IN THE SUPREME COURT OF MISSISSIPPI

No. 2008-CA-01783-COA

RHONDA YEAGER — Appellant

v.

DAVID KITTRELL — Appellee

REPLY TO BRIEF OF APPELLEE

APPELLANT RESPECTFULLY REQUESTS ORAL ARGUMENT

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Much time has been devoted in Mr. Kitrell's Brief to reliving the heated procedural history in this case. Mr. Kittrell has chosen to proceed per se which certainly his right. The issue on Appeal is the Constitutionality of our UCCJA, either in toto, or as applied herein. At stake in this matter is the best interests of two minor children. Mr. Kitrell and Mrs. Yeager were once married and have since fought custody battles in Mississippi Courts for roughly fourteen years. Since the Chancellor ruled herein Mr. Kitrell has used the Texas Courts to prevent visitation and contact of these two minor children with their mother, Mrs. Yeager who remains a Mississippi Resident. These children have paid the price and the legal quagmire must be firmed and the playing field leveled in order to protect the best interest of these minor children in accordance with the PKPA and the UCCJA. Based upon review of Mississippi precedent, and our Sister States, it is clear that this Court shares the same view.

In Owens, by and through Mosely v. Huffman 481 So.2d 231 (Miss. 1985), this Court stated as follows:

> "A child is not a pawn. In exercising its discretion within the confines of the UCCJA and PKPA; a court should consider not only the literal wording of statutes but their purpose; to define and stabilize the right to custody in the best interest of the child."

Likewise this Court has followed the rationale of other Courts in interpreting the interplay between the UCCJA and the PKPA. In Owens this Court cited with approval the following rationale from an Oregon case: "Jurisdiction exists only if it is in the **child's** interest and not merely the interest or convenience of the feuding parties, to determine custody in a particular state." Smith v.

Smith, 594 P.2d 1292, 1296 (Ore. 1979). As cited in Owens, by and through Mosely v. Huffman 481 So.2d 231 (Miss. 1985).

Mr. Kitrell's brief devotes a great deal of time attempting to analyze decisions from our Sister states. Mr. Kitrell misses the point of this appeal. In Owens, this Court made it clear that our Courts must comply with the PKPA and our own UCCJA. However, in Owens this Court dealt with Grandparents that had wrongfully removed a child from this State. In this appeal we are only examining whether or not the Chancellor, in unison wwith the UCCJA and PKPA, had the authority to transfer jurisdiction to Texas since Mrs. Yeager still resides in Mississippi and has no contacts with the state of Texas. This is the only issue that is presently before the Court because if the answer is in the negative then all the Texas Orders are not entitled to Full Faith and Credit and Mr. Kitrell remains subject to Mississippi Courts for the enforcement of Mrs. Yeager's rights to reasonable visitation with her two minor children.

According to Mississippiu precedent we must look both to the UCCJA and the PKPA when viewed through the veil of the best interests of the children. Applying this principle to this appeal we first look to the PKPA as viewed through the Unites States Supremacy Clause.

28 U.S.C.A. § 1738A

§ 1738A. Full faith and credit given to child custody determinations

(a) The appropriate authorities of every State shall enforce according to its terms, and shall not modify except as provided in subsections (f), (g), and (h) of this section, any custody determination or visitation determination made consistently with the provisions of this section by a court of another State.

(b) As used in this section, the term--

(1) "child" means a person under the age of eighteen;

(2) "contestant" means a person, including a parent or grandparent, who claims a right to custody or visitation of a child;

(3) "custody determination" means a judgment, decree, or other order of a court

providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications;

(4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period;

(5) "modification" and "modify" refer to a custody or visitation determination which modifies, replaces, supersedes, or otherwise is made subsequent to, a prior custody or visitation determination concerning the same child, whether made by the same court or not;

(6) "person acting as a parent" means a person, other than a parent, who has physical custody of a child and who has either been awarded custody by a court or claims a right to custody;

(7) "physical custody" means actual possession and control of a child;

(8) "State" means a State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or a territory or possession of the United States; and

(9) "visitation determination" means a judgment, decree, or other order of a court providing for the visitation of a child and includes permanent and temporary orders and initial orders and modifications.

