IN THE SUPREME COURT OF MISSISSIPPI

No. 2008-TS-01783

RHONDA YEAGER *Appellant*

v.

DAVID KITTRELL *Appellee*

BRIEF OF THE APPELLANT

APPELLANT RESPECTFULLY REQUESTS ORAL ARGUMENT

ATTORNEY FOR APPELLANT

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STATEMENT REGARDING ORAL ARGUMENT

The Appellant, Rhonda Yeager, respectfully requests oral argument under Miss. R. APP. P. 34(b). The issues involved in this appeal are claims of procedural misconduct; an oral argument will assist the Court in understanding the evidence and allow all parties the opportunity to respond to questions that might arise in relation to the issues before the Court.

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STATEMENT OF ISSUES

I. Whether the Uniform Child Custody Jurisdiction and Enforcement Act was applied correctly, if applied at all, to the Appellant and her parental rights, in a case where original jurisdiction in Mississippi was transferred to Texas despite Appellant's continued domicile in Mississippi. This transfer as applied immediately led to Appellant being cited for Contempt in Texas with a Bench Warrant issued.

STATEMENT OF THE CASE

Procedural History

This case is unique in that the procedural history and the legality of those procedures imposed upon Appellant, encompass nearly the entire issue before this Court. Unfortunately, as with many child custody cases that have been brought before this Court and noted in many of this Honorable Court's opinions, the docket sheet is a mess and serves better in causing confusion rather than shed light on the proceedings. As with the majority of cases pertaining to child custody hearings in which the undersigned attorney has reviewed, inexplicable one or two year lapses appear in the record and it is left to guess what the Court based its decision upon.

Fortunately, Appellant analyzes the issue as being rather simple and a complete examination of the record is not likely to be necessary.

Appellant filed for divorce in Greene County Mississippi, sometime in early 2003. By agreement, the case was moved to Wayne County, Mississippi, on September 12, 2003, as that was determined to be the most convenient venue, there was never any question that the State of Mississippi had proper jurisdiction. The next two and a half years were filled with the agonizing back and forth between competing custody interests, none of which is at issue in this appeal and none would be considered extraordinary to the good chancery judges of this fine State that have to deal with these matters on a daily basis.

On December 19th 2005, the Chancery Court of Wayne County, Mississippi, entered it's (first) Final Order in regard to child custody as it relates to this case. Appellant took the prerequisite steps in trying to get the order reconsidered in light of new evidence. Appellant then threatened to Appeal. The appeal never ripened largely due to economic concerns, but Appellant had the time to have the Appeal re-opened in October 6, 2006, and on October 24, 2006, Appellant filed a timely notice of appeal. Meanwhile, Appellant again had to file a *Motion to Reconsider Order reopening Time for Appeal,* and on January 19, 2007, this Court granted another opening for time to appeal.

That ends the procedure which is not in dispute and not part of this particular appeal, because something far more ominous arose shortly after the Supreme Court granted the time for appeal again in January of 2007.

On February 5, 2007 (R.E. 5), Appellee filed a *Motion for Transfer of Jurisdiction,* to Texas, while the appeal was pending, while Appellant/Mother still resided in Mississippi and while the mother/ Appellant and children still had significant contacts with the State of Mississippi. On May 11, 2007 Appellant filed a *Motion for Contempt* based upon allegations of wrongdoing by Appellee, not in accord with the Final Decree of the Wayne County Chancery Court. The Chancery Court of Wayne County refused to hear the Motion for Contempt and only heard arguments of the Motion to Transfer Jurisdiction, as evidenced by the Wayne County Chancery Court's Order, which only addressed the Motion to Transfer Jurisdiction, and on August 6, 2007, inexplicably, the Wayne County Chancery Court,

