Nos. 16-FS-447 & 16-FS-603

DISTRICT OF COLUMBIA COURT OF APPEALS

IN RE: R.J., Jr.
IN RE: J.Q.

APPEAL FROM THE SUPERIOR COURT OF THE
DISTRICT OF COLUMBIA, FAMILY COURT

BRIEF OF *AMICI CURIAE*
NATIONAL ASSOCIATION OF COUNSEL FOR CHILDREN AND
THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA

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RULE 28(a)(2) STATEMENT

In re: R.J., Jr.; GAL, appellant, No. 16-FS-447.

In re: J.Q.; GAL, appellant, No. 16-FS-603.

The National Association of Counsel for Children is a 501(c)(3) non-profit corporation. It has no parent corporations, subsidiaries, or stockholders.

The Legal Aid Society of the District of Columbia is a 501(c)(3) non-profit corporation. It has no parent corporations, subsidiaries, or stockholders.

Amici certify that the following listed parties appeared below and on appeal:

Guardian *Ad Litem* Aida Vindell, Esq., in the proceeding below and Abraham Sisson, Esq., Melissa Colangelo, Esq., and Aida Vindell, Esq. in this appeal.

R.J., Sr., appellees' father, represented by Karen Mitchell, Esq., in the proceeding below and in this appeal.

A.Q., appellees' mother, represented by Lisa Orlow, Esq., in the proceeding below and in this appeal.

District of Columbia, represented by Keely Magyar, Esq., in the proceeding below and Todd Kim, Esq., in this appeal.

Amicus curiae National Association of Counsel for Children, Josh Gupta-Kagan, Esq., in this appeal only.

Amicus curiae Legal Aid Society of the District of Columbia, Jonathan H. Levy, Esq., and Stephanie Troyer, Esq., in this appeal only.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES: **Page(s)**

STATUTES & REGULATIONS

MISCELLANEOUS

**Authorities principally relied upon*

INTERESTS OF *AMICI*

NACC, founded in 1977, is a 501(c)(3) non-profit corporation organized under the laws of Colorado. It is a child advocacy and professional membership association dedicated to enhancing the well being of America's children. It is a multidisciplinary organization with approximately 2000 members representing all 50 states and the District of Columbia. NACC's membership is comprised primarily of attorneys and judges, although the fields of medicine, social work, mental health, education, and law enforcement are also represented.

NACC works to strengthen the delivery of legal services to children, enhance the quality of legal services affecting children, improve courts and agencies serving children, and advance the rights and interests of children. Its programs and services include training and technical assistance, the National Children's Law Resource Center, the attorney specialty certification program, the Model Children's Law Office program, policy advocacy, and the *amicus curiae* program.

The appropriate application of the Interstate Compact on the Placement of Children (ICPC) is among the issues that NACC monitors throughout the country. After careful review of the law, NACC opposes the application of the ICPC review process on parents as both a legal and a policy matter. Its reasons why are discussed below.

The Legal Aid Society of the District of Columbia is the oldest general civil legal services program in the District of Columbia. Legal Aid's mission is to "provide legal aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better protect and serve their needs." Legal Aid By-Laws, art. II, § 1. Legal Aid represents parties in disputes involving the custody of children in the Family Court and in this Court and has previously filed briefs as *amicus curiae* on issues concerning child custody. *See, e.g.*, *In re Petition of R.W. & A.W.*, No. 11-FS-1217 (argued June 17, 2014) (*amicus* brief addressing appealability of

permanency goal change affecting parental custody); *In re N.R.*, 41 A.3d 1219 (D.C. 2012) (adoption appeal); *W.D. v. C.S.M.*, 906 A.2d 317 (D.C. 2006) (*amicus* brief opposing rehearing addressing custody actions by third parties).

Legal Aid has a particular interest in the faithful application of the ICPC because these decisions disproportionately impact parents living in poverty, and Legal Aid advocates for keeping families together whenever it is safe for children. Legal Aid expresses no views on other factual and legal issues raised and briefed by the parties to this appeal.

The Guardian *Ad Litem*, counsel for the children's mother, counsel for the children's father, and counsel for the District of Columbia have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This case addresses the recurring situation in which the District removes a child from one parent and the other parent seeks custody. The proper course of action in such a situation is to place the child in the second parent's physical custody unless that parent's rights have been terminated or diminished, or that parent is alleged to be unfit. That proper course of action is no different when the parent seeking custody lives in another state, like the father in this case who lives less than one and a half miles from the District line in Maryland. Yet because of a misinterpretation of the Interstate Compact on the Placement of Children, the children in this case and in others were placed with strangers. Stranger foster care in such cases is both unnecessary and harmful to children.

This case presents the important question whether the Interstate Compact on the Placement of Children forbids placement of a child with a parent who lives outside the District without the permission of the "receiving" state. Getting such permission from a busy child welfare agency in another state creates delay and uncertainty. Even if permission is granted, it can take time to

obtain, leaving a child with strangers in foster care or some other placement in the interim, and violating fundamental rights of both child and parent.

By its terms, the Compact applies only to foster care and adoptive placements – not to placement with a parent. But the magistrate judge below relied on a "regulation" that was neither promulgated nor approved by the District to refuse to place two children with their father despite a determination that it would be in their best interest. That "regulation" does not have the force of law in the District of Columbia and conflicts with the plain language of the Compact. The canon of constitutional avoidance also prevents application of the Compact in this case, because applying the Compact to prevent a child from living with her fit father, who has seized his opportunity interest, shared legal custody, and faces no allegations of unfitness, would violate both the child's and parent's fundamental right to family integrity. Moreover, any contrary rule would frequently fail to serve the District's overriding interest in serving the best interests of all children.

