

# FINDING HARMONY OR SWIMMING IN THE VOID: THE UNAVOIDABLE CONFLICT BETWEEN THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN AND THE INDIAN CHILD WELFARE ACT

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## ABSTRACT

The Indian Child Welfare Act is a federal statute that applies to Indian children who are at the center of child welfare proceedings. While the Indian Child Welfare Act provides numerous protections to Indian children, parents, and tribes, many of these cases play out in state courts which are also required to apply their own requisite, relevant state laws. However, sometimes friction between the Indian Child Welfare Act and state-law provisions arise where state law provisions may seem in accord with the statute but actually contradict it, such as in the case of the Interstate Compact on the Placement of Children. This Article surveys the Interstate Compact on the Placement of Children's provisions and discusses the friction that exists between it and the Indian Child Welfare Act. Ultimately, this Article argues that because the Interstate Compact on the Placement of Children is a state administrative procedure that may alter that status of child welfare proceedings, the Indian Child Welfare Act should preempt the Compact where it is applicable.

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## I. INTRODUCTION

Imagine this scenario: you live in State A. You learn that through involuntary court proceedings, State B has removed your grandchildren from their parents with the intent to terminate parental rights. The children are eligible for enrollment in an Indian tribe. Because of their status, the Indian Child Welfare Act (“ICWA”)<sup>1</sup> applies to the children’s placement. In State B, and as ICWA outlines, the children’s tribe determines that it would be in the best interests of the children to place them in your care. Great! You look forward

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1. Indian Child Welfare Act of 1978, 25 U.S.C. §§ 1901–1963 (2012).

to taking your grandchildren, possibly adopting them, and helping them move forward and build a life in your care in State A.

However, there is just one problem: in nearly all cases, before the children can be moved from temporary foster care in State B to your care in State A, both states must complete an evaluation under the Interstate Compact on the Placement of Children (“ICPC”). In a home evaluation, the State B social worker assigned to visit you arbitrarily decides that your home would not be best-suited to the children. Based on the State B social worker’s evaluation, the ICPC has essentially invalidated the tribe’s placement preference. The children can no longer be placed in your care, even though the tribe, the court of concurrent jurisdiction, wants to place the children in your care. While the courts complied with the federal ICWA and gold standard placement preferences, a state compact—a cordial agreement that states have agreed to adopt into state law and administer through their agencies—has eliminated the chances of you receiving your grandchildren without much chance for review. Now the tribe will have no choice other than to place your grandchildren elsewhere for the purposes of adoption, further breaking up the family and eroding kinship ties. Even the federal law intended to keep your family together cannot save your family from destruction now.

The above scenario is more than just a hypothetical; it is the current state of child placement and adoption procedures when Indian children are placed across state lines. The application of the ICPC in ICWA cases occurs through an administrative procedure, tying a trial judge’s hands until the appropriate state administrative office conducts the ICPC evaluation and approves a placement. As applied to Indian children, there is certain, unavoidable conflict between the ICPC and ICWA because it is unclear whether the state administrative procedure that regulates the placement of children across state lines or the federal law that directs the placement of Indian children should prevail. Scenarios where the ICPC and ICWA both apply exist in a gray area. Although these two laws both purport to further the goals of child welfare, there is a conflict between the laws. The regulation of standards for the placement of a child is an area of law traditionally left to the states, leaving federal courts to generally abstain in these matters. But where Indian children are involved, Congress has exercised its trust responsibility to Indian tribes to promote tribal sovereignty by protecting children from excessive placements outside of their families and tribal communities.<sup>2</sup> Where a state follows ICWA placement preferences, or a tribe desires to place a child out of state,

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2. See *Ankenbrandt v. Richards*, 504 U.S. 689, 706 (1992) (discussing how the doctrine of abstention “might be relevant in a case involving elements of the domestic relationship even when the parties do not seek divorce, alimony, or child custody”); see also Indian Child Welfare Act, 25 U.S.C. §§ 1901–1963.

the receiving state may deny the placement. The denial of such a placement makes ICWA's mandate and tribal preferences moot.

Prioritizing the ICPC over ICWA makes several dangerous presumptions. First, it presumes to interfere with tribal sovereignty where a tribe is forced to comply with this state procedure to place one of its children. Second, it presumes that a tribal or state entity following ICWA's mandate has not adequately ensured a child's safety. Third, it presumes that a state agency has the authority to implement policies that interfere with a federal substantive law. Even though agencies generally have the power to interpret a law where it is ambiguous or implement policy to achieve their goals, ICWA is not ambiguous, nor does the ICPC help to achieve agency goals. State agencies should not have the power to implement policies that afford a state administrative procedure power to potentially override federal, or state, law. Thus, the ICPC unequivocally should not apply in ICWA cases. In fact, ICWA essentially already achieves what the ICPC does without the intermeddler state.

Therefore, this Article argues the ICPC does not and should not apply where its application renders ICWA and its principles null—further disadvantaging Indian children and injuring Indian families. First, this Article begins with a survey of the most recent ICPC guidelines. Second, this Article moves into a survey of the individual states that have enacted the ICPC, focusing on the variations in applicable provisions and case law that impact, intersect, and conflict with ICWA. Third, this Article considers how the ICPC and ICWA work together through tribal-state compacts, state administrative procedure, and case law. And finally, this Article discusses the legal implications of the conflict between the ICPC and ICWA before concluding.

## II. UNDERSTANDING THE INDIAN CHILD WELFARE ACT OF 1978

Enacted by Congress in 1978, ICWA is a federal substantive and procedural law that governs the removal and placement of Indian children in both voluntary and involuntary proceedings.<sup>3</sup> Historically, ICWA was a remedy for the genocidal effect that decades of federally-sanctioned removal programs caused in removing Indian children from their families and communities.<sup>4</sup> Prior to 1978, federal and state programs often called for the removal

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3. See Indian Child Welfare Act, 25 U.S.C. §§ 1901–1963.

4. See *id.* § 1902 (“The Congress hereby declares that it is the policy of this Nation to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum Federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the

of Indian children in deadly assimilationist projects aimed to solve the “Indian problem.”<sup>5</sup> Oftentimes, children were removed to religious orphanages or boarding schools, where leaders brutalized them in attempts to remove their indigeneity.<sup>6</sup> Because government officials often removed Indian children from their homes during their formative years, Indian children in boarding schools often did not receive education in their culture and native languages, leading to a gap in cultural knowledge and near cultural genocide for many tribes in the United States.<sup>7</sup> Moreover, the boarding school atmosphere—lacking in the attention and affection young children require—also lent itself to harsh physical and sexual abuse.<sup>8</sup>

To remedy the violent cultural devastation the removal of Indian children from their homes caused, Congress enacted ICWA to give tribes more power over child placement outcomes.<sup>9</sup> In its findings prior to enacting ICWA, the Senate found that the separation of Indian children from their families created a “socially and culturally” undesirable situation in which Indian children faced the loss of identity.<sup>10</sup> The Senate recognized that the special trust relationship that the United States government held with Indian tribes required a remedy for this problem.<sup>11</sup> Therefore, Congress implemented ICWA, intending it to create fairer procedures for Indian children and families that acknowledged their specific cultural needs.

Today, ICWA governs cases involving both the voluntary placement away from and the involuntary removal of Indian children from their families, and often times, their tribal communities. ICWA applies to child custody matters in four scenarios: (1) foster care placement, (2) termination of

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unique values of Indian culture, and by providing for assistance to Indian tribes in the operation of child and family service programs.”).

5. MARGARET D. JACOBS, *A GENERATION REMOVED: THE FOSTERING AND ADOPTION OF INDIGENOUS CHILDREN IN THE POSTWAR WORLD* 5 (2014).

6. *Id.* at 13; *see also* Corp. of the President of the Church of Jesus Christ of Latter-Day Saints v. RJ, 221 F. Supp. 3d 1317, 1319–20 (D. Utah 2016) (declining to declare the Navajo Nation had a lack of jurisdiction to hear a case filed by a former child participant in the Mormon Indian Placement Program, citing physical and sexual abuse in the program where Indian children were placed in Mormon homes).

7. JACOBS, *supra* note 5, at 13.

8. *Id.*

9. *See supra* note 4.

10. S. REP. NO. 95-597, at 1–2 (1977).

11. *Id.*; *see also* H.R. REP. NO. 95-1386, at 2 (1978), *as reprinted in* 1978 U.S.C.C.A.N. 7530 (“[I]t is the policy of this Nation, in fulfillment of its special responsibility and legal obligations to the American Indian people, to protect the best interests of Indian children and to promote the stability and security of Indian tribes and families by the establishment of minimum federal standards for the removal of Indian children from their families and the placement of such children in foster or adoptive homes which will reflect the unique values of Indian culture . . .”).

parental rights, (3) pre-adoptive placement, and (4) adoptive placement.<sup>12</sup> ICWA applies where a child is enrolled in an Indian tribe *or* the child's parent is an enrolled member and the child is eligible for enrollment.<sup>13</sup> ICWA sets forth procedural requirements that states must, at a minimum, follow in either voluntary or involuntary child custody proceedings.<sup>14</sup> Under ICWA, a voluntary proceeding is a proceeding where a parent "voluntarily consents to a foster care placement or to termination of parental rights."<sup>15</sup> However, involuntary proceedings are generally court proceedings where a state has commenced proceedings against parents to remove a child in a variety of instances, including, but not limited to, child abuse.<sup>16</sup> In any case, ICWA continues to require state courts to meet certain procedural and substantive requirements in placing Indian children.

