

The ICPC Applies to an Out-of-State Placement with a Relative in an A/N/D Case, But Is There More to Consider?

A child has been adjudicated by the district court as abused, neglected, and/or dependent. At the dispositional phase of the case, the trial court determines it is in the child's best interest to place that child with a relative. In fact, the court is required to give a relative priority when making an out-of-home placement. See [G.S. 7B-903\(a1\)](#). The relative, however, lives in another state. The placement must be made in accordance with the Interstate Compact on the Placement of Children (ICPC). *Id.* The Court of Appeals recently addressed whether the ICPC applied to an out-of-state relative placement in [In re J.D.M.-J.](#), ___ N.C. App. ___ (June 18, 2018).

The ICPC is both a uniform law that is adopted in all 50 states, the District of Columbia, and the U.S. Virgin Islands and a contractual agreement between the 52 jurisdictions. It was originally drafted in the 1950s by a group of social services administrators to govern the placement of children in foster care and/or pre-adoptive placements that cross state lines. See *In re Alexis O.*, 157 N.H. 781, 959 A.2d 176 (2008). The ICPC was enacted in North Carolina in 1971 and is codified at [G.S. 7B-3800 et seq.](#) It consists of 10 Articles. There are also regulations that are promulgated by the Association of Administrators of the ICPC (AAICPC), which consists of a designated officer from each of the 52 jurisdictions. G.S. 7B-3800, Article VII.

In re J.D.M.-J. After a petition alleging neglect was filed by DSS in June 2016, two children were adjudicated neglected by an order entered on August 11, 2016. After an August 2017 permanency planning hearing, the resulting order awarded custody of the children to their aunt and uncle who reside in Arizona. In that order, the court converted the action to a Chapter 50 custody action by terminating its jurisdiction in the neglect action and entering a Chapter 50 custody order pursuant to [G.S. 7B-911](#). On appeal, respondent mother argued that the trial court did not (1) make the necessary findings under G.S. 7B-911 to terminate the court's jurisdiction in the neglect action and (2) ensure compliance with the ICPC (other issues on appeal are not addressed in this post). The court of appeals vacated and remanded the order. Regarding the G.S. 7B-911 findings, it was undisputed that the findings were not included in the order, and on remand the trial court was instructed to determine whether further DSS involvement is needed and if not to make the required findings under G.S. 7B-911(c)(2). The court of appeals also agreed with the respondent mother that the provisions of the ICPC had not been satisfied. North Carolina, as the sending state, had not received written notice from the receiving state (Arizona) that the proposed placement does not appear to be contrary to the children's interests. See G.S. 7B-3800, Article III(d).

The Court of Appeals analysis focused on Article III(a) of G.S. 7B-3800, which states "no sending agency shall send, bring, or cause to be sent or brought to another party state any child for *placement in foster care or as a preliminary to a possible adoption* unless the sending agency shall comply with each and every requirement set forth in this Article...." (emphasis provided by court of appeals).

Both DSS and the GAL argued the placement was not a placement in foster care or a preliminary to a possible adoption and relied upon a previous published opinion, [In re J.E.](#), 182 N.C. App. 612 (2007). The court in *In re J.E.* held that the order awarding guardianship to the child's grandparents in Virginia was not a placement in foster care or preliminary to adoption such that compliance with the ICPC was not required. In *In re J.D.M.-J.*, the court of appeals rejected the DSS and GAL arguments after examining 2 other published opinions that addressed the application of the ICPC to out-of-state relative placements: [In re V.A.](#), 221 N.C. App. 637 (2012) and [In re L.L.](#), 172 N.C. App. 689 (2005). In *In re V.A.*, the court of appeals held that the ICPC applied to a child who was placed in the custody of an out-of-state relative. In so holding, it looked to both the AAICPC regulatory definitions of "foster care" and "family free" home (AAICPC Reg. 3(4)(26) & (24)) and the holding in *In re L.L.* "that the statutory preference for relative placements and compliance with the ICPC are not mutually exclusive." Sl. Op. at 8-9. In addressing conflicting holdings, the court of appeals follows the older line of cases. Because the 2012 holding of *In re V.A.* expressly relied upon the 2005 decision of *In re L.L.*, that line of cases is the older line of cases that the court is bound by, not the 2007 holding in *In re J.E.*