released jurisdiction of the case under Mississippi Code Annotated sec. 93-27-207, stating bizarrely that "This Court has *conferred with the Court of Original jurisdiction in the State of Texas, and has agreed that Texas is a more convenient forum as determined within the framework of the Mississippi Code Annotated."* (R.E. 11). This *Order Releasing Jurisdiction* was entered into on March 5, 2007. Appellant's concerns in the case immediately switched from substantive complaints to purely procedural complaints as she was effectively "locked out" of the proceedings due to economic conditions. Had the jurisdiction not been transferred it would have cost Appellant infinitely less to address the critical issues. As will be shown what followed next had a profound impact upon her relationship with her children. Appellant was denied fairness and proper legal application. What happened next is a strong example of the reason why the UCCJA, the PKPA, and the UCCJEA were enacted.

The docket sheet at Wayne County cryptically describes what happened within a month of transfer of jurisdiction of this case to Texas. *Letter from Gary Gueck with copy of Order on Petition to Modify Suit, Affecting the Child Parent Relationship.* (R.E. 12). In this particular Appeal, Appellant is taking great pains to leave aside the substantive issues impacting her parental rights and keep focus on the procedural and jurisdictional questions.

It is critical for this Court to know, that on March 7th, 2008 in Texas, merely 2 days following the *Motion For Transfer of Jurisdiction* Appellant received notice that she was being sued in the District Court of Navarro County, Texas. Appellant was given 20 days to respond or face a *Default Judgment.* The notice of suit set out specifically that the purpose

of the suit was to answer Appellees' *Petition to Establish Jurisdiction and to Modify Orders Affecting the Parent Child Relationship.* The suit utilized dated Exhibits determined by the Wayne County Chancery Court to strengthen his case, without getting into the substantive issues, it is a violation of Appellant's rights to not have the opportunity to file an Answer that addresses the change of circumstances that the Court of original jurisdiction determined.

Appellant was given 20 days to respond. The undersigned attorney is not licensed to practice in Texas and hiring a Texas attorney was simply not an option. The merits of the suit in Navarro County, Texas were heard on September 7, 2007. Appellant was not able to attend. Again, Appellant is focused merely upon jurisdiction and not the substantive allegations in any of the procedural aspects of the case.

Appellant, though highly interested, was not able to attend for a host of reasons, some of which were economic. Regardless, when Appellant Failed to Appear at a hearing in Texas, a *Writ of Capias with Pick Up Order* was issued by the Navarro County, Texas District Court. (R.E. 19)This Warrant was sent to the Sheriff of Wayne County in order to have Appellant arrested. Thankfully, the undersigned attorney immediately moved that the Wayne County Chancery Court quash the Warrant and sanity and fairness prevailed, when the Wayne County Chancery Court quashed the Warrant because it was not entitled to "full faith and credit in Mississippi." As far as the undersigned attorney knows, the *Writ of Capias with Pick Up Order* is still in force in Texas, it prevents Appellant from being arrested when her children are present but Appellant still has to travel to Texas to pick up her children. It

is situations such as this that the UCCJEA was enacted.

Jurisdiction to hear child custody modifications can be heard in more than one jurisdiction, but that hardly allows one participant to immediately take advantage of his sole ability to appear in one jurisdiction. Appellant is currently only appealing the transfer of jurisdiction which severely impacted her ability to respond to the allegations of Appellee, as seen by the actions of Appellee above, it is obvious to any neutral observer that Appellee immediately took advantage of the ability to have critical custody hearings heard in Texas, and Appellants inability to respond. Appellant only requests that this Court follow the laws addressing these matters which would result in her ability to have access to the Court of original and continuing jurisdiction to answer allegations of Appellee.