#### A. ICWA'S PROCEDURAL REQUIREMENTS

Moreover, ICWA contains procedural provisions that vest tribes with exclusive jurisdiction in child placement matters, absent good cause to the contrary.<sup>17</sup> That is, ICWA vests original jurisdiction in child placement matters when Indian children are involved in tribal courts—unless the parent objects or there is good cause to leave the matter to state court adjudication.<sup>18</sup> Because many Native Americans live outside the boundaries of Indian Country, state courts are often involved in child placement decisions from the start, prompting an evaluation of whether ICWA requires tribal involvement and/or transfer to tribal court. In either voluntary or involuntary proceedings, state courts are required to submit notice to a child's presumed tribe.<sup>19</sup> Additionally, tribes maintain the right to intervene in these matters.<sup>20</sup>

In addition to ICWA's jurisdictional requirements and its affirmation that tribes have the right to intervene in child placement matters affecting their children, ICWA also outlines a process, including evidentiary standards, which courts must follow in the placement of Indian children. For example,

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12. 25 U.S.C. § 1903(1) (2012).

13. *Id.* § 1903(4).

14. *See id.* §§ 1912 (discussing involuntary proceedings), 1913 (discussing voluntary proceedings).

15. *Id.* § 1913(a).

16. *See id.* § 1912(a), (f). *But see* *Adoptive Couple v. Baby Girl*, 570 U.S. 637, 650 (2013) (defining involuntary proceedings more narrowly to include only removal of Indian children from their already established families).

17. 25 U.S.C. § 1911(a)–(b).

18. *Id.*

19. *Id.* § 1912(a).

20. *Id.* § 1911(c).

prior to terminating a parent's rights, the state agency must provide remedial services, or preventative measures, to parents.<sup>21</sup> Additionally, a court may not terminate a parent's right without first hearing testimony from a qualified expert witness and making a finding *beyond a reasonable doubt* that the parent's continued custody of the child will result in "serious emotional or physical damage to the child."<sup>22</sup> Similarly, where a child is to be placed into foster care, a state court must make similar findings, including testimony from a qualified expert witness, supported by *clear and convincing evidence*.<sup>23</sup> Where a higher evidentiary standard is applicable under federal or state law, ICWA requires that the court use the higher evidentiary standard to provide the greatest protections to parental rights.<sup>24</sup> Procedurally, ICWA's evidentiary standards are important because they tend to provide greater protections to parents of Indian children than traditional state legal standards.<sup>25</sup>

## B. ICWA'S SUBSTANTIVE REQUIREMENTS

Where a child is removed from his or her parent's care, ICWA provides a placement-preference order that courts must adhere to. A child who is placed in foster care, or in a pre-adoptive placement, must be placed considering the following order of preferences: (1) an extended family member; (2) a foster home approved by the child's tribe; (3) an Indian foster home; or (4) an institution for children approved by an Indian tribe with programs suitable to meet the Indian child's needs.<sup>26</sup> For a child who is placed for adoption, preference is given in the following order: (1) an extended family member; (2) other members of the child's tribe; or (3) other Indian families.<sup>27</sup> While the placement preferences can vary depending upon a child's status, ICWA definitively states that these are the placement preferences a court must follow "in the absence of good cause to the contrary."<sup>28</sup> Thus, ICWA's placement preferences are a mandate that state courts generally must follow.<sup>29</sup>

While all states are required to follow the basic requirements of ICWA, states such as Michigan and Minnesota have codified ICWA into their own

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21. *Id.* § 1912(f).

22. *Id.*

23. 25 U.S.C. § 1912(e).

24. *Id.* § 1921.

25. *See In re K.S.D.*, 2017 ND 289, ¶ 24, 904 N.W.2d 479 ("ICWA does not alter the requirements for state law proceedings, but instead requires an additional finding with a higher burden of proof in cases involving termination of parental rights to Indian children.").

26. 25 U.S.C. § 1915(b).

27. *Id.* § 1915(a).

28. *Id.* § 1915(a)–(b).

29. *See Gila River Indian Cmty. v. Dep't of Child Safety*, 395 P.3d 286, 290 (Ariz. 2017).

state law.<sup>30</sup> Although these states have codified ICWA into state law and will look toward state statutes first, these states generally use federal statutes to fill any gaps that the state statutes may not address.<sup>31</sup> Thus, in cases where the ICPC also applies, ICWA's provisions on child placement preferences are crucial, and sometimes, in conflict.

### III. UNDERSTANDING THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN

The ICPC sets out administrative procedural requirements for the transfer of children at the center of child custody matters and adoptions across state lines. The compact requires states to retain responsibility for minors who are to be or have been placed outside of their home, or sending, state.<sup>32</sup> First drafted in the late 1950s by a group of social service administrators, the Interstate Compact on the Placement of Children is a binding agreement among states to address child safety and jurisdictional concerns over placement monitoring when placing a child across state lines.<sup>33</sup> Though the ICPC is similar to a uniform law, Congress has neither approved nor enacted the ICPC because the compact, made among states over a matter of state law, does not require congressional action.<sup>34</sup>

Typically, the ICPC is a mechanism that allows state administrative agencies to share information with each other to direct the placement of children across state lines.<sup>35</sup> The ICPC centers on the state agency action of removing and placing children.<sup>36</sup> Additionally, the ICPC vests the power to investigate and accept and/or decline a proposed placement in state

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30. MICH. COMP. LAWS § 712B (2018); MINN. STAT. §§ 260.751–260.835 (2018).

31. *See generally In re K.M.N.*, 309 Mich.App. 274, 293, 870 N.W.2d 75 (Mich. 2015) (comparing Michigan's state ICWA statute with the federal statute to determine that a state ICWA law further promoted ICWA's goals to protect an Indian child's culture and its purpose was consistent with ICWA and ICWA's lesser protections did not preempt the state statute); *see also In re S.P.K.*, 911 N.W.2d 821, 829–30 (Minn. 2018) (comparing Minnesota's state ICWA law with the federal statute to determine the constitutionality of the state statute's termination of parental rights provisions).

32. *See* AM. PUB. HUMAN SERVS. ASS'N, GUIDE TO THE INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN 10 (2002) [hereinafter *Guide to the ICPC*], <http://guardianadlitem.org/wp-content/uploads/2014/12/ICPC-2002-Guidebook-with-financial-legal-highlights.pdf> (reprinting the 2002 version of the ICPC as drafted, prior to state adoption or enactment).

33. *Id.* at 3; Bernadette W. Hartfield, *The Role of the Interstate Compact on the Placement of Children in Interstate Adoption*, 68 NEB. L. REV. 292, 294–95 (1989).

34. *Cf. Guide to the ICPC*, *supra* note 32, at 3.

35. Vivek S. Sankaran, *Out of State and Out of Luck: The Treatment of Non-Custodial Parents Under the Interstate Compact on the Placement of Children*, 25 YALE L. & POL'Y REV. 63, 69 (2006).

36. *See id.* at 68–69.

agencies.<sup>37</sup> As states have individually adopted and enacted the ICPC, the compact has allowed administrative agencies to direct the placement of children across state lines outside of an adjudicative process.<sup>38</sup> Although each state has adopted the ICPC in its entirety, some states have further expanded the ICPC's terms and the powers that administrative agencies have in determining whether a child's placement is appropriate.<sup>39</sup> Therefore, as an administrative procedure, the ICPC is an extrajudicial process.

In directing the placement of children across state lines, the ICPC requires that the sending agency send the receiving state a written notice.<sup>40</sup> The sending agency is the state, officer of the state, or state agency that wishes to send a child to another state, and the receiving state is the state where the child is to be sent.<sup>41</sup> The written notice must contain: (1) the name of the child, his/her place of birth, and the date of birth; (2) the identity and address of the child's parent or legal guardian; (3) the name and address of the person or agency with whom the sending state wishes to place the child; and (4) the reasons why the sending state wishes to make the placement and evidence supporting the placement.<sup>42</sup> Additionally, the receiving state is entitled to request and receive any further information necessary for the placement.<sup>43</sup> Once a receiving state has reviewed all this information and has determined that the proposed placement is in the child's best interests, the sending state may then place the child.<sup>44</sup> To ensure states meet these requirements, the ICPC requires that each state have an officer who facilitates the placement of children across state lines under its guidelines.<sup>45</sup>

In all cases, the receiving state must agree to the placement of the child in its state.<sup>46</sup> Thus, the ICPC allows receiving states to reject the placement of a child in its state based on its own analysis of the child's best interest, regardless of the sending state's findings. Depending upon state law, the

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37. *Id.* at 69.

38. *See id.*

39. *See, e.g.*, MICH. COMP. LAWS § 3.711 (2018); N.M. STAT. ANN. § 32A-10-9 (2018); OHIO REV. CODE ANN. § 5103.20 (2018); VA. CODE ANN. § 63.2-1000 (2018); WASH. REV. CODE § 26.34.010 (2018).

40. *Guide to the ICPC*, *supra* note 32, at 11.

41. *Id.* at 10. Here, "sending agency" and "sending state" are used interchangeably.

42. *Id.*

43. *Id.* at 11.

44. *Id.*

45. *Id.* at 12.

46. *See Guide to the ICPC*, *supra* note 32, at 11 ("The child shall not be sent . . . into the receiving state until the appropriate public authorities in the receiving state shall notify the sending agency, in writing, to the effect that the proposed placement does not appear to be contrary to the interests of the child.").

ICPC may apply in child welfare cases, custody cases, foster care placements, and adoptive placements.<sup>47</sup> Generally, each type of case is subject to its own rules and procedures to protect a parent's rights. However, the ICPC is broader than the rules and procedures that already govern these proceedings.

#### A. SURVEY OF STATE ICPC STATUTES<sup>48</sup>

Under Article III(a) of the ICPC, the compact applies only to foster care placements and placements for the purpose of adoption.<sup>49</sup> Some states, such as California and North Carolina, have vehemently ascribed to the principle that the ICPC applies only where the out-of-state placement is for foster care or is preliminary to adoption. However, many states have adopted nonbinding, administrative ICPC guidelines that call for its application even where the placement is with a biological parent living out of state.<sup>50</sup>

The ICPC does not include language on whether it applies to placements with a child's biological parent who lives across state lines, and many states do not apply the ICPC to these placements. California has declined to apply the notice provisions of the ICPC to a child's placement with his biological parent in another state.<sup>51</sup> In Kentucky, the ICPC does not apply to a child's placement across state lines when that placement is with a noncustodial parent, where the sending state: (1) establishes the noncustodial parent has a substantial relationship with the parent; (2) makes a finding, in writing, that the placement is in the child's best interest; and (3) agrees to dismiss its jurisdiction over the case.<sup>52</sup>

Other states tightly regulate placement of children across state lines and apply the ICPC even where the placement is with a noncustodial parent. Although Arizona's ICPC contains a provision defining placement as a "family free" home,<sup>53</sup> Arizona courts have construed the ICPC to apply even where a placement is with a noncustodial parent because it is in a dependent child's best interests to ensure his or her placement in the receiving state is safe.<sup>54</sup> In

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47. *Id.* at 4.