As almost invariably happens, the correctness of the magistrate's ruling here evaded review on appeal to an associate judge, because the court viewed the decision as non-final (because it involved an interim placement) and moot (because the child had been returned to the mother at the end of the case). This Court should exercise its discretion to decide this important and recurring question in order to avoid future harm to children and parents stemming from misapplication of the Compact. The issues are clearly presented and are likely otherwise to continue to evade review. They are particularly important to families in the District of Columbia, because it is common for one parent to live in another state in the metropolitan area.

This Court should accordingly rule that the ICPC does not apply to placements with parents and was improperly applied to the proposed placement with the father here.

BACKGROUND: INTERSTATE COMPACT ON THE PLACEMENT OF CHILDREN

The Interstate Compact on the Placement of Children (ICPC) was drafted in 1960. It was "'intended to facilitate interstate adoption, thereby increasing the pool of acceptable homes for children in need of placement.'" *In re Adoption No. 10087*, 597 A.2d 456, 461 (Md. 1991) (quoting Bernadette W. Hartfield, *The Role of the Interstate Compact on the Placement of Children in Interstate Adoption*, 68 NEB. L. REV. 292, 293 (1989)). A contemporaneous account of the Compact confirms its focus on foster care and adoption only, stating in its first sentence. "The placement of children *for foster care or adoption* is hazardous enough under the best of circumstances; but when state lines are crossed in the process the possibilities for mischance and confusion are multiplied." Harold Hagen, The Interstate Compact on the Placement of Children, *Child Welfare* (Dec. 1960) at 11 (emphasis added).

The ICPC has been adopted by all fifty states, and was adopted by the District in 1989. *See* D.C. Act 8-53; 36 D.C. Reg. 4744 (July 7, 1989); *In re T.M.J.*, 878 A.2d 1200, 1202 (D.C. 2005). It is currently codified as D.C. Code §§ 4-1421 & 4-1422. Although it is called a "compact," the ICPC is not an "Agreement or Compact with another State," because it has not been approved by Congress. U.S. Const. Art. I, Sec. 10. Accordingly, each signatory adopts the ICPC as the law of its own state rather than as a matter of uniform federal law. *McComb v. Wambaugh*, 934 F.2d 474, 479 (3d Cir. 1991). The scope of the ICPC as enacted by the District of Columbia is therefore a question of District of Columbia statutory interpretation.

The ICPC does not apply to every interstate placement of a child. *See In re T.M.J.*, 878 A.2d at 1204 (noting that ICPC does not apply to placements "by 'private arrangement'") (quoting *In re Miller*, 36 P.3d 989, 991 (Or. 2001)). Instead, it is limited to interstate placement "in foster care or prior to a possible adoption." D.C. Code § 4-1422, Art. III(a). In addition to this broad

limitation, specific categories of placements are excluded from the reach of the ICPC as enacted in the District, including, placements by or with a "parent, stepparent, grandparent, adult brother or sister, adult uncle or aunt, or . . . guardian." D.C. Code § 4-1422, Art. VIII(1); *see In re T.M.J.*, 878 A.2d at 1203-04.

When it applies to a placement, the ICPC mandates that "[t]he child shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate authority in the receiving state notifies the sending state, in writing, that the proposed placement does not appear to be contrary to the interests of the child." D.C. Code § 4-1422, Art. III(d). Accordingly, the process involves child welfare authorities in the sending state completing a packet of information, sending it to child welfare authorities in the receiving state, and those authorities determining if the proposed placement is "contrary to the interests of the child." *Id.*

In 2006, the typical timeframe for both the sending and receiving state to complete an ICPC review of the placement of a child was six months, and in many instances the review could take a year or longer. John C. Lore III, *Protecting Abused, Neglected, and Abandoned Children: A Proposal for Provisional Out-Of-State Kinship Placements Pursuant to the Interstate Compact on the Placement of Children*, 40 U. Michigan J.L. Reform 57, 57 (Fall 2006). Meanwhile, the child is typically living with strangers in foster care, and may have limited contact with the non-offending parent. 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, 70 (Fall 2006). A 2014 study of 27 states concluded that delays are "routine," leaving children living in foster care for months. Vivek S. Sankaran, *Foster Kids in Limbo: The Effects of the Interstate Compact on the Placement of Children on the Permanency of Children in Foster Care* 5 (2014) (available online at

https://www.law.umich.edu/centersandprograms/pcl/Documents/Final%20Summary%20to%20Casey.pdf).

ARGUMENT

I. THE STATUTORY TEXT DOES NOT APPLY TO THE PLACEMENT OF A CHILD WITH A PARENT.

The specific provision of the ICPC at issue here – Article III – does not, on its face, apply to the placement of a child with a parent.[1] Instead, it imposes limitations only on the placement of a child in foster care or prior to a possible adoption:

> No sending state shall send, bring, or cause to be sent or brought into any other party state a child *for placement in foster care or prior to a possible adoption*, unless the sending state complies with each requirement set forth in this compact and applicable laws of the receiving state that govern the placement of children.

D.C. Code § 4-1422, Article III(a) (emphasis added). When such a "placement in foster care or prior to a possible adoption" in another state is proposed, the child "shall not be sent, brought, or caused to be sent or brought into the receiving state until the appropriate authority in the receiving state notifies the sending state, in writing, that the proposed placement does not appear to be contrary to the interests of the child." *Id.* § 4-1422, Article III(d).

A child's placement with a parent is *not* a "placement in foster care or prior to a possible adoption."[2] To the contrary, "[f]oster care means 24-hour substitute care for children placed *away*

[1] To be clear, by "parent" we mean legally recognized parent, which might be a birth parent, adoptive parent, or other parent recognized by statute or judicial action. The term "parent" necessarily excludes a "foster parent" or a person who was previously a parent but whose parental rights were terminated.

