OPD OFFICE OF THE PARENT DEFENDER

MONTHLY MINDER #2 – UNCONSTITUTIONAL REQUIREMENT OF AN ICPC[1]

August 2024

Scenario:

You represent an out-of-state, non-removal parent who wishes to have custody of their child who has been removed by DSS from the in-state, removal parent.

The Problem:

DSS insists that they need an approved ICPC home study on your client before the court can consider placement out of state. But it can take a long time to get an ICPC home study completed, and it can get denied for a variety of factors that are unreasonable, such as requiring the parent to become a licensed placement.

This scenario also involves the question of whether a non-removal parent who is fit and has not acted inconsistently with their constitutionally status is entitled to custody and when the right attaches. This is a topic that will be discussed in a separate Monthly Memo.

Main Argument:

Requiring an ICPC home study on an out-of-state parent is unconstitutional because it treats an out-of-state parent differently than an in-state parent.

Applicable Law:

1. **The Juvenile Code does not require an ICPC for a parent.**

The Juvenile Code does not require a trial court to obtain an ICPC home study before placing a child out of state with a parent. To the contrary, the Juvenile Code only requires an ICPC home study if placement is with a relative, not a parent. A relative is defined in NCGS 7B-101(18a) and it does not include a parent.

Every section that addresses the need for the trial court to obtain an ICPC home study specifically addresses only the placement of a child out-of-state with a relative, not a parent. *See* NCGS 7B-505(d), 7B-506(h)(2), and 7B-903(a1).

[1] The Interstate Compact on the Placement of Children (ICPC) governs the placement of children in foster care, adoptive homes, and institutions across state lines. The ICPC is a binding statutory agreement that has been adopted in all fifty states, the District of Columbia, and the U.S. Virgin Islands. It consists of ten different articles, and in North Carolina, it is codified at Article 38 of the Juvenile Code, G.S. 7B-3800 et seq. The district court has exclusive original jurisdiction over ICPC proceedings. G.S.7B-200(a)(1).
A/N/D and TPR Manual, Chapter 7

In 2004, the court of appeals held that the ICPC did not apply at a permanency planning hearing when the court awarded custody to an out-of-state mother. *In re Rholetter,* 162 N.C. App. 653 (2004).

2. The Juvenile Code prioritizes reunification with a parent.

The Juvenile Code prioritizes reunification with a parent. NCGS 7B-100(4). It is error for the court to fail to consider giving custody to a parent when placement with a parent is a possibility. See *In re S.J.T.H*., 258 N.C. App. 277 (2018) (reversing initial dispositional order granting custody to DSS; remanding to enter new order granting father, the non-removal parent, custody absent findings he acted inconsistently with his parental rights); *In re Eckard*, 148 N.C. App. 541 (2002) (holding that the trial court erred when it refused to consider whether the biological father of the child, who had entered the case late, was a candidate for custody of the child after it ceased reunification efforts with the mother).

3. Parents have a constitutionally protected right to their child.

Parents have a constitutionally protected right to the custody, care and control of their child, absent a showing of unfitness to care for the child. *Troxel v. Granville*, 530 U.S. 57, 66 (2000). North Carolina has recognized that the protection of the family unit is guaranteed by the Ninth and Fourteenth Amendments to the United States Constitution. *Petersen v. Rogers*, 337 N.C. 397 (1994).

A trial court's determination that a parent's conduct is inconsistent with his or her constitutionally protected status must be supported by clear and convincing evidence. *Adams v. Tessener*, 354 N.C. 57, 63 (2001) (cited approvingly in *In re I.K.*, 377 N.C. 417 (2021)). "The clear and convincing standard requires evidence that should fully convince. This burden is more exacting than the preponderance of the evidence standard generally applied in civil cases, but less than the beyond a reasonable doubt standard applied in criminal matters." *Id.* at ¶ 19 (cleaned up).

4. The ICPC applies to foster care placements.

By its plain terms, the ICPC applies to foster care placements.

Regarding "foster care" and parents, a recent North Carolina Supreme Court opinion examining a termination of parent rights (TPR) appeal under N.C.G.S. § 7B-1111(a)(2) looked to the definition of "foster care" in N.C.G.S. § 131D-10.2(9) and stated, "the plain meaning of the term 'foster care' presumes that the child has been physically separated and is living apart from his or her parents." *In re K.H.*, 375 N.C. 610, 615 (2020) (reversing TPR; period of time juvenile and minor parent were placed together while in nonsecure custody cannot be included in determinative time period for the juvenile being placed in foster care as required by N.C.G.S. § 7B-1111(a)(2)).

5. **If the ICPC applies to parents, it is unconstitutional!**

When a ruling infringes upon a fundamental right, strict scrutiny applies. To pass strict scrutiny, the law or ruling must further a "compelling governmental interest," and must be narrowly tailored to achieve that interest. Mandating an approved ICPC home study for a non-removal parent does not further a compelling governmental interest (since a parent has a fundamental right to custody of their child) and it is not narrowly tailored even if the interest were protecting children. It is not narrowly tailored because it allows an uninvolved bureaucrat to make a decision that is within the province of the judge.

Requiring an approved ICPC home study prevents the placement of a child with their parent who is located out of state based on the whims of an agency in another state. This is regardless of a judge in this state finding by clear and convincing evidence that the parent is fit and has not acted in a manner that is inconsistent with their constitutionally protected status.