48. *See id.* As previously noted, some states maintain an ICPC code that is very basic, reflecting the original iteration of the document, while other states have expanded their ICPC. Thus, the states surveyed in this section are states that vary from the ICPC's language on the placement of children in their receiving state.

49. *Id.* at 10.

50. *See Sankaran, supra* note 35, at 73.

51. *See In re C.B.*, 116 Cal. Rptr. 3d 294, 302 (Cal. Ct. App. 2010) ("[A]n out-of-state placement with a parent is *never* subject to the ICPC.") (emphasis in original).

52. KY. REV. STAT. ANN. § 615.030 art. III(e) (West 2018) (effective June 25, 2013).

53. ARIZ. REV. STAT. ANN. § 8-548 art. II(d) (2018).

54. *See Ariz. Dep't of Econ. Sec. v. Leonardo*, 22 P.3d 513, 522 (Ariz. Ct. App. 2001) ("It is in the best interests of a child who is the subject of a dependency proceeding and in the custody of

Massachusetts, the code draws seemingly nonsensical distinctions for when the ICPC applies to a child's placement with a noncustodial parent. For example, where a parent in custody proceedings agrees to a child's placement or the court places the child with her out-of-state, noncustodial parent, Massachusetts does not apply the ICPC.<sup>55</sup> Conversely, Massachusetts does apply the ICPC where a family court alters or amends a child's placement in a previously adjudicated family law proceeding and places the child with the out-of-state, noncustodial parent.<sup>56</sup> Where the nature of the proceeding changes, so does the ICPC's applicability.

As Massachusetts demonstrates, states that apply the ICPC to a child's placement with a noncustodial parent who lives out of state create barriers to a parent's exercise of the right to the care, custody, and control of his or her child – violating a biological parent's due process rights.<sup>57</sup> For example, the state does not usually become involved in a child custody dispute between two parents unless there are allegations that one or both parents are unfit. States that apply the ICPC to placements of children with their biological parents essentially make an automatic presumption of the receiving parent's unfitness, circumventing the usual requirement of actual allegations of the parent's unfitness.<sup>58</sup> Applying the ICPC to a placement with an out-of-state, biological parent is therefore fundamentally unfair and violates the right to

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protective services to require an investigation by a receiving state on the suitability of a parent who does not have full custodial rights before placing the child with that parent.”). *But see In re C.B.*, 116 Cal. Rptr. 3d at 296 (“We find the decisions in California and elsewhere holding that the ICPC does not apply to be far better reasoned than those holding that it does. . . . We are publishing this opinion, however, to point out that the resulting lack of uniformity is dysfunctional, that courts and rule makers have not been able to fix it, and hence that it may call for a multistate legislative response.”).

55. *See* 110 MASS. CODE REGS. 7.507(1), (3) (2018).

56. *Id.* 7.507(2).

57. *See Troxel v. Granville*, 530 U.S. 57, 72 (2000); *see also* Josh Gupta-Kagan, *In re Sanders and the Resurrection of Stanley v. Illinois*, 5 CAL. L. REV. CIR. 383, 388 (2014) (discussing how the ICPC interferes with a parent's fundamental right to parent); Sankaran, *supra* note 35, at 68–69 (arguing that where states apply the ICPC to placements with biological parents, the ICPC limits a biological parent's fundamental right to parent because purely administrative procedures may bar placement with a biological parent on the ICPC's requisite considerations, which the home state is otherwise not compelled to consider in making a determination on placement).

58. *See Adoption of Warren*, 693 N.E.2d 1021, 1025 (Mass. App. Ct. 1998) (applying the ICPC to a child's placement with out-of-state, noncustodial parent after child became a dependent child). *But see In re Sanders*, 852 N.W.2d 524, 537–38 (Mich. 2014) (holding that a state must adjudicate a parent's unfitness before interfering with his or her rights, and that adjudicating one parent to be unfit is not sufficient to declare the other unfit). *See generally* Sankaran, *supra* note 35 (arguing that state intervention under the ICPC in child placements with biological parents disregards a parent's fundamental right to parent simply because he or she lives across state lines, even where there is no allegation of abuse).

parent, especially when there is no hearing on the matter and the evaluation is not fully adjudicated.<sup>59</sup>

Under Article VIII(a) of the ICPC, where a parent has decided to place a child out of state with other family members, the ICPC does not apply.<sup>60</sup> Some states, such as Ohio and Kentucky, have adopted this principle and do not apply the ICPC where a biological parent has voluntarily determined to place the child in an out-of-state home.<sup>61</sup> In Kentucky, the sending state may request a determination of whether a placement with a family member qualifies as a placement under the ICPC.<sup>62</sup> Massachusetts, on the other hand, applies the ICPC even to a parent's voluntary placement of a child with out-of-state family members.<sup>63</sup> And where a placement is with family, other states such as California and North Carolina do not apply the ICPC unless the out-of-state placement is for foster care or is preliminary to adoption.<sup>64</sup>

Ultimately, the receiving state has the final word on a child's placement from a sending state.<sup>65</sup> As a matter of policy, involving the receiving state is meant to ensure that the placement is in the child's best interest and that a child is safe in his or her placement, especially since the sending state remains responsible for funding a child's placement.<sup>66</sup> If a receiving state does not believe a placement is in the child's best interests and denies a placement, some states allow for a remedy. For example, Kentucky law allows sending states, or any interested party, to seek an administrative review of the decision.<sup>67</sup>

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59. See *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (“[P]arents are constitutionally entitled to a *hearing* on their fitness before their children are removed from their custody.”) (emphasis added).

60. *Guide to the ICPC*, *supra* note 32, at 12.

61. See KY. REV. STAT. ANN. § 615.030 art. VIII(a) (West 2018) (effective July 12, 2012) (“The sending or bringing of a child into a receiving state by his parent, stepparent, grandparent, adult brother or sister, adult uncle or aunt, or his guardian and leaving the child with any such relative or non-agency guardian in the receiving state.”); see also OHIO REV. CODE ANN. § 5103.20 art. III(B)(4) (West 2018) (“The provisions of this compact shall not apply to . . . [t]he placement of a child with a non-custodial parent provided that: (a) The non-custodial parent proves to the satisfaction of a court in the sending state a substantial relationship with the child; and (b) The court in the sending state makes a written finding that placement with the non-custodial parent is in the best interests of the child; and (c) The court in the sending state dismisses its jurisdiction over the child's case.”).

62. KY. REV. STAT. ANN. § 615.030 art. V(6) (West 2018) (effective June 25, 2013).

63. 110 MASS. CODE REGS. 7.507(3) (2018).

64. See *In re C.B.*, 116 Cal. Rptr. 3d 294, 301 (Cal. Ct. App. 2010) (stating that California courts recognize the application of the ICPC where the placement is a substitute for parental care).

65. *Guide to the ICPC*, *supra* note 32, at 10.

66. See *Ariz. Dep't of Econ. Sec. v. Leonardo*, 22 P.3d 513, 520 (Ariz. Ct. App. 2001) (“The ICPC best safeguards a child's welfare by requiring the receiving state to investigate and monitor the placement.”).

67. KY. REV. STAT. ANN. § 615.030 art. VI(3).

Some states even include provisions in their ICPC that apply specifically to Indian children. Kentucky, for instance, allows the sending state to terminate its jurisdiction under a variety of circumstances, including where an Indian tribe has petitioned for and received jurisdiction over a custody matter involving an Indian child.<sup>68</sup> However, in Washington, where the state code is silent on how the ICPC and ICWA work together, administrative procedures have closed the gap.<sup>69</sup> Washington's Child Administration has interpreted the ICPC to apply where an Indian child is involved.<sup>70</sup> When the Children's Administration sends an Indian child out of state, or a tribe with jurisdiction over the matter requests an ICPC investigation, ICPC placement procedures must be followed.<sup>71</sup> Thus, if the state has retained jurisdiction over an Indian child's placement for any reason, the ICPC must be followed prior to placing the child with anyone out of state, including biological parents, relatives, foster homes, adoptive homes, or residential facilities.

Unsurprisingly, the ICPC placement evaluation can take a considerable amount of time to complete. The ICPC regulations, which states are not required to adopt, provide guidance on the amount of time appropriate for processing routine referrals, home studies, and priority placements.<sup>72</sup> Generally, the ICPC calls for state administrative offices to process referrals within three working days.<sup>73</sup> Under Regulation No. 2, for the placement of a child for foster care or adoptive placement, an interstate home study should be completed within sixty days of the home study request.<sup>74</sup> Regulation No. 2 does permit the receiving state to request more time to complete the home study when a scenario like unmet licensing requirements for foster parents must be met for the home study.<sup>75</sup> Though Regulation No. 2 is not binding on states that have not adopted the regulations, the Social Security Act also requires completed home studies for interstate placements within sixty days—and this

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68. KY. REV. STAT. ANN. § 615.030 art. IV(4)(f).

69. Compare WASH. REV. CODE § 26.34.010 (2018) (lacking guidance on how to apply the ICPC to Indian children), with WASH. STATE DEP'T OF SOC. & HEALTH SERVS., PRACTICES AND PROCEDURES GUIDE: INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN PLACED OUT-OF-STATE 5601(1)(a)(i)(B) (2014) ("Sending an Indian child out-of-state if Children's Administration (CA) has jurisdiction *or* the Tribe has jurisdiction and would like to request an ICPC. The Tribe must agree to follow the content of the ICPC and the receiving state/Tribe agrees to complete the ICPC process as a courtesy.").