[2] The Compact defines the term "placement" as "the arrangement for the care of a child in a family, boarding home, or child-care agency or institution," with specified exceptions. D.C. Code § 4-1422, Art. II(2). Under Article III(a), for the Compact to apply, the placement must fall

from their parents or guardians," D.C. Code § 4-342(2) (emphasis added), and therefore cannot apply to a child's placement with a parent. *See also, e.g.*, 45 C.F.R. § 1355.20 (defining "foster care" as "24-hour substitute care for children placed *away from* their parents or guardians . . . .") (emphasis added). Even when the ICPC was drafted, "foster care" had this "established meaning in welfare circles," which the drafters intended to incorporate. *See Draftsman's Notes on Interstate Compact on the Placement of Children, reprinted in* Roberta Hunt, *Obstacles to Interstate Adoption* 44 (Child Welfare League of America 1972). That "established meaning" excludes living with parents.[3] Similarly, adoption is the process of creating a parent/child relationship that did not previously exist. *See* D.C. Code § 16-312(a). By definition, a parent cannot adopt his or her own child – that would be legally meaningless – so the placement of a child with an existing parent is not a placement "prior to a possible adoption." As a placement with a parent does not fall within the plain language of D.C. Code § 4-1422, that statute does not require the District to receive approval from a receiving state before placing a child with a parent in that state.[4] For this reason alone, the trial court erred and must be reversed.

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within the definition of that term in Article II *and* be a placement "in foster care or preliminary to a possible adoption." The latter phrase excludes a placement with a parent.

[3] Contemporaneous dictionaries distinguished foster care from living with a parent. Black's Law Dictionary 784 (4th ed. 1951) (defining "foster parent" as "[o]ne who has performed the duties of a parent to the child *of another*") (emphasis added).

[4] Article X of the ICPC which states that "[t]he provisions of this compact shall be liberally construed to effectuate the purposes of the compact," D.C. Code § 4-1422, does not change this plain language analysis. A "liberal" construction cannot supersede or abrogate the plain meaning of a statute. *See, e.g.*, *INS v. Phinpathya*, 464 U.S. 183, 192 (1984) ("Respondent contends that we should approve the Court of Appeals 'generous' and 'liberal' construction … notwithstanding the statute's plain language and history.… We disagree."); *CTI/DC, Inc. v. Selective Ins. Co. of Am.*, 392 F.3d 114, 121 (4th Cir. 2004); *United States v. La. Pac. Corp.*, 106 F.3d 345, 349 (10th Cir. 1997).

The only federal court of appeals to have addressed this question correctly interpreted the plain language of the ICPC as inapplicable to the placement of a child with a parent. In *McComb v. Wambaugh*, 934 F.2d 474, 480 (3d Cir. 1991), the United States Court of Appeals for the Third Circuit found that, under the plain language of ICPC's Article III, "[t]he scope of the Compact is carefully limited to foster care or dispositions preliminary to an adoption," which are both "substitutes for parental care." The *McComb* court further found the language of Article III does not apply "to a situation where a child is returned to parental custody," and that the statutory language was "unambiguous" in this regard. *Id.* at 481, 482. The *McComb* court also reviewed the history of the Compact's drafting and concluded that it was not intended to apply to parents. *Id.* at 480-81.[5]

II. THE ICPC MUST BE INTERPRETED TO AVOID UNCONSTITUTIONALLY INFRINGING ON THE FAMILY INTEGRITY RIGHTS OF PARENTS AND CHILDREN.

The application of the ICPC to parents not only contravenes the plain language of that compact, it also threatens the rights of both parents and children that are enshrined in the

[5] The language of Article VIII of the ICPC as enacted in the District also excludes from its reach all placements with parents, grandparents, and other close relatives. *See* D.C. Code § 4-1422, Art. VIII ("This compact shall not apply if: (1) A child is sent or brought into a receiving state by his parent, stepparent grandparent, adult brother or sister, adult uncle or aunt, or his guardian, *or* if the child is left with the relative or nonagency guardian in the receiving state . . . .") (emphasis added). Here, the child was to be left with one of the enumerated relatives (the father) in the receiving state, and the District's version of the ICPC therefore does not apply. This argument is limited to the District because the "or" emphasized in the quotation from § 4-1422 is an unusual modification of the ICPC made by the District Council. Most other jurisdictions' versions of the ICPC contain an "and" in the place of this "or." *See* Association of Administrators of the Interstate Compact on the Placement of Children, *ICPC Articles Text of Interstate Compact on the Placement of Children*, http://www.aphsa.org/content/AAICPC/en/ICPCArticle.html (last visited Aug. 4, 2016).

Constitution. Accordingly, the canon of constitutional avoidance, *see In re D.S.*, 88 A.3d 678, 689 n.17 (D.C. 2012), supports reading the ICPC as inapplicable to placements with parents.

The right of parents to the "care, custody, and control of their children … is perhaps the oldest of the fundamental liberty interests recognized by this [United States Supreme] Court." *Troxel v Granville*, 530 U.S. 57, 65 (2000). These rights have been deemed "essential," *Stanley v. Illinois* 405 U.S. 645, 651 (1972), and form "an interest in liberty entitled to constitutional protection." *Lehr v. Robertson*, 463 U.S. 248, 258, 265 (1983). Accordingly, both the Due Process Clause and the Equal Protection Clause protect parental rights. *Id.*; *Stanley*, 405 U.S. at 651, 658. This protection attaches regardless of whether the parents were ever married to each other. *See Lehr*, 463 U.S. at 258; *see also Stanley*, 405 U.S. at 656. These constitutional rights granted to parents are supported by constitutional concern for children as well. Indeed, "the Due Process Clause mandates" a presumption in favor of parental custody based on an interest in protecting children. *Stanley*, 405 U.S. at 657-58; *see also Franz v. United States*, 707 F.2d 582, 595, 227 U.S. App. D.C. 385, 398 (D.C. Cir. 1983). Children share a right to live in a parent's custody. *Id.* As a reflection of these constitutional rights, District of Columbia law provides that "each parent has an equal right to the custody of his or her children" regardless of their marital status. *Martin v. Tate*, 492 A.2d 270, 273 (D.C. 1985).

