
**IN THE
COURT OF APPEALS OF MARYLAND**

September Term, 2019

No. 58

IN RE: R.S.

On Writ of Certiorari

**BRIEF OF *AMICUS CURIAE*
NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN
NACC**

Scott M. Swafford, Esq.
Swafford Law, LLC
41 State Circle
Annapolis, MD 21401
Tel: (202) 670-8677
Em: scott@theswaffords.org
CPF: 0812180201
Counsel for Amicus NACC

February 24, 2020

TABLE OF CONTENTS

INTRODUCTION	1
ARGUMENT	2
I. THE ICPC HAS A LIMITED SCOPE	2
A) <u>ICPC’s Context</u>	
B) <u>The Intent Was To Facilitate Certain Placements And Associated Problems</u>	
II. MARYLAND’S ADOPTION REFLECTS THIS LIMITED SCOPE	4
A) <u>Adoption</u>	
B) <u>Recodification</u>	
C) <u>Regulations</u>	
III. THE ICPC’S SCOPE EXPANDED	6
A) <u>Expansion by Agencies & the Secretariat</u>	
B) <u>Maryland’s History Mirrors Expansion</u>	
IV. COURTS’ REACTIONS TO PARENTAL APPLICATION	7
A) <u>Current View Of States & Trends</u>	
B) <u>Maryland Has Not Directly Addressed The Issue</u>	
V. APPLICATION TO PARENTS VIOLATES CONSTITUTIONAL PROTECTIONS	14
A) <u>Maintaining Presumptions Are Incompatible with the ICPC</u>	
B) <u>Parental Application Violates Due Process & Equal Protection</u>	

VI. PARENTAL APPLICATION IS COUNTERPRODUCTIVE & UNNECESSARY	16
A) <u>Children Suffer From Prolonged Separation & Foster Care</u>	
B) <u>States Have Alternatives to Full Home Studies</u>	
CONCLUSION	19
CERTIFICATION OF WORD COUNT & COMPLIANCE WITH RULE 8-112	viii
AMICUS' APPENDIX	ix
1. Maryland Legislative History	
S.B. 18 Committee Notes	1-19
Report to the General Assembly of 1975 Excerpts	20-26
1984 Md. Laws, Chap. 296 Excerpts	27-36
2. ICPC Application To Parents: State Survey	37-64

TABLE OF AUTHORITIES

CASES

<i>Adoption of Leland</i> , 65 Mass. App. Ct. 580 (Mass. App. Ct. 2006)	8
<i>Attorney Gen. of Md. v. Waldron</i> , 289 Md. 683 (1981)	14
<i>D.R. v. J.R.</i> , 203 So. 3d 952 (Fla. Dist. Ct. App. 2016)	8
<i>D.S. v. Franks</i> , 182 Ariz. 81 (Ariz. 1995)	3
<i>Dep't of Servs. for Children, Youth & Their Families v. B.T.B.</i> , 16-13494 (Del. Fam. Mar. 14, 2018)	8
<i>Department of Econ. Sec. v. Leonardo</i> , 200 Ariz. 74 (Ariz. Ct. App. 2001)	10
<i>Donald W. v. Dep't of Child Safety</i> , 2019 WL 2181154, No. 1 CA-JV 18-0322 (Ariz. Ct. App. May 21, 2019)	10, 15
<i>Green v. Div. of Family Servs.</i> , 864 A.2d 921 (Del. 2004)	8
<i>H.P. v. Dep't of Children & Families</i> , 838 So. 2D 583 (Fla. Dist. Ct. App. 2003)	7
<i>In re A.J.C.</i> , 393 Mont. 9 (Mont. 2018)	10, 11, 17
<i>In re Adoption No. 10087</i> , 324 Md. 394 (Md. 1991)	12
<i>In re Adoption of Cadence B.</i> , 417 Md. 146 (Md. 2010)	13
<i>In re Adoption of Ulyssa</i> , 75 N.E.3d 1148 (Mass. App. Ct. 2017)	8
<i>In re Adoption/Guardianship No. 3598</i> , 347 Md. 295 (Md. 1997)	12
<i>In re Alexis O.</i> , 157 N.H. 781 (N.H. 2008)	8
<i>In re Alexis Mv. Jenelle F.</i> , 91 A.D.3d 648 (N.Y. App. Div. 2012)	8
<i>In re B.H.</i> , 2020 MT 4 (Mont. 2020)	11, 17
<i>In re Courtney R.</i> , No. M2015-01024-COA-R3-JV, 2017 Tenn. App. LEXIS 263 (Ct. App. Tn. 2017)	8
<i>In re D.F.-M.</i> , 157 Wash. App. 179 (Wa. Ct. App. 2010)	15
<i>In re E.Y.R.</i> , 396 Mont. 515 (Mont. 2019)	11, 17
<i>In re Emmanuel B.</i> , 175 A.D.3d 49 (N.Y. App. Div. 2019)	8
<i>In re Emoni W.</i> , 305 Conn. 723 (Conn. 2012)	8
<i>In re H.W.</i> , 460 Md. 201 (Md. 2018)	14