The entirety of this appeal is focused upon the illegality of the transfer of jurisdiction from its proper place in Wayne County, Mississippi, to Navarro County in Texas. The transfer was in direct contradiction to the Uniform Child Custody Jurisdiction and Enforcement Act, adopted by this State in 2004, (see MS Code sec.97-23-201 *et seq*), which was enacted to specifically prevent situations such as this, where forum shopping leads to absurd and contradictory results and leaving it to the highest Court of this State to settle the matter. Appellant has chosen to frame the question in one simple issue. To repeat one more time, the issue is whether the original *Order Releasing Jurisdiction* is lawful under the Uniform Child Custody Jurisdiction and Enforcement Act (MS Code Sec 93-27-201 *et seq*), the preceding Uniform Child Custody Jurisdiction Act and the Parental Kidnapping

Prevention Act. An overlapping issue is whether was it proper to transfer jurisdiction while the Wayne County, Mississippi, Chancery Court was well aware that an appeal was cer

SUMMARY OF ARGUMENT

The Chancery Court of Wayne County committed clear legal error in it's transfer of this case under the UCCJEA and Miss. Code § 93-23-201, et seq. Specifically violating the statute in not putting proper prioritization to the court of original jurisdiction and further compounding the error by not listing substantive reasons for doing so. All of which are contradictory to the letter and spirit of the UCCJEA and led to tragic results for the Appellant.

ARGUMENT

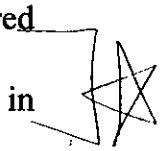
This Court does not need to be reminded or told that no legal proceedings are as wrought with emotion and ugly cross charges as parents' fight for the well being of their children. Nothing pulls on the heart strings like the custody of a child and these cases are difficult and taxing for all parties involved, Courts being no exception. This case is no different in that sense.

This case involves a custody dispute regarding the children of Appellant and Appellee, they are R.C.K who was born on January 10, 1995, and T.R.K. who was born on May 3, 1996. It has always been a hard struggle, but nothing like lately, as demonstrated above. Critical issues impacting custody have changed, yet Appellant is effectively shut out to address those matters.

However, as Appellant will argue below, there are few facts actually relevant to the legal question presented. Respondent submitted to the jurisdiction of Mississippi because

he was domiciled here at the time of filing the *Petition for Decree*. Respondent has primary custody of the two children, with Appellant having reasonable visitation rights. At some point Respondent moved to Navarro County Texas and took the children with him.

Appellant continues to reside in Wayne County, Mississippi, is actively involved in Wayne County, Mississippi, Appellant maintains significant ties to Wayne County, Mississippi, and her children are now of an age in which their desires should be considered in what is in their best interests, both have signed Affidavits stating their desire to live in Wayne County, Mississippi, with their mother. Simply speaking, both in a jurisdictional and venue sense, Appellant's only lawful place to have her parental custody concerns heard remains in Wayne County, Mississippi.



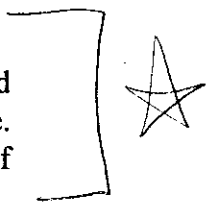
Legal Analysis

The standard of review in jurisdiction cases regarding child custody is well established. The decision on whether to accept, decline or transfer jurisdiction under the UCCJA and the 2004 adoption of the UCCJEA give full faith and credit to a sister state's order as one of law and of course, when presented with issues of law, [The Mississippi Appellate Courts] employ a de novo standard of review; and, when confronted with the issue of whether a sister state's judgment should be given full faith and credit by our Courts, we are indeed considering an issue of law. J.E.W.*I-Com Management, Inc. v. Waveland Resort Inns, Inc.*, 782 So.2d 149, 151 (Miss.2001) (citing *Ellis v. Anderson Tully Co.*, 727 So.2d 716, 718 (Miss.1998)). As such, impersonam jurisdiction may not be waived and may be asserted at any stage of the proceeding or even collaterally. *Id." Hunt v. Hunt*, 629 So.2d 548, 551 (Miss.1992). Therefore, to the extent that

this case calls for legal analysis given the bereft docket sheet in Wayne County, Mississippi, as to what actually took place during these child custody proceedings, of primary importance is establishing an initial Court with proper ongoing jurisdiction

The accompanying committee notes set out specifically the importance of establishing clear intent to keep jurisdiction, even for modifications with the court of original jurisdiction so long as the committee notes set forth:

> 2. Continuing jurisdiction is lost when the child, the child's parents, and any person acting as a parent no longer reside in the original decree State. The exact language of subparagraph (a)(2) was the subject of considerable debate.