The constitutional rights of natural parents are so elemental that the propriety of granting them custody is presumed. In *Stanley*, the Supreme Court held that "the Due Process Clause mandates" this presumption because ignoring it undermines a state's interest in protecting children. 405 U.S. at 657-58. If a state places a child in foster care over a fit parent's objection then "the State spites its own articulated goals." *Id.* at 652. In *Lehr*, the Supreme Court found that where "an unwed father demonstrates a full commitment to the responsibilities of parenthood

. . . his interest in personal contact with his child acquires substantial protection under the due process clause." 463 U.S. at 261.

This Court has applied these constitutional protections in the context of adoption proceedings. In *Appeal of H.R.*, 581 A.2d 1141, 1176-77 (D.C. 1990), this Court noted the "substantial constitutional protection" afforded to the parent/child relationship and held that parents seeking to maintain their parental relationship must be awarded custody absent "clear and convincing evidence" of unfitness. Indeed, because parents are "presumptively entitled to custody," interrupting the parent-child relationship may give rise to "a damages remedy … for violations of the [parent]'s statutory and constitutional rights that may have caused prejudicial delay." *Id*. at 1180.

More recently, in *In re D.S.*, 88 A.3d at 689, this Court reaffirmed that holding, noting that "when a fit parent exercises his or her opportunity interest, the trial court can deem that preference rebutted only by clear and convincing evidence that the best interest of the child would be better served if the child were placed elsewhere." In addition to the presumption favoring custody of a fit parent, there is also a presumption that a parent is fit. The District bears the burden of proving that a parent is unfit, and lack of information about a parent is not a constitutionally-permissible reason to place a child in the care of someone other than the parent. *Id.* at 689, 693.

Applying the ICPC to parents intrudes upon the parent-child relationship and tramples the "substantial constitution protection" that the Supreme Court and the District expressly recognize. *Appeal of H.R.*, 581 A.2d at 1177. Rather than acknowledging that parents are "presumptively *entitled* to custody," *id*. at 1180 (emphasis added), such application of the ICPC constitutes an implicit presumption that parents who reside outside of the District are not entitled to custody. Unless and until the receiving state approves, there is not just a presumption, but a requirement,

that the child not be placed with the parent, even if that means placing the child with strangers in state custody. That application of the ICPC turns due process and settled precedent on its head. It separates children from parents without first establishing parental unfitness – violating the Supreme Court's instruction to provide parents with "a hearing on their fitness *before* their children are removed from their custody." *Stanley*, 405 U.S. at 649 (emphasis added). It shifts the burden of proof from the state to parents prior to placement, despite the well-settled rule that the state bears the burden of proving that foster care is necessary. *E.g.*, *In re D.S.*, 88 A.3d at 689.

This case is an excellent example. The improper application of the ICPC caused the District to place the child with strangers in foster care rather than with a presumptively fit[6] parent who simply happened to reside outside of the District. This placement decision was significant, given both the legal import afforded to parental rights and, as explained in Section IV below, the grave harm that forcible separation from parents often visits upon children. Here, although the parties, including the District, had agreed that placement with the father would be in the children's best interests, the magistrate judge placed the children with strangers under the purported command of the ICPC. This Court should be extraordinarily reluctant to interpret the ICPC as mandating such a result, especially, because, as noted above, that result is not compelled by (and is actually contrary to) the statutory language.

III. THE ICPC SHOULD BE INTERPRETED BASED ON THE INTENT OF ITS DRAFTERS TO AVOID INTERFERENCE IN FAMILIES WHERE ADOPTION IS NOT CONTEMPLATED.

As reflected in its plain language, the purpose of the ICPC is a limited one, namely "to

[6] *Amici* do not make any factual assertions about the fitness of either parent in this case. *Amici* do note that no party alleged and no court found that the father in this case was unfit, so as a matter of law, he must be considered a fit parent. Moreover, the Child and Family Services Agency agreed that releasing the children to their father would serve their best interest.

facilitate interstate adoption." *In re T.M.J.*, 878 A.2d at 1202 (quoting B. Hartfield, *The Role of the Interstate Compact*, at 293). The ICPC also regulates interstate placements in foster care, possibly because those placements are a common precursor to interstate adoptions. *McComb v. Wambaugh*, 934 F.2d 474, 480 (3d Cir. 1991) (ICPC "focuses wholly on adoption and foster care of children"). Indeed, the ICPC was first proposed specifically to address "common problems arising from the interstate care and placement of children *in foster care or adoptive homes*." *Id.* at 479 (emphasis added, citing The Secretariat to the Association of Administrators of the Interstate Compact on the Placement of Children, *Guide to The Interstate Compact on the Placement of Children* 3 (1990)).

That purpose is not served by applying the ICPC to placements with parents because a placement with a parent is not an adoption or related to an adoption, and is not intended or likely to lead to an adoption. Nor is such a placement a form of foster care or related to a placement in foster care, and is not intended or likely to lead to foster care placement. The ICPC does not extend to placements with parents because such placements are simply beyond the scope of the issue that the ICPC was intended to address. Indeed, the ICPC drafters sought "to avoid entanglement with the natural rights of families," *McComb*, 934 F.2d at 481, and intended for the Compact to apply "only in the absence of adequate family control," *Draftsman's Notes on Interstate Compact on the Placement of Children*, *reprinted in* R. Hunt, *Obstacles to Interstate Adoption* 44 (1972), and *quoted in McComb*, 934 F.2d at 481. Applying the ICPC to placements with parents is an entanglement with the natural rights of families in which the drafters of the ICPC never intended to engage.