<i>In re IJO</i> , 2019 COA 151, 10 (Colo. App. 2019)	8, 9
<i>In re Interest of O. B.</i> , 787 S.E.2d 344 (Ga. Ct. App. 2016)	8
<i>In re M.W.</i> , 130 N.E.3d 114 (Ind. App. 2019)	8
<i>In re M.W.</i> , 237 Cal. Rptr. 3d 540 (Cal. Ct. App. 2018)	18
<i>In re Mary L.</i> , 778 P.2d 449 (N.M. Ct. App. 1989)	8
<i>In re Natalie S.</i> , 139 A.3d 824 (Conn. App. Ct. 2016)	8
<i>In re Natasha</i> , 943 A.2d 602 (Me. 2008)	8, 9
<i>In re R.B.</i> , 285 Ga. App. 556 (Ga. 2007)	8
<i>In re Rholetter</i> , 592 SE.2d 237 (N.C. Ct. App. 2004)	8
<i>In re S.r.c.-Q.</i> , 52 Kan. App. 2d 454 (Kan. Ct. App. 2016)	8
<i>In re Sophie S.</i> , 167 Md. App. 91 (Md. Ct. Spec. App. 2006)	13
<i>In re T.K.M.</i> , 2019 Ohio 5076 (Ohio Ct. App. 2019)	8
<i>In re T.M.J.</i> , 878 A.2d 1200 (D.C. 2005)	16
<i>In re W.Y.</i> , 228 Md.App. 596 (Md. Ct. Spec. App. 2016)	13
<i>In the Interest of C.R.-A.A.</i> , 521 S.W.3d 893 (Tex. App. 2017)	8, 9
<i>Kaczorowski v. City of Baltimore</i> , 309 Md. 505 (Md. 1987)	4
<i>McComb v. Wambaugh</i> , 934 F.2d 474 (3d Cir. 1991)	7, 10
<i>Motor Vehicle Admin. v. Seenath</i> , 448 Md. 145 (Md. 2016)	14
<i>N.J. Div. of Youth & Family Servs. v. K.F.</i> , 803 A.2d 721 (N.J. Super. Ct. App. Div. 2002)	8
<i>R.F. v. Dep't of Children and Families</i> , 50 So.3d 1243, 1244 (Fla Dist. Ct. App. 2011)	8
<i>San Diego Cnty. Health & Human Servs. Agency v. Christine L. (In re Liam L.)</i> , 193 Cal. Rptr. 3d 378 (Cal. Ct. App. 2015)	8
<i>State v. M.A.</i> , 215 So. 3d 1276 (Fla. Dist. Ct. App. 2017)	8
<i>Troxel v. Granville</i> , 530 U.S. 57 (2000)	14
<i>Weller v. Dep't of Social Services</i> , 901 F.2d 387 (4thCir. 1990)	16

STATUTES

42 U.S.C.A. § 671	16
Md. Fam. Law § 5-601	5
Md. Fam. Law § 5-604	5, 14
Md. Fam. Law § 5-607	13
Md. Fam. Law § 5-609	5, 13

REGULATIONS

COMAR 07.02.11	6
COMAR 07.02.24	5, 7
COMAR 07.02.25.02	16
COMAR 07.02.28	5, 7
COMAR 07.06.25.06	16

RULES

Rule 5.616(g), 2020 California Rules of the Court (Rev. 2020)	19
---	----

OTHER AUTHORITIES

Bernadette W. Hartfield, <i>The Role of the Interstate Compact on the Placement of Children in Interstate Adoption</i> , 68 Neb. L. Rev. 292 (1989)	2
Brendan Callanan & Mitchell Wendell, <i>The Interstate Compact on the Placement of Children</i> , 26 Juv. Just. 41, 44 (1975)	4
Child and Family Visitation Best Practice Guide (Tex. DPFS 2015)	17
Fawley-King, K., Trask, E.V., Zhang, J., & Aarons, G.A., <i>The Impact of Changing Neighborhoods, Switching Schools, and Experiencing Relationship Disruption on Children's Adjustment to a New Placement in Foster Care</i> , 63 Child Abuse & Neglect 141, 146 (2016)	18
ICPC Reg. 3	7, 8, 9, 10
John Harlow, <i>Pediatricians Know Why Family Separation is Child Abuse</i> , CNN, July 10, 2018	17
Joseph Goldstein, et al., <i>The Best Interests of the Child: The Least Detrimental Alternative</i> (1996 ed.)	17
Joseph J. Doyle, Jr., <i>Child Protection and Child Outcomes: Measuring the Effects</i>	18

<i>of Foster Care</i> , 97 Amer. Econ. Rev. 1583 (2007)	
Joseph J. Doyle, Jr., <i>Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care</i> , 116 J. Polit. Econ. 746 (2008)	18
Leonard Edwards, <i>Reasonable Efforts: A Judicial Perspective</i> , (2014)	17
Lucy Hudson, Eva Klain, Margaret Smariga, Victoria Youcha, <i>Healing the Youngest Children: Model Court-Community Partnerships</i> , American Bar Association (2007)	17
Maryland Child Welfare Benchbook, Administrative Office of the Courts (2009)	16
Revisor’s Notes accompanying Ch. 296, derived from H.B. 1	5
Roberta Hunt, <i>Obstacles to Interstate Adoption</i> (Child Welfare League of America 1972)	2, 3, 4
Secretariat to the Association of Administrators of the Interstate Compact on the Placement of Children, <i>Guide to the Interstate Compact on the Placement of Children 1</i> (1985)	3
Vivek Sankaran, <i>Out of State and Out of Luck: The Treatment of noncustodial Parents Under the Interstate Compact on the Placement of Children</i> , Yale L. & Pol’y Rev. 25, no. 1 (2006)	6
Vivek Sankaran, <i>Foster Kids in Limbo: The Effects of the Interstate Compact on Children in Foster Care</i> , June, 2014 Child Law Practice Today, American Bar Association	15
Vivek Sankaran, <i>The Impact of the Interstate Compact on the Placement of Children in Foster Care</i> , A Report to the Annie E. Casey Foundation	16
Vivek Sankaran, <i>Perpetuating the Impermanence of Foster Children: A Critical Analysis of Efforts to Reform the Interstate Compact on the Placement of Children</i> . Fam. L. Q. 40 (2006): 435-66	17

INTRODUCTION

This appeal concerns applicability of the Interstate Compact on the Placement of Children (“ICPC”) to parents. The Court of Special Appeals (“COSA”) held broadly it may not be applied to parents, relying upon plain language, original intent, and desire to avoid constitutional infirmities. Appellant Maryland Dep’t. of Human Services (“DSS”), argues it *must be* applied to promote safe placement of children consistent with other child welfare laws, where few alternatives ostensibly exist, relying less on statutory text and more on expansive implementing regulations. While some states follow DSS’s reasoning, a majority have rejected it as application to parents is outside the ICPC’s scope and raises constitutional concerns. Other states that have previously endorsed its application are now retreating, imposing limitations after viewing impacts of mis-applying a tool designed for other purposes and trying to fit Pandora back into her box. They’ve experienced increasing difficulty applying the ICPC to parents consistent with constitutional protections, or avoiding ridiculous outcomes including years of separation based solely on a solitary social worker’s perception an otherwise fit father’s bedroom is too small.