Applying the older line of cases to *In re J.D.M.-J.*, the court of appeals held that the children's placement with their aunt and uncle in Arizona must comply with the ICPC. It further stated that "the trial court was not authorized to award custody" of the children to their out-of-state relatives until Arizona sent written notice to North Carolina that the proposed placement did not appear to be contrary to the children's interests. Sl. Op. at 11. On remand, the trial court must confirm that DSS received the required notice from Arizona.

The Court of Appeals did not consider the types of placements involved or whether permanency was achieved in those cases it did examine. Instead, it appears that the court of appeals has created a bright line rule that any placement with an out-of-state relative requires compliance with the ICPC. The cases relied upon in *In re J.D.M.-J.* are distinguishable from one another, however. The orders appealed from differ in that one achieved permanency and the other 2 did not. That difference in the status of the permanency plan may explain what the court of appeals described as conflicting holdings.

In *In re J.E.*, the trial court ordered permanent guardianship of the children to out-of-state relatives pursuant to G.S. 7B-600. In determining whether the ICPC applied, the court of appeals cited [In re Rholetter](#), 162 N.C. App. 653 (2004) (decided before *In re L.L.*, and therefore, an older case), which interpreted the *statutory* definition of "placement" under the ICPC. See G.S. 7B-3800, Article II(d). The court held permanent guardianship was not a placement in foster care or preliminary to adoption.

In contrast, the trial court in *In re V.A.* ordered at disposition legal custody to DSS and placement with the out-of-state relative while also ordering concurrent permanent plans of reunification and adoption. The court of appeals held this placement falls under either category under the ICPC – foster care or a preliminary to adoption – and requires compliance with the ICPC. The order

appealed from in *In re L.L.* was a review order that involved a question of “who should have custody pending reunification efforts” (the foster parents or the out-of-state relatives) and did not involve the question of the child’s permanent placement. *In re L.L.*, 172 N.C. App. at 704.

Placement versus Achievement of a Permanent Plan. For ICPC purposes, it seems like there a difference between a placement when permanency has not been achieved and the county department (DSS) is required to provide reasonable efforts to achieve the concurrent permanent plans (see G.S. 7B-906.2(b)) and an order that achieves a permanent plan.

Foster care involves “substitute care for children placed away from their parents or guardians and for whom the state agency has placement care and responsibility.” AAICPC Reg. 3(4)(26); see 45 C.F.R. 1355.20(a). When permanent guardianship or legal and physical custody is awarded to a relative, the state agency no longer has placement care and responsibility.

The provisions of the ICPC require the sending agency retain jurisdiction over the child and continue to have financial responsibility for the support and maintenance of the child during the period of placement. G.S. 7B-3800, Article V. When a permanent plan of guardianship or custody has been achieved, DSS is not responsible for the support and maintenance of the child. DSS may even be relieved from providing services such it may be able to administratively “close” its case (note, it is still a party to the court action should a motion be filed in that action, see e.g. G.S. 7B-401.1(a); -905.1; -906.1(n)).

When custody has been awarded, the court may order the jurisdiction in the abuse, neglect, dependency action terminated and enter a G.S. Chapter 50 custody. G.S. 7B-911. In that circumstance, the remaining action is a private custody action, which does not involve foster care placements. In *In re J.D.M.-J.*, the order appealed from ordered permanent custody with a 7B-911 order. Had the G.S. 7B-911 order been affirmed, would the analysis of the application of the ICPC differed? Can it still differ moving forward? What do you think?