IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

DIANE M. GARTRELL,
LISA LEANN GARTRELL AVERESCH,
AND JODEY JON GARTRELL — APPELLANTS

VS. — CAUSE NO: 2008-IA-01410-SCT

M. KAY GARTRELL (A/K/A
KAY GARTRELL KIRSCHNER),
EXECUTRIX OF THE ESTATE OF
DOROTHY BRYAN GARTRELL — APPELLEE

APPELLANTS' REPLY BRIEF

APPEAL FROM THE DECISION OF THE
CHANCERY COURT OF DESOTO COUNTY, MISSISSIPPI

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of the case. These representations are made in order that the Justices of this Court may evaluate possible disqualifications or recusal.

Diane M. Gartrell, Lisa Leann (Gartrell) Averesch, and Jodey Jon Gartrell	Appellants
M. Kay Gartrell	Appellee
John T. Lamar, Jr., & law firm of Lamar & Hannaford, P.A.	Attorney of Record for Appellants
David M. Slocum, Jr., & law firm of Slocum Law Firm, PLLC	Attorney of Record for Appellants
Richard C. Roberts, III, Esq. & Law Offices of Richard C. Roberts, III	Attorney of Record for Appellee
Honorable Mitchell M. Lundy, Jr.	Chancellor

Respectfully submitted,
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STATEMENT OF ISSUES

The issues presented by the Appellant in this Appeal are:

ISSUE #1: WHETHER THE DESOTO COUNTY CHANCERY COURT HAD JURISDICTION OVER THE ADOPTION IN 1984.

ISSUE #2: WHETHER THE CHANCELLOR ERRED IN ALLOWING THE APPELLEE TO COLLATERALLY ATTACK A FINAL DECREE OF ADOPTION ENTERED TWENTY FIVE (25) YEARS AGO.

ISSUE #3: WHETHER THE PRINCIPLES OF EQUITY AND JUDICIAL ESTOPPEL PRECLUDE THE APPELLEE'S COLLATERAL ATTACK ON A TWENTY FIVE (25) YEAR OLD ADOPTION.

STATEMENT OF CASE

A. NATURE OF CASE, COURSE OF PROCEEDINGS AND DISPOSITION IN THE COURT BELOW.

The Appellant reincorporates the Nature of Case, Course of Proceedings and Disposition in Court Below contained in the Appellant's Brief previously filed with this court.

B. STATEMENT OF THE FACTS

The Appellant reincorporates the Statement of Facts contained in the Appellant's Brief previously filed with this court and will refrain from rehashing the same facts in this Reply Brief. However, the Appellant would like to clarify some of the facts.

Diane Mae Weiss was divorced from George Joseph Weiss (hereinafter "Weiss") by Order of the Circuit Court for Saginaw County, Michigan on March 1, 1971. (Appellee's R. 43-46). On July 20, 1979, an Order Terminating Support due from Weiss in regards to the minor children was entered. (Appellee's R. 86). This order was the final action filed in the cause Circuit Court for Saginaw County, Michigan on March 1, 1971.

The Petition for Adoption in regards to Jodey John Gartrell (hereinafter "Jodey") and Lisa LeAnn Gartrell Averesch(hereinafter "Lisa") was filed on July 3, 1984 in the Chancery Court of DeSoto County, Mississippi. (Sealed Adoption record). The Final Decree of Adoption in regards to Jodey and Lisa was entered on November 15, 1984 in the Chancery Court of DeSoto County, Mississippi. (Sealed Adoption record). The initial pleading which formally

contested the Adoption was a collateral attack by way of a Second Amended Petition for Determination of Heirs filed within the Estate of Dorothy Bryan Gartrell (hereinafter "Dorothy") on February 8, 2008. (Appellee's R. 168).

SUMMARY OF ARGUMENT

The Uniform Child Custody Jurisdiction Act (hereinafter "UCCJA) is not applicable in the current case since the case did not involve interstate parental kidnaping. Further, the Desoto County, Mississippi Chancery Court clearly had jurisdiction over the adoption in 1984.

Additionally, the Appellee clearly lacks standing the challenge the adoption as that right is vested in the natural parents of the adopted children. In this case, the natural father has acknowledged that he has no intent of challenging the adoption. As a result, this court must reverse the order of the chancellor, find that the adoption is valid, and order that Jodey and Lisa are heirs-at-law of Dorothy.