No review of history informing the ICPC’s development leads to any conclusion other than it was designed to *facilitate* and provide protections *only to* interstate foster, pre-adoptive, or delinquency placements, and its adoption in Maryland reflects the same limited view. COSA rejected views of states that endorsed its use but increasingly must revisit a morass of unintended consequences: constitutional violations inherent in any process forcing parents to prove fitness through ill-defined, arbitrary procedures with no protections, that only cause more harm to children from prolonged foster care and separation. Amicus National Association of Counsel for Children (“NACC”) urges this Court to abandon this practice for good.¹

¹ Amicus incorporates Appellee’s Statement of Facts & Case, and Questions Presented.

ARGUMENT

I. The ICPC Has A Limited Scope

Interpretation of the ICPC and states' adoptions starts with comprehension of problems it was originally designed to address, and ends with certainty it was never meant to subject parents to home studies before they could be reunited with their own children.

A) ICPC's Context

In the 1950's, frameworks addressing interstate adoption or foster care were impediments to placements. Despite efforts to adapt, they were structurally incapable of responding to increased mobility and geographic imbalances between pre-adoptive parents and potential adoptees.² Problems included providing protections before children were transported interstate; inability to ensure continued care and supervision; and no mechanism to compel other states to provide continued services.³ The ICPC was drafted by Dr. Mitchell Wendell through the New York State Legislative Committee on Interstate Cooperation in 1960 to address those failures.⁴

B) The Intent Was To Facilitate Certain Placements And Associated Problems

Contemporaneous initiatives place the ICPC in perspective: the ARENA initiative (practically linking children with pre-adoptive parents in other states); the Revised Uniform Adoption Act ("UAA," to standardize in-state adoption processes);⁵ and the Uniform Child

2 Roberta Hunt, *Obstacles to Interstate Adoption* 17-19 (Child Welfare League of America 1972) (recounting by 1948 34 states' laws relating to interstate adoptions or foster placements were "importation" laws designed to prevent cross state "dumping" of children, while 9 had "exportation" laws attempting to extend state oversight and protections) ("Obstacles"); Secretariat to the Association of Administrators of the Interstate Compact on the Placement of Children, *Guide to the Interstate Compact on the Placement of Children* 1 (1985) ("ICPC Guide") (framework necessary to address imbalance of children with "the numbers and kinds of adults anxious and able to receive them in balance within any state or local area"). Although the ICPC Guide was written subsequent to the ICPC's drafting, its earlier versions somewhat reflect initial thoughts.

3 Bernadette W. Hartfield, *The Role of the Interstate Compact on the Placement of Children in Interstate Adoption*, 68 Neb. L. Rev. 292, 295 (1989).

4 *Draftsman's Notes on Interstate Compact on the Placement of Children* ("Draftsman's Notes"), reprinted in *Obstacles* 44.

5 ARENA ("Adoption Resource Exchange of North America") developed under the Child Welfare League of

Custody Jurisdiction Act (“UCCJA”). These and related child welfare laws were conceived as operating in complement: the ICPC as a *procedural* device facilitating interstate cooperation in limited categories of placements; ARENA’s practicality; and the UAA and UCCJA’s substantive rules on adoption and jurisdiction.⁶ This relationship with other initiatives and state laws was well understood as the ICPC was not conceived to effect substantive changes to them:

[ICPC is a] means of permitting child placement activities to be pursued throughout the country *in much the same way and with the same safeguards and services as though they were being conducted within a single state.*⁷

Or to supercede existing state laws on child welfare:

[the ICPC] does not purport to supplant existing child placement laws, but rather is a valuable supplement to them. *The Compact does not attempt to deal with all aspects of placements but only those of particular significance for interstate situations.* For example, although *Stanley v. Illinois*, 405 U. S. 645 (1972), is of great consequence in the field of child placement, *it has no special bearing on the operation of the Compact.* Such matters as relinquishment of parental rights or licensing of agencies, although of great concern in child placement are of equal importance whether the placement is intrastate or interstate. *Those placement matters which are not uniquely of interstate concern remain within the realm of individual state action.*⁸

Contemporaneous writings are clear. The ICPC was not envisioned as applying in any way to affect parental presumptions of fitness in conflict with *Stanley* or other laws. Rather, it only addressed three types of interstate placements with an assumption other laws would address implications for parents: foster care, adoptions, and delinquents.⁹

America, practically linked children needing adoption with prospective families who often resided in other states. The RUAA attempted to standardize adoptions which could be accepted by other states. *See* Obstacles, pp. 1-4 (RUAA drafting); Joel Tenenbaum, *Introducing the Uniform Adoption Act*, Family Law Quarterly 30, no. 2 (1996).

6 *See, e.g., D.S. v. Franks*, 182 Ariz. 81 (Ariz. 1995) (ICPC is a *procedural* tool for interstate cooperation in adoptions, and declining to interpret its’ provisions as negating UCCJA procedures).

7 ICPC Guide, 1.01 (emphasis added).

8 ICPC Guide, 1.03 (emphasis added).

9 ICPC Guide 1.01 (“applies to placements preliminary to possible adoptions, placements in foster care where no adoption is contemplated, and institutional placements of adjudicated delinquents needing special services or programs not available within the state.”).

This is reinforced by countless references to its limited scope: comments on the relationship between a “sending agency” and exclusions in Article VIII (sending agency includes private persons but must be read with Article VIII’s exceptions of close relatives “to protect the social and legal rights of the family” and regulation desirable only in narrow circumstances),¹⁰ or narrow conceptions of “foster care” as another limitation on placements (foster care has an established existing meaning which acts to limit the scope of placements).¹¹

Other relevant commentary reinforces a limited scope addressing *only* juvenile delinquencies and “[t]wo other and probably more numerous groups [served by the ICPC] children placed with would-be parents as a preliminary to a possible adoption, and children placed in foster care where no adoption is contemplated.”¹²

II. Maryland’s Adoption Reflects This Limited Scope

Interstate compacts are interpreted using both legislative and contractual precepts: under both approaches, plain language and meaning are informed by usage at the time; interrelation of provisions to each other are limited to the statute and its history; but intent may look to other contemporaneous actions.¹³ Although extensive historical records do not exist, what does belie a broader application, refuting suggestion the ICPC should be read in conjunction with other child welfare laws based upon legislative intent or design.

