or will cause it to exceed thirty (30) days or the school vacation period, as the case may be. *If a stay does not from the outset have an express terminal date, or if its duration is not clear from the circumstances, it shall be considered a placement or proposed placement and not a visit.*
6. A *request for a home study* or supervision made by the person or agency which sends or proposes to send a child on a visit and that is pending at the time that the visit is proposed will *establish a rebuttable presumption that the intent of the stay or proposed stay is not a visit.*<sup>100</sup>

Some courts attempt to evade compliance with the compact by calling what is really a placement, a visit.<sup>101</sup> Because a “visit” is not a matter to which the ICPC applies, it does not

<sup>98</sup> Telephone Interview with Pamela Parker, Legal Division, Department of Family and Protective Services, in Austin, Tex. (June 19, 2008).

<sup>99</sup> Texas CIP Judicial Survey (Apr. 2008).

<sup>100</sup> ICPC Regulation 9 (Emphasis added).

involve the Compact Administrator, and thus, in many of these cases neither the Compact Administrator in the sending state nor the receiving state knows anything about the children unless and until some sort of problem arises or until services are requested. When a court engages in this practice, when the intent is in fact a “placement,” not only does the court violate the law, but also may place the child at risk of harm. Because the ICPC procedure is not properly initiated, a home study has not been conducted to determine the appropriateness of the placement, and services that may support a successful placement have not been provided. There is no concept of an “extended visit” under the ICPC. Attorneys frequently provide judges with suggested orders which include this language, but in doing so they are contributing to violation of the ICPC.

#### USING GUARDIANSHIP TO EVADE COMPLIANCE

Another way courts try to avoid compliance with the ICPC procedure is by naming prospective adoptive parents as “guardians” of the children they propose to adopt, thereby falling into the exception for children being placed with guardians.<sup>102</sup> There have been sufficient instances of this practice that an ICPC Secretariat memorandum was issued on this topic in 1988 and revised in 1998.<sup>103</sup> The memorandum discusses the issue of the legitimacy of such appointments and their meaning for the ICPC, compliance issues, and enforcement. The memo takes the position that such appointments should be held invalid as a matter of law and that they do not relieve sending agencies and other parties of their obligation to comply with and enforce the ICPC. The memo urges courts, Compact Administrators, public officials, and enforcing

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<sup>101</sup> See NAT’L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES & AM. PUB. HUMAN SERVS. ASS’N, *supra* note 15, at 85-86.

<sup>102</sup> See TEX. FAM. CODE § 162.102, Art. VIII(a).

<sup>103</sup> See WENDELL, TUCKER, AND ROSENBAUM: MEMORANDUM ON GUARDIANSHIP AND ATTEMPTS TO EVADE THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN, ICPC SECRETARIAT (Revised 1998).

agencies to inquire further into the appearances of a guardianship to determine the actual facts and point out the existence of a sham guardianship.

Whether an individual is a proper guardian of a child going through a placement and adoption situation depends on the particular circumstances of the case. However, there are a few applicable rules<sup>104</sup>:

1. If a particular party is already the guardian of the child before there is any thought of placing the child, the chances are that such a guardian is within the exempt class. Nonetheless, special attention should be paid to the state laws that provide for the Child Welfare Agency of the State to be the “guardian” of each state ward. This is an agency guardianship, even though a named individual may appear as the “guardian.”
2. A “friend of the family” may be a non-agency guardian within the meaning of Article VIII. In any such case, it is matter of fact as to whether that person is really a friend or merely an individual who is found for the purpose and merely alleged to be a friend of the family.
3. The prospective adoptive parents should never be guardians and cannot properly serve in that capacity because their role as petitioners to adopt makes it impossible for them to perform the duties of independent surveillance and protector that are the essence of the guardianship function and responsibility.

When a guardianship is found to be a sham to evade the ICPC process and a placement is made with this “guardian” pursuant to the ICPC exemption, the placement is illegal.

### **CONSEQUENCES OF ILLEGAL PLACEMENT**

The placements described in the previous sections (extended visits and sham guardianship) represent illegal placements. Whenever the court makes an illegal placement, there are consequences that follow, the most serious of which can be to the innocent party (the child who has been illegally placed).<sup>105</sup> When the ICPC has not been fully complied with, home

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<sup>104</sup> See NAT’L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES & AM. PUB. HUMAN SERVS. ASS’N, *supra* note 15, at 87.

<sup>105</sup> See *id.* at 87.

assessments have not been made and supports and services have not been arranged for, which sets the child up for the possibility of being placed at physical and emotional risk.<sup>106</sup>

When a receiving state discovers that an illegal placement has occurred within their state, it may determine that the child is in an inappropriate setting that could be injurious to the wellbeing of the child. There have been numerous cases where noncompliance with the ICPC has put the child in danger without a place to turn. Depending on the severity and circumstances of the situation, the receiving state may take the following actions:

1. Consult with the sending state to make immediate arrangements to return the child to the sending state.
2. Refuse to proceed with a pending adoption.
3. Remove the child from the inappropriate setting and place the child in emergency shelter/foster care in the receiving state while more permanent plans can be developed and implemented.
4. Determine that the child is not in any danger and notify the sending state that the child can remain in the current setting while a home study is completed and compliance can be achieved.<sup>107</sup>

In the first three consequences, there is a harmful result to the child and significant delay in permanency. In the fourth possibility, the child may be safe and in an appropriate home, but if the child is Title IV-E eligible, the agency faces loss of reimbursement and possible financial sanctions for non-compliance. Sending states may attempt to cure the illegal placement by retroactively complying, but courts, agencies, attorneys, and administrators face significant risks when they knowingly engage in retroactive compliance, including:

1. Placement decision may be overturned on appeal, resulting in embarrassment for the judge and delays in permanency for the child;
2. Violations reported to state's Judicial Review Committee for corrective action;

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<sup>106</sup> *See id.*

<sup>107</sup> *See id.* at 87-89.

3. Attorneys' actions reported for review and corrective action to the state's bar association and the American Academy of Adoption Attorneys (AAAA) which may result in revocation of license, suspension, and/or sanction;<sup>108</sup>
4. Sending state court that places a child in violation of Compact law remains liable for its actions in making an illegal placement;
5. Several states (including Texas) have enacted criminal sanctions for a violation of the ICPC.<sup>109</sup> In other states which do not have express provisions relating to violations of the ICPC, it appears that provisions in other criminal statutes could be utilized to address non-compliance with the ICPC.<sup>110</sup>

In practice these serious actions are rarely taken, which continues to exacerbate the problem of non-compliance.<sup>111</sup> In reality, the only serious consequence is the safety and wellbeing of the child. If a child is illegally placed, the receiving state is less likely to comply with requests to review the placement and provide assistance.<sup>112</sup>

As stated previously, the ICPC is in place not only to ensure that home assessments are made, but also to make sure that the children have all the necessary services to succeed in their new placement. This includes things as trivial as a birth certificate or social security card so that they can be enrolled in school. When children are placed interstate without the ICPC approval, often the caretaker is unable to enroll the child in school and may not be able to obtain a medical insurance card. When the caregiver realizes they are in this bind and go to their state (the receiving state) for assistance, the receiving state is often unwilling to help. As a result, a placement that with the proper services could become a permanent home may unnecessarily be

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<sup>108</sup> See Iowa Supreme Court Bd. of Prof'l Ethics & Conduct v. Hill, 576 N.W.2d 91 (Iowa 1998) (Attorney's license was revoked because of the mishandling of an interstate adoption, including failure to comply with the ICPC, among many other serious violations); Matter of Adoption of R.N.L., 913 P.2d 761 (Utah App. 1996) (Attorney was sanctioned for not complying with the ICPC); State *ex. rel.* Okla. Bar Ass'n v. Johnson, 863 P.2d 1136 (Okla. 1993) (Attorney was suspended for four months from the practice of law for charges including that the attorney took no steps to comply with the ICPC when facilitating an adoption).

<sup>109</sup> See TEX. FAM. CODE § 162.107 (violation of the ICPC is a Class B misdemeanor).

<sup>110</sup> See NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES & AM. PUB. HUMAN SERVS. ASS'N, *supra* note 15, at 89-90.