ARGUMENT

A. STANDARD OF REVIEW

The Appellant reincorporates the Standard of Review contained in the Appellant's Brief previously filed with this court.

B. ISSUE # 1: WHETHER THE DESOTO COUNTY, MISSISSIPPI CHANCERY COURT HAD SUBJECT MATTER JURISDICTION OVER THE 1984 ADOPTION PROCEEDINGS.

The Appellee accurately states that the sole question before this honorable court is whether the DeSoto County, Mississippi

Chancery Court had subject matter jurisdiction over the 1984 adoption proceedings. There is still a great deal of question within the Mississippi court system concerning whether the UCCJA governed jurisdiction over adoptions in Mississippi in 1984. As more thoroughly discussed in the Appellant's Brief, adoption proceedings are entirely separate and distinct statutory proceedings neither connected with or controlled by the prior custody awards of another court. *In re: Petition of Beggiani*, 519 So.2d 1208 (Miss. 1988)

The Mississippi statutes are written in order to bring stability to the relationship between an adoptive parent and their children. *Humphrey v. Pannell*, 710 So.2d 392, 399-400 (Miss. 1998). The adoption of children is sacred, and the finality of adoptions is of the utmost necessity. *In re: Estate of Reid,* 825 So.2d 1, 7 (Miss. 2002). Consequently, the very nature of adoption is to create a legally binding and unbreakable bond between the adoptive parent and the adopted children. *In re: Adoption of J.E.B.*, 822 So.2d 949, 953 (Miss. 2002).

The Mississippi Supreme Court has consistently looked to the purpose of the UCCJA in order to determine whether it applied to the particular facts associated adoption in question. The general consensus of the cases that have interpreted this issue is that the UCCJA had limited applicability in adoption cases based primarily on the UCCJA's purpose of preventing interstate parental kidnaping. *In the matter of the Adoption of D.N.T.*, 843 So.2d 690, 701 (Miss. 2003); *In the matter of the Adoption: C.L.B.*, 812 So.2d 980, 983

(Miss. 2002). The Court has held that public policy demands that consensual adoptions not be subject to the UCCJA. *C.L.B.*, 812 So.2d at 983. Moreover, the Mississippi Supreme Court recognized a clear fear that subjecting adoption to the UCCJA would open the floodgate to late jurisdictional challenges and release uncertainty into the home of every adoptive parent. Id.

The UCCJA's power and benefit existed in its ability to give children similar to the children in this case some sense of permanence and stability in their home environment. *Walker v. Luckey*, 474 So.2d 608, 612 (Miss. 1985). The court in *Walker* cleverly reasoned that it would take the wisdom of Solomon and the patience of Job to solve the problems presented by children who are subject to interstate tugs of war. Id. at 609. In the case at bar, the natural father never picked up his end of the rope, and there never existed a interstate parental kidnaping fight to settle.

The court in *Walker* ultimately upheld a Florida custody order which resulted from a Petition for Modification of custody filed some three (3) years after the decree for divorce, which made the initial custody determination, was entered in Simpson County, Mississippi. Id. The court in *Walker* addressed the two competing states which both entered decrees concerning the custody of the child, and erred in favor of permanency and stability for the child.

The most interesting part of *Walker* is that the Mississippi Courts, based on the argument of the Appellee, would be the courts

with continuing and exclusive jurisdiction sufficient to void the Florida order. Based upon the ruling in *Walker*, this was clearly not the intent of the Mississippi's adoption of the UCCJA due to the fact that Mississippi's Supreme Court recognized the Florida order as valid and enforceable. Clearly, the Chancellor's decision in the case at bar runs counter to the spirit of the UCCJA and the prior interpretations by the Mississippi courts in regards to its relation to adoption proceedings. If the decision of the Chancellor is allowed to stand in this matter, then it would destroy the stability and permanence established by an adoption that is twenty-five (25) years old. Clearly, this outcome would run counter to the very intent and purpose of the UCCJA and the established Mississippi case law interpreting the UCCJA, not to mention the clear conflict with the applicable adoption statutes and case law.