A) Adoption

The General Assembly adopted the ICPC in 1975, introduced as S.B. 18. The only

10 Draftsman’s Notes, 44.

11 Draftsman’s Notes, 44-45.

12 Brendan Callanan & Mitchell Wendell, *The Interstate Compact on the Placement of Children*, 26 Juv. Just. 41, 44 (1975).

13 Plain meaning is “controlled by the context in which it appears,” *Kaczorowski v. City of Baltimore*, 309 Md. 505, 514 (1987), which includes “a bill’s title and function paragraphs, amendments that occurred as it passed through the legislature, its relationship to earlier and subsequent legislation, and other material that fairly bears on the fundamental issue of legislative purpose or goal” *Id.* at 515.

amendments relate to where it was to be codified in the code, but notes suggest members of the Judicial Proceedings Committee coordinated with ICPC's administration including Dr. Wendell. That Committee included an explanation of the bill reflecting its limited scope:

Those situations to which the compact primarily addresses itself are (1) *placement preliminary to possible adoption*; (2) *placement in foster care when no adoption is likely to occur*, and (3) *placement of children adjudicated delinquent* in an institution of another state. Each child requiring placement will receive the maximum opportunity to be placed in a suitable environment and with persons or institutions having *appropriate qualifications and facilities to provide a necessary and desirable degree and type of care*.¹⁴ (emphasis added).

B) Recodification

The Assembly recodified several statutes into the Family Law Article in 1984, making only one substantive change to the ICPC: to avoid confusion or misapplication definitions in other areas of the code *would not apply to the ICPC*. See Md. Fam. Law § 5-601(9) (“definitions in § 1-101 of this article do not apply to the [ICPC] set forth in this subtitle”); Revisor’s Notes accompanying Ch. 296, derived from H.B. 1 (noting many of the articles were being recodified without substantive change, but 5-601(9) “is new language added to avoid possible confusion over the applicability of the definitions appearing in 1-101 of this article,” and the ICPC “contains its own definitions, which are supplemented by the definitions *in this section*.”¹⁵ (emphases added).¹⁶

C) Regulations

Regulations implementing the ICPC have expanded from an originally limited scope.

14 See Amicus App. 1-19 (Committee Notes, S.B. 18, retrieved from Maryland Leg. Svcs.); 20-26 (Report to the General Assembly of 1975, Proposed Bills, excerpt of pp. 187-193, reflecting Committee Explanation and introduced bill); 27- (1984 Md. Laws, Chap. 296, excerpts of pp. 1994-2003).

15 CINA’s evolution seems to support the same conclusion. Substantive revisions to CINA in 2001 appear unconcerned with the ICPC, and if anything suggest then heightened awareness of parental rights. See Acts 2001, c. 415, § 3 (separating delinquency from CINA, expanding role of public defenders for indigent parents, changing shelter care hearing timing, and increasing review hearings).

16 Article III is codified within Md. Fam. Law § 5-604, and Article VIII within § 5-609.

The regulations most directly cited as mandating application to parents (07.02.24 and 07.02.28) either did not then exist, or have been substantially changed, and early versions reflect no intent to apply to parents. The 1977 definition of “foster care” within 07.02.11 only applied to a child “who cannot be cared for by his own family.”¹⁷ Out-of-state placement, previously only a subsection of placement: (1) contained other requirements for placement of a “foster child” in an out-of-state “foster or adoptive home” that pre-dated ICPC requirements; and (2) addressed ICPC requirements by noting that placements “of children for foster care or as a preliminary to possible adoption” must comply with the ICPC, repeating almost verbatim statutory definitions. 1989 regulations still maintained a limited definition of foster care; used the same terminology of “foster child” in an out-of-state “foster or adoptive home”; placements “of children for foster care or as a preliminary to possible adoption” would be subject to the ICPC; but removed the list of the ICPC’s statutory definitions.¹⁸

III. The ICPC’s Scope Expanded

New York adopted the ICPC in 1961, with New Jersey and the District of Columbia becoming the last states in the early 1990’s. Continued demographic changes increased the number of children in foster care as well as divorces, adding impetus for states to assess and monitor cross-state placements.¹⁹ Administrators from each state formed the Association of Administrators of the ICPC (“AAICPC”) in 1974, to provide centralized support and resources, assisted by the American Public Human Services Agency (“APHSA”) as a Secretariat, which issued model regulations and advisory opinions, several of which only later supported application to parents. Although judicial review in the 1980’s was largely confined to

¹⁷ 4:17 Md.R. 1305-1314 (Aug. 17, 1977).

¹⁸ 16:4 Md.R. 500-514 (Feb. 24, 1989).

¹⁹ Vivek Sankaran, *Out of State and Out of Luck: The Treatment of noncustodial Parents Under the Interstate Compact on the Placement of Children*, Yale L. & Pol’y Rev. 25, no. 1 (2006) (“Out of State and Out of Luck”).

jurisdictional issues in foster or adoption contexts, the Third Circuit Court of Appeals addressed expansion to parents in 1991, finding it beyond the ICPC's plain language and original intent.²⁰

A) Expansion by Agencies & the Secretariat

In response to *McComb* and other states' expansive use, AAICPC amended Regulation 3 in 2001 to provide added legitimacy for broadened scope while also addressing growing constitutional concerns over application to fit parents.²¹ Many states adopted implementing regulations patterned after Regulation 3 as they continued applying the ICPC to parents.

B) Maryland's History Mirrors Expansion

Maryland appears to have first amended ICPC regulations in 1990 to include specific language that a "foster child" placement with an out-of-state noncustodial parent, relative or guardian requires ICPC approval.²² The expansion of "foster care" to include placement in a "family home" and the definition of "out-of-home placement" as being inclusive of kinship or residential treatment care, appears to have been first added to the regulations in 1999, which also replaced linkage of out-of-state placements to "foster care" for the new term "out-of-home placement."²³

IV. Courts' Reactions To Parental Application

Judicial reviews to challenges to application to noncustodial parents first appears in the 1990's.²⁴ Most states initially endorsing application did so in the 1990's and early 2000's, although several also refuted it. Although not all states have currently expressed a definitive

20 *McComb v. Wambaugh*, 934 F.2d 474 (3d Cir. 1991).