Ultimately the Conference settled on the phrase that "a court of this State or a court of another State determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State" to determine when the exclusive, continuing jurisdiction of a State ended. The phrase is meant to be identical in meaning to the language of the PKPA which provides that full faith and credit is to be given to the court of a sister State.

The actual statute addressing ongoing jurisdiction lists the most important consideration to be considered when a *Motion to Transfer Jurisdiction* is filed by the custodial parent. This statute is completely on point with respect to lawful consideration of the ongoing jurisdiction to modify decrees once a determination has been made that initial jurisdiction lies in this state: elsewhere, the exclusive, continuing jurisdiction ceases only;

> (a) A court of this state determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or

(b) A court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent currently do not reside in this state.

(2) A court of this state which has made a child custody determination and does not have exclusive, continuing jurisdiction under this section may modify that determination only if it has jurisdiction to make an initial determination under Section 93-27-201.

Sources: Laws, 2004, ch. 519, § 14, eff from and after July 1, 2004.

The issue in our sister state Oklahoma in *G.S. v. Ewing,* 786 P.2d 65 (OK 1990), was precisely the same as the one presented to this Honorable Court and followed the rules that were actually strengthened with respect to retention of original jurisdiction under the UCCJA and subsequent UCCJEA, the Oklahoma Supreme Court characterized the issue as:

> The two issues presented are: 1) whether an Oklahoma court, having rendered the original divorce decree, has jurisdiction to modify custody if the non-custodial parent resides in Oklahoma, but Oklahoma is not the child's "home state" within the meaning of 10 O.S. 1981 § 1604 ;1 and 2) if the trial court was correct in hearing the cause, should it have refused to exercise jurisdiction because Oklahoma is an inconvenient forum.

There simply cannot be a case more on point with the facts in this case, a custodial parent trying to establish new jurisdiction with a foreign court when the non-custodial parent still presently resides within the jurisdiction of the State issuing the original decree and the children retaining significant contacts with that State.

The facts in *G.S. v. Ewing* were set forth as such; ¶3 The petitioner/mother and the respondent/father were married on January 30, 1982. The couple had two children, L.L.B., born on September 14, 1982, and A.H.B., born on August 20, 1985. The couple was divorced

in McClain County on September 22, 1986. The mother and children resided in Oklahoma until shortly before the decree. Under the terms of the decree, custody was placed with the mother, with the father receiving reasonable visitation rights. When the decree was entered, the mother and two children were living in Jasper County, Missouri. Since the divorce, the children have lived with their mother in Missouri.

¶4 On August 5, 1989, the children's fraternal grandmother went to the children's home in Missouri and brought the children to Oklahoma for their regular summer visitation. The mother entered Baxter Memorial Hospital, Baxter Springs, Kansas, on August 12, 1989, for "treatment for Co-Dependency." She was dismissed from the hospital on September 13, 1989. The facts are disputed concerning whether the treatment and its duration, were discussed by the parties before the children came to Oklahoma. The mother asserts that she and the children's father agreed that the children's visitation would be extended to allow her to complete a thirty-day treatment program. The father alleges that he was unaware that the mother had entered treatment, or that the children would need to extend their stay until the mother called him on August 17, 1989. The type of treatment for which the mother voluntarily committed herself is in dispute.

