State of Michigan
In The Supreme Court

Appeal from the Michigan Court of Appeals
O'Connell, P.J., Talbot, and Stephens, J.J.

LEAH ROSE FOSTER,
Plaintiff-Appellee,

Supreme Court No. _____
Court of Appeals Case No. 291825
Monroe Cir. No: 2008-2771-DP

v.

DAVID KENNETH WOLKOWITZ
Defendant-Appellant.

Defendant-Appellant's Application for Leave to Appeal

This case involves an interstate child-custody dispute

Submitted by:

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As required by MCR 7.302(1) this Application contains:

•	Identification of the Court of Appeals Order.	MCR 7.302(a)
•	Questions presented for review.	MCR 7.302(b)
•	Table of Contents.	MCR 7.302(c)
•	Index of authorities.	MCR 7.302(c)
•	Statement of material proceedings and facts.	MCR 7.302(d)
•	Argument.	MCR 7.302(e)
•	Opinion, findings, and judgment of the trial court.	MCR 7.302(f)[1]
•	Order of the Court of Appeals.	MCR 7.302(g)[2]

[1] Attached at Tabs 1 and 2.

[2] Attached at Tab 3.

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Identification of Court of Appeals Order

Defendant-appellant father appeals from unpublished decision of the Court of Appeals issued on September 15, 2009.

The trial court order that is the subject of this appeal was entered by the Hon. Pamela Moskwa of the Monroe County Circuit Court on February 17, 2009. That order states that Michigan has jurisdiction of this interstate custody dispute based on the Acknowledgement of Parentage Act and it denies Defendant-appellant's motion for summary judgment on jurisdiction and motion for attorney fees.

The father appealed and although the Court of Appeals did not agree that the Acknowledgment of Parentage Act was sufficient to establish jurisdiction, the Court of Appeals held that Michigan has continuing jurisdiction of this interstate custody dispute based on a 'significant connection' between the child in question and the State of Michigan, although no inquiry had ever been made by the trial court or the Court of Appeals as to the child's home state.

The Court of Appeals opinion states that when a father signs an affidavit or acknowledgment of parentage, doing so is by default a 'child-custody determination' as defined by the UCCJEA. Therefore, the Court of Appeals opined, the trial court properly asserted continuing jurisdiction over this interstate child custody dispute without making a finding as to the child's home state because a 'child-custody determination' had already been made via the acknowledgment of parentage; and although no evidentiary hearing had ever taken place on the issue of jurisdiction, the Court of Appeals found that the minor child in this case has a 'significant connection' with the State of Michigan and a 'custody determination' had already been made, so Michigan should have continuing exclusive jurisdiction. This was clear legal error.

The father now seeks leave to appeal the Court of Appeals decision to this Court.

He requests that the Court ultimately:

REVERSE the Court of Appeals decision;

VACATE the trial Court's February 17, 2009 order; and

ORDER that Illinois is the child's Home State under the UCCJEA and ORDER that Illinois assert continuing jurisdiction over the issues of custody, parenting time, and child support and ORDER that Plaintiff-Appellee pay all of Defendant-Appellant's attorney fees and costs.

Questions Presented for Review

1. DOES SIGNING AN AFFIDAVIT OF PARENTAGE FOR A CHILD BORN OUT OF WEDLOCK AUTOMATICALLY ESTABLISH A 'CHILD-CUSTODY DETERMINATION' AS DEFINED BY MCL 722.1201 OR MCL 722.1203 (UCCJEA)?

Plaintiff-Appellee:	Yes
Defendant-Appellant:	No
Court of Appeals:	Yes

2. SHOULD JURISDICTION OF ALL INTERSTATE CHILD CUSTODY DISPUTES BE GOVERNED BY THE UCCJEA REGARDLESS OF WHETHER THERE IS AN ACKNOWLEDGMENT OF PARENTAGE?

Plaintiff-Appellee:	Yes
Defendant-Appellant:	No
Court of Appeals:	Yes

3. CAN A COURT ASSERT SIGNIFICANT CONNECTION JURISDICTION UNDER THE UCCJEA WITHOUT FIRST INVESTIGATING WHETHER THE CHILD HAS A HOME STATE?

