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ATTORNEY GENERAL OPINION NO. 88- 174

The Honorable Sam K. Bruner
District Judge, Division No. 2
Johnson County Courthouse
Olathe, Kansas 66061

Re: Minors -- Interstate Compact on Placement of
Children -- Enactment of Compact; Enforcement of
Compact; Limitations

Probate Code -- Probate Procedure; Adoption
Proceedings -- Nonresident Mother

Synopsis: K.S.A. 38-1202 and K.S.A. 1987 Supp. 59-2278b do
not require a pregnant woman who is not a Kansas
resident, but whose child is born in Kansas, to
comply with the procedures of the interstate
compact on placement of children. Cited herein:
K.S.A. 38-1202; K.S.A. 1987 Supp. 59-2278b; K.S.A.
65-509.

* * *

Dear Judge Bruner:

You request our opinion on whether the interstate compact on
placement of children applies in the case of a pregnant
nonresident mother giving birth in Kansas who, before
returning to her home state, consents to the adoption of the
baby by a resident Kansan couple. You inform us that both the
mother's home state and Kansas have enacted the interstate
compact on placement of children.

Enacted in 1985, K.S.A. 1987 Supp. 59-2278b states:

"Interstate placements of children shall comply with the procedures contained in the interstate compact on placement of children as set forth in K.S.A. 38-1202 and amendments thereto."

Enacted in 1976, K.S.A. 38-1202 provides in pertinent part:

"ARTICLE II. Definitions.

"As used in this compact: (a) 'Child' means a person who, by reason of minority, is legally subject to parental, guardianship or similar control.

"(b) 'Sending agency' means a party state, officer or employee thereof; a subdivision of a party state, or officer or employee thereof; a court of a party state; a person, corporation, association, charitable agency or other entity which sends, brings, or causes to be sent or brought any child to another party state.

"(c) 'Receiving state' means the state to which a child is sent, brought, or caused to be sent or brought, whether by public authorities or private persons or agencies, and whether for placement with state or local public authorities or for placement with private agencies or persons.

"(d) 'Placement' means the arrangement for the care of a child in a family free or boarding home or in a child-caring agency or institution but does not include any institution caring for the mentally ill, mentally defective or epileptic or any institution primarily educational in character, and any hospital or other medical facility.

. . .

"ARTICLE VIII. Limitations.

"This compact shall not apply to: (a)
The sending or bringing of a child into a
receiving state by his parent,
step-parent, grandparent, adult brother or
sister, adult uncle or aunt, or his
guardian and leaving the child with any
such relative or nonagency guardian in
the receiving state.

. . .

"ARTICLE III. Conditions for Placement.

"(a) No sending agency shall send, bring, or cause to be sent or brought into any other party state any child for placement in foster care or as a preliminary to a possible adoption unless the sending agency shall comply with each and every requirement set forth in this article and with the applicable laws of the receiving state governing the placement of children therein. . . ." (Emphasis added).

Thus, Kansas has attempted to insure that children brought into Kansas are afforded some protection. See K.S.A. 1987 Supp. 59-2278(c); K.S.A. 65-509; State ex rel. v. Heart Ministries, Inc., 227 Kan. 244 (1980); Matter of Adoption of Hobson, 8 Kan. App. 2d 772 (1983). See also "The Interstate Placement of Children: A Preliminary Report", Council of State Governments (1978); J. Hall, "The Out-of-State Placement of Children: A National Survey 2" (Major Issues in Juvenile Justice Information and Training, 1982). Clearly, if a governmental agency places the child in an out-of-state institution, the procedures contained in the interstate compact on placement of children become applicable. See Sinhogar v. Parry, 427 N.Y.S. 2d 216 (1980), app. dism., 431 N.Y.S. 2d 813, modified on other grounds, 442 N.Y.S. 2d 438.

The situation presented concerns what is essentially a private adoption involving a pregnant nonresident mother. K.S.A. 1987 Supp. 59-2278b mandates the applicability of the interstate compact to adoption proceedings. The required procedures are set forth at K.S.A. 38-1202. Independent adoptions in Kansas historically have occurred without the assistance of a licensed agency. L. Elrod, "The Kansas Family Law Handbook," 6-3, 6-4 (1983). Nationwide estimates show that

independent placements exceed agency placements two-to-one. Evans, "Independent Adoptions: In Whose Best Interests?", 53 OK. B.J. 1805 (1982).

Other states' courts involved with adoptions and enforcing procedural requirements contained in the interstate compact focus on the activities of persons other than the natural parents of a child. Those courts have indicated that failure to comply with the procedures of the interstate compact on placement of children may jeopardize independent adoptions. The Montana supreme court removed a child from the prospective adoptive parents' care and placed the child in foster care because the compact procedures were not followed. The Adoption of T.M.M., 608 P. 2d 130 (1980). In T.M.M. the prospective adoptive couple went to another state and picked up the child. The court recognized that the compact did not apply to "the sending or bringing of a child into a receiving state by his parent . . . and leaving the child with any such relative or nonagency guardian in the receiving state." However, the court stated that because the prospective adoptive parents are not relatives of the natural mother, or nonagency guardians, they were required to comply with the requirements of the compact. Id. at 133. The Arizona supreme court found that a juvenile court was without authority to allow foster parents to take a minor out of the state for placement unless the terms of the compact were complied with. Pima v. Fisher, 610 P.2d 64 (Az. 1980).

Assuming, arguendo, that limitations contained in Article VIII(a) of K.S.A. 38-1202 do not apply to parents and that K.S.A. 1987 Supp. 59-2278b therefore precludes a mother who does not comply with the compact from bringing her child into Kansas for the purpose of independently placing that child for adoption, if the child is as yet unborn at the time the mother enters the state the applicability of the compact is limited. Under K.S.A. 38-1202, Article II(a), child means "a person who, by reason of minority, is legally subject to parental, guardianship or similar control." While an unborn child is subject to a certain degree of parental control, the term "child" within the adoption statutes means a living child who can receive attention. In re Adoption of Nelson, 202 Kan. 663 (1969). "We do not ordinarily use the term child to mean an unborn child." Id. at 666. See also Wisdom v. Norton, 507 F. 2d 750 (Conn. 1974); Poole v. Endsley, 371 F. Supp. 1370 (5th Circ. 1974). Transporting expectant mothers to another jurisdiction until the baby is born appears to represent a creative circumvention of the terms of the compact. Note, "Independent Adoption:

Regulating the Middleman," 24 W.L.J. 327, 334 at note 64 (1985). Such circumvention is properly addressed by the legislative body possessing the authority to regulate such matters.

In summary, K.S.A. 1987 Supp. 59-2278b mandates the applicability of procedures contained in the interstate compact on placement of children to adoption proceedings. These required procedures are set forth at K.S.A. 38-1202. Article VIII(a) expressly limits the applicability of the compact to certain persons and situations. There is some question whether these limitations operate to allow a parent to bring his or her child into the state for private adoption purposes. Nevertheless, if a woman is pregnant at the time she enters Kansas she has not, for purposes of the compact, brought a "child" into the state. It is therefore our opinion that the procedures contained in the interstate compact on placement of children and K.S.A. 1987 Supp. 59-2278(b) do not apply to a pregnant woman who enters Kansas and then gives birth.

Very truly yours,



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