The Appellee has cited numerous cases in support of their reliance upon the UCCJA. However, it is important to note that all of the cases cited by the Appellee concerned a contest to an order by the natural parent whose parental and/or custodial rights were impacted by the decree being challenged. In the case at bar, the natural father has acknowledged that he has no intention of challenging the adoption decree.

More specifically, *Tollison v. Tollison*, 841 So.2d 1062 (Miss. 2003) can be distinguished based on the fact that it concerned a contempt action between the natural parents of the child based upon a custody decree that was entered in a different county from the

county in which the contempt action was filed. *Id.* The court's ruling in *Tollison* was based upon the fact that a contempt action is properly brought in the county where the decree, which is the basis of the contempt proceeding, was entered. *Id.*

The primary issue in *C.M. v. R.D.H.Sr.*, 947 So.2d 1023 (Miss.Ct.App. 2007) was a petition for termination of parental rights which was filed in a different county from the original divorce and custody decree. *Id.* Once again, the issue in *C.M.* centered around a contest between the natural parents of the minor children brought in a timely manner by the natural father upon his discovery of the decree. *Id.*

Furthermore, *Curtis v. Curtis*, 574 So.2d 24 (Miss. 1990) is clearly distinguishable since it concerns a non-custodial parent who brought the children to Mississippi during vacation and immediately filed a Petition for Modification of Custody in a clear attempt to circumvent the prior custody determination. *Curtis v. Curtis*, 574 So.2d 24 (Miss. 1990). Within the spirit of the UCCJA, the court refused to condone behavior which amounted to interstate parental kidnaping. *Id.*

K.M.K. v. S.L.M., 775 So.2d 115, 117 (Miss. 2000) relies upon a completely different code section that was amended in 1996 to give county courts sitting as youth courts concurrent jurisdiction with chancery courts over termination of parental rights. *Id.* The court's ruling was limited in order to allow a county court to continue its jurisdiction over matters which originated in that court through youth court proceedings. *Id.* Again, all of these

cases were based upon the pleadings of a natural parent whose rights were terminated or limited by an order entered in violation of the UCCJA. These holdings are in line with the purpose and spirit of the UCCJA, which is to prevent interstate parental kidnaping.

The most glaring difference between the facts of the case at bar versus the facts presented in *Tollison, C.M., K.M.K.*, and *Curtis*, is that the case at bar concerns a collateral attack that it is being presented twenty five (25) years after the adoption decree, it concerns an adoption rather than a custody proceeding, the attack is being brought subsequent to the death of the adoptive father, and the natural father has no intention of challenging the adoption. The purpose of this contest is obviously to interfere with the permanency and stability of the relationship between the adopted children and their deceased adoptive father.

Affirmation of the chancellor's order would effectively void a substantial portion of the adoptive children's natural lives. Based upon the arguments enunciated in the Appellants' Brief and the above and foregoing, the UCCJA is not controlling in this situation and the Chancery Court of DeSoto County, Mississippi had subject matter jurisdiction over the 1984 adoption proceedings. As a result, the chancellor's decree should be reversed.

C. ISSUE # 2: WHETHER THE CHANCELLOR ERRED IN ALLOWING THE APPELLEE TO COLLATERALLY ATTACK A FINAL DECREE OF ADOPTION ENTERED TWENTY FIVE (25) YEARS AGO.

To the knowledge of the Appellant, there exists only a single Mississippi case which has allowed a collateral attack to an

adoption. It is clear that the ruling in that case was intended to be an isolated ruling based solely upon the unusual facts presented in that case, and the court acknowledged as much when stated as follows:

> "Based upon Miss.Code Ann. § 93-17-7 (1994), only a natural parent has a statutory right to object to the adoption of a child. *In re J.J.G.*, 736 So.2d 1037,1040 (Miss. 1999). Also, there is a six-month statute of limitations for challenging final adoption. Miss.Code Ann. § 93-17-7 (1994). We recognize that the adoption of children is sacred, and the finality of adoptions is of the utmost necessity. However, we are not dealing with the adoption of a child in this case. We are dealing with an adult man, with a law degree, who gained the trust and dependence of an elderly lady. Other states have recognized this problem and found that the heirs of a deceased person who adopted an adult do have standing to attack the adoption. *In re Sewall*, 242 Cal.App.2d 208, 51 Cal.Rptr. 367, 378 (1966); *Greene v. Fitzpatrick*, 220 Ky. 590, 295 S.W. 896 (1927); *Raymond v. Cooke*, 226 Mass. 326, 115 N.E. 423 (1917). In accord with these cases, we find that Pluskat does have standing to attack the adoption of Michael Cupit....
>
> The chancellor found that the adoption was also the product of a 'long term plan and scheme' concocted and obtained by Cupit by fraud and overreaching...Let it be clear that our findings concerning the adoption in this case are specific to the facts of this case." *Reid*, 825 So.2d at 7.