Plaintiff-Appellee:	Yes
Defendant-Appellant:	No
Court of Appeals:	Yes

4. DOES DETERMINING THE PROPER FORUM FOR JURISDICTION OF AN INTERSTATE CUSTODY DISPUTE BY APPLYING MCL 722.1010 TO *UNMARRIED* PARENTS WHILE APPLYING THE UCCJEA TO *MARRIED* PARENTS VIOLATE THE EQUAL PROTECTION CLAUSE OF THE U.S. AND STATE CONSTITUTIONS AND CAUSE ABSURD RESULTS ALL OVER THE COUNTRY AND THEREFORE IS AGAINST PUBLIC POLICY?

Plaintiff-Appellee:	No
Defendant-Appellant:	Yes
Court of Appeals:	No

Statement of Material Proceedings and Facts

The minor child in this matter is named Mila Wolkowitz. Mila Wolkowitz was born on October 12, 2006. Her mother (Leah) is the Plaintiff-Appellee in this matter and her father (David) is the Defendant-Appellant. Leah and David were not married at the time of Mila's birth and have never been married. Prior to the birth of their daughter, Leah and David resided in the State of Illinois. They came to Michigan right before the birth of their daughter. On January 25, 2007, Leah and David signed and executed an Affidavit of Parentage naming David as Mila's Wolkowitz's biological and legal father.[3] The Affidavit of Parentage was filed in the State of Michigan. On or about April 27, 2007 Leah, David, and the minor child moved back to Chicago, Illinois.[4] They lived, as co-tenants, in an apartment they leased for a 6-month term before moving back to Chicago. Leah was enrolled as an in-state student at Northeastern Illinois University[5]. When their 6-month lease expired in October, 2007, Leah and David both signed a year-long lease for another apartment in Chicago.[6] At this time, Leah was employed full-time in Chicago.[7]

On May 9, 2008, as Leah was on her way to a job interview a few miles away from their home in Chicago, Leah and David had an argument in their apartment about how Leah was causing disruption in Mila's schedule and daily routine.[8] By this time, the

[3] January 6, 2009 Tr., p. 4, line 8-9.

[4] January 6, 2009 Tr., p. 10, line 7.

[5] Pl-App. Dep. Tr., p. 5, line 25; and p. 6, lines 1 and 11.

[6] Pl-App. Dep. Tr., p. 29, line 10..

[7] Pl-App. Dep. Tr., p. 6, lines 15-18; and p. 53, lines 7-8.

[8] Pl-App. Dep. Tr., p. 45, line 21; and p. 48, line 21.

parties' relationship was severely strained as David had made it clear to Leah that he did not want to marry her and was not, at the time, interested in having more children; and Leah agreed she did not see them getting married.[9] In fact, outside of sharing parenting responsibilities, David and Leah had been living as platonic roommates for several months before Leah left Illinois.[10] Both David and Leah had communicated their feelings to each other, and they understood that they were no longer in a romantic relationship.[11] After living in Chicago with David and Mila for more than a year, Leah decided that she should move out of the apartment. On May 11, 2008, Leah left the State of Illinois with Mila and she filed a Paternity Action four days later in Monroe County, Michigan.[12] Immediately thereafter, David filed a custody action in Cook County in Mila's home state of Illinois.[13]

Right before Leah left Illinois with Mila, she called her parents who live in Monroe, Michigan, and asked them to help her pack.[14] She did not leave Chicago in frenzy. Leah's parents drove from Monroe to Chicago, spent the night in Chicago, and Leah left with Mila the next day while David pleaded with her not to take Mila away from home.[15] She filed this action the same week she left Chicago.

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[9] Pl-App. Dep. Tr., p. 44, line 14.

[10] Pl-App. Dep. Tr., p. 51, lines 9-11.

[11] Pl-App. Dep. Tr., p. 51, lines 9-11.

[12] January 6, 2009 Tr., p. 9, line 5.

