No. 20-236

In The

Supreme Court of the United States

JERRY W. WELLS,

Petitioner,

v.

ROBBIN NELSON, ROBERT A. SHARP JR., HEATHER ANNE GREENE SHARP,

Respondents.

On Petition For A Writ Of Certiorari To The Kentucky Supreme Court

RESPONDENTS' BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

INTRODUCTION

Respondent files this *pro se* brief in support of petitioner's brief. Respondent agrees there are multiple arbitrary and capricious orders, which constitute an abuse of discretion within the various levels of the Kentucky judiciary throughout this case, including but not limited to, denial of due process rights based on the failure of acknowledgement by the judiciary of petitioner's de facto standing and award of custody previously granted by the lower court in May 2014, (Petitioner's App. 66). Respondent accedes petitioner's position that egregious, bias actions manifested throughout the case, coupled with numerous appearances of ex-parte communication prior to the issuance of certain orders, (Petitioner's Apps. 18 & 20). These arbitrary and capricious orders, abuse of discretion, overt bias, and questionable communications within the judiciary itself coupled with the actions and communications between a lower court judge assisting a favored attorney, can only be corrected by the exercise of this Court's supervisory power; however, the question now before the Court is not to decide whether petitioner will prevail on the specific merits of his petition at this point.

The Court must decide at this stage whether to grant review of this case as it addresses a much larger societal issue which is the inconsistent interpretation of the UCCJEA during an adoption proceeding resulting in circuit orders not made in substantial conformity with the UCCJEA act itself, blatant disregard and failure to effectuate the plain language and intent of

the respective legislatures, and conflicts of law created by decades of inconsistent precedent previously established within the circuits.

The attempts by some circuits to distinguish adoptions from a mere change in custody where the UCCJEA does not apply and where federal law, specifically the PKPA allows a modification from any original custody order when adoption comes into play, demonstrates the limited scope of the Kentucky Supreme Court's erroneous holding in this case. These inconsistent interpretations among the circuits open the door for collateral attacks when multiple jurisdictions are involved, causes jurisdictional conflict as exemplified in this case, and are sufficient to establish violations of both federal law and the procedural jurisdiction of the UCCJEA which unambiguously excludes adoptions (UCCJEA §103).

Respondent relies on information not presented by Petitioner including a review of the commentary by the drafters of the UCCJEA Act regarding its application to adoptions, the Commonwealth of Kentucky and State of Tennessee statutory interpretation case law, US Supreme Court opinions addressing plain language, exclusion of adoptions pursuant to the UCCJEA Act as a procedural jurisdiction issue, and inconsistent precedent opinions issued by various circuits which are not addressed in the *Williams v. Biddle* opinion of the Kentucky Court of Appeals regarding the application of the UCCJEA during an adoption.

ARGUMENTS

I. ADOPTIONS ARE EXCLUDED UNDER THE UCCJEA

The model UCCJEA[1], drafted in 1997 as a replacement to the 1968 UCCJA "includes a sweeping definition that, with the exception of adoption, includes virtually all cases that can involve custody of or visitation with a child as a custody determination."[2] The model UCCJEA expressly and unambiguously states "this Act does not govern an adoption proceeding . . . ".[3] Adoption is excepted from the UCCJEA not as an oversight; rather, it was intentional and deliberate as it is a specialized area covered by other similar provisions of the UAA, for which Vermont, at the point of this writing, is the only state to have partially enacted. The delay to accept the UAA by other states is probably due to the complexity of adoptions, which has different jurisdictional considerations for interstate adoptions, is not based on common law but rather requires states to strictly construe statues, have subject matter jurisdiction which cannot be conferred by consent or action of the parties, and conform with the numerous federal laws such as the constitutional rights of the natural

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[1] Uniform Child Custody Jurisdiction and Enforcement Act, (UCCJEA) (1997), 9(1A) U.L.A. 657 (1999). The UCCJEA has been adopted by all states, the federal district and US Territories except for Massachusetts and Puerto Rico.

[2] Uniform Child Custody Jurisdiction Act, Prefatory Note. Pg 3

[3] Section 103, Uniform Child Custody Jurisdiction and Enforcement Act, (UCCJEA).

parents, rights of the adoptive parents, rights of the child(ren) at the center of an adoption, the Supremacy Clause of the PKPA,[4] the VAWA,[5] the ICARA,[6] the ICPC,[7] the Hague Convention,[8] or the Restatement (Second) of Conflict of Laws Sec. 78 which broadly provides that "a state court has power to exercise jurisdiction to grant an adoption it if is in the state of domicile of either the adopted child or adoptive parent and the adoptive parent and either the adopted child or the child's legal custodian is subject to the court's personal jurisdiction." Given the numerous laws which must be reconciled during an adoption proceeding, and the additional issues currently presenting before the circuits including international, de facto, step-parent, same sex, assisted reproductive technology adoptions, there are compelling reasons that suggest all adoptions must be evaluated on a case by case basis specifically as they are not subject to the UCCJEA.