¶5 The father enrolled L.L.B., in the Purcell public schools on August 24, 1989. However, when the father tried to enroll A.H.B. in a pre-school program, he discovered that the child had not been given his regular immunizations perhaps because of a previous allergic reaction. On September 18, 1989, the father filed a motion to modify the custody provisions of the divorce decree. He was also granted temporary custody of the two children. The same day, the mother

arrived in Purcell to pick up the children, but the father refused to surrender their custody. On October 2, 1989, the mother filed a writ of habeas corpus and a motion to dismiss for lack of jurisdiction under the Uniform Child Custody Jurisdiction Act (the UCCJA/Act), 10 O.S. 1981 § 1601 , et seq. After denying the writ of habeas corpus, the trial court set the motion to dismiss for a hearing on October 19, 1989 the same date as the hearing on the father's temporary custody order.

¶6 All parties appeared before the trial court on October 19, 1989. The trial court denied the mother's motion to dismiss because: 1) no action was pending in any other state; 2) Oklahoma was a convenient forum; 3) the father had not engaged in reprehensible conduct; and 4) an emergency existed because of the mother's mental health. A hearing on the merits of the father's motion to modify the divorce decree was set for December 1, 1989, and we issued a temporary stay on November 30, 1989. The Oklahoma Court made its determination under the older UCCJA, and prior to the stronger emphasis found in the UCCJEA:

> 2. Continuing jurisdiction is lost when the child, the child's parents, and any person acting as a parent no longer reside in the original decree State. The exact language of subparagraph (a)(2) was the subject of considerable debate.
> Ultimately the Conference settled on the phrase that "a court of this State or a court of another State determines that the child, the child's parents, and any person acting as a parent do not presently reside in this State" to determine when the exclusive, continuing jurisdiction of a State ended. The phrase is meant to be identical in meaning to the language of the PKPA which provides that full faith and credit is to be given to custody determinations made by a State in the exercise of its continuing jurisdiction when that "State remains the residence of ... ." The phrase is also the equivalent of the language "continues to reside" which occurs in UIFSA § 205(a)(1) to determine the exclusive, continuing jurisdiction of the State that made a support order. The phrase "remains the residence of" in the PKPA has been the subject of conflicting case law. It is the intention of this Act that paragraph (a)(2) of this section means that the named persons no

longer continue to actually live within the State. Thus, unless a modification proceeding has been commenced, when the child, the parents, and all persons acting as parents physically leave the State to live elsewhere, the exclusive, continuing jurisdiction ceases. The phrase "do not presently reside" is not used in the sense of a technical domicile. The fact that the original determination State still considers one parent a domiciliary does not prevent it from losing exclusive, continuing jurisdiction after the child, the parents, and all persons acting as parents have moved from the State. If the child, the parents, and all persons acting as parents have all left the State which made the custody determination prior to the commencement of the modification proceeding, considerations of waste of resources dictate that a court in State B, as well as a court in State A, can decide that State A has lost

exclusive, continuing jurisdiction. The continuing jurisdiction provisions of this section are narrower than the comparable provisions of the PKPA. That statute authorizes continuing jurisdiction so long as any "contestant" remains in the original decree State and that State continues to have jurisdiction under its own law. This Act eliminates the contestant classification. The Conference decided that a remaining grandparent or other third party who claims a right to visitation, should not suffice to confer exclusive, continuing jurisdiction on the State that made the original custody determination after the departure of the child, the parents and any person acting as a parent. The significant connection to the original decree State must relate to the child, the child and a parent, or the child and a person acting as a parent. This revision does not26 present a conflict with the PKPA. The PKPA's reference in § 1738(d) to § 1738(c)(1) recognizes that States may narrow the class of cases that would be subject to exclusive, continuing jurisdiction. However, during the transition from the UCCJA to this Act, some States may continue to base continuing jurisdiction on the continued presence of a contestant, such as a grandparent. The PKPA will require that such decisions be enforced. The problem will disappear as States adopt this Act to replace the UCCJA. Jurisdiction attaches at the commencement of a proceeding. If State A had jurisdiction under this section at the time a modification proceeding was commenced there, it would not be lost by all parties moving out of the State prior to the conclusion of proceeding. State B would not have jurisdiction to hear a modification unless State A decided that State B was more appropriate under Section 207.