[13] *In Re Custody of Mila Wolkowitz, a minor, David Wolkowitz v. Leah Foster*, Case #2008D 079886. On June 4, 2008, the Cook County Court issued an ex-parte order for the immediate return of Mila Wolkowitz to the State of Illinois, but this order was held in abeyance until the Michigan Court concluded the UCCJEA hearing it was scheduled to have, but decided not to hold. Illinois Order attached at Tab 4.

[14] Pl-App. Dep. Tr., p. 69, line 25 and p. 70, line 2.

[15] Pl-App. Dep. Tr., p. 70, lines 16-24.

This Monroe County Court and the honorable Court in Cook County, Illinois had a telephone conference on July 7, 2008 at which time this matter was set for evidentiary hearing. Judge Weipert entered an order dated July 7, 2008 for an evidentiary hearing to determine jurisdiction after conducting, "a phone conference pursuant to UCCJEA."[16] One day later, the Monroe County Court entered an order dated July 8, 2008, stating, "This matter having come to be heard before the Court on the question of jurisdiction under UCCJEA and the Court having been advised in the matter," IT IS HEREBY ORDERED that this matter is set for hearing on the question of jurisdiction under UCCJEA for Friday, July 18, 2008 at 9:00a.m."[17]

However, instead of making its jurisdictional decision pursuant to these two orders (under UCCJEA) the Monroe County Court entered an order on the question of jurisdiction under the Acknowledgment of Parentage Act on February 17, 2009, over David's objection that Illinois is the minor child's home state and that the Acknowledgement of Parentage Act does not pertain to subject matter jurisdiction of an interstate child custody case.

Leah's statements to the court during that telephone conference were riddled with lies and inaccuracies that would later be confirmed as deceit at the time of her deposition. For example, despite signing an affidavit of parentage on January 25, 2007 naming David as Mila's father, when the court asked if parentage had been established, Leah's counsel said, "No."[18] Leah was present and under oath at the telephone conference but stood silent while the issue was repeatedly discussed. Then she carried

[16] July 7, 2008 Order, attached at Tab 5.

[17] July 8, 2008 Order, attached at Tab 6.

[18] Interstate telephone conference transcript, p. 5, line 7.

on with this fraud in an attempt to alienate the court from David by stating in her Memorandum on the Issue of Jurisdiction that, "The minor child in this matter had only one legal parent at the time Leah filed this action."[19] Despite being forwarded a copy of the Affidavit of Parentage on October 16, 2008, proving that David was Mila's legal parent when this action was filed, Leah has failed to amend her pleadings to correct her dishonesty. In an attempt to gain sympathy from the court and portray David as uninvolved in Mila's life, Leah also claimed that David had not spent more than two hours alone with Mila, except for on one occasion, only to state under oath during her deposition that David routinely cared for Mila alone for more than two hours while she attended a college class, worked out at a gym, and attended a pottery class.

Furthermore, during telephone conference Leah also attempted to influence the court into believing that the parties were not going to maintain a residence in Chicago.[20] Had Leah been forthcoming and indicated to the court that: the parties had signed a 12 month lease for an apartment in Chicago; that she was registered as an in-state student at Northeastern Illinois University; that she had only an Illinois driver's license;[21] that she was applying and interviewing for jobs in Chicago in the five months preceding her "sudden" departure; that she and David jointly visited a childcare center in Chicago, where they both put their daughter's name on an enrollment waiting list knowing that there would not be a space at that facility for Mila for at least six months;[22] and that she that only weeks before she left she had pleaded with David to be a family and get

[19] Plaintiff-Appellee's Memorandum on the Issues of Jurisdiction, page 2.

[20] Interstate telephone conference transcript, p. 15, lines 12-19.

[21] Pl-App. Dep. Tr., p. 10, line 5.