70. WASH. STATE DEP'T OF SOC. & HEALTH SERVS., *supra* note 69, at 5601(1)(a)(i)(A) (2014).

71. *Id.*

72. See INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN REGULATIONS §§ 4(7)(b), 2(7)(a), 2(8)(a) (AM. PUB. HUMAN SERVS. ASS'N 2012).

73. *Id.* § 4(7)(b).

74. *Id.* § 2(7)(a).

75. See *id.* § 2(7)(b).

requirement is tied to federal funding.<sup>76</sup> However, this sixty-day timeframe is not for the placement approval or denial. Regulation No. 2 provides 180 days for the receiving state to approve or deny the interstate placement.<sup>77</sup>

For placements with family members, the ICPC's Regulation No. 7 provides for an expedited placement process.<sup>78</sup> In order for Regulation No. 7 to apply, child welfare proceedings must result in: the child becoming a ward of the court, the child no longer being in the home the court removed the child from, and the court-ordered placement being an interstate placement with a family member.<sup>79</sup> Additionally, the child must be either (1) in an unexpected dependency due to incarceration or incapacitation; (2) four years old or younger; (3) placed with a sibling who has a substantial relationship with the placement; or (4) currently in an emergency placement.<sup>80</sup> Regulation No. 7 also allows the sending state to request a provisional placement.<sup>81</sup> If the receiving state issues a provisional approval, the child may be placed immediately.<sup>82</sup> If the receiving state issues a provisional denial, the receiving state will conduct a more extensive home study.<sup>83</sup> Within twenty business days of the referral, the receiving state must issue the provisional approval or denial.<sup>84</sup>

## B. JURISDICTION UNDER THE ICPC

Article V of the ICPC is the compact's jurisdictional provision. Article V states:

The sending agency shall *retain jurisdiction* over the child sufficient to determine all matters in relation to the custody, supervision, care, and disposition of the child which it would have had if the child had remained in the sending agency's state, until the child is adopted, reaches majority, becomes self-supporting or is discharged with the concurrence of the appropriate authority in the receiving state. Such jurisdiction shall also include the power to effect or cause the return of the child or its transfer to another location and custody pursuant to law. The sending agency shall continue to have financial

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76. See Social Security Act § 471(a)(26)(A)(i), 42 U.S.C. § 671(a)(26)(A)(i) (2012).

77. See ICPC REGULATIONS § 2(8)(a).

78. *Id.* § 7(3) (declining to apply this regulation to foster care or adoptive placements).

79. *Id.* § 7(5).

80. *Id.*

81. *Id.* § 7(6).

82. *Id.* § 7(6)(d), (e).

83. ICPC REGULATIONS § 7(6)(f).

84. *Id.* § 7(9)(e).

responsibility for support and maintenance of the child during the period of the placement . . . .<sup>85</sup>

Therefore, the ICPC allows sending states to retain jurisdiction over and financial responsibility for a child's placement, regardless of the nature of the proceedings.<sup>86</sup> Because the ICPC is an administrative mechanism that only allows a sending state to retain jurisdiction over and responsibility for the placement of a child in the receiving state, a state court may not confer jurisdiction through the ICPC.<sup>87</sup> However, the ICPC does allow the sending state to extend its jurisdictional reach into another state through the retention of jurisdiction over a child's placement.<sup>88</sup> The ICPC allows sending states to retain jurisdiction until a child is adopted, reaches the age of majority, becomes self-supporting, or is discharged.<sup>89</sup> Where a jurisdictional conflict arises after the child's placement, the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA") applies, not the ICPC.<sup>90</sup>

#### IV. THE COLLABORATION AND CONFLICT OF THE ICPC AND ICWA

##### A. PLACEMENT-PREFERENCE CONFLICTS

In this context, placement preferences refer to where a child should be placed if his or her parent is no longer fit, the parent is no longer able to take care of the child, or the child is placed for adoption. The capability of the foster care system in a state making a decision as to a child's placement depends on many factors, including availability of licensed homes and funding. The American foster care system is notoriously lacking in its ability to care for the children in its care, including funding for placements, providing oversight for placements, and ensuring that placements are safe and appropriate.<sup>91</sup>

Title IV-E of the Social Security Act provides for the federal government to match the funds that states expend for foster care and adoption

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85. *Guide to the ICPC*, *supra* note 32, at 11–12 (emphasis added).

86. *See id.*

87. *Id.*

88. Hartfield, *supra* note 33, at 296.

89. *Guide to the ICPC*, *supra* note 32, at 11.

90. *See In re Adoption of Asente*, 734 N.E.2d 1224, 1231–32 (Ohio 2000) (holding that jurisdiction must be conferred in accordance with the UCCJEA's predecessor, not the ICPC, because the ICPC does not provide for jurisdiction in adoption matters).

91. *See Anarida Delaj et al., Adoption and Foster Care*, 19 GEO. J. GENDER & L. 157, 187–88 (2018) (discussing the current problems with the foster care system, including disproportionate removal of poor and minority children, shortage of foster homes, and problems facing children with disabilities); *see also Guide to the ICPC*, *supra* note 32 (noting lack of oversight as a reason the ICPC is necessary).

placements.<sup>92</sup> Title IV-E ensures that foster families receive individual payments for children in their care.<sup>93</sup> Additionally, Title IV-E payments apply to kinship care, or placements with family members, when they become permanent.<sup>94</sup> To receive Title IV-E matching funds, states agreed to enter into interstate compacts, like the ICPC, to promote uniformity in interstate placements.<sup>95</sup>

In addition to requiring interstate compacts, Title IV-E funds are tied to stipulations that states must meet, such as ensuring involuntary placements are in the best interest of the child.<sup>96</sup> Title IV-E also requires state agencies receiving funds to demonstrate that they are making reasonable efforts to keep a family unified, creating and finalizing permanency plans at the appropriate stage of a placement, conducting in-home placement visits for no longer than six months, conducting reviews and permanency hearings, and creating appropriate licensing standards.<sup>97</sup> To demonstrate they meet these requirements, states must submit a plan to the Secretary of the U.S. Department of Health and Human Services for approval.<sup>98</sup> Indian tribes are also eligible and must generally meet the same requirements as states to receive Title IV-E funding to place children in foster care, adoptive care, and kinship care placements.<sup>99</sup>

Even though the ICPC is a state mechanism, Title IV-E requirements link joining the ICPC to federal funding for foster care and adoption placements. Perhaps one of the most important aspects of a placement decision remains the funding and determining who will provide the funding for a child placement. Under the ICPC, the sending state retains financial responsibility for the placement for its duration.<sup>100</sup> If for some reason the sending state loses or relinquishes its jurisdiction to the receiving state, then the receiving state assumes jurisdiction—and financial responsibility for the child.<sup>101</sup> In tribal

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92. 42 U.S.C. §§ 670–679 (2012) (providing for funding for foster care programs).

93. *Id.* § 672(a); *see also* D.O. v. Glisson, 847 F.3d 374, 380 (6th Cir. 2017) (holding that § 672(a) provides an individually enforceable right to foster care maintenance funds).

94. *Glisson*, 847 F.3d at 384 (“But kinship guardianship assistance applies only when the relative becomes the child’s permanent guardian, not while the child is in temporary status.”).

95. 42 U.S.C. § 673a.

96. *See id.* § 672(e) (requiring a best interest of the child analysis in any case where a child’s placement lasts longer than 180 days).

97. 45 C.F.R. § 1356.21(b) (2018).

98. 45 C.F.R. § 1356.20(a) (2018).

99. *See* 42 U.S.C. § 679c(b).

100. *See Guide to the ICPC*, *supra* note 32, at 10.

101. *Id.*

ICWA placements, Title IV-E funds follow a child in foster care placement.<sup>102</sup>

Though the ICPC and ICWA have a similar funding source, most state laws are silent as to whether the ICPC provisions apply to ICWA placement preferences. Thus, the application of the ICPC in ICWA cases becomes a matter of state administrative procedure. Generally, administrative law allows an executive branch agency to fill gaps—within reason—where they exist in substantive law to further the goal of applying the law through rule-making, which includes implementing interpretative policies and procedures.<sup>103</sup> With regards to ICWA, these interpretive measures and policies come through regulations and guidelines that the Bureau of Indian Affairs (“BIA”) promulgates.<sup>104</sup> In addition to the BIA’s regulations and guidelines, ICWA also encourages states to produce interpretative policies and procedures through the use of tribal-state compacts.<sup>105</sup>

At its core, the ICPC aims to ensure children are placed in safe out-of-state homes that are in their best interests, but its application in ICWA cases assumes that ICWA and tribal placement preferences have not taken into account the Indian child’s best interests and safety. Perhaps one of the most important aspects of ICWA is the placement preferences it provides to state courts. State courts must notify a child’s tribe when he or she is involved in dependency or adoption proceedings, and generally, the child’s tribe must approve of the proposed placement for the child.<sup>106</sup> In descending order of preference, ICWA requires state agencies to place the child (1) with family members, including extended and/or non-Native blood relatives; (2) with a tribe-approved placement; or (3) in another placement.<sup>107</sup> Therefore, ICWA

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102. *See In re S.B.C.*, 2014 MT 345, n.2, 377 Mont. 400, n.2, 340 P.3d 534, n.2 (citing 42 U.S.C. §§ 671–679(b)) (“Title IV–E is an entitlement program authorized under the Social Security Act that provides federal funding to assist states and Indian Tribes in providing foster care, adoption assistance, and kinship caregiver payments for children who meet the program’s eligibility criteria.”); *see also In re Hanna*, 2010 MT 38, ¶ 19, 355 Mont. 236, ¶ 19, 227 P.3d 596, ¶ 19 (holding that a tribal-state memorandum of agreement permitting the use of Title IV-E funds for tribal placements valid).