<sup>111</sup> Telephone Interview with Pamela Parker, Legal Division, Department of Family and Protective Services, in Austin, Tex. (June 19, 2008).

<sup>112</sup> *Id.*

disrupted, causing more trauma to the child and yet another move, further delaying permanency. This is not the case when the ICPC is followed; when the receiving state approves a home, the receiving state is obligated to also provide supervision on request.

The surveys conducted of judges and caseworkers all seemed to highlight a common frustration with the prolonged ICPC process. Many judges suggested that the ICPC could be improved by having an exception for certain relatives when there is no safety concern. Their frustration is justified, as they witness children having to stay in foster homes while waiting on a placement. However, trying to evade the ICPC procedure is not the answer.

The survey (of judges and social workers) results showed that many of the respondents were unaware of consequences of non-compliance with the ICPC. Several respondents mentioned that a child might end up in danger, but it seemed that some of the judges were of the feeling that they could assess the safety of a potential placement just by looking at the individuals. Perhaps a better awareness of the possible consequences would lead to greater compliance with the requirements.

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## **LEGAL ISSUES**

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As previously mentioned, the Safe and Timely Act establishes new assessment requirements for state courts under the CIP. The Act, in combination with the other statutes, encourages courts to share information, obtain information and testimony without requiring interstate travel by parties, and permit the participation by parties and attorneys in interstate placement cases without requiring interstate travel. To understand the feasibility of achieving these goals, it is necessary to analyze the legality of these suggestions under the standard rules of Texas procedure and evidence. Specifically, the American Bar Association pointed out several key issues to address,

including subpoena power, the transfer of evidence across state lines, and the ability of attorneys and parties to participate when not physically present in a state or at a hearing.

### TEXAS FAMILY CODE PROVISIONS

Courts are authorized by the Texas Family Code to obtain information and testimony from agencies and parties, which can be transmitted through the in-state caseworker appearing before the court holding the hearing, as well as other parties such as the attorney ad litem, volunteer advocate, therapist, foster parent, or relative care giver.<sup>113</sup>

The Texas Family Code has provisions in Chapter 104 relating to evidence in family law cases. These rules are specific to Texas proceedings, so they would only apply where Texas is holding the hearing in state. Several of the provisions relate to the use of technology for pre-recorded or closed circuit testimony by the child. These provisions are mainly for the protection of the child, and do not really apply to the use of technology to send evidence across state lines. However, Section 104.007 provides for the video testimony of certain professionals regarding alleged abuse or neglect of a child. "Professionals," as used in Section 104.007 has the same meaning as assigned by Section 261.101(b).<sup>114</sup> While this provision applies to abuse and neglect proceedings brought by the Department of Family and Protective Services, the rules in (c) regarding the procedure for videoconference testimony could arguably be extended to an ICPC proceeding to ensure due process of parties.

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<sup>113</sup> See TEX. FAM. CODE §§ 263.306, .501, & .503.

<sup>114</sup> See *id.* § 261.101(b) (explaining "professional" means an individual who is licensed or certified by the state or who is an employee of a facility licensed, certified, or operated by the state and who, in the normal course of official duties or duties for which a license or certification is required, has direct contact with children. The term includes teachers, nurses, doctors, day-care employees, employees of a clinic or health care facility that provides reproductive services, juvenile probation officers, and juvenile detention or correctional officers.).

**§ 104.007. Video Testimony of Certain Professionals**

- (a) In this section, “professional” has the meaning assigned by Section 261.101(b).
- (b) In a proceeding brought by the Department of Protective and Regulatory Services concerning a child who is alleged in a suit to have been abused or neglected, the court may order, with the agreement of the state’s counsel and the defendant’s counsel, that the testimony of a professional be taken outside the courtroom by videoconference.
- (c) In ordering testimony to be taken as provided by Subsection (b), the court shall ensure that the videoconference testimony allows:
  - (1) the parties and attorneys involved in the proceeding to be able to see and hear the professional as the professional testifies; and
  - (2) the professional to be able to see and hear the parties and attorneys examining the professional while the professional is testifying.
- (d) If the court permits the testimony of a professional by videoconference as provided by this section to be admitted during the proceeding, the professional may not be compelled to be physically present in court during the same proceeding to provide the same testimony unless ordered by the court.

Subsection (c) sets up procedures to preserve due process and protect against ex parte communication. This section sets up a system for video testimony that closely mirrors the normal courtroom testimony procedure.

**EXCHANGING EVIDENCE BETWEEN STATES**

**Do the Texas Rules of Evidence permit the sending and receiving of evidence between states as is encouraged in the CIP initiative?**

There is no Texas law that requires or prohibits the sharing of information between states. Logically, the sharing of relevant information or data will not begin until the ICPC process has been properly initiated. Prudent practice would demand that safeguards regarding identity and confidential information exist to protect the child who is the subject of the suit.

All states have Rules for Civil Procedure and Evidence that address the procedures for exchanging evidence and taking depositions in another state. Because most states have Rules of Evidence that mirror the Federal Rules of Evidence, the state rules are somewhat uniform.

The Texas Rules of Evidence already include safeguards for authenticating evidence in Rules 901 and 902.

AUTHENTICATION

**RULE 901. REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION**

**(a) General Provision.** The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

**(b) Illustrations.** By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

(1) *Testimony of witness with knowledge.* Testimony that a matter is what it is claimed to be.

(2) *Nonexpert opinion on handwriting.* Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.

(3) *Comparison by trier or expert witness.* Comparison by the trier of fact or by expert witness with specimens which have been found by the court to be genuine.

(4) *Distinctive characteristics and the like.* Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.

(5) *Voice identification.* Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at anytime under circumstances connecting it with the alleged speaker.

(6) *Telephone conversations.* Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if:

(A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called; or

(B) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.

(7) *Public records or reports.* Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.

(8) *Ancient documents or data compilation.* Evidence that a document or data compilation, in any form, (A) is in such condition as to create no suspicion concerning its authenticity, (B) was in a place where it, if authentic, would likely be, and (C) has been in existence twenty years or more at the time it is offered.

(9) *Process or system.* Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.

(10) *Methods provided by statute or rule.* Any method of authentication or identification provided by statute or by other rule prescribed pursuant to statutory authority.

Especially relevant to this context is Rule 901(b)(7); this provision is likely to be used with increasing frequency as it deals, in part, with the computer process.<sup>115</sup> The Federal Rule 901(b)(7) is verbatim to the Texas Rule.<sup>116</sup> If the data is compiled and kept in a public office, it is sufficiently identified and authenticated.<sup>117</sup> Of course, relevancy must still be shown for admissibility, and the data can be attacked like any evidence.<sup>118</sup>

In *Mullins v. State*, the Texas Court of Appeals found that documentary evidence of defendant's prior federal conviction was authenticated under Rule 901(b)(7) (as well as 902(1) and (4)) where the evidence bore the seal of the federal district clerk's office and her attestation that the documents were certified copies of originals and her signature.<sup>119</sup>

In the context of the ICPC process, the most important information that will be sent across state lines is the home study report. Under the Texas Rules of Evidence, the home study report (if sent from the receiving state agency) would qualify as an official document under Rule 902 allowing for self-authentication. However, if a home study was conducted by a contracted private entity and the report was not sent through the receiving state's agency, the report would not fall under the Rule 902 (1) or (2) exceptions. A home study report from a private entity could be self-authenticated as a business record accompanied by an affidavit under Rule 902 (10).

#### **RULE 902. SELF-AUTHENTICATION**

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

**(1) Domestic Public Documents Under Seal.** A document bearing a seal purporting to be that of the United States, or of any State, district, Commonwealth, territory, or insular possession thereof, or the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.

<sup>115</sup> See 1-5 Matthew Bender, *Texas Courtroom Evidence* § 5.20 (2007).

<sup>116</sup> See *id.*

<sup>117</sup> See *id.*

<sup>118</sup> See *id.*

<sup>119</sup> *Mullins v. State*, 699 S.W.2d 346 (Tex. App. Corpus Christi 1985, no pet.).

**(2) Domestic Public Documents Not Under Seal.** A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1) hereof, having no seal, if a public officer having a seal and having official duties in the district or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.