The chancellor in *Reid* heard and considered extensive testimony which revealed highly unusual circumstances surrounding the adoption, which included but were not limited to numerous attempts at adoption, clear abuse by the adopted party of the trust inherent in the fiduciary relationship between an attorney and his

client, and failure to disclose the attorney/client relationship at the adoption proceedings. *Id.*

In the case at bar, the chancellor granted a motion for summary judgment without the benefit of any testimony. The chancellor's order consisted of one sentence which stated as follows:

> "This Court, having reviewed all the case law and memorandum submitted by both sides hereby finds that the Motion for Summary Judgement because of lack of subject matter jurisdiction is hereby sustained." (Appellant's R. 79).

The chancellor did not make any findings of fact or reference any testimony which would indicate that the facts in the present case resembled the facts in *Reid*.

Subject matter jurisdiction has reference to the power and authority of a court to entertain a case at all. *In re: Adoption of R.M.P.C.*, 512 So.2d 702, 706 (Miss. 1987). Ordinarily, the existence of that authority turns on the nature of the case, either by reference to the primary right asserted or the remedy or relief demanded. *Id.; citing Dye v. State Ex Rel. Hale*, 507 So.2d 332, 337 (Miss. 1985). Subject matter jurisdiction cannot be waived. *Id.; citing Goodman v. Rhodes*, 375 So.2d 991, 993 (Miss. 1979) Further, Adoption cases are well within the jurisdiction of the Chancery Court. *Id.; citing Welch v. Welch*, 208 Miss. 726, 732, 45 So.2d 353, 354 (1950).

The court in *R.M.P.C.* was faced with a petition filed by Mars, who was "factually and legally" the father of the natural child, requesting the court to set aside an adoption on the basis of jurisdictional defects. *Id.* The chancellor in that case characterized the matter as a "tragedy of errors" because of the potential for great damage to a child who was innocent of any wrong. *Id.* at 704. Additionally, Mars was one of the petitioners in the adoption proceeding which was finalized over two (2) years prior to the filing of his petition to set aside the adoption. *Id.* Mars relied upon the Miss.Code Ann. § 93-17-7 (1994), which governed "jurisdiction" for adoptions in the state of Mississippi at that time. *Id.* The "jurisdictional" provisions questioned by Mars included the following requirements: (a) joinder by the spouse of a married person, (b) a sworn petition, (c) a doctor's certificate, and (d) a sworn statement of all property owned by the child. *Id.* The Court held that Mars' complaints were waived, time-barred, and Mars was estopped from complaining due to the fact that he induced the court to act on the adoption. *Id.*

In the case at bar, the Appellee steps into the shoes of Dorothy, who was the natural mother of the adoptive father, William C. Gartrell, III (hereinafter "Willie"), who induced the court to act upon the petition for adoption. The natural father has never challenged, nor is he now challenging the adoption. Clearly, the

Appellee does not have standing to encourage to court to void the adoption.

The appellee leans heavily upon the court's ruling in *Naveda v. Ahumada*, 381 So.2d 147 (Miss. 1980) for support of her contention that she has standing to challenge the adoption. The facts of *Naveda* reveal that the court allowed a natural mother to contest the court's jurisdiction, by and through the applicable adoption statutes, in an adoption by her parents which had been finalized more than six (6) months prior to the filing of her petition to set aside the adoption. *Id.* After a full hearing, the lower court, whose decision was affirmed, determined that the adoption decree was void for lack of jurisdiction based upon testimony and documentary evidence which revealed that the adoptive parents were in regular contact with the natural mother immediately proceeding and immediately subsequent to the time that they sought non-resident publication. *Id.* Standing in *Naveda* rested with the natural mother and not a third party. *Id.*

Also, the case of *Roberts v. Roberts*, 866 So.2d 474 (Miss. Ct.App. 2003) is clearly distinguishable given the fact that it concerned an entirely different jurisdictional statute from the adoption statute. *Roberts* found that the court lacked jurisdiction under the requisite statue and allowed the wife, who initiated the divorce proceedings, to void the decree, but strongly encouraged

the lower court to impose sanctions against the wife and/or her attorney. *Id.* at 477. The wife in *Roberts* had standing to bring the action due to the fact that she was a party to the initial proceeding and not a third party.