21 *See H.P. v. Dep't of Children & Families*, 838 So. 2D 583, 585 (Fla. Dist. Ct. App. 2003) (reviewing intent behind and impact of Regulation 3).

22 17:15 Md.R. 1871-1887 (July 27, 1990).

23 26:19 Md.R. 1454-1471 (Sept. 10, 1999).

24 *McComb* at 479 (court has found "[n]o state Supreme Court has analyzed the question in a reasoned opinion, nor has any state intermediate appellate court" on whether the ICPC applies to parents).

position on application to parents, trends are discernible. The majority that have reviewed scope based upon language or legislative history have held it may not be applied to noncustodial parents. That trend is increasing, and since 2010 more have ruled against its application, while others have reversed or refined earlier positions, barring or restricting application. Growing concerns have emerged over the constitutionality and practical effect of applying it where application delays placements and increases harm to children, and alternative processes become more available.

A) Current View Of States & Trends

Of states that have directly addressed application to parents:

- Eleven hold it may not be applied to noncustodial parents (Arkansas; Connecticut, Indiana, Kansas, North Carolina, New Hampshire, Tennessee, Texas), more broadly to placements with close relatives (New Jersey), or intimated opposing application (Colorado & Maine);
- Ten hold it does apply to noncustodial parents (Ohio), but some only where there are other indicia of unfitness (Arizona, New Mexico, Montana) or fitness is initially in doubt (Delaware), not to deny initial placement but only to “offending” parents under reunification or treatment plans (California & Washington & Georgia), allowing out of state placements pending approval if in a child’s best interests (Florida), or denial does not preclude visitation or continued reunification efforts (Massachusetts); and
- One where authorities are split (New York).²⁵

i. Recent States: Doesn’t Apply To Prevent Placements

Although some have recently reiterated earlier holdings, of the states that initially addressed the issue within the past fifteen years, most have held it does not apply. Although Tennessee had previously addressed relative placements, it rejected application to parents under the clear language of Article III and Regulation 3.²⁶

Texas also extensively reviewed history, and in a “case of first impression” held the

²⁵ Surveys of states addressing of the ICPC is included in Amicus’ Appendix.

²⁶ *In re Courtney R.*, No. M2015-01024-COA-R3-JV, 2017 Tenn. App. LEXIS 263 (Ct. App. Tn. 2017).

limitations of scope in Article III made it “inapplicable to an interstate placement of a child with a parent,” and Regulation 3 impermissibly expanded scope beyond foster care or adoption. *In the Interest of C.R.-A.A.*, 521 S.W.3d 893 (Tex. App. 2017). Connecticut, Indiana, Kansas, and New Hampshire, have also recently rejected wholesale application, or to deny initial placements (Washington).

ii. Other States Express Skepticism

Although courts in Maine and Colorado have not explicitly ruled on the issue, both have recently expressed skepticism that the ICPC would apply to noncustodial parents. In Maine, the court deemed a home study inadmissible for rehabilitation, suggesting it could only be introduced in a proceeding where authorized, which didn’t apply to noncustodial parents based upon the plain language of Article III.²⁷ Similarly, Colorado rejected denial of a study as sole grounds to cease reunification with an “offending” parent. The court directly refuted the agency’s position that failure of a study precluded placement, as “[w]ere the Department’s view correct, the State could terminate a parent’s rights without making any reasonable efforts to reunify the family,” placing out-of-state parents “on equal footing with nonparents” violating federal law and parents’ “constitutionally protected interest in [their] parental relationship with the child.”²⁸ Although the court ultimately declined to resolve the overall issue, it suggested conflict between the ICPC and obligations to parents should be resolved in favor of parents.²⁹

iii. States That Apply Are Reigning In Application

Arizona and Montana represent the clearest trend of states earlier upholding blanket

²⁷ *In re Natasha*, 943 A.2d 602 (Me. 2008).

²⁸ *In re JJO*, 2019 COA 151, 10 (Colo. App. 2019).

²⁹ *In re JJO*, at 8 (“We need not resolve that question now. Even if the ICPC applies to placement with a natural parent, it cannot be applied in such a way as to relieve the Department of its obligations to exercise reasonable efforts to reunify the family.”).

application that have revisited the issue responding to problems. Arizona had held that the ICPC must be applied to noncustodial parents, dismissing the analysis of *McComb* and due process concerns, premising its holding on liberal construction and validity of Regulation 3. *Department of Econ. Sec. v. Leonardo*, 200 Ariz. 74 (Ariz. Ct. App. 2001). Arizona has since limited *Leonardo*, holding the ICPC “is not required when the evidence does not support a dependency concerning the out-of-state parent.” *Donald W. v. Dep’t of Child Safety*, 2019 WL 2181154, No. 1 CA-JV 18-0322, at *2 (Ariz. Ct. App. May 21, 2019). The court was confronted with an agency’s effort to terminate a “non-offending” father’s parental rights, where his efforts at obtaining custody were thwarted by the agency through the ICPC and other means for nearly three and a half years. That court was unaware of any authority “permitting [agency] to withhold custody of a child from its parent while [it] investigates the parent without *some* evidence of unfitness.” *Donald W.*, at *14 (emphasis in original). Citing other states’ recent opinions, the court severely restricted *Leonardo*, finding that agencies *could* request courtesy checks through the ICPC or perform other investigation, but *could not require* a full home study in the absence of any other information suggesting unfitness.

Montana’s Supreme Court had earlier endorsed general application in a string of cases between 2008 and 2016 but even more recently was forced to restrict application three times in the past 3 years. In *In re A.J.C.*, 393 Mont. 9 (Mont. 2018), an out-of-state father with little previous interaction attempted to gain custody after an agency had removed the child from the mother’s care. Even after completion of a home study and approval, the agency still denied placement with the father citing a need to further investigate issues uncovered during the home study, but which did not result in its denial. From a review of the facts recounted by the Court,

the father appears to have first requested custody in October, 2014, shortly after the child was removed from the mother's care, and the home study was not completed until the end of July, 2015. Years later, the agency had subsequently abandoned any efforts at reunification with the father, recommended permanent placement with the child's grandmother and to terminate the father's parental rights.