[22] March 23, 2009 Tr., p. 63, lines 16-18.

married, the court may have been more hesitant to order that this hearing take place in Michigan instead of Illinois. Unfortunately, and to the great detriment of this minor child and David, by promulgating her fabricated allegations in furtherance of avoiding the reality that Mila's home state is Illinois, she has deprived Mila of a relationship with her father and caused tens of thousands of dollars in unnecessary fees and costs for both parties. In summary, the following facts are undisputed per Leah's own testimony:

1. Leah moved to Illinois in 2004 and moved in with David and was working in Illinois in 2005.[23]
2. Leah and David stayed in Illinois until August, 2006.[24]
3. Leah and David came to Michigan for Mila's birth with plans to move back to Illinois and they did so after Mila was born.[25]
4. The parties and the minor child resided in the State of Illinois from April 27, 2007 until May 11, 2008, when Leah removed the child from the State of Illinois, and filed this action four days later in the State of Michigan.[26]
5. During the time the parties and the minor child resided in the State of Illinois, they visited the State of Michigan, where the minor child's maternal grandparents reside.[27]

[23] Pl-App. Dep. Tr., p. 28, line 17.

[24] Pl-App. Dep. Tr., p. 55, line 17.

[25] Pl-App. Dep. Tr., p. 55, line 13.

[26] Pl-App. Dep. Tr., p. 5, lines 6 and 14.

[27] Pl-App. Dep. Tr., p. 5, line 13.

6. During the time the parties and the minor child resided in the State of Illinois, David was registered in law school at Chicago Kent, and Leah was registered as in-state student at Northeastern Illinois University, a public university.[28]
7. During the time the parties and the minor child resided in the State of Illinois, Leah was gainfully employed, full-time, in Illinois.[29]
8. During the time the parties and the minor child resided in the State of Illinois, Leah and David both had Illinois driver's licenses that they had not only obtained before moving back to Illinois, but had continued to use while temporarily residing in Michigan.[30]
9. During the time the parties and the minor child resided in the State of Illinois, Leah's and the minor child's health insurance was provided by the State of Illinois' AllKids health care plan. A requirement to qualify for the plan is that one must be an Illinois resident.[31]
10. In October, 2007, both parties signed a 12 month lease for an apartment in Chicago, Illinois.[32]
11. Less than one week before this action was filed in the State of Michigan, Leah had a job interview at Kinder Care in Chicago, Illinois.[33]

[28] Pl-App. Dep. Tr., p. 6, lines 1 and 11.

[29] Pl-App. Dep. Tr., p. 9, line 25; page 13, line 16; and page 24, line 8.

[30] Pl-App. Dep. Tr., p. 10, line 5.

[31] Pl-App. Dep. Tr., p. 39, line 6.

[32] Pl-App. Dep. Tr., p. 69, line 20.

[33] Pl-App. Dep. Tr., p. 48, line 21.

Trial Court's Opinion: Despite the prior orders of the trial Court that the issue of jurisdiction shall be decided pursuant to the UCCJEA, the trial court found that jurisdiction was proper in Michigan pursuant to the Acknowledgment of Parentage Act.

Appeal to the Court of Appeals: Father appealed the trial court's ruling and the Court of Appeals affirmed the trial court's determination that it has jurisdiction, but for a different reason. The Court of Appeals erroneously determined that signing an affidavit of parentage is a 'custody determination' as defined by the UCCJEA and therefore affirmed that jurisdiction is proper in Michigan, because of a 'significant connection' between the child and this state. Interestingly though, there is no record for the Court of Appeals to have reviewed before making this factual determination, as the trial court never held a hearing on the issue of jurisdiction and there is no factual record concerning the child's home state because the trial court applied the Acknowledgment of Parentage Act instead of the UCCJEA.

Despite the fact that the trail court did not hold a hearing on the issue of jurisdiction, the record is more than replete with enough facts to support a finding by this Court that at the time this action was filed, the State of Illinois was Mila Wolkowitz's home state. Upon a finding that the Court of Appeals made a clear legal error by determining that Michigan can assert continuing jurisdiction, the order establishing jurisdiction should be VACATED and the issues of custody, parenting time, and child support should be determined in Mila's home state of Illinois; and Defendant-Appellant should be awarded attorney fees and costs pursuant to MCL 722.1311(1).