**(3) Foreign Public Documents.** A document purporting to be executed or attested in an official capacity by a person, authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (A) of the executing or attesting person, or (B) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court may, for good cause shown, order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification. The final certification shall be dispensed with whenever both the United States and the foreign country in which the official record is located are parties to a treaty or convention that abolishes or displaces such requirement, in which case the record and the attestation shall be certified by the means provided in the treaty or convention.

**(4) Certified Copies of Public Records.** A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2) or (3) of this rule or complying with any statute or other rule prescribed pursuant to statutory authority.

**(5) Official Publications.** Books, pamphlets, or other publications purporting to be issued by public authority.

**(6) Newspapers and Periodicals.** Printed materials purporting to be newspapers or periodicals.

**(7) Trade Inscriptions and the Like.** Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

**(8) Acknowledged Documents.** Documents accompanied by a certificate of acknowledgment executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgments.

**(9) Commercial Paper and Related Documents.** Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.

**(10) Business Records Accompanied by Affidavit.**

(a) *Records or photocopies; admissibility; affidavit; filing.* Any record or set of records or photographically reproduced copies of such records, which would be admissible under Rule 803(6) or (7) shall be admissible in evidence in any court in this state upon the affidavit of the person who would otherwise provide the prerequisites of Rule 803(6) or (7), that such records attached to such affidavit were in fact so kept as required by Rule 803(6) or (7), provided further, that such record or records along with such affidavit are filed with the clerk of the court for inclusion with the papers in the cause in which the record or records are sought to be used as evidence at least fourteen days prior to the day upon which trial of said cause commences, and provided the other parties to said cause are given prompt notice by the party filing same of the filing of such record or records and affidavit, which notice shall identify the name and employer, if any, of the person making the affidavit and such records shall be made available to the

counsel for other parties to the action or litigation for inspection and copying. The expense for copying shall be borne by the party, parties or persons who desire copies and not by the party or parties who file the records and serve notice of said filing, in compliance with this rule. Notice shall be deemed to have been promptly given if it is served in the manner contemplated by Rule of Civil Procedure 21a fourteen days prior to commencement of trial in said cause.

(b) *Form of affidavit.* A form for the affidavit of such person as shall make such affidavit as is permitted in paragraph (a) above shall be sufficient if it follows this form though this form shall not be exclusive, and an affidavit which substantially complies with the provisions of this rule shall suffice, to-wit:

No. \_\_\_\_\_

John Doe (Name of Plaintiff) v. John Roe (Name of Defendant)

IN THE \_\_\_\_\_  
COURT IN AND FOR  
\_\_\_\_\_ COUNTY, TEXAS

AFFIDAVIT

Before me, the undersigned authority, personally appeared \_\_\_\_\_, who, being by me duly sworn, deposed as follows:

My name is \_\_\_\_\_, I am of sound mind, capable of making this affidavit, and personally acquainted with the facts herein stated:

I am the custodian of the records of \_\_\_\_\_. Attached hereto are \_\_\_\_\_ pages of records from \_\_\_\_\_. These said \_\_\_\_\_ pages of records are kept by \_\_\_\_\_ in the regular course of business, and it was the regular course of business of \_\_\_\_\_ for an employee or representative of \_\_\_\_\_, with knowledge of the act, event, condition, opinion, or diagnosis, recorded to make the record or to transmit information thereof to be included in such record; and the record was made at or near the time or reasonably soon thereafter. The records attached hereto are the original or exact duplicates of the original.

\_\_\_\_\_  
(Affiant)

SWORN TO AND SUBSCRIBED before me on the \_\_\_\_\_ day of \_\_\_\_\_, 19\_\_\_\_\_.

Notary	Public,	State	of	Texas
Notary's		printed		name:
_____				
My		commission		expires:
_____				

**(11) Presumptions Under Statutes or Other Rules.** Any signature, document, or other matter declared by statute or by other rules prescribed pursuant to statutory authority to be presumptively or prima facie genuine or authentic.

In practice, the presiding judge has quite a bit of discretion to admit or exclude evidence subject to an objection by a party. In considering the nature of these types of proceedings, it is unlikely that there will be a party who objects to the cooperation and facilitation of exchange of evidence between states, as all states have enacted the ICPC which encourages this type of procedure.

## USE OF TECHNOLOGY

Section 30.012 of the Texas Civil Practice and Remedies Code states that with the agreement of the parties, a trial judge may order that a hearing of a preliminary matter or witness testimony at trial be conducted by electronic means, including satellite transmission, closed-circuit television transmission, or any other method of two-way electronic communication that is available to the parties, approved by the court, and

capable of visually and audibly recording the proceedings. Witness testimony at trial may be conducted by electronic means only if the witness is deposed before the commencement of the trial.<sup>120</sup> Courts that allow for a transmission to be made under this Section shall consider the transmission to be accurate and include it in the record of the case, unless the court determines otherwise.<sup>121</sup>

*Diagram 1 (courtesy of www.tandberg.com)*



In large part, the issue of whether video technology can be used in a courtroom is up to judicial discretion. Texas Rules of Evidence Rule 611(a) gives the court discretion over the mode and order of interrogating witnesses and presenting evidence. This provision allows for the presiding judge to make the determination of whether or not they wish to permit technology for the transition of testimony and evidence. The Federal Rules of Evidence have a verbatim provision codified in FRE 611(a). Most states have enacted rules of evidence modeled after the Federal Rules, so many states have this identical provision.

<sup>120</sup> Tex. Civ. Prac. & Rem. Code § 30.012(b).

<sup>121</sup> *Id.* § 30.012(c).

Video teleconferencing is frequently used in the criminal setting when a court needs to communicate with an offender that is in custody. The implementation of the video system has proved beneficial in the criminal setting as it increases safety and reduces travel time and expense. Recently, video teleconferencing units have become more common in family law courts, as they save money that would otherwise have to pay for travel and other expenses. Many counties across the state of Texas have already implemented programs to allow for video technology and are currently equipped with the technology. Many of the video systems already in place in the state of Texas were made possible through criminal justice grants, which have funded the placing of video units in courtrooms and in confinement facilities (see diagram). Many of the courtroom video units, supplied through the criminal justice funding, are placed on carts so they can easily be moved around the courthouse. Additionally, the language of the criminal justice grant allows for the video units to be used in any type of case. Thus, many Texas courtrooms are already equipped for video teleconferencing.

By law, justice communication must be visual, and the video systems meet that demand by providing seamless, secure, and reliable interactive video communication. Another barrier in implementing a system is that the units across states might not be compatible. While technology offers great possibilities in communicating in a cost efficient matter, it is vital that the systems used across the country are compatible with one another.

In implementing a video teleconferencing system, courts may face the obstacle of parties objecting to not being able to be physically present in the court room. However, in the context of the ICPC, this would not be as much of a concern, as the type of proceeding the ICPC concerns is not usually an adversarial proceeding and many times takes place under Chapter 263 once a

child is already under the primary managing conservatorship of DFPS and legal rights of parents have been determined.

### PARTICIPATION BY OUT-OF-STATE ATTORNEY

**Does Texas law allow for attorneys that are located in the receiving state to file motions and question and cross-examine witnesses in the sending state's hearings?**

A non-resident attorney<sup>122</sup> can move to be admitted to practice before a Texas court for a particular proceeding.<sup>123</sup> The process to allow for an out-of-state attorney to make an appearance in a particular case in a state court is referred to as *admission pro hac vice*. To be admitted pro hac vice, the non-resident attorney must be associated with a licensed Texas attorney in the Texas proceeding.<sup>124</sup> The process requires the following steps:

1. The non-resident attorney must first pay a \$250 fee to the Board of Law Examiners for each case in which he or she seeks to participate.<sup>125</sup>
2. The non-resident attorney must then file a sworn motion pro hac vice with the particular court in which he or she seeks to appear, attaching proof of payment of the fee or proof of indigency acknowledgment issued by the Board of Law Examiners.<sup>126</sup> The motion must include information about the attorney's good standing, bar memberships, disciplinary history, and number of past Texas cases in which the non-resident attorney has appeared.<sup>127</sup>
3. The non-resident's motion shall be accompanied by a motion of the resident practicing Texas attorney with whom the non-resident attorney shall be associated, containing a statement that the resident attorney finds the Applicant to be a reputable attorney and recommends that the Applicant be granted permission to participate in the particular proceeding before the court.<sup>128</sup>

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<sup>122</sup> See TEX. GOV'T CODE § 82.0361(a) (defining "non-resident attorney" as a person who resides in and is licensed to practice law in another state but who is not a member of the State Bar of Texas).