Shortly afterwards, that court addressed a similar situation where a noncustodial father was denied initial placement despite no allegations of abuse or neglect, told he would have to complete a home study which the agency delayed initiating for almost a year. *In re E.Y.R.*, 396 Mont. 515 (Mont. 2019). Even more directly than in *In re A.J.C.*, the court addressed the impact on constitutional rights from forced application of the ICPC. It described a continuum where agencies should only pursue an ICPC process *after* an initial investigation, and then only if that investigation reveals potential imminent safety risks that are *endorsed by a reviewing court*, otherwise immediate placement should occur. *In re E.Y.R.*, at 532 (“[w]hile an ICPC may be indicated if objective, demonstrable circumstances warrant the Department seeking a court order to evaluate the noncustodial parent, *an ICPC is not required merely because a noncustodial parent resides in another state.*”) (emphasis added).

Earlier this year, Montana removed any remaining ambiguity, remonstrating its agency that had required full ICPC approval despite no allegation or suggestion a parent was unfit. *In re B.H.*, 2020 MT 4, 22 (Mont. 2020) (“if a state has legitimate concerns regarding the safety of a child in a parent's custody, it must plead those concerns and *prove them to the court*. Here, the Department did not do so, offering only the vague assertion that there *might be* some concerns about Father, and depending on the ICPC to turn up concerns to retroactively justify the

Department's assertion.") (emphasis added).

B) Maryland Has Not Directly Addressed The Issue

Maryland's courts have reviewed the ICPC in other contexts, but not whether it may be applied to nonresident parents based upon Article III's scope, Regulation 3, or constitutional limitations.³⁰ Prior reviews however consistently reflect reliance on the ICPC's history and original intent, analysis of other states' opinions, and recognition any application should neither supplant Maryland law nor exceed constitutional boundaries.

This Court first addressed the ICPC where a child was sent from Virginia to Maryland without full ICPC approval, and whether that would invalidate subsequent adoption. *In re Adoption No. 10087*, 324 Md. 394 (Md. 1991). This Court relied heavily upon Dr. Bernadette Hartfield and her review of the ICPC and its history, finding its original intent was "to facilitate interstate adoption, thereby increasing the pool of acceptable homes for children in need of placement." *In re Adoption No. 10087*, at 404. Although this Court found the ICPC should have been applied, retroactive compliance was the preferred remedy over invalidating the adoption, as the ICPC did not extend to interfere with Maryland's existing responsibilities to act in a child's best interests once within the state.

Confronted with a similar issue but where a natural parent challenged an adoption that appeared to involve purposeful and repeated violations of the ICPC, this Court again upheld the adoption, relying on the best interests of the child and whether the challenging parent's consent was required under New York law, also looking both to Dr. Hartfield and how other states had addressed penalties for noncompliance. *In re Adoption/Guardianship No. 3598*, 347 Md. 295

³⁰ Application of the ICPC has also arisen in unpublished cases. Not offered for precedential value, they represent recurrence of issues implicated by the ICPC's application to parents.

(Md. 1997).

The ICPC was also implicated where COSA addressed a trial court's award of custody to a father and dismissal of a CINA petition brought upon allegations against the mother. *In re Sophie S*, 167 Md. App. 91 (Md. Ct. Spec. App. 2006). The lower court was presented with a quandary by the parties' positions: the agency maintained if the court were to make a finding against the mother and commit the child, the agency would have to await final ICPC approval before placement with the father; but the agency did not object to dismissal of the entire action and immediate award of custody to the father following only a "courtesy check" with no other evidence suggesting his unfitness. The COSA reversed only because the lower court had not yet sustained any finding against the mother under *In re Russell G.* and amendments to the CINA provisions.

Reviewing termination of a father's parental rights, this Court also addressed the ICPC in a limited context. Although the father's primary challenge was the agency had not undertaken reasonable reunification efforts, the father raised in a footnote the agency shouldn't have required him to obtain ICPC approval for visitation at his residence in Pennsylvania. Responding in its own footnote, this Court noted that exceptions contained within Article VIII (§5-609) do not apply where a state has taken custody and would be placing the child. *In re Adoption of Cadence B.*, 417 Md. 146, 158, fn. 11 (Md. 2010).

The COSA also reviewed application to juvenile placements, and despite finding the issue moot as the placement ended, addressed the matter as one of great public importance to provide guidance to lower courts. The court construed the plain language of § 5-607, but did so *strictly* because of its reflection of due process requirements. *In re W.Y.*, 228 Md.App. 596 (Md. App.

2016).

V. Application to Parents Violates Constitutional Protections

“[P]erhaps the oldest fundamental liberty interest recognized by the [Supreme] Court” is a parent’s “right to direct the upbringing of their children.” *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Whether granting third parties visitation rights, temporarily removing children in need, or severing parental bonds, states must comport with constitutional guidelines that respect the importance of parents’ fundamental rights. As parental rights are fundamental, application of the ICPC to them is presumptively unconstitutional and may be upheld only if the State may demonstrate its necessary to promote a compelling government interest.³¹ Application here and in the manner advocated by DSS both implicate “as applied” constitutional concerns.³² Application to parents also disproportionately influences whether “exceptional circumstances” exist – used by courts in multiple contexts including TPR, reunification following removal, or alternative placements.³³

A) Maintaining Presumptions Are Incompatible with the ICPC

Once the ICPC is invoked, its terms are mandatory and facially provide no discretion to an agency or court. If Article III’s scope is interpreted to extend to parents, it precludes Maryland from placing a child until and unless a receiving state replies “the proposed placement

31 *Attorney Gen. of Md. v. Waldron*, 289 Md. 683, 705-706 (1981) (“when a statute creates a distinction based upon clearly ‘suspect’ criteria, or when [it] infringes upon personal rights or interests deemed to be ‘fundamental,’” that statute is subject to strict scrutiny. A statute that triggers strict scrutiny is presumptively unconstitutional and survives only if the government can demonstrate that the challenged statute is “necessary to promote a compelling government interest.”).