Argument

A. SIGNING AN ACKNOWLEDGMENT OF PARENTAGE IS NOT A 'CUSTODY DETERMINATION' AS DEFINED BY THE UCCJEA.

Introduction: MCL 722.1102(c) states: "'Child-custody determination' means a judgment, decree, or other **court order** providing for legal custody, physical custody, or parenting time with respect to a child. Child-custody determination includes a permanent, temporary, initial and modification **order**.[34] Child-custody determination does not include an order relating to child support or other monetary obligation of an individual. [Emphasis added]." In this case the Court of Appeals incorrectly determined that when a father signs an acknowledgment of parentage, doing so triggers a 'child custody determination' for purposes of asserting jurisdiction under the UCCJEA.

The Court of Appeals erroneously relied on *Eldred v Ziny*, 246 Mich App 142, 631 NW2d 748 (2001), and in doing so mistakes 'already had custody' for a 'child-custody determination.' They are not the same thing. MCL 722.1006 provides:

> After a mother and father sign an acknowledgment of parentage, the mother has initial custody of the minor child, without prejudice to the determination of either parent's custodial rights, until otherwise determined by the court or otherwise agreed upon by the parties in writing and acknowledged by the court. This grant of initial custody to the mother shall not, by itself, affect the rights of either parent in a proceeding to seek a court order for custody or parenting time.

This statute does not in any way whatsoever provide for a **court order** as required by the UCCJEA for there to be a 'determination', whereby the mere signing of an acknowledgment of parentage does not create a 'child-custody determination.'

[34] The *Random House Webster's College Dictionary* (2001) defines "determination" as the "act of coming to a decision or of resolving something." Black's Law Dictionary (8th ed) defines "determination" as "A final decision by a court or administrative agency."

Standard of Review: A claim that the lower court lacks jurisdiction is a question of law, which this Court reviews de novo. *Ryan v Ryan*, 260 Mich App 315, 331, 677 NW2d 899 (2004). Questions of law in child custody disputes are to be reviewed under the "clear legal error" standard. *Fletcher v Fletcher*, 447 Mich 871, 526 NW2d 889 (1994).

Applicable Law: When a court is called upon to interpret a statute, the fundamental task of a court is to discern and give effect to the Legislature's intent as expressed in the words of the statute. *Pohutski v City of Allen Park*, 465 Mich 675, 683; 641 NW2d 219 (2002). Where the plain and ordinary meaning of the statutory language is clear, further judicial construction is unwarranted. *Nastal v Henderson & Assoc. Investigations, Inc.*, 471 Mich 712, 720; 691 NW2d 300 (2000).

Argument: Subject-matter jurisdiction is a court's right to exercise judicial power over a class of cases. *Joy v Two-Bit Corp.*, 287 Mich 244, 253-254; 283 NW 45 (1938). Unlike MCL 722.1010, which pertains to general and personal jurisdiction, the UCCJEA, as evidenced by its very title, governs a specific class of cases, namely interstate child custody actions, such as the instant matter before this honorable Court.[35]

The UCCJEA defines a "child-custody proceeding" as:

> "a proceeding in which legal custody, physical custody, or parenting time with respect to a child is an issue. Child-custody proceeding includes a proceeding for divorce, separate maintenance, separation, neglect, abuse, dependency, guardianship, **paternity**, termination of parental rights, and protection from domestic violence, in

[35] In this matter, the Plaintiff-Appellee filed a Paternity Action despite the fact that the parties had already signed an affidavit of parentage. This was improper, as "An action to determine paternity shall not be brought under this act if the child's father acknowledges paternity under the acknowledgment of parentage act." MCL 722.714(2). Wherefore, this matter should have been brought as a custody action not a paternity action.

> which the issue may appear." [Emphasis added]. MCL 722.1102(d).

Therefore, even if this matter was supposed to be filed as a paternity action, the UCCJEA would still govern the subject-matter of the dispute, as it is undisputedly a "child-custody proceeding." Accordingly, a court of this state has jurisdiction to make an initial child-custody determination in this matter only if this is the home state of the child. MCL 722.1201. David affirms that Illinois is the child's home state.