103. *See* Administrative Procedure Act, 5 U.S.C. § 553 (2012) (describing the notice requirements and rulemaking process under the federal Administrative Procedure Act). Additionally, most states have similar provisions that allow state administrative agencies to create administrative procedures for state law.

104. 25 U.S.C. § 23.107 (2012).

105. *See id.* § 1919(a).

106. *Id.* § 1915(c).

107. *Id.* § 1915(b).

substantively requires that states follow this order of placement preferences absent good cause not to follow them or a tribal resolution to the contrary.<sup>108</sup>

1. *The ICPC as an Administrative Procedure: Tribal-State Compacts and State Regulations*

In addition to providing these explicit placement preferences for states to follow, ICWA also allows tribes and states to enter into compact agreements that direct and define how ICWA cases will proceed within that respective jurisdiction.<sup>109</sup> Similar to the ICPC, these compacts are not codified law, but both jurisdictions agree to enforce their provisions. Thus, these Section 1919 compacts are cooperative agreements that ICWA allows to help states and tribes fill gaps in the statute's procedural requirements by coming to agreements on their own terms.<sup>110</sup> As of December 2016, thirty-nine tribal-state compacts existed, and those compacts involved thirty-seven tribes and ten states.<sup>111</sup> Even so, a state court may not always afford the tribal-state compact the same rigid enforcement as statutory law in an ICWA case.<sup>112</sup> Nevada actually interprets Section 1919 to mean that the state and the tribe can enter into an agreement on placement preferences on a literal case-by-case basis, not just a general agreement like other states such as Michigan, Minnesota, Alaska, and Washington have.<sup>113</sup>

Compact agreements can provide guidance on how the ICPC works with ICWA to place an Indian child during ICWA proceedings. Michigan and Minnesota, both of whom have enacted state level Indian Child Welfare Acts, have tribal-state ICWA compact agreements that discuss how to apply the ICPC in ICWA cases.<sup>114</sup> To accept an Indian child into Minnesota from out

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108. See INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN REGULATIONS § 12(6)(a)(5) (AM. PUB. HUMAN SERVS. ASS'N 2012). Section 1915(b) placement preferences are a matter of substantive law. *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 32 (1989).

109. 25 U.S.C. § 1919(a) ("States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings, including agreements which may provide for orderly transfer of jurisdiction on a case-by-case basis and agreements which provide for concurrent jurisdiction between States and Indian tribes.").

110. Matthew L.M. Fletcher, *States and Their American Indian Citizens*, 41 AM. INDIAN L. REV. 319, 335 (2017).

111. SHANNON KELLER O'LOUGHLIN, THE ASS'N ON AM. INDIAN AFFAIRS, A SURVEY AND ANALYSIS OF TRIBAL-STATE INDIAN CHILD WELFARE ACT AGREEMENTS INCLUDING PROMISING PRACTICES 2 (2017).

112. See *In re E.G.M.*, 750 S.E.2d 857, 862 (N.C. Ct. App. 2013) (refusing to take judicial notice of a memorandum of agreement between the state and tribe for ICWA's placement preferences because it was a legislative, not adjudicative, fact).

113. *In re Parental Rights as to S.M.M.D.*, 272 P.3d 126, 131 (Nev. 2012).

114. See O'LOUGHLIN, *supra* note 111, at 85–86 (listing the tribal-state compacts of the Penobscot Indian Nation: Maine, Houlton Band of Maliseet-Maine, Saginaw Chippewa Tribe-

of state, the placement preferences set out in both ICWA and the Minnesota Indian Family Preservation Act must first be followed.<sup>115</sup> If the placement is outside of those preferences, the compact compels the Minnesota Department of Human Services to reject the placement unless it meets the good-cause exception.<sup>116</sup> When Minnesota wishes to place an Indian child outside of the state, the state's Department of Human Services must send notice to the child's tribe.<sup>117</sup> Similarly, Michigan's compact with the Saginaw Chippewa Tribe requires a strict application of ICWA, favoring tribal placement preferences over the ICPC.<sup>118</sup>

Sometimes, the compact can also provide a boon to tribal placement preferences when dealing with other states that are not party to the tribal-state compact and that normally require a full ICPC analysis regardless of the child's Indian status. Minnesota's compact calls for the state to assist tribes in placing Indian children out of state if that is where the tribe has decided to place the child.<sup>119</sup> The Saginaw Chippewa-Michigan compact calls for the state to ensure that the tribe's specific preferences are followed.<sup>120</sup> Additionally, the Saginaw Chippewa-Michigan compact requires the state to verify the tribe's placement preferences before accepting a child into Michigan.<sup>121</sup> Unless a tribal-state ICWA compact directly discusses how to apply the ICPC to existing ICWA cases exists, there is not always guidance on how to apply the ICPC in ICWA cases.<sup>122</sup>

Today, some states have ICPC provisions that simply require compliance with ICWA as a matter of ICPC procedure.<sup>123</sup> Others have administrative procedures that direct the application of ICPC to ICWA cases. For example, Alabama's regulations explicitly state that the ICPC applies in ICWA

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Michigan, Southern Ute Tribe-Colorado, and Minnesota tribes as the few tribal-state compacts that mention the ICPC). Due to the similarities in these tribal-state compacts, this Article focuses on the Minnesota and Saginaw Chippewa compacts for comparing and contrasting provisions.

115. MINN. DEP'T OF HUMAN SERVS., MINNESOTA TRIBAL/STATE AGREEMENT 28 (2007) [hereinafter *Minnesota Tribal/State Agreement*].

116. *Id.*

117. *Id.*

118. MICH. DEP'T OF HEALTH & HUMAN SERVS., TAM 310, SAGINAW CHIPPEWA INDIAN TRIBE INDIAN CHILD WELFARE AGREEMENT 26 (2014) [hereinafter *Saginaw Chippewa Agreement*].

119. *Minnesota Tribal/State Agreement*, *supra* note 115, at 29.

120. *Saginaw Chippewa Agreement*, *supra* note 118, at 26.

121. *Id.*

122. See 25 U.S.C. § 1919(a) (2012). Section 1919 allows tribes and states to enter into an agreement on ICWA, and some states such as Michigan, Minnesota, and Washington all have compacts that address the application of the interstate compact, while Alaska's tribal-state compact does not. See O'LOUGHLIN, *supra* note 111, at 85–86.

123. 110 MASS. CODE REGS. 7.516 (2018); OHIO ADMIN. CODE 5101:2-52-08(C)(11) (2018).

cases even where a tribe assumes jurisdiction.<sup>124</sup> For the purposes of the ICPC, Alabama considers tribes sending states where they place children either off- or on-reservation—and Alabama’s regulations provide for tribal supervision where tribes are involved in placement.<sup>125</sup> When tribes are the sending state, Alabama’s regulations uphold the tribe’s jurisdiction as the sending state under the ICPC.<sup>126</sup> Although Alabama structured its regulations such that the ICPC’s application does not conflict with a tribe’s concurrent jurisdiction under ICWA, the regulations still impose the ICPC’s procedures onto tribes.

Other states also regulate how the ICPC and ICWA interact with each other. Oregon’s regulations state that the “protections of the Indian Child Welfare Act also apply to children who are subject to the protections of the ICPC.”<sup>127</sup> Interestingly, this language frames the Indian Child Welfare Act, a substantive and procedural law, as something that should be applied to a state administrative procedure—not the other way around. For some states, the application of the ICPC in ICWA cases comes down to funding – who will pay for a child’s placement and monitoring. Rhode Island, as an illustration, applies the ICPC and considers tribes sending states with regards to Title IV-E placement funding.<sup>128</sup>

In 2001, the National Council of Juvenile and Family Court Judges (“the Council”) attempted to provide guidance on the interaction between the ICPC and ICWA. The Council stated that the ICPC should not apply where an Indian child is placed interstate and on-reservation, unless other conditions require the ICPC’s application.<sup>129</sup> However, the ICPC should apply, the Council believed, where an ICWA placement places a child interstate and off-reservation.<sup>130</sup> The Council’s hair-splitting distinction in applying the ICPC to ICWA cases seemingly relies upon traditional notions of federal supremacy—not the ICPC’s current manifestation as an instrument of state administrative regulations.<sup>131</sup>

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124. ALA. ADMIN. CODE r. 660-5-36-.05(1)(a) (2018).

125. *Id.* r. 660-5-36-.05(1)(c).

126. *Id.* r. 660-5-36-.05(1)(d).

127. OR. ADMIN. R. 413-040-0200(1) (2018).

128. *See* R.I. CODE R. § 14-1-700-0170 (2018) (stating the ICPC applies to Title IV-E funding). *But see* R.I. CODE R. § 14-1-700.0060 (2018) (applying ICWA in ICPC cases, but not exempting or providing further guidance on how ICWA applies in ICPC cases).

129. NAT’L COUNCIL OF JUVENILE & 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 43 (Barbara Seibel ed., 2001).

130. *Id.*

131. *See id.* at 44 (“If ICPC implementation will interfere with placement of the Indian child pursuant to placement requirements of the ICWA, the ICWA preempts the ICPC.”).

## 2. *The Conflict Between Administrative Procedure and Substantive Law*

Applying the ICPC in ICWA cases, much like where the ICPC is applied in noncustodial parent placements, creates a dual-layer intrusion into an Indian child's placement. The ICPC allows a receiving state to decide that an otherwise valid, safe placement that a tribe proposes is not appropriate, and neither the sending agency nor the placement is left with recourse in most states. However, this clearly violates ICWA's fundamental mandate that vests tribes with the power to be the arbiters of Indian children's best interests. Much like their state counterparts, tribes also have codes, regulations, and procedures that provide for the evaluation of, and investigation into, a child's placement.<sup>132</sup>

In one such South Dakota case, *In re P.S.E.*,<sup>133</sup> the receiving state agency denied an Indian child's placement, finding serious rehabilitative steps that the parent needed to take to overcome substance abuse issues and become a qualified placement. Thus, a South Dakota trial court eventually terminated the parent's rights.<sup>134</sup> The court made findings that active efforts were made to reunite the family, but it was the parent's inability to become a qualified placement in the receiving state that made the placement unattainable.<sup>135</sup> On appeal, the parent argued South Dakota had not made active efforts to rehabilitate and place his child with him, improperly terminating his parental rights.<sup>136</sup> The Supreme Court of South Dakota held that the state made active efforts to place the child with his parent, but the parent had not followed the receiving state's mandates, making the placement impossible.<sup>137</sup>

While the South Dakota Supreme Court had serious issues concerning his ability to parent in *In re P.S.E.*, the case demonstrates how powerful ICPC mandates are when applied to ICWA cases—where a compact is not in place.