Admittedly, the committee notes concerning ongoing jurisdiction includes the consideration under Section 207 of the UCCJA, however it is clear that the more refined act of the UCCJEA,

places far greater emphasis on retaining jurisdiction in the original state of jurisdiction so long as a parent continues to reside in that jurisdiction.

With respect to the other considerations to be considered when addressing a *Motion to Transfer Jurisdiction* they list in descending order;

> (1) whether domestic violence has occurred and is likely to continue in the future and which State could best protect the parties and the child;
> (2) the length of time the child has resided outside this State;
> (3) the distance between the court in this State and the court in the State that would assume jurisdiction;
> (4) the relative financial circumstances of the parties;
>
> (5) any agreement of the parties as to which State should assume jurisdiction;
> (6) the nature and location of the evidence required to resolve the pending litigation, including testimony of the child;
> (7) the ability of the court of each State to decide the issue expeditiously and the procedures necessary to present the evidence; and
> (8) the familiarity of the court of each State with the facts and issues in the pending litigation.
>
> UCCJEA Sec. 207(b); MS Code 93-27-207(b) 2004

The Wayne County Chancery Court in its *Order Releasing Jurisdiction* simply stated that his honor had reviewed all of the factors in accordance with the UCCJEA and found, with no explanation that taken together they favor Respondent. Not setting out the finding is clear legal error and enough on its own to remand the case for further examination. Using the few substantive facts presented, it is hard to believe that the Sec. 207 (b) factors favor Respondent;

1. There is no allegation of physical abuse of either party.

2. The longest the children have resided outside of Mississipi is 10 months, the majority the vast majority of their lives has been spent in Mississippi.

3. There is enough distance between the two courts considering jurisdiction that it clearly makes Appellants visitation significantly difficult.

4. As set forth above Appellant clearly is at a disadvantage financially, Respondent has the financial means to answer all accusations in Wayne County Chancery Court as well as unleash a barrage of litigation in Texas to the disadvantage of Appelant.

5. Appellant was never asked, never mind agreed to change jurisdiction to Texas.

6. All of the evidence gathered in this long fight has been litigated and collected in Wayne County Chancery Court, and was in fact used *ex parte* in Texas to persuade the Navvaro County Court to enter the order it did, including the *Writ of Capius.*

7. Admittedly there is no advantage or disadvantage to either party under the seventh consideration.

8. The familiarity with the Wayne County Chancery Court is obvious in that it has heard all of the substantive allegations between the parties when both parties were present, and far more importantly would recognize a change in circumstances regarding Appellant's ability to properly nurture and provide a good safe home for her children.

The above list is a pro Appellant view of the circumstances but none of the proposed findings can be considered outrageous. The failure of the Chancery Court Judge to fully make findings of fact concerning the second most important factors (the first being the bias toward keeping cases in the original jurisdiction provided one parent lives within that jurisdiction and has significant contacts with the original jurisdiction location) is an *ipso facto* error requiring a remand for further findings.

IV. Conclusion

Child custody cases can be the most emotional, hard fought cases faced by any court. This

case is no exception. It is critical therefore that the rules established to prevent unfairness and multiple "forum shopping" be reserved for a few minority cases in which there is no real alternative option. The Wayne County Chancery Court violated the rules set forth both procedurally and in spirit, with the horrible consequences that are nearly certain to follow. Therefore it is imperative that this Honorable Court rule for Appellant in strong terms, not just for this Appellant, but for public policy reasons for the inevitable future cases with similar facts.

RESPECTFULLY SUBMITTED, this the 3rd day of April, 2009.

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CERTIFICATE OF SERVICE

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

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SO CERTIFIED, this the 30th day of April, 2009.

Eric Tiebauer
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