Aside from the fact that agencies do not comply with the timelines for completing ICPC home studies, home studies are often denied for ludicrous reasons:

- Parent is not a licensed foster home (Virginia, among others);
- Window openings are not the right size;
- Income is insufficient (even if they might qualify for benefits);
- Parent has a criminal history (including something very old, non-violent, or something which does not cause concern for our own judge);
- Parent's home size is not adequate (even if parent is willing to sleep on couch); and
- Someone doesn't fill out the form correctly.

Worse, there is no right to appeal a denial.

As an example, if you represent a non-removal parent who lives just across the border in Virginia and would like to have placement of their child with them, an ICPC home study would be denied unless the parent participates in (and completes) the 16-week foster parenting class. That would not be a requirement if the same parent lived in North Carolina. The disparate treatment between an in-state parent and an out-of-state parent is what makes the requirement unconstitutional.

What about the ICPC regulations?

In addition to state law, there are the twelve AAICPC regulations. These regulations are not codified in North Carolina, but DSS often cites to them to support their request for ICPC approval on an out-of-state parent.

There is a split in court decisions throughout the country about whether those ICPC regulations 1) exceed the scope of the statute because placement with a parent is not a placement in foster

care or a pre-adoptive placement (holding against the application of ICPC is that those placements don't apply to parents), and 2) violate the parent's constitutional rights to have care and custody of their child if they are fit.

The ICPC regulations exempt placement with a parent.

The current ICPC regulations, exempt the ICPC from a placement with a parent if all of the following apply:

- the parent is not the parent from whom the child was removed;
- the court has no evidence that the parent is unfit;
- the court does not seek any evidence from the receiving state regarding the parent's fitness; and
- the court relinquishes jurisdiction over the child immediately upon placement with the parent.

Regulation No. 2, #3 "Placements made without ICPC protection."

Action Steps:

If you know that your county is going to request that your client submit to an ICPC home study, take the lead by doing the following:

- Look at what home studies in your county look like.
- Have your client prepare their own home study tracking the ICPC form.
- Ask your client to obtain a printout of their criminal record (and lack thereof).
- Provide copies of your client's lease and photos of the home.
- Assist your client in providing a plan of care (where will child go to school, after-school care, medical and dental providers, etc.).
- Obtain a finding of fact from the trial court that your client is neither unfit nor has acted inconsistently with their constitutionally protected status.

Trial Court Script (closing argument):

- Applying the ICPC to a parent through the provisions of N.C.G.S. § 7B-3800 et seq. is unconstitutional because it disregards a parent's right to the care and custody of their child if they are fit and have not acted inconsistently with their constitutionally protected status.

- Requiring a parent to undergo an ICPC home study is unconstitutional because it treats an out-of-state parent differently than an in-state parent, in violation of **the 14th Amendment**. If a similarly positioned parent were found in-state, they would not be burdened with the bureaucracy of the ICPC home study process.

- The ICPC is unconstitutional because it removes the trial court's authority to make decisions about the best interests of the child; it tramples the non-removal parent's constitutionally protected right to the care and custody of their child when an agency in another state can deny placement based upon subjective criteria having nothing to do with the parent's fitness; it leaves the decision of what is in a child's best interest up to the mercy of a non-judicial administrator in another state; it treats an out-of-state parent differently than an in-state parent (our NC parents do not need to be licensed foster parents, for example, but Virginia requires it).

- The ICPC [pursuant to Article III, section (a)], plainly, clearly, and unambiguously applies only to "pre-adoptive" or "foster care placements" including "relatives"
  - But does NOT apply to **PARENTS** because **parents don't adopt their own kids** and **placements are by definition, outside of a parent's home.**
  - The ICPC is written to respect the integrity of the family.
  - The ICPC definition in Regulation 3 (and elsewhere) that says the ICPC applies to parents exceeds the scope of the statute and exceeds the scope of the Compact itself.

- Parents have a constitutionally protected right to the care and custody of their children.
  - Intervening and interfering with the parent's constitutionally protected right requires clear and convincing evidence (live testimony, the rules of evidence applying, the burden is on the petitioner to show, etc.) that:
    - ✓ the parent is unfit or
    - ✓ has acted inconsistent with his/her constitutionally protected status.
  - Given that the ICPC regulation 3 **DOES NOT** require this evidentiary burden, it is unconstitutional.

What to Do if You're Unsuccessful:

If at the end of the hearing the trial judge orders an ICPC home study, you can still preserve some issues on behalf of your client: by requesting the trial court to order the following:

- Check if your situation meets the criteria for an expedited home study under Regulation 7, and if so, ask the judge to enter an Order for Priority Placement.
- Ask the judge to order that DSS submit the complete ICPC packet within 7 days from the court's hearing.
- Prepare an ICPC Order that requires a hearing to expedite the home study if there is no decision within 30 days.
- Ask that DSS notify you within 5 days when they receive the results of the ICPC.
- If a denial is received, ask that DSS submit a reconsideration within 7 days of the notification by you that your client seeks a reconsideration.

Conclusion:

Your client, the out-of-state, non-removal parent, is entitled to custody of their child if they are fit and have not acted inconsistently with their constitutionally protected status. Object to the court requiring an ICPC home study before placing the children in their home and if ordered, protect your client's rights by preserving the issue for appeal!

Attorney Tools:

- AND/TPR Manual, p. 7-47 to 7-56.
- On the Civil Side: A/N/D, ICPC, and Out-of-State Parents: Say What?
- ICPC Motion for Non-Removal Parent