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132. See, e.g., COLVILLE CONFEDERATED TRIBES CODE § 5-2-374 (West 2011) (requiring an investigative report on placement conditions within twenty days of the filing of an adoption petition); COQUILLE INDIAN TRIBAL CODE § 640.130 (West 2013) (prescribing procedures for investigation and child placement in abuse and neglect cases); PONCA TRIBE OF NEB. CODE § 4-8-9 (West 2011) (requiring a home study prior to the placement of a child for purposes of adoption); SNOQUALMIE TRIBAL CODE 13.2, § 11.0 (West 2010) (providing factors for when a child is in need of care, investigative procedures, and placement and dispositional procedures); WAGANAKISING ODAWA TRIBAL CODE § 5.121 (West 2011) (mandating a dispositional review hearing every six months, including the content the court must consider).

133. See generally *In re P.S.E.*, 2012 S.D. 49, 816 N.W.2d 110.

134. *Id.* at ¶ 9.

135. *Id.* at ¶ 13.

136. *Id.* at ¶ 18.

137. See *id.* at ¶¶ 23–26 (“Without an acceptable California homestudy, the Interstate Compact on Placement of Children (ICPC) would not allow P.S.E. to be placed with Father in California.”).

Because the parent failed to complete the receiving state's compulsory steps for its approval of his child's placement, the sending state eventually deemed active reunification efforts satisfied under ICWA and terminated his rights.<sup>138</sup> In this case, not only did the termination of the parent's rights raise serious ICWA concerns, but the ICPC interfered with the parent's fundamental right to parent.<sup>139</sup> Here, a state administrative agency essentially determined whether the parent was fit. Though the receiving state's ICPC determination was not an adjudicative determination, that determination was nevertheless used to terminate a parent's fundamental right to parent.

*In re P.S.E.* also demonstrates another conflict between ICWA and the ICPC: the best interest of the child. As a term of art in family law, the best interest of the child is a standard that courts use to determine child custody matters, including the placement of children in child welfare proceedings.<sup>140</sup> While some states have statutes that provide criteria that courts should, or must, consider, the criteria is often subjective and left to the discretion of the trial judge.<sup>141</sup> Traditionally, the best interest of the child standard has led to gender disparities in assigning child custody.<sup>142</sup> Where Indian children are involved, acknowledging a child's cultural rights and the tribe's interest in the child should be considered in the best interest of the child analysis.<sup>143</sup>

For example, in New Mexico, trial courts must consider a non-exhaustive list of five factors, including (1) the wishes of the child's parents; (2) the wishes of the child; (3) the relationship between the child and his or her parent, as well as the relationship with any siblings; (4) the child's adjustment to home, school, and community; and (5) the mental and physical health of all of those involved.<sup>144</sup> Though this is a non-exhaustive list of factors, none include a child's connection to his or her culture—or the cultural norms of a

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138. *Id.*

139. See generally *Stanley v. Illinois*, 405 U.S. 645 (1972) (defining the fundamental right to parent).

140. See *In re J.V.*, 314 Mont. 487, 490, 67 P.3d 242 (Mont. 2003) (“[T]he best interests of the children are of paramount concern in a parental rights termination proceeding and take precedence over the parental rights.”); see also *In re Juvenile Appeal* (83-CD), 189 Conn. 276, 285, 455 A.2d 1313 (1983) (holding that the state's intervention in a family matter is warranted only where it is in the best interest of the child); *In re Lenore*, 55 Mass.App.Ct. 275, 278, 770 N.E.2d 598 (Mass. App. Ct. 2002) (holding that at a hearing to terminate parental rights, the focus is on the best interests of the child in addition to the ability of the parent to provide care).

141. See Jason J. Reed, Comment, *The Façade of a Best Interest Standard: Moving Past the Presumption to Ensure Decisions are Made for the Right Reasons*, 29 WIS. J.L. GENDER & SOC'Y 149, 155 (2014).

142. *Id.* at 157.

143. See H.R. REP. NO. 95-1386, at 2 (1978), as reprinted in 1978 U.S.C.C.A.N. 7530 (recognizing the need for placements that acknowledge a child's unique Indian culture).

144. N.M. STAT. ANN. § 40-4-9 (2018).

child's tribe. In many cases, a trial judge would likely consider an argument made regarding a child's connection to his culture, but statutorily, the court is not obligated to do so.

In an ICWA case, the statute provides a different, more culturally cognizant and competent standard. In enacting ICWA, Congress found that protecting the interests of Indian children to be an important obligation it held as a trustee in ensuring the continued existence and integrity of Indian tribes.<sup>145</sup> ICWA's provisions require courts to make findings that are beyond the simple subjective best interest of the child analysis that states require.<sup>146</sup> In fact, where removal proceedings are in place to remove a child from his parents, or to terminate the parents' rights, ICWA requires findings at two different stages to meet two different legal standards.<sup>147</sup> To place a child in foster care, the court must find there is clear and convincing evidence to support that continued custody is not in the best interest of the child.<sup>148</sup> When terminating a parent's rights, the court must find there is evidence beyond a reasonable doubt that continued custody is not in the best interest of the child.<sup>149</sup> Though ICWA requires analysis beyond state-law best interest of the child standards, again, this analysis is left to the discretion of a trial court that has numerous factors to weigh.

In addition to the ICWA and state-law best interest of the child standards, numerous tribal codes also have a best interest of the child standard. For example, the Swinomish Tribe recognizes a child's tribal and cultural ties as part of best interest of the child analysis—in addition to the factors that state courts would consider regarding a child's emotional, physical, and mental health.<sup>150</sup> Similarly, the Absentee Shawnee Tribe of Indians of Oklahoma's code lists sixteen different factors that a court must consider in the placement of a child, including factors such as the child's extended family's opinion on the placement, the ability to relate to the natural parents, and the ability to help a child return home when necessary.<sup>151</sup> Perhaps this is where the rubber

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145. See Indian Child Welfare Act, 25 U.S.C. § 1901(3) (2012) (“[T]here is no resource that is more vital to the continued existence and integrity of Indian tribes than their children and that the United States has a direct interest, as trustee, in protecting Indian children who are members of or are eligible for membership in an Indian tribe.”).

146. See *id.* § 1912(e) (requiring clear and convincing evidence prior to placing an Indian child in foster care); see also *id.* § 1912(f) (requiring evidence beyond a reasonable doubt prior to terminating parental rights).

147. *Id.*

148. *Id.* § 1912(e).

149. *Id.* § 1912(f).

150. See SWINOMISH TRIBAL CODE § 7-04.010 (West 2018) (“The best interests of the child are served by a parenting arrangement that best maintains a child's emotional growth, tribal and cultural ties, health and stability, and physical care.”).

151. ABSENTEE SHAWNEE TRIBAL CODE § 415 (West 2011).

meets the road in cases where the ICPC and ICWA intersect. Not only do these tribes have best interest of the child standards, but the tribal standards include the respective cultural analysis that state-court standards often do not require. Where tribal best interest of the child standards exist, applying nontribal standards is contrary to ICWA's mandate. Further, applying state best interest of the child analysis to a placement case where a tribe has concurrent jurisdiction is contrary to tribal sovereignty.

At a minimum, receiving states must consider the cultural context of a placement and why the ICWA mandate and/or tribal preferences are in the best interest of an Indian child. While the receiving state completes its investigation into a placement, it is unclear how much of that investigation involves an analysis that pertains to the best interests of the Indian child. That is, while a sending state may do its due diligence in applying ICWA, the receiving state's investigation is free to ignore ICWA, instead focusing on a best interest analysis that lacks any mention of why a particular placement is culturally appropriate. With the receiving state's denial, an Indian child may not be placed in a culturally appropriate home, even where the sending state has done its ICWA homework like in *In re P.S.E.*

Furthermore, where states apply ICPC provisions to noncustodial parents, it is unclear if and how ICWA would apply. Where parents are engaged in private custody disputes and states apply the ICPC to noncustodial parents who live out of state, the compact supports treating the noncustodial parent in the same manner as foster care and adoptive placements.<sup>152</sup> In such scenarios, courts continuously support the spirit of securing a child's best interests and safety over a parent's right to parent.<sup>153</sup> The ICPC implicates ICWA in cases where a sending state wishes to place an Indian child with his or her noncustodial parent living out of state. When a receiving state initiates an investigation into a noncustodial parent to make its own determination as to whether that child should be placed there, this is beyond the realm of a private custody dispute between two parents. As it applies between two custodial parents of an Indian child, the application of the ICPC compels ICWA to do something that it was never meant to do: govern private custody disputes between two parents. For the purposes of ICWA, applying the ICPC in this scenario is more akin to a state-driven dependency proceeding than a private family court proceeding because of the receiving state agency's involvement in the process.

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152. See *In re Sanders*, 852 N.W.2d 524, 530 (Mich. 2014) (defining the right to an adjudication of parental rights); see also *Stanley v. Illinois*, 405 U.S. 645, 658 (1972) (defining the fundamental right to parent).