<sup>123</sup> See *id.* § 82.0361; TEX. R. GOVERN. BAR ADM'N XIX(a).

<sup>124</sup> See Tex. R. Govern. Bar Adm'n XIX(a)(2).

<sup>125</sup> TEX. GOV'T CODE § 82.0361(b).

<sup>126</sup> See TEX. R. GOVERN. BAR ADM'N XIX(a), XIX(c) (Proof of indigency acknowledgment for indigent client).

<sup>127</sup> Tex. R. Govern. Bar Adm'n XIX(a).

<sup>128</sup> *Id.* at XIX(b).

The court is permitted to examine the non-resident attorney to determine that the non-resident attorney is aware of and will observe the ethical standards required of attorneys in Texas and to determine whether the non-resident attorney has appeared in Texas courts on a frequent basis.<sup>129</sup>

While this process is available under Texas law, use in the ICPC context would be rare. The process required by the ICPC is between the two state agencies, and although attorneys are at times involved, they are often there as legal counsel for the child welfare agency or as the attorney ad litem for the child.

### **SUBPOENA POWER IN OTHER STATES**

#### **Do judges have subpoena power in other states?**

Generally, judges do not have subpoena power in other states. A subpoena may be used to compel a witness to attend a deposition, hearing, or trial, and to compel a person produce documents or tangible things.<sup>130</sup> The subpoena power of the district and county courts extends only to witnesses who reside within 150 miles of the county where the suit is pending or to witnesses who are served within 150 miles of the county at the time of trial.<sup>131</sup>

If a witness resides outside of the range or outside of the state and cannot be counted on to appear voluntarily, the attorney can take a deposition of the witness and use the deposition testimony at trial. A deposition of any person or entity located in another state or a foreign country may be taken by a party for use in Texas proceedings.<sup>132</sup> Texas Civil Procedure Rule 201.1 provides that the deposition may be taken by: (1) Notice; (2) Letter rogatory, letter of

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<sup>129</sup> *Id.* at XIX(d).

<sup>130</sup> *See* Tex. R. Civ. P. 176.2.

<sup>131</sup> *Id.* at 176.3(a); TEX. CIV. PRAC. & REM. CODE § 22.002.

<sup>132</sup> TEX. R. CIV. P. 201.1(a).

request, or other such device; (3) Agreement of the parties; or (4) Court order.<sup>133</sup> Although Rule 201 addresses the use of these procedures, it does not control the permissibility or recognition of such procedures in the jurisdiction where the witness is located.<sup>134</sup> Thus, before applying Rule 201, it must first be determined which of these procedures are permitted by the jurisdiction where the witness is located. The foreign jurisdiction's laws may not allow for the deposition to take place, so it is vital to understand the local law and contacting local counsel or consular representatives is suggested. For example, some civil law countries do not allow the taking of testimony by private attorneys without the involvement of the local judiciary.<sup>135</sup>

When a court of record of any other state or foreign jurisdiction issues a mandate, writ, or commission that requires a witness's deposition testimony in Texas, the witness may be compelled to appear and testify in the same manner and by the same process used for taking testimony in a proceeding pending in Texas.<sup>136</sup>

The UCCJEA (& UCCJA) provide for cooperation between courts, such that a judge in this state can request the court of another state to issue a subpoena, but these Acts only apply to making a determination of jurisdiction to enter or change an order or to enforcing an already existing order. These acts normally will not apply to the ICPC process. The ICPC provisions encourage the cooperation of courts, but there is no real way to enforce orders in the other state.

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<sup>133</sup> *Id.*

<sup>134</sup> TEX. R. CIV. P. 201 cmt 1.

<sup>135</sup> Doak Bishop, *International Litigation in Texas: Obtaining Evidence in Foreign Countries*, 19 HOUS. L. REV. 361, 364-365 (1982).

<sup>136</sup> TEX. CIV. PRAC. & REM. CODE § 20.002; TEX. R. CIV. P. 201.2.

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## BEST PRACTICES TO INCREASE TIMELINESS

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### UNDERSTANDING OF LAW AND TRAINING

Because of the complexity and interrelationship between the laws involved in interstate placement, it is vital that attorneys, judges, and caseworkers have a better understanding of the UCCJEA and the ICPC. Lack of understanding and knowledge of the ICPC law is always cited as one of the causes of delay in complying with ICPC procedures. Survey results indicate that the lack of understanding of the law seems to be across the board.<sup>137</sup>

### CASEWORKERS

It is widely recognized that caseworker turn over is a problem. Because of the turn over rate, caseworkers are often inadequately trained. The turn over rate may likely be related to the nature of the work, and thus it is hard to identify any real solutions to this inherent problem.

One issue, which is currently being addressed by the child welfare agency, is updating caseworker manuals. As noted in the State of Texas Plan for Title IV-E of the Social Security Act Foster Care and Adoption Assistance, the CPS Handbook section addressing the ICPC is currently in the process of being revised in order to comply with P.L. 109-239 Safe and Timely Interstate Placement of Foster Children Act of 2006.<sup>138</sup> Those revisions will be helpful for use as a reference and for caseworkers to refresh on the rules.

Additionally, it might be helpful to implement a case management system to stay on top of deadlines and the progress of cases. This is discussed later in the report.

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<sup>137</sup> Texas CIP Judicial Survey (Apr. 2008).

<sup>138</sup> See 2007 State Plan for Title IV-E of the Social Security Act: Foster Care, Independent Living And Adoption Assistance, available at [http://www.dfps.state.tx.us/About/State\\_Plan/2007\\_State\\_Plan/2007\\_IV-E%20plan.pdf](http://www.dfps.state.tx.us/About/State_Plan/2007_State_Plan/2007_IV-E%20plan.pdf).

## ATTORNEYS

Lack of understanding by attorneys is also cited as a common problem. The Texas Family Code has made some efforts to improve attorney ad litem knowledge of the law by requiring at least three hours of continuing legal education relating to child advocacy.<sup>139</sup>

**§ 107.004. Additional Duties of Attorney Ad Litem for Child** *{excerpt of subsections (b) & (c)}*

(b) An attorney ad litem appointed for a child in a proceeding under Chapter 262 or 263 shall complete at least three hours of continuing legal education relating to child advocacy as described by Subsection (c) as soon as practicable after the attorney ad litem's appointment. An attorney ad litem is not required to comply with this subsection if the court finds that the attorney ad litem has experience equivalent to the required education.

(c) The continuing legal education required by Subsection (b) must:

- (1) be low-cost and available to persons throughout this state, including on the Internet provided through the State Bar of Texas; and
- (2) focus on the duties of an attorney ad litem in, and the procedures of and best practices for, a proceeding under Chapter 262 or 263.

Texas might consider extending a CLE requirement to attorneys representing children in Child Protective Services (CPS) cases to include instruction on the ICPC.

Texas could also address the problem of lack of attorney understanding by promoting the use of standard orders, forms, and instructions for complying with the ICPC system in Texas. Providing information to help attorneys prepare for a case and understand the law would help attorneys to best perform their job and advocate for the timely placement of the child. Currently, Texas does not have much of any information available.

The CIP is currently seeking to enter into a contract with a vendor to provide attorney training in CPS cases throughout Texas. Part of the curriculum will include education on the ICPC. The Texas CIP also funds a website called “Texas Lawyers for Children” which is a

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<sup>139</sup> TEX. FAM. CODE § 107.004(b)-(c).

repository for case law, forms, and manuals for child welfare cases.<sup>140</sup> This website could be enhanced to provide a separate link to ICPC-related documents. The website and its resources are free to attorneys and judges who practice in this area.

### JUDGES

Lack of understanding is also a problem with judges. The results of the survey show that some judges feel that many of the ICPC provisions are discretionary. For instance, one judge stated that expediting all orders can improve timeliness. However, the situation must fit those outlined in Regulation 7 for priority placement to be available; it is not a matter of discretion for judges. Additionally, some judges feel that it is within their discretion to grant “extended visits,” which as discussed are actually deemed an illegal placement with significant consequences. It might be helpful to provide information on the ICPC, common misconceptions and mistakes in applying the law, and form orders to all judges hearing ICPC cases. Additionally, it would be helpful to make this information and more detailed explanations available online, so that anyone could access the material to refresh on the rules.