IV. APPLYING THE ICPC TO PLACEMENTS WITH PARENTS DOES NOT FURTHER CHILDREN'S BEST INTERESTS.

"[I]n all proceedings affecting the future of a minor, the decisive consideration is the best

interests of the child." *In re S.C.M.*, 653 A.2d 398, 405 (D.C. 1995) (quoted in *Wilkins v. Ferguson*, 928 A.2d 655, 667 (D.C. 2007)); *accord In re R.E.S.*, 19 A.3d 785, 789 (D.C. 2011). This general rule has been applied in numerous contexts in District statutory and common law,[7] and there is no reason to deviate from this general rule in interpreting the District's statute adopting the ICPC. The application of the ICPC here was unquestionably against the children's best interests, as the District determined that it would be in the children's best interests to place the children with the father, and the only reason that the District did not do so was its (incorrect) belief that the ICPC prohibited it from doing so without Maryland's prior approval.

This case is not an outlier; applying the ICPC to placements with parents will often be against the child's best interests. Application of the ICPC will often mandate the placement of a child with strangers in foster care (as it did here), rather than with a parent who has been found to be fit (like the father here) or a parent whose fitness has not been determined and therefore must be presumed. And the duration of this separation of child and parent can be considerable, as discussed in the Background section, *supra*.

Such separation of a child from a parent can be extremely damaging, and thus inconsistent with the best interests of the child. Even relatively brief forcible separations from parents can traumatize children. Joseph Goldstein, *et al.*, *The Best Interests of the Child: The Least Detrimental Alternative* 41-45 (1996 ed.). The resulting feelings of uncertainty and dislocation

[7] Those contexts include adoption, D.C. Code §§ 16-304(e) & 16-309(b)(3), third-party custody, D.C. Code § 16-831.06(a)(2), parental custody, D.C. Code § 16-914(a)(3), termination of parental rights, D.C. Code § 16-2353(a), visitation, *Wilkins*, 928 A.2d at 667, examination of child witnesses, *In re N.D.*, 909 A.2d 165, 171 (D.C. 2006), child support, *Sollars v. Cully*, 904 A.2d 373, 375, 376 (D.C. 2006), child neglect, *In re De.S.*, 894 A.2d 448, 451 n.3 (D.C. 2006), correcting date of birth on a birth certificate, *In re E.D.R.*, 772 A.2d 1156, 1158-59 (D.C. 2001), mental health treatment placement, *In re Myrick*, 624 A.2d 1222, 1229 (D.C. 1993), school placement, 5 DCMR § E2010, and TANF decisions, 29 DCMR § 5801.6.

may manifest themselves in a host of ways, including depression, acting out, withdrawal, poor academic performance and the like. Vivek S. Sankaran, *Perpetuating the Impermanence of Foster Children: A Critical Analysis of Efforts to Reform the Interstate Compact on the Placement of Children*, 40 Fam. L. Quarterly 435, 436 (2006) (citing *Fostering the Future: Safety, Permanency and Well-Being for Children in Foster Care*, Pew Commission (2004), http://www.pewtrusts.org/uploadedFiles/wwwpewtrustsorg/Reports/Foster_care_reform/foster_care_final_051804.pdf); *see also* Sankaran, *Out of State*, at 91-92; Lore, *Protecting Abused, Neglected, and Abandoned Children* 86 (discussing the benefit of kinship foster care in minimizing trauma on child).

These helpless feelings are often accompanied by the child's incorrect belief that she has misbehaved or angered the parent, and that the separation is due to her unworthiness rather than, what is the actual case, the fact that the parent must await compliance with legal requirements. Sankaran, *Out of State*, at 92. "From the kids' point of view, it's like they are being punished." Erik Eckholm, *Waits Plague Transfers of Children to Relative's Care*, New York Times at A11, 2008 WLNR 12098563 (June 28, 2008).

In addition to the possible emotional damage caused by the separation from the parent, the child's placement in foster care for an indefinite (and often protracted) amount of time carries its own risks. First, the child may face multiple foster care placements while awaiting ICPC approval, which can be traumatic, especially since they take place at a time when a child is likely feeling vulnerable, and can ultimately result in the child having difficulty in forming appropriate bonds in the future. Lore, *Protecting Abused, Neglected, and Abandoned Children* 88. And each placement opens up an opportunity for the child to be subject to abuse or neglect. Sankaran, *Out of State* 76. As one court stated, the duration of the ICPC process "often eliminates viable alternatives from

the court's consideration and thus harms the child rather than helps the child." *In re Lisa B.*, 818 N.Y.S.2d 443, 445 (N.Y. Supr. Ct. 2006).

Further compounding the injury, the ICPC review process lends itself to delays, which will increase the amount of time the child is in the foster-care system, and, particularly for a young child, result in greater detrimental impact. Sankaran, *Perpetuating the Impermanence* 453. The ICPC has no set timelines for completion of a home study or other required review by the receiving state. *See* Vivek S. Sankaran, *Navigating the Interstate Compact on the Placement of Children: Advocacy Tips for Child Welfare Attorneys*, ABA Child Law Practice, Vol. 27, No. 3, 1, 39 (May 2008). The result is that application of the ICPC to placements with parents fails to "safeguard each child's need for continuity." Goldstein, *Best Interests* 7.