MCL 722.1010 should be interpreted to mean plainly that once an acknowledgment of parentage is signed, the issues of custody, parenting time, and child support can be raised by either party in a Michigan court <u>if Michigan is factually the state that has subject-matter jurisdiction over those issues</u>. Factually, Illinois is the child's home state in this case and therefore Illinois has proper subject-matter jurisdiction over this child custody dispute.

In the State of Minnesota, there is no confusion as to what qualifies as an initial 'child-custody determination.' "Once paternity has been recognized through a [Recognition of Parentage], the father may petition for rights of custody or parenting time in an independent action under *Minn. Stat. §518.156* (2004). **<u>The proceeding must be treated as an initial determination of custody</u>** under *section 518.17*." *Williams v Carlson*, 701 NW2d 274, 280 (2005). [Emphasis added]. The same is true in the State of Ohio. *See Ellen v Deal*, 1994 Ohio App LEXIS 6062. The same is also true in the State of Illinois. *See Fisher v Waldrop,* 221 Ill 2d 102, 849 NE2d 334 (2006).

In Texas, a 'child custody determination' means a judgment, decree, or other order of a court providing for legal custody, physical custody, or visitation with respect to a child. Tex. Fam. Code Ann. § 152.102(3). In New Jersey an 'initial custody

determination' means the first permanent, temporary, initial, and modification order concerning a particular child. N.J. Stat. Ann. § 2A:34. In Alabama a 'child custody determination means a "judgment, decree, or other order of a court providing for the legal custody, physical custody, or visitation with respect to a child. Code of Ala. § 30-3B-102 (2009) § 30-3B-102. This includes a permanent, temporary, initial, and modification order. This does not include an order relating to child support or other monetary obligation of an individual.

These states follow the federal government's definition, namely:

> 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. 28 USC 1738(A)(3).

It is as if the Court of Appeals decided to ignore all applicable law when interpreting the UCCJEA, including the UCCJEA itself, which clearly and unambiguously states:

> Before a child-custody determination is made under this act, notice and an opportunity to be heard in accordance with the standards of section 108 must be given to each person entitled to notice under the law of this state as in child-custody proceedings between residents of this state, a parent whose parental-rights have not been previously terminated, and a person having physical custody of a child. MCL 722.1205(1).[36]

Conclusion: It was a clear legal error for the Court of Appeals to find that signing an acknowledgment of parentage results in a 'child-custody determination' that satisfies the requirements of the UCCJEA when determining the issue of jurisdiction of interstate custody disputes. It is troubling that the Court of Appeals relied on *Eldred v Ziny* (246 Mich App 142, 147, 631 NW2d 748 (2001) in order to come to the conclusion that a

[36] See also *Nash v Salter*, 280 Mich App 104, 113, 760 NW2d 612 (2008).

mother “is presumed to have custody of the minor child” equates to a “child-custody determination” as required by the UCCJEA when they clearly are not the same thing. It is especially troubling when that very case makes it crystal clear that, “the Child Custody Act is the ‘exclusive means’ of pursuing child custody rights,” *Id.*, citing *Van v Zahorik*, 460 Mich 320, 328, 597 NW2d 15 (1999).

It is crucial that this Court, whether or not it decides to grant leave to appeal and place this case on the formal calendar, vacate the Court of Appeals’ hasty and misguided attempt to reconcile the Acknowledgment of Parentage Act and the UCCJEA that results in the signing of an acknowledgment of parentage now equating to a ‘custody determination’ when that is clearly not the intent of the Acknowledgement of Parentage Act itself.

B. JURISDICTION OF ALL INTERSTATE CHILD CUSTODY DISPUTES SHOULD BE GOVERNED BY THE UCCJEA REGARDLESS OF WHETHER THERE IS AN ACKNOWLEDGMENT OF PARENTAGE. TO DO OTHERWISE WOULD YIELD ABSURD RESULTS ALL OVER THE COUNTRY.

The purpose of the UCCJEA is to have a *Uniform* method of determining the proper forum for jurisdiction of all interstate child-custody disputes. Applying the UCCJEA to some child-custody disputes and the Acknowledgment of Parentage Act to other child-custody disputes defeats the primary purpose of the UCCJEA.