153. See generally *Stanley*, 405 U.S. 645.

Hypothetically, if a receiving state opens an investigation into a noncustodial parent simply because they live out of state, ICWA's provisions apply to protect the parent's rights. Where the ICPC is applied to a noncustodial parent living out of state, the application of the ICPC invites an attack on an Indian parent's household where no previous abuse or neglect allegations exist.<sup>154</sup> Applying the ICPC in a "one parent doctrine" scenario is akin to an involuntary proceeding.<sup>155</sup> Therefore, Section 1912 should govern the proceeding.<sup>156</sup> Because ICWA requires states use certain procedural and substantive measures when breaking up an Indian family and placing an Indian child, applying the ICPC here invokes significant ICWA protections in a custody dispute between two parents.

Though Congress did not intend for ICWA to apply to private custody disputes between parents, Congress did intend to protect and maintain Indian families. That is not to say that ICWA should extend beyond its purview. Rather, the ICPC's ability to strip out-of-state, noncustodial parents of their parental rights should invoke ICWA's procedural safeguards for parents of Indian children, including applying heightened legal standards and employing a qualified expert witness. At the very least, the receiving state should consider other factors particular to Indian children in its best interest analysis.

#### B. JURISDICTIONAL CONFLICT BETWEEN ICPC AND ICWA

Where ICWA applies, a jurisdictional question exists as to whether there is conflict between the ICPC's retention of jurisdiction in the sending state and ICWA's provisions allowing an Indian tribe to confer jurisdiction absent good cause to transfer the case. Under ICWA, an Indian tribe may move for a state court to transfer the child custody proceedings to a tribal court unless a parent objects to the removal of the proceedings – tribes also have a right of intervention in state child custody proceedings.<sup>157</sup> Additionally, ICWA calls for both state and tribal courts to afford full faith and credit to child custody orders involving Indian children.<sup>158</sup>

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154. *See In re Sanders*, 852 N.W.2d at 531.

155. *See id.*

156. *Cf. Diego K. v. State Dep't of Health & Soc. Servs., Office of Children's Servs.*, 411 P.3d 622 (Alaska 2018) (holding that information from status hearing that did not comport with ICWA's finding requirements could not support removing an Indian child from her parents); *In re A.L.D.*, 2018 MT 112, ¶ 9, 391 Mont. 273, ¶ 9, 417 P.3d 342, ¶ 9 (applying ICWA's active efforts in a case where the state terminated parental rights); *In re Anhayla H.*, 2018-NMSC-033, ¶¶ 37–38, 421 P.3d 814 (recognizing the fundamental right to parent and applying ICWA's clear and convincing standard of evidence to review whether the state properly terminated a parent's right).

157. Indian Child Welfare Act, 25 U.S.C. § 1911(b)–(c) (2012).

158. *See id.* § 1911(d).

Although the ICPC governs child placement as an instrument of state law, jurisdictional concerns create serious questions over whether the ICPC should apply where ICWA governs a child's placement. The Uniform Child Custody and Jurisdiction Enforcement Act ("UCCJEA") does not apply where ICWA governs a child's placement.<sup>159</sup> In at least one state, Kentucky, application of the UCCJEA is expressly prohibited "to the extent that [the proceeding] is governed by the Indian Child Welfare Act."<sup>160</sup> Additionally, Kentucky law also expressly requires that under the UCCJEA, Indian Tribes are treated as states.<sup>161</sup> The UCCJEA is a uniform law, similar to the ICPC, and forty-nine states have adopted it.<sup>162</sup> Like the UCCJEA, the ICPC was conceptualized as an instrument that states could implement to create uniformity in child placements across state lines. Unlike the UCCJEA, though, some states such as South Dakota continue to apply ICPC requirements in cases that fall under ICWA's purview.<sup>163</sup>

Where placement decisions fall under ICWA's purview, state courts should treat the ICPC the same as they treat the UCCJEA: the ICPC should not apply. For example, Kentucky's ICPC provision calls for the collapse of the ICPC requirements where an Indian tribe petitions for and receives jurisdiction over a case.<sup>164</sup> This model is ideal because it allows tribes retaining ICWA jurisdiction to make their own determinations of where to place the Indian child without further intrusion by state agencies—promoting tribal sovereignty. While tribes and state agencies work together daily, Indian tribes must maintain the ability to make decisions on the placement of their children. Under Kentucky's model, the tribe is free to make its own placement decision and determine whether to accept a child without inviting state officials to make the determination on its behalf. Without acknowledging an Indian tribe's ICWA status and interest in an Indian child, the ICPC ultimately makes the child's tribe and two different states responsible for placement.

Not applying the ICPC in ICWA cases also alleviates other jurisdictional concerns. Because Indian tribes are sovereigns, they generally retain the ability to make decisions on the placement of their members. Where the ICPC is applied in ICWA cases, a third-party sovereign is invited to disrupt a tribe's

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159. UNIF. CHILD CUSTODY JURISDICTION & ENF'T ACT § 104 (UNIF. LAW COMM'N 1997).

160. KY. REV. STAT. ANN. § 403.804(1) (West 2018).

161. *Id.* § 403.804(2).

162. Jaye L. Samuels, *Subject Matter Jurisdiction in Child Custody and Support Issues: An Argument for the Adoption of the UCCJEA*, FAM. L. NEWSL. (Bos. Bar Ass'n), Fall 2016, <http://www.bostonbar.org/sections-forums/sections/family-law/family-law-newsletter/2016/11/29/fall-2016-subject-matter-jurisdiction-in-child-custody-and-support-issues-an-argument-for-the-adoption-of-the-uccjea>.

163. *See In re P.S.E.*, 2012 S.D. 49, ¶¶ 29–30, 816 N.W.2d 110.

164. *See* KY. REV. STAT. ANN. § 615.030 art. IV(4)(f) (West 2018) (effective June 25, 2013).

sovereignty and determine a child's placement status. Conversely, in cases affecting non-Indian children, both the sending and receiving states retain the appropriate jurisdiction without abrogating either state's sovereignty. The application of the ICPC in ICWA cases creates a third-party placement scenario where a tribe and/or the sending agency may comply with ICWA, but the receiving state, whose only involvement is the ICPC mandate, may abrogate ICWA's guidelines and purpose, declining the application of a tribe's explicit jurisdiction over the third-party placement of an Indian child. While this scenario plays out between states from time to time when one state may reject another's planned placement, the major distinction where an Indian child is involved is that doing so contradicts ICWA's mandate.

### C. FEDERAL PREEMPTION OF THE ICPC

Congress passed ICWA in 1978 to bring an end to the massive removal of Indian children from their parents and relocation to placements with non-Indian families.<sup>165</sup> Even though ICWA sets out procedures for dealing with the voluntary and involuntary removal of Indian children, ICWA remains federal substantive law that seeks to protect the rights of Indian children and families.<sup>166</sup> Because ICWA is an instrument of federal law, and the ICPC is an instrument of state law, when they interact the preemption doctrine potentially applies.

Where Congress has either expressly or implicitly intended for a federal law to completely occupy a field of law, a federal law will preempt any state law that pertains to the same matter.<sup>167</sup> In the case of ICWA, Congress has not expressly stated that ICWA is intended to preempt state-law custody proceedings.<sup>168</sup> Additionally, it does not appear that Congress intended for ICWA to fully occupy and preempt state law on custody proceedings.<sup>169</sup> Thus, courts look to whether conflict preemption exists.<sup>170</sup> Where (1) it is

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165. Indian Child Welfare Act, Pub. L. No. 95-608, 92 Stat. 3069 (1978) (codified as amended at 25 U.S.C. §§ 1901–1963 (2012)).

166. Miss. Band of Choctaw Indians v. Holyfield, 490 U.S. 30, 32 (1989).

167. U.S. CONST. art. VI, cl. 2.

168. *In re W.D.H.*, 43 S.W.3d 30, 36 (Tex. Ct. App. 2001) (citing *In re Brandon M.*, 63 Cal. Rptr. 2d 671, 677 (Cal. Ct. App. 1997)).

169. See *In re J.J.T.*, 544 S.W.3d 874, 879 (Tex. Ct. App. 2017) (“A state procedural rule which would deny the right to intervene in a child custody proceeding because the tribe did not file a written pleading prior to the hearing directly conflicts with this purpose.”); see also *In re K.S.D.*, 2017 ND 289, ¶ 24, 904 N.W.2d 479 (stating that “ICWA does not alter the requirements for state law proceedings, but instead requires . . . a higher burden of proof”); *In re D.S.P.*, 480 N.W.2d 234, 238 (Wis. 1992) (holding that Congress did not intend ICWA to fully occupy the field of termination of parental rights because ICWA's language on the burden of proof allows the use of state standards).

170. *In re W.D.H.*, 43 S.W.3d at 36.

impossible to comply with both the federal and the state law, or (2) the state law is an obstacle to the accomplishment and execution of congressional objectives, conflict preemption exists.<sup>171</sup>

When state law and procedure invoke the ICPC in an ICWA case, it is impossible for courts to comply with both federal and state law. In a Texas case, *In re W.D.H.*, the Texas Family Code conflicted with ICWA where its standard for determining the best interest of the child was different from ICWA's standard.<sup>172</sup> Thus, the Texas Court of Appeals held that the trial court erred when making a determination as to an Indian child's best interest in an ICWA case using a state standard because it was impossible to comply with the findings required under the Family Code and ICWA at the same time.<sup>173</sup> The court therefore found that ICWA preempted a state law that required more stringent findings for a child's best interests.<sup>174</sup>

Moreover, that the ICPC is an administrative procedure, while ICWA is a federal substantive law, provides another conflict. Generally, state procedural rules or statutes do not preempt ICWA's substantive provisions.<sup>175</sup> Conversely, states recognize that while ICWA is a federal substantive law, it does not contradict state rules of procedure.<sup>176</sup> In an Iowa case, *In re J.D.B.*, the Iowa Court of Appeals held that the respondent still had the duty to comply with the state rules of appellate procedure in preserving an error for appeal, in spite of the application of ICWA and its modifications on state child custody law.<sup>177</sup> However, the ICPC is vastly distinct from following state rules of procedure; the ICPC is an administrative procedure where the only parties who can actually comply are states. Without the application of a tribal-state compact or statutory guidance, like Kentucky provides, the ICPC essentially preempts ICWA's substantive provisions on placement preference. Because a receiving state can choose to ignore a tribe's placement preference, the child's ICWA-approved placement is nullified.