Finally, there is always the possibility that the receiving state, once it acts, will improperly deny its approval. The bureaucracy involved in reviewing an ICPC placement with a non-custodial parent can be "prone to errors because social workers, utilizing a vague and undefined legal standard, are empowered to make decisions without any judicial oversight." Sankaran, *Perpetuating the Impermanence* 444. Notably, the Compact directs an agency to evaluate the "interests" of a child – not the constitutional standard of "fitness" set in *Stanley*. D.C. Code § 4-1422, Art. III(d). In some instances, this subjective review has produced a denial of a child's placement with an out-of-state parent under the ICPC for reasons unrelated to fitness, including: the amount of living space the parent has, the parent's dated criminal history, or a perceived lack of cooperation by the parent with the caseworker. Sankaran, *Navigating the Interstate Compact* 38; *see also* Sankaran, *Out of State* 65; *see also* Editorial, *Parental Right*, The Sun News, 2010 WLNR 19106917 (Sept. 7, 2010) (non-custodial father was unable to judicially challenge caseworker's opinion that his financial situation was "fragile" and the resulting refusal to endorse

placement of father's daughter with him under the ICPC). The risk of erroneous decisions, which would necessarily be against a child's best interest, is therefore high. In instances where an error may have been made, administrative review procedures are generally unavailable under state law. Sankaran, *Perpetuating the Impermanence* 444.[8]

In sum, the fact that the application of the ICPC here went against the child's best interests does not make this case an outlier, but rather places this case squarely within the heartland; withholding a child from a fit (or presumptively fit) parent is generally harmful to a child.[9] Interpreting the ICPC as applicable to placements with parents is not just contrary to the purpose of the ICPC itself, it is contrary to the overriding purpose of all District of Columbia law relating to children, namely, to serve the best interests of each and every child.

V. THE AAICPC "REGULATION NO. 3" IS NEITHER CONTROLLING NOR PERSUASIVE.

The District relies, as the basis for extending the ICPC to parents, on a regulation (known as "Regulation No. 3") promulgated by the Association of Administrators of the Interstate Compact on the Placement of Children (AAICPC). Regulation No. 3 purports to extend the reach

[8] This Court has suggested that such administrative review might be available in some states. *In re T.M.J.*, 878 A.2d at 1203. When the Court made that assertion it did not have available to it Professor Sankaran's detailed study of the question, which concluded that administrative appeals are generally unavailable. Sankaran, *Perpetuating the Impermanence* 448-50. Sankaran surveyed state agencies, 35 of which responded that no mechanism was available to appeal an ICPC denial, and another 3 responded that they did not know if such an appeal was available. *Id.* at 449 n.57.

[9] Importantly, the conclusion that the ICPC does not apply to placements with parents does not mean that the District would be *required* to make all such placements requested. If the District determines that such a placement would not be in a child's best interests (because, for example, the parent is unfit, has abandoned the child, or has failed to show interest in the child), it can avoid making such a placement by initiating a child neglect or abuse case. But the District cannot refuse an interstate placement with a parent as a matter of course, which is precisely what the District currently contends the ICPC requires it to do.

of the ICPC contrary to its plain language in a way that would bring its constitutionality into question and that would be contrary to the purpose of enacting the ICPC in particular and all District laws relating to child welfare more generally. *See, e.g., District of Columbia v. Brookstowne Community Dev. Co.*, 987 A.2d 442, 449 (D.C. 2010) (regulation that purports to extend the reach of a statute is invalid, as is any regulation that conflicts with the statute).

Many courts have rejected the interpretation proposed by Regulation No. 3 and by the District because it conflicts with the plain language and history of the ICPC. For example, the *McComb* case discussed above rejects Regulation No. 3 based on a detailed analysis of the plain language of the statute, the statutory purpose, and the constitutional rights at issue. *See* 934 F.2d at 479-82. *In re Alexis O.*, 959 A.2d 176, 181-83 (N.H. 2008), analyzes at length the ICPC's "plain language" and "legislative history" before concluding that it does not apply to placements with parents. Similarly, "California cases have consistently held that the Interstate Compact on Placement of Children . . . does *not* apply to an out-of-state placement with a parent." *Riverside Cnty. Dept. of Public Social Servs. v. B.B.*, 116 Cal. Rptr. 3d 294, 295 (Cal. App. 4th Dist. 2010). One recent California appellate opinion engaged in extensive textual analysis of the ICPC and provided a detailed timeline of the AAICPC's attempts to extend the ICPC to placements with parents. *See id*. at 299-302. While recognizing the AAICPC's "overwhelming expertise" in the area, the court nevertheless concluded that the AAICPC's regulations are simply incompatible with Article III of the ICPC itself. *See id.* at 303. Similarly, the Supreme Court of Connecticut recently determined that the ICPC did not apply to placements with noncustodial parents. *See In re Emoni W.*, 48 A.3d 1, 6 (Conn. 2012). The court held that the "ordinary meaning" of Article III does not encompass such placements, and that the drafters of the ICPC likely did not intend for it to apply to out-of-state parents due to "constitutionally based presumptions that parents generally are fit and that their decisions are in the child's best interests." *Id.* at 6-8. In addition to these

cases, courts in multiple other jurisdictions have held that the ICPC does not apply to placement with parents. *See Arkansas Dep't of Human Servs. v. Huff*, 65 S.W.3d 880, 887 (Ark. 2002) (reaffirming the court's previous holding on this question in *Nance v. Ark. Dept. of Human Servs.*, 870 S.W.2d 721 (Ark. 1994)); *D.B. v. Ind. Dept. of Child Servs.*, 43 N.E.3d 599 (Ind. Ct. App. 2015); *In re A.X.W.*, No. 299622, 2011 WL 2119626 (Mich. Ct. App. May 26, 2011); *In re Dependency of D.F.-M.*, 236 P.3d 961 (Wash. Ct. App. 2010); *In re S.R.C.-Q*, No. 113, 483, 2016 WL 683242 (Kan. Ct. App. Feb. 19, 2016).

An additional reason to disregard Regulation No. 3 is that it is not a properly promulgated District of Columbia regulation. As enacted in the District, the ICPC contains a District-specific provision regarding regulations which states that "[t]he appropriate authority shall be the general coordinator of activities under this compact in his or her state and who, acting jointly with the appropriate authority of other party states, shall promulgate rules and regulations in accordance with the procedures established by subchapter I of Chapter 5 of Title 2." D.C. Code 4-1422, Art. VII.