### **CASE TRACKING SYSTEMS**

As discussed, there are many different timeframes that come into play in completing the ICPC request and placement process. Close monitoring is necessary in each case to identify whether the case is moving according to the timeframe expectation. Case tracking systems should be implemented at both the judicial and agency level. A ticker system should be used to red flag the ICPC cases close to critical points. After a placement has been made, the court and agency should continue to monitor the case until one of the conditions for termination has been met and the court closes the case.

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<sup>140</sup> See Texas Lawyers for Children Website, available at <http://texaslawyersforchildren.org>.

Despite the importance of implementing a case tracking system, the Texas Deputy Compact Administrator reported that the ICPC staff within the Texas Interstate Compact Office does not have a case tracking system. The ICPC staff is left to use their own suspense system, such as a follow-up email folder. Thus, the timeliness of these cases depends on each individual worker's system of organization. Considering the grave importance of this work and the fact that children are left in limbo in foster care, leaving case load organization up to each individual social worker is inefficient and contributes to the delay.

It is also necessary to track cases on an aggregate level to assess the trends in timeliness and identify possible problems. Given the multitude of steps an ICPC placement goes through, it is important to keep track of where the delays are occurring. When accurate information is kept, problem areas can easily be identified and corrected.

CIP has recently funded a major overhaul of its specialty court case management system through the Data Collection and Analysis grant. The CIP, in conjunction with the Office of Court Administration (OCA), has taken on a long-term project to update Texas courts' child protection case management systems by implementing the use of new case management software. Eventually, Texas judges will have access to automated case management systems with instant access to information about child protection cases before them, including CPS reports and links to related proceedings. The project, called Texas Data-Enabled Courts for Kids (TexDECK), strives to integrate information between related governmental entities including the child protective agency and various courts.<sup>141</sup> TexDECK will establish data interchange standards and enable software tools to facilitate collaboration between DFPS and courts. Because of the uniqueness of CPS cases and the child welfare specialty court system, TexDECK is currently undertaking the effort of

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<sup>141</sup> See Texas Data-Enabled Courts for Kids Website, available at <http://www.courts.state.tx.us/oca/txdeck-home.asp>.

mapping out the progression of a child welfare case in an effort to design a case management software tailored to the specific needs of Texas's child welfare system.

### **ENSURING THAT COMPLETION OF COURT ORDERS DOES NOT CAUSE DELAY**

Many times delays occur because the court order is not prepared correctly or in a timely manner. Lawyers representing DFPS can improve timeliness by making sure that permanency and placement review orders are prepared so that the judge can sign the orders the same day. In cases where it is necessary for the order to be generated after the hearing is complete, judges should institute procedures that ensure orders are prepared, signed, certified, and either delivered by same-day inter-departmental mail or faxed to the local agency within 24 hours of the hearing. If faxed, the original orders should follow immediately.

It is also necessary that all orders be correct and contain all the necessary information the first time. If information is missing or incorrect in the order, the request may be sent back and the timeframes will restart, causing significant delay for the placement of the child. Form orders could be utilized by attorneys and courts to make sure that all the relevant information is included.

Regulation 7 Priority Placement orders are an area of particular difficulty. Part of the problem is that judges, caseworkers, and attorneys ad litem do not understand Regulation 7. Priority placement is not used in a majority of the cases, so the lack of familiarity and understanding of the regulation results in frequent errors.

A Regulation 7 order cannot be part of the permanency or placement hearing order; it must be completed as a separate order. Also, some courts will use the oldest child's first name followed by "et al" as the case name. This invalidates the Regulation 7 order, as the order must

include all children's names. As discussed previously, a Regulation 7 priority order must contain the express findings and facts which support issuance of the order. The standard form for a priority request (ICPC-101)<sup>142</sup> could be revised to include check boxes to mark the appropriate circumstances that entitle the case to priority treatment. Similarly, standard Regulation 7 court orders could be made available which contain such checkboxes.

Where the orders are completed correctly, many times they do not make it to the ICPC office in a timely manner. According to survey results, many states will not process an order received after 30 days from the date the order was signed.<sup>143</sup> There is an inconsistency between states regarding whether the 30 days runs from the date the judge signs the order or the date the order is received.<sup>144</sup> Texas processes the Regulation 7 orders from the date of receipt.<sup>145</sup> Thus, appropriate case tracking systems and ensuring that orders are correct is especially important in priority placement cases.

### **USING FAX, OVERNIGHT MAIL, & ELECTRONIC TRANSMISSION**

Regulation 7 requires all transmission of paperwork between entities in priority placements to be by fax or overnight mail to expedite the process.<sup>146</sup> Non-priority placements do not require the expedited method of fax or overnight mail, but the sending and receiving agencies should be willing to use these methods to improve timeliness.<sup>147</sup> The states which do not accept electronic or faxed forms of documents tend to justify the policy based on certain situations which require

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<sup>142</sup> See ICPC Regulation .01(3).

<sup>143</sup> Texas CIP Judicial Survey (Apr. 2008); Telephone Interview with Gina Gelnett, Deputy Compact Administrator, Department of Family and Protective Services, in Austin, Tex. (June 9, 2008).

<sup>144</sup> Telephone Interview with Gina Gelnett, Deputy Compact Administrator, Department of Family and Protective Services, in Austin, Tex. (June 9, 2008).

<sup>145</sup> *Id.*

<sup>146</sup> ICPC Regulation No. 7 (9).

<sup>147</sup> See NAT'L COUNCIL OF JUVENILE AND FAMILY COURT JUDGES & AM. PUB. HUMAN SERVS. ASS'N, *supra* note 15, at 96.

original documents. While it is true that there are certain instances where original documents are important for the receiving state, having the original is a moot point unless the receiving state approves the placement. If the placement is denied by the receiving state, there is no need for the original documents, as they are only required if a placement is actually made. If, and when, the placement is approved, original documents can be sent by overnight mail.

Because overnight mail can be costly, it is recommended that it only be used once an approval has been made and original documents are required. In all other situations the agencies should use fax whenever possible, as it incurs no extra costs. The use of fax and overnight mail can significantly reduce waiting time for a child, so judges should require in their court orders initiating the ICPC placement approval process that the interagency transmittal of written information at local and state levels must be by the most expeditious method available.

Given the reliability, veracity, and security of electronic transmittal of documents made possible through technological advancements, the drawbacks that were once complained of are no longer a concern. The ICPC was originally drafted in the 1950's when the available technology for transmitting documents was minimal. The ICPC's requirement of written documentation may have been necessary at the time of the law's original implementation, but the law should be updated to allow for the use of new technology to submit documents. Similarly, technology has improved a great deal in the seven years since the enactment of Regulation 7, making this fairly recent enactment somewhat antiquated.<sup>148</sup> Even though Regulation 7 does not speak to the use of these specific media, agencies should be allowed and encouraged to process requests using electronic documents using email, scanned documents, and PDF files. Technological advancements in the last decade allow these forms of electronic transmission to be

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<sup>148</sup> See ICPC Regulation 7 (stating the regulation effective on and after July 2, 2001).

arguably more secure than mail or fax. Allowing such means of transmission should be read into Regulation 7 or the provision should be amended to include the use of available technology.

Standard electronic forms would drastically improve the ICPC placement process. Electronic forms should be developed that have fields for all the required information. Such a system could incorporate a case management system that automatically logs the data in a database for the relevant state agencies. Timeframes would improve by weeks, as the system would save time that would have been spent mailing the forms and inputting the data for record keeping at each level.

Currently, the ICPC process allows states to escape compliance with timeframes where the information in the request is incomplete. This could be easily misused. Having a standard electronic form would insure that requests with missing fields would not be sent and agencies would not be able to use the excuse of incomplete information to delay their compliance.

The forms should also use standard names. ICPC Regulation .01 mandates the use of standard forms and provides standard names for these forms.<sup>149</sup> However, Texas currently uses names in addition to those assigned in the Regulation, which adds confusion to an already complicated process.<sup>150</sup> ICPC Regulation .01 requires that states make the forms available to the public.<sup>151</sup> Texas should ensure that the forms are readily accessible to the public by referring to them by the standard name assigned by Regulation .01 and making them available online.