Patricia Hoff, legal consultant and advisor to the drafting committee of the UCCJEA on behalf of the ABA Center on Children and the Law, writes in the

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[4] PKPA – Parental Kidnapping Prevention Act of 1980, 28 U.S.C. § 1738A

[5] VAWA – Violence Against Women Act, 18 U.S.C. 2265, 2266 (2000)

[6] ICARA – International Child Abduction Remedies Act,

[7] ICPC – Interstate Compact for the Placement of Children,

[8] The Hague Convention – International Child Abduction (The Hague Convention) 51 Fed. Reg. 10,494 *et seq.* (1986)

December 2001 Bulletin of the Office of Juvenile Justice and Delinquency Prevention (OJJDP)[9]:

> Identifying the specific proceedings to which the UCCJEA is applicable clarifies when courts must conform to the UCCJEA, which should minimize the likelihood that more than one State will take jurisdiction over the same matter.

Hoff's statements are clear. The UCCJEA is only applicable in specific proceedings, there is no provision within the UCCJEA Act which allows a court to apply the UCCJEA during an adoption, and the UCCJEA is preempted by the PKPA and all other federal law.

II. PLAIN LANGUAGE RULE

The verbiage of the sentence "this Act does not govern an adoption proceeding . . . " is written in plain language and does not require statutory interpretation. There is nothing in the statement that makes an exception or permits the statement to be taken out of context, manipulated, twisted, or applied to an adoption in contravention of the Act itself and/or in contravention of the codified statutes of the respective states, federal district or territories.

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[9] Hoff, P.S. 2001. The Uniform Child-Custody Jurisdiction and Enforcement Act. U.S. Department of Justice *Office of Juvenile Justice and Delinquency Prevention* (OJJDP). pg 4-5.

The Kentucky Court of Appeals addressed this issue at length writing as follows: From *Pena v. Green Tree Servicing, LLC*, NPO, COA 3/11/2011

> The seminal duty of a court in construing a statute is to effectuate the intent of the legislature. *Commonwealth v. Plowman*, 86 S.W.3d 47, 49 (Ky. 2002) (citing *Commonwealth v. Harrelson*, 14 S.W.3d 541 (Ky. 2000)). If a statute is clear and unambiguously expresses the legislature's intent, it must be applied as written. *Hall v. Hospitality Resources, Inc.*, 276 S.W.3d 775, 784 (Ky. 2008); see also *Griffin v. City of Bowling Green*, 458 S.W.2d 456, 457 (Ky. 1970). Furthermore, when a word used in a statute is ascribed a particular meaning, courts must accept such even if the statutory definition differs from the ordinary meaning of the word. *Schroader v. Atkins*, 657 S.W.2d 945, 947 (Ky. 1983). Finally, [w]hen there appears to be a conflict between two statutes, . . . a general rule of statutory construction mandates that the specific provision take precedence over the general. *Commonwealth v. Crum*, 250 S.W.3d 347, 351 (Ky. App. 2008) (quoting *Commonwealth v. Phon*, 17 S.W.3d 106, 107-8 (Ky. 2000)).

Tennessee addresses the issue of "statutory and constitutional interpretation as questions of law," *State v. McCoy*, 459 S.W.3d 1, 8 (Tenn. 2014):

> In construing statutes, it is our duty to adopt a construction which will sustain a statute and avoid constitutional conflict if any reasonable construction exists that satisfies the

> requirement of the Constitution. *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 529 (Tenn. 1993) (citations omitted). Our primary objective in statutory interpretation is to carry out legislative intent without broadening or restricting the statute beyond its intended scope. *Houghton v. Aramark Educ. Res., Inc.*, 90 S.W.3d 676, 678 (Tenn. 2002) (citations omitted). We first look to the statute's text, giving the words their natural and ordinary meaning in the context in which they appear and in light of the statute's general purpose. *Mills v. Fulmarque, Inc.*, 360 S.W.3d 362, 368 (Tenn. 2012). If a statute is clear, we apply the plain meaning without complicating the task and enforce the statute as written. *Lind v. Beaman Dodge, Inc.*, 356 S.W.3d 889, 895 (Tenn. 2011). If a statute is ambiguous, we may consider the broader statutory scheme, legislative history, and other sources in discerning the legislative intent. *Arden v. Kozawa*, 466 S.W.3d 758, 764 (Tenn. 2015).