32 Although normally limited to particular facts, *Motor Vehicle Admin. v. Seenath*, 448 Md. 145, 181 (2016) (“claim[s] that a statute is unconstitutional on the facts of a particular case or in its application to a particular party”), virtually all proposed applications to parents would engender similar violations.

33 Analysis of exceptional circumstances include considering a child’s emotional ties and aspects of placements, which subsumes consideration of the time a child has spent apart from a parent, and developing bonds in other placements. Although this Court has cautioned against reliance upon that factor as dispositive, it has noted judges’ difficulties in not according it excessive weight. *In re H.W.*, 460 Md. 201 (Md. App. 2018).

does not appear to be contrary to the interests of the child.” § 5-604(d). To even delay placement where an agency has no evidence suggesting unfitness eviscerates holdings of this Court, underlying statutes, and constitutional presumptions, which mandate immediate placement if a nonoffending parent had no knowledge of the other’s abuse, and otherwise appears willing and able to care for a child.

Nor can recourse to ICPC’s regulations provide an answer. DSS states it has and will use discretion under regulations to dispense with a home study and immediately place with a noncustodial parent if “fitness is not in question.” Yet DSS also argues the ICPC “provides juvenile courts and local departments with a critical and necessary tool” to be applied to parents “whose fitness is unknown”; it has an affirmative duty to conduct a “thorough evaluation” before placement; courts need to obtain “vital information” to ensure children’s safety; and recounts its inabilities to obtain such information without a full home study. While DSS may assert it would not seek a full home study for a hypothetical parent whose fitness is not in question, it remains difficult to imagine it ever would.

B) Parental Application Violates Due Process & Equal Protection

Application to parents raises pervasive due process concerns inherent throughout the ICPC’s design and operation. Home study results and recommendations of a social worker in a receiving state become dispositive, forcing abdication of judicial determination on fitness or the best interests of the child. Placement decisions are made subjectively without uniform standards governing home studies,³⁴ under states’ procedures which vary widely, frequently containing no guidance to parental placements and default to foster home certification standards.³⁵ Reflecting

³⁴ See *Donald W.*, at *15 (recounting use of subjective criteria in ICPC evaluations); *In re D.F.-M.*, 157 Wash. App. at 193, 236 P.3d at 967 (Wa. Ct. App. 2010) (describing receiving state’s determination that fit father lacked adequate bedroom space for his child as “nonsense”).

³⁵ See, e.g., Vivek Sankaran, *Foster Kids in Limbo: The Effects of the Interstate Compact on Children in Foster*

that disparity, home studies of natural parents are denied at much higher rates.³⁶ Nor does the ICPC or most states' internal regulations contain any procedure for appealing other states' denials. *See, e.g., In re T.M.J.*, 878 A.2d 1200, 1203 (D.C. 2005) (rejecting attempt to have court review denial of placement from out-of-state agency).³⁷ Excessive delays and interruptions with parent-child relationships alone violate due process rights,³⁸ and may unduly influence future considerations of whether "exceptional circumstances" exist sufficient to recommend alternative placements in large part because children have had months or years to bond with foster or adoptive families after prolonged separation from their parents. Nor are there any mandates requiring placements with parents or prompt agency action even where home studies are approved, although there are for pre-adoptive parents.³⁹ Nor may application of this litany of problems to nonresident parents be done without disparate treatment of either foster or pre-adoptive nonresidents, or resident parents under the Equal Protection Clause.

Care, June, 2014 Child Law Practice Today, American Bar Association, available at https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/child_law_practice/vol-33/june-2014/foster-kids-in-limbo--the-effects-of-the-interstate-compact-on-c/ (agencies deny roughly 40% of all placement requests, studies denied for arbitrary reasons, few states have guidelines for parents apart from foster home certifications, and noting reasons cited to deny parents include "insufficient living space"; "unstable housing"; "parent would have to sleep on the couch to accommodate children"; "the client does not meet qualification due to shared housing"; "financially fragile").

- 36 Vivek Sankaran, *The Impact of the Interstate Compact on the Placement of Children in Foster Care*, A Report to the Annie E. Casey Foundation, available at <https://www.law.umich.edu/clinical/calcp/practitionerresources/Documents/ICPC%20on%20Children%20in%20Foster%20Care.pdf> (recounting results from study of data obtained from state ICPC offices for 2006-2011, and noting significantly higher denial rates for parents) ("Casey Report").
- 37 Ironically, Maryland affords foster care and adoptive parents rights to administratively challenge denials of approval from home studies, but does not extend the same rights to relatives or natural parents. *See* COMAR 07.06.25.06(F) (imposing timelines for processing of home studies under the ICPC, but additionally requiring notification to a "prospective resource parent" of approval or denials, according them administrative rights to appeal). COMAR 07.02.25.02(B)(32) (defining "resource parent" as only those "dually approved as a foster and adoptive parent").
- 38 *See Weller v. Dep't of Social Services*, 901 F.2d 387, 396 (4th Cir. 1990) (four month delay in adjudicating a father's deprivation of custody rights clearly violates the prompt due process the Constitution requires).
- 39 *See* Casey Report, p. 8 (noting a third of ICPC requests took over 90 days to process). States are subjected to challenge where they fail to place with pre-adoptive parents with "reasonable promptness" following approval of home studies. 42 U.S.C.A. § 671(a)(23); Maryland Child Welfare Benchbook, Administrative Office of the Courts (2009), CL-104 ("DSS cannot deny or delay placing a child in an approved out-of-state adoptive home.").

VI. Parental Application is Counterproductive & Unnecessary

A) Children Suffer From Prolonged Separation & Foster Care

Applying the ICPC to parents means agencies will not place children into their care until after successful completion of a home study – which even with expedited processing takes months to occur.⁴⁰ Nor do temporary periods of visitation with parents, where explored, necessarily remove trauma. Separating especially younger children from family can lead to lifelong trauma. “[F]requent, meaningful parent-child visits are critical for infants and toddlers in foster care.”⁴¹ For children birth to three, best practice guides prescribe daily visitation or at the least every two to three days.⁴² Academics have consistently reached the same conclusions about harmful effects of family separations.⁴³ Although children who experience longer periods of separation are at greater risk, even relatively brief separations can traumatize children.⁴⁴ Resulting feelings of uncertainty and dislocation manifest themselves in depression, acting out, withdrawal, and poor academic performance.⁴⁵ As the American Psychological Association has pointed out, “[d]ecades of psychological research have determined that it is in the best interest of the child and the family to keep families together.”⁴⁶

Extensive research establishes *any* placement in foster care exacerbates parental

40 Numerous courts have lamented at the extreme processing time of several cases, including *In re B.H.* (process had to be re-started after processing time of 19 months); *In re E.Y.R.* (agency delayed making initial request for 8 months); *In re A.J.C.* (agency didn’t place child with father even after completion of ICPC home study and approval of placement by receiving state “asserting it wanted additional time to obtain more information”).