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<sup>149</sup> ICPC Regulation .01 (3).

<sup>150</sup> See “Regulations” section of this report for more detailed discussion.

<sup>151</sup> ICPC Regulation .01 (2).

### **PROCESSING REQUIREMENTS CONCURRENTLY**

It is extremely important that the training process, home study, and criminal background checks be run concurrently.<sup>152</sup> If a caseworker completes each component separately, the placement may take well over a year.<sup>153</sup>

### **USING CONCURRENT TRANSMITTALS OF REQUESTS**

Currently, the Texas system for sending and processing ICPC request requires that documents be sent through the Texas ICPC office which acts as an intermediary between the local/regional ICPC offices in Texas and the out-of-state office. While it is true that this intermediary step allows for documents to be reviewed for completeness and tracked, the step adds unnecessary delays. Timeframes could be reduced by more than one week if Texas streamlined the process by allowing the simultaneous receipt of interstate requests at both the state ICPC office and the local office.<sup>154</sup> In making this change, Texas should facilitate communication between the state and local offices to ensure the same level of supervision and record keeping, while eliminating the unnecessary intermediate step.

Even if this practice is not implemented on a state level, judges can include a requirement for concurrent transmittals of requests in their court order initiating the ICPC approval process.<sup>155</sup> If the order is complied with, the practice can save a lot of time, but there is no real way of enforcing such an order out-of-state.

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<sup>152</sup> *See id.* at 59-60.

<sup>153</sup> *See id.*

<sup>154</sup> *See id.* at 97.

<sup>155</sup> *See id.*

### **ENHANCED COMMUNICATION**

All of the surveys and questionnaires indicated that placements are timelier when there is communication between groups. For instance, respondents mentioned that contacting the caseworker or agency in the receiving state is effective to make sure that the state is staying on top of the case and keeping the process moving.

Similarly, judge-to-judge communication has proven effective to deal with delays and problems in ICPC cases. For instance, when determination of jurisdiction is a question of the juvenile court at the time a complaint is filed, it is accepted practice for the judge in the jurisdiction where the complaint is filed to contact another judge who may have ongoing jurisdiction over the child through another matter and make a determination as to which court should properly hear the matter.

In ICPC cases, if a judge in a sending state becomes aware of undue delays in the placement process, such as in obtaining a home study, unless state statutes and/or judicial conduct codes of ethics specifically forbid such communication, it is recommended that the same method of judge-to-judge communication occur in order to determine if the judge in the receiving county can assist in determining what is causing the problem and find a solution.

### **IMPLEMENTING TELECONFERENCING SYSTEMS**

As discussed previously, the use of technology would allow for out-of-state parties to participate in hearings without having to travel. In implementing a teleconferencing system, states should make sure systems are compatible and secure.

With open communication comes risk, so security of information is of great concern, especially given the private nature of child custody judicial proceedings. Safeguards regarding

identity and confidential information must be in place to protect the child who is the subject of the suit. The video networking providers have found solutions to these security concerns. For instance, Tandberg, a vendor of video conferencing systems, addresses security on three levels: authentication, policy and encryption. Authentication is the process of determining who has the right to access the network, ensuring that there are no rogue endpoints within a network and that no external unauthorized systems have attached to the network. The video systems utilize an IP network that verifies each caller and network resource at each connection point to ensure that only authorized parties gain access to the system. Policies are set up for each network resource that controls who has access to the service. The implementation of policy ensures that people unfamiliar with procedures do not accidentally gain access to services or bandwidth to which they are not entitled or cause any detrimental effect to overall service delivery. The final security measure, encryption, is a way of scrambling data so that only those who know how to unscramble the data can access it. Encryption ensures privacy by using common algorithms. A key, consisting of a number, passes to the algorithm to tell it how to encrypt the data. The video teleconferencing cryptographic algorithm system has been validated as conforming to Federal Information Processing Standards (FIPS) by a laboratory accredited by The National Institute of Standards and Technology (NIST).

States should make sure that their teleconferencing systems meet these security standards. Additionally, states should take steps to cooperate in selecting video technology systems that will be compatible, ensuring clear and uninterrupted communication.

### **STANDARDIZED HOME STUDY CRITERIA**

Currently, the home study criteria for evaluating a potential home varies by state. The standard set forth in the ICPC is that the receiving state agency certify that the “proposed

placement does not appear to be contrary to the interests of the child.”<sup>156</sup> The statute never defines the interests of the child or identifies the relevant factors to be considered. Thus, the standards employed by caseworkers vary by state, are unwritten, and often depend on the personal biases of individual caseworkers.<sup>157</sup>

Many times home study reports do not contain all the information required by the sending state necessitating repeat requests for information and documents.<sup>158</sup> The system could be improved by creating a uniform home study document for use by all states.<sup>159</sup> States have long recognized the need for uniform home study requirements and documents, but individual state licensing requirements make uniformity difficult.<sup>160</sup> Thus, it might be insightful for Congress or the AAICPC to look into establishing uniform licensing requirements, in addition to uniform home study criteria.

### **CONTRACTING WITH PRIVATE AGENCIES TO CONDUCT HOME STUDIES**

Normally when a potential placement is identified in a state other than the state responsible for the care and custody of the child, the public agency in the receiving state typically conducts the home study at no cost to the sending state.<sup>161</sup> Some states have strict policies that allow only their caseworkers to perform home studies. Some states, however, allow for private agencies to conduct home studies. Having the ability to contract can expedite the process, especially when a receiving state may not have the capacity to complete out-of-state requests in a timely manner.<sup>162</sup>

A 2002 report by APHSA reported that twenty-three of the forty-four responding states allow for

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<sup>156</sup> See TEX. FAM. CODE § 162.102, Art. III; Sankaran, *supra* note 83, at 446.

<sup>157</sup> See Sankaran, *supra* note 83, at 446.

<sup>158</sup> Telephone Interview with Pamela Parker, Legal Division, Department of Family and Protective Services, in Austin, Tex. (June 19, 2008).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> See AM. PUB. HUMAN SERVS. ASS’N, UNDERSTANDING DELAYS IN THE INTERSTATE HOME STUDY PROCESS 21 (2002).

<sup>162</sup> See *id.*

contracting with private agencies to conduct the studies.<sup>163</sup> However, some states that allow for contracting with private agencies vary by county.

The Dallas area (Region 3) has its' own ICPC unit, which contracts out their home studies. The Texas Deputy Compact Administrator for the ICPC reported that the Dallas area processes the largest amount of ICPC requests and in the timeliest manner compared with the other ten regions in Texas. The Deputy Administrator reported that the Dallas Regional ICPC Coordinator has extensive casework and supervisory experience. She displays the ability to retain her staff and has an extensive understanding of policy, procedures, and guidelines. It might be useful to study the workings of the Region 3 office to gain insight into improvements that could be implemented statewide.

The Safe and Timely Act explicitly allows for a receiving state to contract with a private entity to conduct a study.<sup>164</sup> However, the Act does not go so far as requiring that a receiving state allow a sending state to contract with a private entity in the receiving state to conduct the home study. The Department of Human Services clarified the provision in an advisory letter saying that under 471(a)(26)(A), it is the receiving state's responsibility to complete the home study themselves or contract it to a private agency, but if a sending state chooses to contract with a private agency to conduct a home study in another state rather than making a request of that state, it is not prohibited by statute under Title IV-E.<sup>165</sup> However, in the latter situation, the receiving state still must approve the placement, which may involve the receiving state repeating the home study themselves to satisfy their state law.

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<sup>163</sup> *See id.*

<sup>164</sup> *See* Social Security Act § 471(a)(26)(A).

<sup>165</sup> *See* SUSAN ORR, U.S. DEP'T OF HEALTH AND HUMAN SERVS., *supra* note 51, at 2.

Law makers should clarify the rules regarding the use of a private entity to conduct the home study. The ICPC should be changed to encourage the use of private entities to conduct home studies when an agency's case load is high. Making this change would not cause the state agencies to lose too much power; studies have shown that of those states that allow for contracts with private home study providers, a vast percentage of the studies conducted are completed by the state agency.<sup>166</sup> Thus, states would turn to the private contractors when heavy caseloads required the use of a private provider to achieve a timely recommendation.