The statutory provision at issue is succinctly stated, not ambiguous, (*Bryant v. HCA Health Servs. Of N. Tenn., Inc.*, 15 S.W.3d 804, 809 (Tenn. 2000)), and is not susceptible to more than one meaning; therefore, in ascertaining the legislative intent, one need not consider the entire statutory framework or look any further than the statement itself. Even if one considered the entire UCCJEA Act under the doctrine of *in pari materia* requiring the interpretation together, the framers clearly acted "purposely in the subject included or excluded.") (quoting *State v. Pope*, 427 S.W.3d 363, 368

(Tenn. 2013). Accordingly, there should be no deviation from the plain language requirements of the UCCJEA Act itself or codified state statutes which require the exclusion of adoptions.

III. STATUTORY INTERPRETATION

The US Supreme Court, in *Chung Fook v. White Commissar of Immigration*, 264 U.S. 443 (1924) focused on the plain meaning rule when a native born citizen of the United States was denied a petition for a writ of habeas corpus for his wife, an alien Chinese woman ineligible for naturalization, based on a statute for naturalized citizens, despite the doctrine of absurdity. The court writes:

> To the same effect, see *Ex parte Leong Shee* (D. C.) 275 Fed. 364. We are inclined to agree with this view; but, in any event, the statute plainly relates only to the wife or children of a naturalized citizen and we cannot interpolate the words 'native-born citizen' without usurping the legislative function. *Corona Coal Co. v. United States*, 263 U.S. 537, 44 Sup. Ct. 156, 66 L. Ed. ___, decided January 7, 1924; *United States v. First National Bank*, 234 U.S. 245, 259-260, 34 Sup. Ct. 846, 58 L. Ed. 1298; *St. Louis, Iron Mountain, etc., Railway Co. v. Taylor*, 210 U.S. 281, 295, 28 Sup. Ct. 616, 52 L. Ed. 1061; *Amy v. Watertown*, 130 U.S. 320, 327, 9 Sup. Ct. 537, 32 L. Ed. 953. The words of the statute being clear, if it unjustly discriminates against the native-born citizen, or is cruel and inhuman in its results, as

> forcefully contended, the remedy lies with Congress and not with the courts. Their duty is simply to enforce the law as it is written, unless clearly unconstitutional.

In *Ardestani v. Ins.*, 502 U.S. 129 (1991), a case dealing with administrative deportation proceedings as adversary adjudications "under section 554" requesting a waiver of sovereign immunity with award of attorney fees and cost, the U.S. Supreme Court provided additional guidance regarding plain language requirements:

> The starting point in statutory interpretation is the language [of the statute] itself. *United States v. James*, 478 U.S. 597, 604 (1986) (quoting *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)). The strong presumption that the plain language of the statute expresses congressional intent is rebutted only in rare and exceptional circumstances, *Rubin v. United States*, 449 U.S. 424, 430 (1981), when a contrary legislative [502 U.S. 129, 136] intent is clearly expressed. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432, n. 12 (1987); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). In this case, the legislative history cannot overcome the strong presumption that the legislative purpose is expressed by the ordinary meaning of the words used. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (quoting *Richards v. United States*, 369 U.S. 1, 9 (1962).

The application of the UCCJEA Act to an adoption proceeding, in contravention of the Act itself and that of its codified version within the respective state statutes, is not only erroneous but a blatant disregard of the plain language requirements and statutory interpretation as required by the respective state legislatures as well as the directives previously established by the U.S. Supreme Court. This action by the circuits who engage in such discourse nullifies the legislative intent for which they are sworn to enforce and pushes a society towards an unpredictable, ungoverned Hobbesian state.

IV. THE EXCLUSION OF ADOPTIONS UNDER THE UCCJEA IS A PROCEDURAL JURISDICTION RULE

Senior Attorney, Paul Ferrer, from the National Legal Research Group, wrote the following:

> The U.S. Supreme Court has been called on a number of times in recent years to decide whether a procedural rule is jurisdictional. See *Henderson v. Shinseki*, 131 S. Ct. 1197, 1202 (2011). The question is important because once a procedural rule is labeled jurisdictional, the court has no power even to consider granting relief, for any reason, from a failure to comply strictly with the rule's requirements.[10]

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[10] Public Law Legal Research Blog CIVIL PROCEDURE: When Is a Procedural Rule "Jurisdictional"? The Lawletter Vol 36 No 10 Paul Ferrer, Senior Attorney, National Legal Research

Because the UCCJEA is a uniform law, strict compliance with the UCCJEA Act itself and the applicable procedural principles which are codified in the state statutes is a requirement before a court can assert authority to proceed in a specific case at a defined time. The UCCJEA is essentially a procedural jurisdiction rule; therefore, the application of the UCCJEA during an adoption proceeding when it is expressly and unambiguously excluded is a conspicuous error and invalidates any decisions rendered in contravention of same.