(c) A child custody or visitation determination made by a court of a State is consistent with the provisions of this section only if--

(1) such court has jurisdiction under the law of such State; and

(2) one of the following conditions is met:

(A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State;

(B) (i) it appears that no other State would have jurisdiction under subparagraph (A), and (ii) it is in the best interest of the child that a court of such State assume jurisdiction because (I) the child and his parents, or the child and at least one contestant, have a significant connection with such State other than mere physical presence in such State, and (II) there is available in such State substantial evidence concerning the child's present or future care, protection, training, and personal relationships;

(C) the child is physically present in such State and (i) the child has been abandoned, or (ii) it is necessary in an emergency to protect the child because the child, a sibling, or parent of the child has been subjected to or threatened with mistreatment or abuse;

(D) (i) it appears that no other State would have jurisdiction under subparagraph (A), (B), (C), or (E), or another State has declined to exercise

jurisdiction on the ground that the State whose jurisdiction is in issue is the more appropriate forum to determine the custody or visitation of the child, and (ii) it is in the best interest of the child that such court assume jurisdiction; or

(E) the court has continuing jurisdiction pursuant to subsection (d) of this section.

(d) **The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.** (Emphasis Added.)

(e)Before a child custody or visitation determination is made, reasonable notice and opportunity to be heard shall be given to the contestants, any parent whose parental rights have not been previously terminated and any person who has physical custody of a child.

(f) A court of a State may modify a determination of the custody of the same child made by a court of another State, if--

(1) it has jurisdiction to make such a child custody determination; and

(2) the court of the other State no longer has jurisdiction, or it has declined to exercise such jurisdiction to modify such determination.

(g) A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody determination.

(h) A court of a State may not modify a visitation determination made by a court of another State unless the court of the other State no longer has jurisdiction to modify such determination or has declined to exercise jurisdiction to modify such determination.

History:

(Added Dec. 28, 1980, P.L. 96-611, § 8(a), 94 Stat. 3569; Nov. 12, 1998, P.L. 105-374, § 1, 112 Stat. 3383; Oct. 28, 2000, P.L. 106-386, Div B, Title III, § 1303(d), 114 Stat. 1512.)

Prior to the enactment of the UCCJA, Sister States often made inconsistent rulings in Child Custody proceedings which led to a quagmire of legal uncertainty. After the near universal enactment of the UCCJA, inconsistencies in various precedents remained. The United States Congress enacted the 28 U.S.C.A. § 1738A (referred to herein as the PKPA) to provide continuity to our State Courts

in an effort to prevent forum shopping and inconsistent rulings which had the effect of harming children. Although a more than laudable tasks, the realities of heated domestic litigation often lead to tragic outcomes. The undersigned diligently searched Mississippi precedent, along with cases across the nation, searching for precedent directly on point. This proved to be a very difficult task. This domestic case is, like all others, very fact driven. It touches on subject matter jurisdiction and interpretation of the United States Supremacy Clause. The Appellate Court of Connecticut dealt with a very similar situation in Scott v. Somers, 903 A.2d 663 (Conn. App. 2006). In Scott the Father persuaded a Connecticut Court to modify custody of a Florida decree. The Appellate Court of Connecticut reversed the trial court holding that the lower court lacked jurisdiction to modify the prior Florida custody order under the Parental Kidnapping Prevention Act.

The Court below released jurisdiction citing inconvenient forum within the meaning of 93-27-207 of the Mississippi Code. (Appellee R.E. 11). In Owens, by and through Mosely v. Huffman 481 So.2d 231 (Miss. 1985) this Court stated that "we must comply with the PKPA when interpreting our own UCCJA". The Court went on to say that the PKPA is focused on wrongdoing of a parent but it is not limited thereto and further stated in dicta that our procedural rules are important but should not be used to defeat justice.