### **POLICY CHANGES**

In order for the interstate placement system to work efficiently, changes in law must be made to correct the problems addressed in this report. While several efforts have been made throughout the years to revise the ICPC, none have been successful in being adopted by states across the country. The latest 2008 revision of the ICPC has gained support by some organizations and has been adopted in a few states, but the new revision is criticized as not addressing the real problems with the current ICPC.<sup>167</sup>

### **ENFORCEABILITY**

While the ICPC encourages cooperation between states, there is no real way to enforce the provisions against another state. As currently enacted, a state cannot enforce an order against another state's agency. The success of the compact rests on each state's willingness to participate and self-enforce the process. With cooperation the ICPC can work, but states must rely on the good faith efforts of the receiving state. Timeliness could be improved if legislation was passed that allowed for real means of enforcing compliance with orders to timely process requests.

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<sup>166</sup> *See id.*

<sup>167</sup> Letter from Marvin Ventrell, President & CEO, Nat'l Ass'n of Counsel for Children, to Jerry Friedman, Executive Director, Am. Pub. Human Servs. Ass'n (Feb. 28, 2008) (on file with author).

One possible solution would be to enact a federal version of the ICPC. The 108<sup>th</sup> U.S. Congress considered a federal law to revise the ICPC.<sup>168</sup> In October 2004, the Orderly and Timely Interstate Placement of Children Act of 2004 was passed by the U.S. House of Representatives as House Bill 4504 but was never voted on by the Senate.<sup>169</sup> Lawmakers should continue to look into the possibility of enacting a federal law. This legislation should include meaningful evidentiary provisions, which will be evenly interpreted and applied by courts across the country. The language currently used in the ICPC is interpreted as *encouraging* states to cooperate, rather than mandating collaboration.

Similarly, ICPC Regulation 7 is a useful tool to achieve a prompt response, but there is no real way for a state to enforce such an order against another state. Congress should enact a law allowing for a method of enforcement of Regulation 7 priority orders across state lines.

Another problem with the current system is that when two states disagree, there is no neutral third party to adjudicate the disputes between states.<sup>170</sup> The AAICPC recommends going to federal court in such situations, but according to DFPS, the department cannot afford to go into federal court on every disputed case, as they handle interstate placements constantly.<sup>171</sup>

Policy makers need to find a cost efficient means for dispute resolution between states regarding ICPC issues. DFPS suggests that an administrative appeals process to handle disputes and levy sanctions against violators might help.<sup>172</sup>

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<sup>168</sup> See Orderly and Timely Interstate Placement of Children Act of 2004, H.R. 4504, 108<sup>th</sup> Cong. (2004).

<sup>169</sup> See *id.*

<sup>170</sup> Telephone Interview with Pamela Parker, Legal Division, Department of Family and Protective Services, in Austin, Tex. (June 19, 2008).

<sup>171</sup> *Id.*

<sup>172</sup> Telephone Interview with Pamela Parker, Legal Division, Department of Family and Protective Services, in Austin, Tex. (June 19, 2008).

## JUDICIAL REVIEW

Currently, the ICPC procedure has a high level of subjectivity in the decision-making process. The ICPC process is prone to errors because caseworkers, using a vague and undefined legal standard, have the sole authority to decide whether the interstate placement should be made.<sup>173</sup> The caseworker is given little statutory guidance to make the placement decision; the standard set forth in the ICPC is that the receiving state agency certify that the “proposed placement does not appear to be contrary to the interests of the child.”<sup>174</sup> The statute never defines the interests of the child or identifies the relevant factors to be considered. Thus, the standards employed by caseworkers vary by state or even regions within the state, are unwritten, and often depend on the personal biases of individual caseworkers.<sup>175</sup>

Additionally, there is no real system to make checks on these placement determinations. The ICPC provides no process to seek review of an agency’s placement decision.<sup>176</sup> Administrative review procedures are unavailable in a majority of states, and where they do exist, they are often inadequate as litigants face a nearly insurmountable burden to have the agency’s determination overruled.<sup>177</sup> Texas law does not permit an administrative challenge to decisions where the substantive statute does not explicitly grant litigants the right to a hearing.<sup>178</sup>

Having the availability of review is necessary to preserve due process, especially where a parent’s rights are involved. The Compact fails to differentiate between parents and other caregivers, and does not incorporate the constitutional presumption that children remain placed

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<sup>173</sup> See Sankaran, *supra* note 83, at 446 (discussing problems with the current ICPC procedure).

<sup>174</sup> See TEX. FAM. CODE § 162.102, Art. III; Sankaran, *supra* note 83, at 446.

<sup>175</sup> See Sankaran, *supra* note 83, at 446.

<sup>176</sup> See Sankaran, *supra* note 83, at 448-49.

<sup>177</sup> See *id.* (explaining that the burden to demonstrate that the agency’s decision was erroneous is extremely difficult to meet because the standard set forth in the ICPC (whether a placement is contrary to the interests of the child) is subjective and largely based on the individual opinion of the caseworker).

<sup>178</sup> See TEX. GOV’T CODE § 2001.001-.902 (Texas Administrative Procedure Act).

with their parents absent a finding of parental unfitness.<sup>179</sup> Additionally, the ICPC fails to incorporate a preference to place a child with relatives, which is recognized by both statute and case law.<sup>180</sup>

A home may be denied as a placement because the caseworker deems it to be dirty or too small, or a caretaker may lack the expertise to care for the child.<sup>181</sup> It is problematic that the subjective (and potentially bias) decision of an individual caseworker in the receiving state has the final word over whether a placement should be made. Because the receiving state does not feel the financial pressure of keeping a child in temporary care while a placement is being found, allowing the receiving state agency to have the sole and final decision results in a major delay to permanency and great costs.

Law makers should provide an opportunity for meaningful review of agency determinations in Texas and nationwide. Perhaps this could be incorporated with the neutral dispute resolution system suggested in the previous section.

#### INCORPORATING UCCJEA EVIDENTIARY RULES

The UCCJEA (& UCCJA) both include specific provisions relating to cooperation between courts and the transfer of evidence. However, the ICPC and UCCJEA, as currently enacted, are parallel but not directly related, and thus, the UCCJEA rules cannot be applied as a method of enforcing an interstate placement request against another state agency. The UCCJEA provisions

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<sup>179</sup> See Sankaran, *supra* note 83, at 447-48.

<sup>180</sup> See 42 U.S.C. § 671(a)(19) (preference should be given to an adult relative over a non-related caregiver when determining a placement for a child, provided that the relative caregiver meets all relevant State child protection standards); Moore v. East Cleveland, 431 U.S. 494, 499 (1977) (recognizing that familial relations between children and their extended family are protected by substantive due process); Rivera v. Marcus, 696 F.2d 1016, 1017 (2d Cir. 1982) (Constitutional protections of family extend to relationships among members of what has commonly become known as extended family).

<sup>181</sup> See Adoption of Leland, 65 Mass. App. Ct. 580, 583 (2006) (denying placement with father because too many people lived in the house); New Jersey v. K.F., 803 A. 2d 721 (denying placement in part because prior home was cramped, cluttered, and dirty, even though current residence met all of the relevant state standards).

only apply in determining jurisdiction to issue an order, modify an existing order, or enforce an order. The legislature could specify that they intend the evidentiary provisions in the UCCJEA to apply to the ICPC process.

The UCCJEA includes specific provisions instructing courts to cooperate.

**§ 152.110. Communication Between Courts**

- (a) In this section, “record” means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.
- (b) A court of this state may communicate with a court in another state concerning a proceeding arising under this chapter.
- (c) The court may allow the parties to participate in the communication. If the parties are not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before a decision on jurisdiction is made.
- (d) If proceedings involving the same parties are pending simultaneously in a court of this state and a court of another state, the court of this state shall inform the other court of the simultaneous proceedings. The court of this state shall request that the other court hold the proceeding in that court in abeyance until the court in this state conducts a hearing to determine whether the court has jurisdiction over the proceeding.
- (e) Communication between courts on schedules, calendars, court records, and similar matters may occur without informing the parties. A record need not be made of the communication.
- (f) Except as otherwise provided in Subsection (e), a record must be made of any communication under this section. The parties must be informed promptly of the communication and granted access to the record.