V. CIRCUIT SPLITS

Within the fifty circuits, the federal district of D.C. and the U.S. territories, only two jurisdictions have not yet adopted the UCCJEA. In Massachusetts, the UCCJA, as modified by the PKPA, controls. In Puerto Rico, neither the UCCJA nor the UCCJEA have been adopted, thus only the PKPA controls. In the remaining jurisdictions some states have eliminated adoption from the respective codified UCCJEA statutes; specifically, Florida, Iowa, Kansas, Maryland, New Jersey, Oregon, creating separate statutes to deal directly with adoption. Vermont is the only state to partially enact the Uniform Adoption Act. The remainder of the jurisdictions have codified the UCCJEA within their own statutes, and all exclude adoptions under

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Group Read more at: Retrieved 9-21-2020, https://www.nlrg.com/public-law-legal-research/bid/76859/CIVIL-PROCEDURE-When-Is-a-Procedural-Rule-Jurisdictional

the UCCJEA. Despite this exclusion, the circuits have varied interpretations of the application of the UCCJEA to adoptions:

> The Utah Supreme Court decided that adoptions constitute a custody proceeding for the purposes of the PKPA and the PKPA did not limit the subject matter jurisdiction of state court. The court found that the PKPA, and only the PKPA by its plain language, applies to adoption proceedings, *In re Adoption of Baby E.Z.*, (Utah 2011).
>
> California determined that the UCCJEA did not apply to adoption proceedings when a mother and her husband petitioned to terminate the father's parental rights for a stepparent adoption, *In re Adoption of K.C.*, 203 Cal. Rptr. 3d 110 (Ct. App. 2016).
>
> The Kansas Supreme Court found that the jurisdiction provision of the adoption statute, as a specific statute, rather than the UCCJEA, controlled the determination of jurisdiction in adoption proceedings where an adoption or child-custody proceeding involving the child is pending in another state or where the court of another state has already made a child custody determination, *In re Adoption of H.C.H.*, 304 P.3d 1271 (Kan. 2013).
>
> A state can become a newborn child's home state almost as soon as the child is born. New York found it was the home state based on a literal construction of the statute since the mother gave birth February 23, 2013, and

lived there continuously until she filed for custody two days later. Even though the father had filed a paternity petition in November, 2012, the child had not been born yet so California did not have jurisdiction "substantially in conformity" with the UCCJEA, *In re Sara Ashton McK. v. Bode M.*, 974 N.Y. S. 2d 434 (App Div. 2014).

A Louisiana Adoption Case for a step-parent. Subject matter jurisdiction and the right to modify the original orders of Mississippi were at issue based under the UCCJEA because there was ongoing litigation in the original state. The petition for adoption was dismissed. *In re D.C.M. Applying for Intrafamily Adoption*, La. App. 22 Cir L. (2011).

The Kentucky case *Williams v. Bittel*, 299 S.W. 3d 284 (Ky. App 2009), the case upon which petitioner's jurisdictional challenge was based. The UCCJEA in effect in Kentucky exempted adoption from its provisions. Despite the plain language of the UCCJEA excluding adoptions, Kentucky retained exclusive, continuing jurisdiction over a custody case that originated in its jurisdiction as long as Bittel, the boyfriend of a deceased mother, remained in Kentucky. Bittle and the decedent's sister and brother-in-law, the Williamses argued over the child which was born in Kentucky. Williams were the designated primary residential custodians with liberal visitation to Bittel. The Williams moved to Georgia where they adopted the child. The adopted was vacated due to the UCCJEA.

Respondent purports the case at bar is differentiated from the *Williams v. Bittel* case as described by petitioner in his brief and concurs with his position that the UCCJEA does not apply for reasons presented in this brief. Had petitioner and respondent engaged in forum shopping, which they did not do but for which they were accused, and relocated with the children to Utah or Kansas then filed for adoption, the different interpretations of the application of the UCCJEA to the adoption by those circuits would have resulted in the finalization of the adoption and subsequent enjoyment of the stability of a home for the minor children which they had enjoyed since infancy but for which they have been denied by the erroneous orders of the Kentucky judiciary.

CONCLUSION

Certiorari should be granted based upon the foregoing, so the Court can resolve the conflict among the circuits regarding the inconsistent interpretation of the application of the UCCJEA during adoption proceedings, resolve the subsequent violations of federal law, as well as the specific issues of the appearance of judicial misconduct, failure of the Kentucky judiciary to recognize petitioner's standing in this case, and

subsequent violation of his due process rights specific within this case.

Respectfully submitted,

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