41 Lucy Hudson, Eva Klain, Margaret Smariga, Victoria Youcha, *Healing the Youngest Children: Model Court-Community Partnerships*, American Bar Association (2007), <https://perma.cc/5EJE-JJX3>.

42 Child and Family Visitation Best Practice Guide (Tex. DPFS 2015), <https://perma.cc/Q79J-X87J>.

43 John Harlow, *Pediatricians Know Why Family Separation is Child Abuse*, CNN, July 10, 2018 (citing studies dating to the turn of the last century), available at <https://www.cnn.com/2018/07/10/opinions/family-separation-child-abuse-harlow/index.html>.

44 Joseph Goldstein, et al., *The Best Interests of the Child: The Least Detrimental Alternative*, at 41-45 (1996 ed.).

45 Vivek S. Sankaran, *Perpetuating the Impermanence*, 40 FAM L.Q. at 436 (citing *Fostering the Future: Safety, Permanency and Well-Being for Children in Foster Care*, Pew Commission (2004)).

46 Available at <http://www.apa.org/advocacy/immigration/separating-families-letter.pdf>; Leonard Edwards, *Reasonable Efforts: A Judicial Perspective*, (2014) (describing the efforts of courts and legislators to help keep families together).

separation and can impose lasting harm. Many studies have noted the correlation between placement in foster care and later criminal activities, substance abuse, teen pregnancies, employment success, or other delinquency issues.⁴⁷ Although not all experiences are the same, high correlations exist showing a majority moved to new neighborhoods (72%), new schools (68%), and were separated from at least one sibling.⁴⁸ Although a necessary evil in some circumstances, foster care should only be pursued where no other options exist and every effort should be undertaken to minimize time spent in such care. In no event though should a child be subjected to foster care where there is a fit parent available and willing to care for that child.

B) States Have Alternatives to Full Home Studies

As admitted by DSS, it has many tools to perform initial investigations of resident parents, including criminal records or records of prior abuse or neglect, before appearance at an initial adjudicatory or shelter care hearing. Yet the same information is often available for nonresident parents. State agencies routinely collaborate with and rely upon the services of other agencies or private organizations operating in other states through the UCCJEA or cross-border agreements. The ICPC itself recognizes agencies are empowered to “enter into an agreement with an authorized public or private agency” in another state to perform services. Md. Fam. Law §§ 5-606(b); 5-601(5).⁴⁹ Other states routinely resort to these and other authorities to provide

47 Joseph J. Doyle, Jr., *Child Protection and Child Outcomes: Measuring the Effects of Foster Care*, 97 *Amer. Econ. Rev.* 1583 (2007); Joseph J. Doyle, Jr., *Child Protection and Adult Crime: Using Investigator Assignment to Estimate Causal Effects of Foster Care*, 116 *J. Polit. Econ.* 746 (2008).

48 Fawley-King, K., Trask, E.V., Zhang, J., & Aarons, G.A., *The Impact of Changing Neighborhoods, Switching Schools, and Experiencing Relationship Disruption on Children’s Adjustment to a New Placement in Foster Care*, 63 *Child Abuse & Neglect* 141, 146 (2016), available at <http://europepmc.org/abstract/MED/27919001>.

49 Maryland and the District of Columbia have previously entered into a Memorandum of Understanding (“DC MOU”) allowing for placements into foster care “on an emergency basis” prior to receiving ICPC approval. Policy on Interstate Compact on the Placement of Children, Child and Family Services Agency, District of Columbia, available at https://cfsa.dc.gov/sites/default/files/dc/sites/cfsa/publication/attachments/Program%20-%20Interstate%20Compact%20on%20the%20Placement%20of%20Children%20%28ICPC%29%20%28final%29%28H%29_2.pdf.

services and inspections following placements in other states.⁵⁰

Finally, DSS discounts that ICPC courtesy checks provide a viable means to obtain initial information about a nonresident as “there is no mechanism to guarantee that another entity will agree or do so in a timely or thorough manner.” Ironically, the same concerns exist for full home studies. If anything, the applicable regulation maintains “responsibility for credentials and quality” remain with the state that requests **and** the entity in the receiving state that responds. Some states have even enshrined pursuit of a “courtesy check” as one component of initial investigations that may be done without resort to a full home study.⁵¹

CONCLUSION

Applying the Compact to placements with parents violates the plain language of the statute, the constitutional rights of parents and children, the “best interests of the child” principle, and core precepts of administrative law. It has no legal basis and threatens to harm children. Amicus urges the Court to rule that the Compact does not apply to placements with parents.

⁵⁰ See, e.g., *In re M.W.*, 237 Cal. Rptr. 3d 540, 546-47 (Cal. Ct. App. 2018) (refuting agency argument it could not operate in Nevada to assess, approve, or supervise placement done outside of the ICPC by noting it could provide services through private agencies).

⁵¹ See Rule 5.616(g), 2020 California Rules of the Court (compliance with ICPC not required for parental placements, but listing courtesy checks and other available tools).

CERTIFICATE OF WORD COUNT AND COMPLIANCE

1. This brief contains 6,499 words, excluding the parts of the brief exempted from the word count by Rule 8-503.
2. This brief complies with the font, spacing, and type size requirements stated in Rule 8-112.



Scott M. Swafford, Esq.
Swafford Law, LLC
41 State Circle
Annapolis, MD 21401
Tel: (202) 670-8677
Em: scott@theswaffords.org
CPF: 0812180201
Counsel for Amicus National Association of
Counsel for Children (“NACC”)