Texas Family Code Section 152.110<sup>182</sup> provides that a Texas state court may communicate with a court in another state concerning a UCCJEA proceeding, and the court may allow the parties to participate in the communication.<sup>183</sup> If a party is not able to participate in the communication, they must be given the opportunity to present facts and legal arguments before the court makes a decision regarding jurisdiction.<sup>184</sup> Section 152.110 requires that a record be made of the conversation and that the parties have access to that record in order to be informed

<sup>182</sup> Section 152.110 is Texas’s codification of UCCJEA Section 110.

<sup>183</sup> TEX. FAM. CODE § 152.110(b) & (c).

<sup>184</sup> *Id.* at § 152.110(c).

of the content of the conversation.<sup>185</sup> The only exception to this requirement is when the communication involves relatively inconsequential matters such as scheduling, calendars, and court records. Communication between courts on schedules, calendars, court records, and similar matters may occur without informing the parties, and a record need not be made of the communication.<sup>186</sup> Included within this latter type of communication would be matters of cooperation between courts under Section 112 (Texas Family Code Section 152.112) which regards cooperation of courts to preserve the evidentiary record.

This Section emphasizes the role of judicial communications, and allows for communication to occur in many different ways such as by telephonic conference and by on-line or other electronic communication. The UCCJEA does not preclude any method of communication and recognizes that there will be increasing use of modern communication techniques.<sup>187</sup>

Communication between courts is required by the UCCJEA in certain circumstances, such as Section 204: Temporary Emergency Jurisdiction, Section 206: Simultaneous Proceedings, and Section 306: Enforcement of Registered Determination. Communication is strongly suggested in applying Section 207, the provision regarding inconvenient forum. Because of the prioritization of “home state jurisdiction” in the UCCJEA, there may be less of a need, aside from those situations, for courts to communicate concerning jurisdiction. However, communication is authorized whenever the court finds it would be helpful.<sup>188</sup> The court may authorize the parties to participate in the communication, but the Act does not mandate participation.<sup>189</sup> Scheduling

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<sup>185</sup> *Id.* at § 152.110 cmt.

<sup>186</sup> *Id.* at § 152.110(e).

<sup>187</sup> *Id.* at § 152.110 cmt.

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

communication between courts and parties is often difficult and impractical, and may call for after hours phone conferences.<sup>190</sup>

The second sentence of Subsection (b) protects the parties against unauthorized ex parte communications.<sup>191</sup> The parties' participation in the communication may amount to a hearing if there is an opportunity to present facts and jurisdictional arguments, but absent such an opportunity, the participation of the parties should not be considered a substitute for a hearing and the parties must be given an opportunity to fairly and fully present facts and arguments (through hearing, if appropriate, or by affidavit or memorandum) on the jurisdictional issue before a determination is made.<sup>192</sup> The court is expected to set forth the basis for its jurisdictional decision, including any court-to-court communication which may have been a factor in the decision.<sup>193</sup>

Subsection (d) of 152.110 anticipates simultaneous proceedings in two states, and instructs the Texas court to make the other state court aware of the simultaneous proceedings and request that the other court to hold the proceeding in that court in abeyance until the Texas court is able to conduct a hearing to determine whether the court has jurisdiction over the proceeding.<sup>194</sup>

Initiatives to create a federal interstate placement act or efforts to reform state law could model proposed legislation after the UCCJEA evidentiary provisions. The UCCJEA sets up the necessary safeguards to provide the proper notice and preserve due process.

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<sup>190</sup> *Id.*

<sup>191</sup> *Id.*

<sup>192</sup> *Id.*

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at § 152.110(d).

UCCJEA Section 111 (Texas Family Code Section 152.111) allows for a party in a child custody proceeding<sup>195</sup> to offer testimony of witnesses who are located in another state, including testimony of the parties and the child, by deposition or by other means allowed in this state for testimony taken in another state.<sup>196</sup>

**§ 152.111. Taking Testimony in Another State**

(a) In addition to other procedures available to a party, a party to a child custody proceeding may offer testimony of witnesses who are located in another state, including testimony of the parties and the child, by deposition or other means allowed in this state for testimony taken in another state. The court on its own motion may order that the testimony of a person be taken in another state and may prescribe the manner in which and the terms upon which the testimony is taken.

(b) A court of this state may permit an individual residing in another state to be deposed or to testify by telephone, audiovisual means, or other electronic means before a designated court or at another location in that state. A court of this state shall cooperate with courts of other states in designating an appropriate location for the deposition or testimony.

(c) Documentary evidence transmitted from another state to a court of this state by technological means that do not produce an original writing may not be excluded from evidence on an objection based on the means of transmission.

It should be noted that Section 111 specifically authorizes the use of telephone, audiovisual, or other electronic means for taking depositions or testimony. Further, Subsection (c) provides that documentary evidence transmitted between states by technological means can not be excluded based on the means of transmission. This means that for a case involving UCCJEA, a document sent electronically should not be excluded because an original document or writing is required. The provisions of Section 111 are taken from the UCCJA, so jurisdictions that still operate under the UCCJA also have these same provisions.

UCCJEA Section 112 provides a mechanism for courts to cooperate with each other in order to decide cases in an efficient manner without causing undue expense to parties.

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<sup>195</sup> *Id.* at § 152.102(4) provides that "child custody proceeding" means a proceeding in which legal custody, physical custody, or visitation with respect to a child is an issue. The term includes a proceeding for divorce, separation, neglect, abuse, dependency, guardianship, paternity, termination of parental rights, and protection from domestic violence in which the issue may appear. The term does not include a proceeding involving juvenile delinquency, contractual emancipation, or enforcement under Subchapter D.

<sup>196</sup> TEX. CIV. PRAC. & REM. CODE § 20.001 (discussing the means by which a deposition may be taken).

**§ 152.112. Cooperation Between Courts; Preservation of Records**

- (a) A court of this state may request the appropriate court of another state to:
- (1) hold an evidentiary hearing;
  - (2) order a person to produce or give evidence pursuant to procedures of that state;
  - (3) order that an evaluation be made with respect to the custody of a child involved in a pending proceeding;
  - (4) forward to the court of this state a certified copy of the transcript of the record of the hearing, the evidence otherwise presented, and any evaluation prepared in compliance with the request; and
  - (5) order a party to a child custody proceeding or any person having physical custody of the child to appear in the proceeding with or without the child.
- (b) Upon request of a court of another state, a court of this state may hold a hearing or enter an order described in Subsection (a).
- (c) Travel and other necessary and reasonable expenses incurred under Subsections (a) and (b) may be assessed against the parties according to the law of this state.
- (d) A court of this state shall preserve the pleadings, orders, decrees, records of hearings, evaluations, and other pertinent records with respect to a child custody proceeding until the child attains 18 years of age. Upon appropriate request by a court or law enforcement official of another state, the court shall forward a certified copy of those records.

Both the UCCJEA and its predecessor, the UCCJA, provide that courts may request assistance from courts of other states and may assist courts of other states.<sup>197</sup> The UCCJEA has provisions allowing a court to request a court of another state to order a person to produce or give evidence and order a party to a child custody proceeding or any person having physical custody of the child to appear in the proceeding with or without the child.<sup>198</sup> This cooperation mechanism is also available when dealing with the four states that continue to operate under the UCCJA, as it has nearly identical provisions in Section 19 of the Act.

The provisions from the UCCJEA preserve fairness and due process, and thus, legislators should model ICPC evidentiary provisions after the Act.

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<sup>197</sup> UCCJEA § 112 (Codified in Texas as TEX. FAM. CODE § 152.122); UCCJA § 19.

<sup>198</sup> UCCJEA § 112 (Codified in Texas as TEX. FAM. CODE § 152.112). This section combines the text of Sections 19-22 of the UCCJA.

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## **CONCLUSION**

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Overall the ICPC procedures seem to be improving timeliness to some extent, but there is room for improvement. Primarily, the state should focus on improving communication between agencies and courts and making available information and forms so that all groups can better understand the workings of the law. Most of the problems with the ICPC procedure seem to stem from a lack of understanding of the laws. Providing information explaining the laws and common mistakes and misunderstandings would help make compliance easier. Improving communication would allow those involved to make sure the case is moving along according to the procedure.