Article Six, Clause Two of the United States Constitution provides in relevant part that the: "Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all the Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the contrary notwithstanding. As cited in Scott v. Somers, 903 A.2d 663 (Conn. App. 2006). The PKPA anchors exclusive modification jurisdiction in the original

home state as long as the child or one of the contestants remains in that state, 28 U.S.C.A. 1738A. To the extent that the PKPA and the UCCJA conflict, the Supremacy Clause of the United States constitution mandates **667 that the PKPA preempts the state's enactment of the UCCJA. See *Rogers v. Rogers,* 907 P.2d 469, 471 (Alaska 1995); *52 *Matter of Adoption of Child by T.W.C.,* 270 N.J. Super. 225, 233, 636 A.2d 1083 (1994); *Barndt v. Barndt,* 397 Pa.Super. 321, 334, 580 A.2d 320 (1990); *Wilcox v. Wilcox*, 862 S.W.2d 533, 544 (Tenn.Appl. 1993); *Shute v. Shute*, 158 Vt. 242, 246, 607, A.2d 890 (1992). Notwithstanding its title, the PKPA is not limited in its application to cases involving child abduction but extends to all child custody determinations and the full faith and credit to be accorded to such determinations. *Rees v. Reves,* 602 A.2d 1137 (D.C.App.) cert. Denied, 503 U.S. 991, 112 S.Ct. 1686, 118 L.Ed.2d 400 (1992); *Peterson v. Peterson*, 464 A.2d 202 (Me. 1983); *Tufares v. Wright,* 98 N.M. 8, 644 P.2d 522 (1982); *Holm v. Smilowitz*, 83 Ohio App. 3d 757, 615 N.E.2d 1047 (1992); *Davidson v. Davidson*, 169 Wis.2d 546, 485 N.W.2d 450 (1992). Rather, Florida law provides that Florida, as the originating state and the continuing residence of Somers, has exclusive, continuing jurisdiction over this matter. In this circumstance, the PKPA requires that the Connecticut court defer to the Florida court's continuing jurisdiction. As cited in Scott v. Somers, 903 A.2d 663 (Conn. App. 2006).

In this Appeal, the parties litigated through many years; many attorneys; and two (2) Learned Chancellors. Through fourteen (14) years of hearings, many allegations by both Mr. Kittrell and Mrs. Yeager were made and the end result is that two (2) minor children are now in Texas without contact with their mother, Mrs. Yeager, through no fault of their own. As was discussed in the Owens case, the purpose of our Chancery Courts are to protect the best interests of minor children above and beyond the rights of feuding and estranged parents. As discussed in that case law, Court rules and

precedent are not meant to be used as swords against litigants only to defeat the solemn duties of Courts and those attorneys who practice before them to protect the best interests of innocent children who become the victims of unjust legal rulings. The Learned Chancellor below decided to release jurisdiction to Texas which has the effect of denying Mrs. Yeager access to her children because of her poverty. Mrs. Yeager's Federal Constitutional rights, as well as her State right to open access to Mississippi Courts, have been erased. The undersigned respectfully submits that this is not and could not be the intended result of the spirit behind the PKPA and UCCJA.

A state's child custody determination is made consistent with the PKPA if the state court making the child custody determination: "(1) ....has jurisdiction under the law of such State; and (2) one of the following conditions is met: (A) such State (I) is the home State of the child on the date of the commencement of the proceedings....." 28 U.S.C. § 1738A(c). "and it continues up until a Florida court expressly determines on some other basis that jurisdiction is no longer appropriate, until virtually all contacts with Florida have ceased, until some other Florida statute terminates jurisdiction, or until jurisdiction is terminated by operation of the PKPA." As Cited in Scott v. Somers, 903 A.2d 663 (Conn. App. 2006).

Connecticut has also dealt with these interstate conflicts in child custody proceedings. Once such case, Curtis v. Curtis, 790 P.2d 717 Ct. App. (Utah 1990). In Curtis, the Utah Appellate Court held that a Mississippi Order was invalid. Once again, a sister Appellate Court wrestled with the inner play of competing Orders from sister States. Interpreting the Court stated as follows:

> It is particularly appropriate to apply the PKPA in this dispute because the federal act was specifically created to deal with this kind of case. We need not turn to general legislative history to ascertain this fact. Congress formulated specific "findings and purposes," which were thereafter enacted as part of the PKPA, though not codified. *See generally* Parental Kidnapping Prevention Act of 1980, Pub.L. No. 96–611, § 7, 94 Stat. 3568- - 69(1980). In these "findings and purposes," Congress recognized the lack of a national standard to guide states in resolving their jurisdictional disputes in the are of child custody. Without a national standard, states were reaching inconsistent and conflicting results. Thus, disgruntled noncustodial parents, like William in this case, were tempted to snatch children away from the custodial parent and to seek a more favorable decree from another state. In response to