This provision is far from clear with respect to what person or persons or entity may "promulgate rules and regulations" relating to the ICPC in the District.[10] This Court need not resolve that question, however, because it is obvious that Regulation No. 3 was not "promulgate[d] . . . in accordance with the procedures established by subchapter I of Chapter 5 of Title 2." This

[10] District law identifies two "appropriate authorities" under the Compact. D.C. Code § 4-1421. *Amici* do not know whether either or both of these officers were members of the AAICPC when it promulgated Regulation No. 3. Moreover, the AAICPC is not a branch of the District of Columbia government or a public agency of any kind, and, instead claims to be an "affiliate" of a private organization, the American Public Human Services Association. AAICPC: About: Who We Are, http://www.aphsa.org/content/AAICPC/en/about.html (last visited 27 July 2016). The ability of the AAICPC to promulgate regulations valid in the District of Columbia – even if it complied with the District of Columbia Administrative Procedures Act – is far from clear.

statutory reference is to the District of Columbia Administrative Procedures Act, D.C. Code §§ 2-501 through 2-511 (the DC APA). The DC APA, in turn, imposes numerous requirements which were not satisfied by the promulgation of Regulation No. 3. For example, the DC APA requires notice and comment rulemaking. Rules must be published in the District of Columbia Register at least 30 days before their adoption, and the notice must state the relevant legal authority and provide the opportunity to submit comments. D.C. Code § 2-505(a). Regulation No. 3 meets none of these requirements. It is also telling that Regulation No. 3 does not appear in the compilation of the District of Columbia Municipal Regulations (DCMR). Because Regulation No. 3 was not promulgated according to the DC APA, it necessarily does not meet the requirements set forth in the District's enactment of the ICPC itself and is therefore not a valid regulation to be followed in the District or to be used by this Court to interpret the ICPC here.

Other states that have enacted the ICPC have reached similar conclusions. *In re Alexis O.*, 959 A.2d at 184 ("Regulation No. 3, however, is of no effect in New Hampshire. It has not been adopted here and was not promulgated pursuant to our statutes governing the adoption of regulations."); *In re D.F.-M.*, 236 P.3d at 966 ("The AAICPC regulations have not been adopted in Washington and therefore have no binding effect.").

Some state decisions are to the contrary and interpret the ICPC in accordance with Regulation No. 3. None of these decisions is controlling here, however, and the cases holding that Regulation No. 3 applies contain flawed reasoning. For example, *Ariz. Dept. of Econ. Security v. Leonardo*, 22 P.2d 513, 521 (Ariz. Ct. App. 2001), departed from the plain statutory text on the basis that "the primary purpose of the ICPC" was extremely broad, namely "to protect children by making certain they are placed in a safe environment." But this Court has already found that the ICPC's purpose is much narrower, a necessary conclusion given the fact that the ICPC does not apply to large categories of out-of-state placements, including placements by a child's parent or

certain close relatives. *See In re T.M.J.*, 878 A.2d at 1202-04; D.C. Code § 4-1422, Art. VIII. In addition, *Leonardo* addressed a parent whose rights had been diminished by a prior court ruling, 22 P.2d at 518, while the father in this case shared legal custody of his children.

Other decisions applying the ICPC to placements with parents are similarly flawed or otherwise inapplicable. *See In re Adoption of Warren*, 693 N.E.2d at 1024-26 (relying on Massachusetts regulations stating that the ICPC applies to placements with parents, regulations that have no analog in the DCMR); *D.B.*, 43 N.E.3d at 609 (following *Leonardo* without addressing contrary case law, including *McComb*); *Dept. of Children & Families v. Benway*, 745 So. 2d 437, 438-39 (Fla. 5th DCA 1999) (rejecting *McComb* on the basis that it was not the majority view); *D.S.S. v. Clay Cnty. Dep't of Human Res.*, 755 So. 2d 584, 591 (Ala. Civ. App. 1999) ("[a]ccept[ing]" the position that the ICPC applies to placements with parents, without analyzing the text of the ICPC or relevant regulations); *Green v. Div. of Family Servs.*, 864 A.2d 921, 926-927 (Del. 2004) (liberally interpreting the ICPC and rejecting *McComb* on the grounds that it narrowly interpreted the ICPC); *K.D.G.L.B.P. v. Hinds Cnty. Dep't of Human Servs.*, 771 So. 2d 907, 913 (Miss. 2000) (stating, without analysis, that the ICPC applies to placement with parents); *State ex rel. Juvenile Dep't of Clackamas Cnty. v. Smith*, 811 P.2d 145, 147 n.4 (Or. 1991) (in dicta, asserting that the ICPC applies to placement with parents and citing as authority a "Juvenile Law Handbook" published by the Oregon State Bar in 1984).

Courts ruling that the ICPC does not apply to parents are persuasive for a final reason: they consider the constitutional rights of parents and children discussed in Section II of this brief, while courts ruling to the contrary have not. The only federal appellate decision on the subject explained the ICPC's inapplicability to parents as "consistent with the limited circumstances that justify a state's interference with family life," citing two Supreme Court cases on the subject. *McComb*,

934 F.2d at 481 (citing *Moore v. City of East Cleveland*, 431 U.S. 494 (1977) and *Santosky v. Kramer*, 455 U.S. 745 (1982)). Other cases which explicitly consider or evoke the constitutional context reach the same conclusion. *In re A.X.W.*, 2011 Mich. App. LEXIS at *19-*21 (discussing the constitutional "Guiding Principles"); *In re Alexis O.*, 959 A.2d at 183 ("Biological and adoptive parents have a fundamental liberty interest . . . ."); *State v. K.F.*, 803 A.2d 721, 727-28 (N.J. Sup. Ct. App. Div. 2002) (citing *McComb*); *Tara S. v. Superior Court*, 13 Cal. App. 4th 1834, 1839 (Cal. App. 1993).