The appellee fails to address the relevant adoption statutes concerning jurisdiction and standing to contest an adoption. Instead, the Appellee encourages to court to adhere to the UCCJA, find that UCCJA allows anyone at anytime to challenge jurisdiction in regards to Mississippi adoption, discount the applicable adoption statutes as they existed in 1984, and find that the Executrix of the estate of the natural mother of the adoptive father of two children, whom he adopted twenty five (25) years ago, has standing to attack the twenty five (25) year old adoption decree on the basis that the Chancery Court of Desoto County, Mississippi did not have subject matter jurisdiction due a prior custody decree in Michigan even though this adoption has never been contested by the natural father. This challenge is being brought in light of the fact that the natural father has sworn that he "learned of the adoptions...and decided not to hire an attorney and file litigation" (Appellant's R. 42).

Clearly, there is no risk of interstate parental kidnaping which the UCCJA was designed to prevent. The Appellee does not have standing to challenge as a third party a twenty five (25) year

old adoption through a motion for summary judgment based upon a second amended petition to determine the heirs at law of the natural mother of the adoptive father. The only logical conclusion based upon the relevant statutory and case law is that the Appellee does not have standing to challenge the adoption. As a result, the decision of the Chancellor should be reversed, the adoption held to be valid, and the court determine that the Jodey and Lisa were heirs at law of Dorothy.

D. ISSUE # 3: WHETHER THE PRINCIPLES OF EQUITY AND JUDICIAL ESTOPPEL PRECLUDE THE APPELLEE'S COLLATERAL ATTACK ON A TWENTY FIVE (25) YEAR OLD ADOPTION.

The Appellee accuses the Appellants of preventing the natural father's appearance. (Appellee's Brief 42). In reality, the Appellee obtained an order granting commission to take the out-of-state deposition of the natural father, Weiss, of the adopted children. The Appellants contested the order in part on the basis that she did not have standing to contest the adoption. During the pendency of the Interlocutory Appeal on that matter, the Appellee waived any rights granted order granting commission to take the out of state deposition of Weiss, due to her assertion that the waiver was in the best interest of the estate. (Appellant's R. 29-30). Clearly, the Appellee is not acting in candor and honesty in her dealings with the court.

The Appellee has the duty to determine the heirs at law of Willie due to their interest in the estate of Dorothy. Additionally, the Appellee has the authority to contest in good faith all claims against the estate. During the pendency of the Appellee's purported investigation, she obtained an affidavit from the natural father which stated that he "learned of the adoptions...and decided not to hire an attorney and file litigation" (Appellant's R. 42). An objective executrix exercising good faith would have concluded her investigation into the validity of the adoptions based upon the natural father's admission that he has no intention of contesting the adoptions.

CONCLUSION

For the reasons stated in the Appellants' Brief and in this Reply Brief, the Desoto County, Mississippi Chancery Court clearly had jurisdiction over the adoption in 1984. The Appellee lacks standing the challenge the adoption as that right is vested in the natural parents of the adopted children. Consequently, this court must reverse the order of the chancellor, find that the adoption is valid, and order that Jodey and Lisa are heirs-at-law of Dorothy.

Respectfully submitted,

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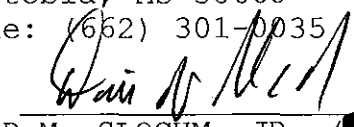
By: 
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CERTIFICATE OF SERVICE

I, David M. Slocum, Jr., attorney for Appellants, Diane M. Gartrell, Lisa LeAnn (Gartrell) Aversrush, and Jodey Jon Gartrell, do hereby certify that I have this day mailed, by United States mail, postage prepaid, a true and correct copy of the above and foregoing Appellants' Reply Brief to:

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Honorable Mitchell M. Lundy, Jr.
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So certified, this the 5th day of August, 2009.

DAVID M. SLOCUM, JR.