Applying the ICPC in ICWA cases also provides a large obstacle to the congressional goals of protecting the rights of Indian children and families.

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171. *Nw. Cent. Pipeline Corp. v. State Corp. Comm'n of Kan.*, 489 U.S. 493, 509 (1989).

172. *In re W.D.H.*, 43 S.W.3d at 37.

173. *Id.* at 37-38.

174. *Id.*

175. *See In re Desiree F.*, 99 Cal. Rptr. 2d 688, 699 (Cal. Ct. App. 2000) (holding there is no authority that "would permit a state procedural statute to preempt the substantive provisions of the federal ICWA").

176. *See In re J.D.B.*, 584 N.W.2d 577, 581 (Iowa Ct. App. 1998) (holding that in spite of ICWA's application to a child custody case, the respondent still had to comply with state rules of appellate procedure in preserving an error for appeal).

177. *In re J.D.B.*, 584 N.W.2d at 581.

As an administrative procedure, the ICPC further defines the placement process in state court proceedings. However, ICWA, a federal substantive law, already provides a placement procedure where the child in question is an Indian child.<sup>178</sup> Congress, with its plenary authority over Indian affairs, mandated the appropriate placement preferences in 25 U.S.C. § 1915. Thus, where states apply ICPC procedures in lieu of—or even in conjunction with—ICWA’s provisions, the states ignore this congressional mandate.

Though ICWA generally does not supplant state law, its purpose is not to protect states’ traditional jurisdiction, and the federal statute is not beholden to state law.<sup>179</sup> For example, in *In re Adoption of B.B.*,<sup>180</sup> the Utah Supreme Court had to determine whether a biological father met the definition of a parent under ICWA.<sup>181</sup> Under Utah state law, the biological father did not meet the definition of a parent because he did not take the steps Utah state law required to establish paternity.<sup>182</sup> However, the Utah Supreme Court held that Utah courts should have relied upon the federal definition of a parent because Congress was silent and did not provide for a state or tribal law definition of a parent.<sup>183</sup> As the Utah Supreme Court noted in *In re Adoption of B.B.*, applying a state legal standard to an ICWA case would lessen ICWA protections in some cases.<sup>184</sup> Thus, ICWA sometimes requires state-law definitions to give deference to federal legal standards. Where ICWA does not provide the greatest protection to Indian families, the higher standard applies.<sup>185</sup> But in a conflict between state law and ICWA, ICWA often provides the greatest protections for Indian families and should therefore apply without state-law constraints.

While this Article specifically discusses the ICPC and ICWA, dissimilarity and discord in state substantive law abounds in ICWA cases because each state has its own standards for a variety of issues. But the key distinction is that those conflicts stem from substantive state law, such as the definition of paternity. Such substantive legal provisions provide further guidance in implementing ICWA and adjudicating a child’s placement. Here, however, the ICPC acts as an administrative provision that is determined separately

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178. 25 U.S.C. § 1915 (2012).

179. *See* *Miss. Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 43 (1989) (“Congress when it enacts a statute is not making the application of the federal act dependent on state law.”).

180. 2017 UT 59, 417 P.3d 1.

181. *Adoption of B.B.*, 2017 UT 59, ¶ 2, 417 P.3d 1.

182. *See id.* ¶ 68 (discussing Utah’s establishment of paternity laws as “notoriously strict”).

183. *See id.* ¶ 60 (“Because Congress did not mandate a state or tribal law definition for ‘acknowledge’ or ‘establish,’ we can and should rely instead on a federal definition.”).

184. *See id.* ¶¶ 65–69.

185. 25 U.S.C. § 1921 (2012).

from adjudicative matters. Although states have codified the ICPC, it remains an administrative procedure that every state coordinates through a state administrative office, not through a court.<sup>186</sup> For example, Washington's Children's Administration—the agency that formulates the rules on how ICPC applies in ICWA cases—handles ICPC evaluations.<sup>187</sup>

While generally administered through a state's executive branch as an administrative process, the ICPC eventually directly impacts a court's decision-making process. In ICWA cases, this is incredibly dangerous because this administrative decision removes the power from a state-court judge to adjudicate the case under ICWA's purview while also following ICPC recommendations. Where the ICPC is applied to ICWA cases, the ICPC effectively guts a state court's mandate to follow ICWA placement procedures by implementing a superseding administrative procedure.

#### D. COUNTERMEASURES TO THE CONFLICT BETWEEN THE ICPC AND ICWA

In general, states should look toward the ICPC's regulations. Though not all states have adopted and promulgated the regulations, they contain guidance that would help when placing children within their families. For example, adopting Regulation No. 7 on the expedited interstate placement of children within their family would lessen the ICPC's impact on a parent's rights by removing intrafamily placements from the compact's scope. Additionally, these regulations could provide greater uniformity amongst the states when it comes to the situations in which the ICPC should and must be enforced. With that said, applying the ICPC to a situation where a child is being placed with a parent in another state continues to provide an attack on the fundamental right to parent, especially when the court has not adjudicated his or her fitness.<sup>188</sup>

When ICWA and the ICPC apply to the same matter, Kentucky provides a good model for deferring to ICWA's preferences. As sovereigns, tribes have the right to make placement decisions for their member children. Tribal-court judges do not make decisions as to a child's placement in a vacuum. To the contrary, in identifying a placement, tribal courts rely upon the same processes that state courts do. Like state courts, tribal courts also make inquiries into the best interests of the child. Most importantly, tribal courts tend to be the optimal arbiters of the best interests of an Indian child for a variety of

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186. *Guide to the ICPC*, *supra* note 32, at 10.

187. See WASH. STATE DEP'T OF SOC. & HEALTH SERVS., *supra* note 69, at 5601(1)(a)(i)(B) (discussing the ICPC process in the state of Washington).

188. See *In re Sanders*, 852 N.W.2d 524, 527 (Mich. 2014).

reasons that include knowledge of a child's family and cultural requirements. In most states, only new state regulations could create such a model. Creating regulations that define Indian child placements out of the state's ICPC purview is more efficient than waiting for legislation to clearly define the ICPC's and ICWA's roles where Indian children are concerned. State regulations prioritizing tribal interests and defining how the ICPC and ICWA work together are necessary.

Perhaps as a rather obvious legislative fix and countermeasure, Congress could amend ICWA, or the BIA could implement regulations that provide further guidance on whether the ICPC is applicable in ICWA cases and the extent of its applicability. Through its trust responsibility to Indian tribes, Congress certainly has the authority to enact such a law as it pertains to Indian children. However, that is a rather lofty, long-term goal.

In the interim, one thing that tribes can do to protect their status in these situations is to exercise their rights under 25 U.S.C. § 1919 and work with states to create tribal-state ICWA compacts, similar to Minnesota or the Saginaw Chippewa-Michigan agreements. Minnesota and Saginaw Chippewa-Michigan both have tribal-state compacts that decline to apply the ICPC in ICWA cases.<sup>189</sup> A tribal-state compact, much like the ICPC itself, provides guidance to state courts weighing whether the ICPC applies in an ICWA case. Moreover, tribal governments should consider a tribal-state compact that actually defines placement preferences like the Saginaw Chippewa-Michigan agreement does. Though the provisions of this agreement do not bind third-party states, they do bind the State of Michigan to ensure that it defers to the proper ICWA preferences when receiving a child into the state.

At the litigation stage, tribes can and should assert that ICWA preempts the ICPC. Asserting that ICWA's concerns outweigh the ICPC is not commandeering state law because ICWA continues to support and promote the trust responsibility the federal government owes to Indian tribes. Deferring to an ICWA placement in a case where the ICPC would otherwise apply for a non-Indian child supports the adjudicative process that protects both Indian families and tribal interests in familial relationships. When a state administrative agency is vested with the power to overrule an adjudicative decision that ICWA demands, it is almost impossible to apply both ICWA and the ICPC—and still achieve ICWA's goals. In addition to the problems with achieving ICWA's goals, the potential for the ICPC to apply to private custody disputes between the parents of an Indian child calls into question whether a parent's rights are violated and whether ICWA should apply to a private custody dispute in ways it has not previously.

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189. *See supra* notes 115, 118.

## V. CONCLUSION

Without a doubt, ICWA and the ICPC conflict when applied to cases concerning the placement of Indian children. ICWA is a federal law that provides both procedural and substantive legal standards for proceedings where the state is placing an Indian child. The ICPC is an administrative tool that state agencies use to ensure a placement is valid. In ensuring a child's safety, the ICPC and ICWA act in the same field of law. The ICPC and ICWA have complementary goals. However, the application of both the state administrative procedure and the federal process in the same case does not complement congressional goals to protect Indian children.

Generally, federal substantive law preempts state administrative procedure. In the case of ICWA, Congress has spoken to define the placement preferences for Indian children, as well as the forum that is entitled to make this decision. Additionally, Congress has spoken to allow tribal-state compacts where two sovereigns come to an agreement on the placement of Indian children. Congress certainly did not intend to preempt all state law as applied to Indian families, but it did intend to regulate how the states and their administrative agencies would interact with Indian families. Accordingly, where ICWA applies, state courts and agencies should provide absolute deference to ICWA's tribal placement preferences. Much like states, tribes are sovereigns that are generally equipped to evaluate and place a child. In fact, where Indian children are concerned, tribes are the best equipped to make these decisions after evaluating a child's kinship ties and cultural needs in the best interest of the child analysis.

Now, this Article does not argue that tribes and states should refuse to work together to seek placement solutions for Indian children. As it stands, ICWA regulates state courts in its dealings with Indian children, and it requires a working relationship between states and tribes. However, this relationship is severely imbalanced when state administrative agencies assert supremacy over tribal placement preferences through the ICPC, working contrary to ICWA's goals. Certainly, the ICPC and ICWA could collaborate to further each other's goals for child welfare. However, without the proper guidance, there is a large void where the ICPC and ICWA conflict.