VI. THE APPEAL SHOULD NOT BE DISMISSED AS MOOT.

The trial court's decision to dismiss the cases when the children were returned to their mother ended, at least for that time, the possibility of placement with their father. However, it is particularly appropriate for this Court to review recurring issues in child welfare, such as this one, that are otherwise capable of evading review. *Amici* will not duplicate the GAL's thorough examination of the jurisdictional issues and will instead focus on one central point – appellate review of issues otherwise capable of repetition yet evading review is particularly appropriate in child welfare cases, because many essential decisions would otherwise effectively be unreviewable. Unless appellate courts exercise jurisdiction to hear issues such as those in this appeal, they will lose precious opportunities to develop important areas of child welfare law – such as the proper scope of the ICPC's application – and children will suffer from trial court decisions made without the benefit of well-developed law.

A. Courts Should be Particularly Reluctant to Decline to Review Cases Raising Issues of Child Welfare.

This Court has written in a delinquency appeal: "Particularly in the juvenile context, however, our decisions have been generous in applying the exception to mootness for issues that are 'capable of repetition yet evading review.'" *In re M.N.T.*, 776 A.2d 1201, 1203 n.2 (D.C.

2001). This Court has applied a similar approach to child welfare appeals as well. For instance, *In re T.R.J.* addressed a trial court decision to terminate jurisdiction over a youth in foster care after his 18th birthday but before his 21st birthday. The Court decided the substantive issue even though T.R.J. had turned 21 during pendency of the appeal, precisely because the Court concluded it was "quite likely that other young people" would face similar facts. 661 A.2d 1086, 1088 (D.C. 1995) (*cited in In re M.N.T.*, 776 A.2d at 1203 n.2).

A "generous" approach to deciding issues on appeal is appropriate for children because, as this Court has noted, the life of each child is "an ongoing event," requiring frequent reappraisals in light of new facts. *In re S.M.*, 985 A.2d 413, 420 (D.C. 2009). Trial courts must make essential decisions early in a case – such as whether to release a child to a parent, or to place the child with another family member, with strangers in foster care, or in an institution. These decisions are essential to the children who are the subject of child protection cases, and those children deserve to have those decisions made pursuant to well-developed standards. But appellate review often cannot take place until after the "ongoing event" of a child's life has moved on to other issues. Absent a "generous" approach to mootness, few of these essential issues will ever be litigated to completion on appeal. If that happens, then this Court's ability to develop important areas of the law would be severely undermined, and children would be deprived of a decision-making structure based on well-developed standards.

B. The Present Case Illustrates How the ICPC's Purported Application to Parents Repeats Itself While Evading Review.

This case illustrates a common method through which a court's decision to apply the ICPC to parents escapes review. Here, following a dispute over the Compact's application and shortly after the GAL filed a motion for review challenging the Compact's application, the District worked

to quickly return the children to the mother from whom it had just removed them.[11] In other cases in *amici's* experience in both the District and nationally, courts often rush to grant full custody to the non-offending out-of-state parent and then close the case. In addition, the ICPC process will often run its course before any appellate review. In all such cases, misapplication of the ICPC can cause real harm and should not be shielded from review based on rapidly changing facts, lest the same mistake harm more children in future cases. *See In re Emoni W.*, 48 A.3d 1, 4-6 (Conn. 2012) (reviewing application of ICPC as capable of repetition yet evading review).

When an ICPC issue arises, family courts face strong incentives to reunify children quickly with the parent from whom they were recently removed, or to transfer custody quickly to the non-offending parent and terminate jurisdiction. The latter course is preferred by the purported ICPC regulations. AAICPC Regulation 3(3)(a), http://www.aphsa.org/content/AAICPC/en/ICPCRegulations.html. Family courts understand the risks to children of applying the ICPC to parents – doing so can keep a child separated at length from a fit out-of-state parent and force a child to live in foster care when (as in this case) even the agency agrees that is not in the child's best interest. When one concludes, as the trial court did, that the ICPC applies to parents, then the only way to avoid an extended stay in foster care is to rush to a permanent custody with one parent or the other. This course of action shows how the issue is capable of repetition yet evading review.

Such speedy actions are sometimes appropriate in individual cases, but not always. Rushing a reunification with a parent who has not yet rehabilitated adequately is often contrary to a child's interests – especially when the child can live with the other parent rather than with

[11] *Amici* take no position on whether this removal or the reunification which quickly followed was justified.

strangers. And quickly shifting custody permanently to a non-offending parent may also be contrary to a child's interests. While children should generally live with such a parent rather than with strangers (and this is an essential reason that the ICPC does not apply to parents), continued court jurisdiction can also serve children's interests. Family courts can require and supervise rehabilitation services to the parent from whom the child was removed. Once that parent has rehabilitated, the court can then, with much greater information about the child's relationship with both parents, decide permanent custody. In contrast, when a child has been removed from one parent for abuse or neglect and lives, at least temporarily, with the other parent, it is difficult to make a permanent custody decision after just a few weeks.

There should be no need to trade off a child's constitutional right to live with a fit and involved parent for the child's right to have the Family Court supervise rehabilitative services to a parent who has been the child's primary caretaker. Unfortunately, current practice – exemplified by the facts of this case – requires that trade-off as a practical matter and threatens to do so in a manner from which appellate review is difficult if not impossible to obtain. *Amici* urge the Court to decide the case and to hold clearly that the ICPC does not apply to parents.

CONCLUSION

Applying the ICPC to placements with parents violates the plain language of the ICPC, the constitutional rights of parents and children to family integrity, the "best interests of the child" principle, and core precepts of administrative law. Quite simply, it has no legal basis and threatens to harm children. *Amici* urge the Court to rule that the ICPC does not apply to placements with parents.

Respectfully submitted,

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Dated: August 25, 2016

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief of *Amici Curiae* to be delivered by first-class mail, postage prepaid, the 25th day of August, 2016, to

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