these problems, Congress enacted the PKPA. Its expressed purpose was "to establish national standards under which the courts of [each state] will determine their jurisdiction to decide such disputes and the effect to be given by each such [state] to such decisions by the courts of other such [states.] at Pub.L. No. 96 - - 611, § 7 (b). These standards guide and instruct courts to "ascertain the one state with jurisdiction to modify an existing child custody order." *Murphy v. Woerner,* 748 P.2d 749, 750 (Alaska 1988) (emphasis added). In most cases, the appropriate state will be the one that issued the original decree, fulfilling the "strong Congressional intent to channel custody litigation into a court having *continuing* jurisdiction." *Mark L. V. Jennifer S.*, 133 Misc. 2d 454, 506 N.Y.S.2d 1020, 1023 (Fam.Ct. 1986) (emphasis in original). By limiting the discretion of individual state courts, Congress has removed the success of forum shopping and thus the incentive for child snatching. *See E.E.B. v. D.A.*, 89 N.J. 595, 446 A.2d 871, 876 (1982), *cert denied,* 459 U.S. 1210, 103 S.Ct., 1203, 75 L.Ed.2d 445 (1983); *Tufares v. Wright*, 98 N.M. 8, 644 P. 2d 522, 525 (1982).

Likewise "These provisions of the PKPA are dispositive of this case. They provide that a second state may only modify the custody decree of the first state in very limited circumstances, even though both states may have an interest in the matter. *In re B.B.R.*, 566 A.2d 1032, 1036 (D.C.Ct.App. 1989). Subsection (f) is the key modification provision of the PKPA and creates a two-prong test for courts to apply. Before a second state may modify the decree of the first state, (1) the **second state must have such jurisdiction** as would permit it to make an initial custody determination and (2) the first state must have lost or given up its continuing jurisdiction." As Cited in Scott v. Somers, 903 A.2d 663 (Conn. App. 2006).

As applied to this case, the District Court of Navarro County, Texas, on September 10, 2007, entered an Order altering visitation rights of Mrs. Yeager. See Appellee R.E. 14. Subsection (f), provision of the PKPA, as spelled out above, as simply not been complied with. Prong 1 requires that, in this case, Texas must have jurisdiction over Mrs. Yeager. Texas has no jurisdiction, personal or otherwise, over Mrs. Yeager. Neither long arm, specific, and/or general jurisdiction. Mrs. Yeager has done nothing to avail herself of the Courts of Texas, having not conducted business nor done any acts nor owning any real property within the State of Texas. It is axiomatic that a Court of one state

has no jurisdiction over the resident of a sister state without some affirmative act. With the result being, that the minor children herein, are without access or visitation, telephonic or otherwise, with their own natural mother. After diligent review of Mississippi cases and those of other jurisdictions, the undersigned has been able to find authority which interpreted factual situations mostly centered on the physical taking of minor children from any given number of jurisdictions. Also, it appears fairly clear that the intended inter play between the PKPA and the UCCJA is to promote, protect, and foster the ever so important child/parent relationship which should exist in every democratic society. The unfortunate facts of this case can lead to but one conclusion and that is that Mrs. Yeager's relationship with her children has been extinguished due to the financial and legal kidnapping of her own children. The undersigned respectfully submits that the end result defies the sprit and intent of the PKPA and UCCJA and constitutes the most severe travesty of justice imaginable. The underlying ruling herein has the undeniable effect of obliterating constitutional rights that all people, and even more so the legal community, has an obligation to protect, preserve and promote.

CONCLUSION:

That Mrs. Yeager, by and through the undersigned counsel, does respectfully pray that this Court reverse the Honorable Chancery Court of Wayne County's Order Releasing Jurisdiction as the same is Unconstitutional on its face and/or as applied strictly herein to these unfortunate set of facts.

RESPECTFULLY SUBMITTED, this the 23rd day of July, 2009.

RHONDA YEAGER

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CERTIFICATE OF SERVICE

I, Eric Tiebauer, the undersigned attorney, have this day forwarded, via United States Mail, postage prepaid, a copy of the above and foregoing document to the following:

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SO CERTIFIED, this the 23rd day of July, 2009.

Eric Tiebauer
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