Standard of Review: Questions of statutory interpretation are reviewed de novo on appeal. *Polkton v Charter Twp v Pellegrom*, 265 Mich App 88, 98, 693 NW2d 170 (2005).

Applicable Law: Statutes should be construed so as to prevent absurd results, injustice, or prejudice to the public interest. *McAuley v General Motors Corp.*, 457 Mich 513, 518; 578 NW2d 282 (1998). It would be absurd to conclude that MCL 722.1010 automatically exempts some cases involving a child born out of wedlock from analysis under the UCCJEA while including others simply because the parents signed an acknowledgment of parentage. The primary concern of the court is to ascertain the facts as to residency of the child when the action is filed in order to determine proper jurisdiction. It would clearly be prejudicial and contrary to the public interest to force parties who have no connection to the State of Michigan to submit to the jurisdiction of a Michigan Court simply because this is where the acknowledgment was signed.

For example, two parents could sign and file an acknowledgment in the State of Michigan when a child is born out of wedlock, and then move to Alaska and live in Alaska for ten years. To conclude that after living in Alaska for ten years, the parties

must file any custody, parenting time, or child support matter in the State of Michigan is absurd, and certainly prejudicial to the public interest, not to mention completely contrary to the purpose of the UCCJEA, which places preeminent importance on a child's home state. The UCCJEA does not differentiate between a child born out of wedlock and a child born to a married couple, and neither should the State of Michigan.

In another example, suppose the same facts existed as above, but instead of the unmarried parents removing the child from the child's home state, the unmarried father does so alone. In such a case, despite not having lived in Michigan (where the acknowledgment of parentage was filed) for 17 years, and not having any legally established custodial rights, the unmarried father would benefit from Michigan taking continuing under the UCCJEA. Again, this is in absolute contradiction to the UCCJEA's purpose of establishing primary jurisdiction in a child's home state.

The rules of statutory construction require the courts to give effect to the Legislature's intent. Courts should first look to the specific statutory language to determine the intent of the Legislature. The Legislature, of course, is presumed to intend the meaning that the words of the statute plainly express. *Institute in Basic Life Principles, Inc. v Watersmeet Twp (After Remand),* 217 Mich App 7, 12, 551 NW2d 199 (1996). If the language is clear and unambiguous, the plain and ordinary meaning of the statute reflects the legislative intent and judicial construction is neither necessary nor permitted. *Tryc v Michigan Veterans' Facility,* 451 Mich 129, 135-136, 545 NW2d 642 (1996).

Whether or not a court of this state has subject-matter jurisdiction over the issue of child custody depends on the residency requirements of MCL 722.26(2) for an

intrastate case and of MCL 722.1201(a) for an *interstate* case. This issue is also addressed by the Michigan Court Rules, which state, "[U]nless otherwise provided by statute, original actions under MCL 722.21 *et seq.* that are not ancillary to any other action must be filed in the circuit court for the county in which the minor resides" if the case is an intrastate case. MCR 3.204(A) Interstate cases are governed, instead, by the UCCJEA.

The purpose of the UCCJEA is to make sure that custody actions are filed in the proper state and the, "unless otherwise provided by statute" language of MCL 722.21 clearly refers to a statute such as the UCCJEA. As stated in *People v Webb*, 458 Mich 265, 274; 580 NW2d 884 (1998):

> When [the] Court construes two statutes that arguably relate to the same subject or share a common purpose, the statutes are in pari materia and must be read together as one law, even if they contain no reference to one another and were enacted on different dates…. If the statutes lend themselves to a construction that avoids conflict, that construction should control.

If this honorable Court finds that the Acknowledgment of Parentage Act and the UCCJEA conflict with regard to subject-matter jurisdiction, and that they share a common purpose (exercising jurisdiction over the issues of custody, parenting time, and child support in a case where both parents have signed an acknowledgment of parentage) then they should be read together to avoid a conflict, if possible.

As there is no mention of interstate custody disputes in MCL 722.1010, the statutes, as read together, yield only one reasonable interpretation: ***Except as otherwise provided [in the Child Custody Act and UCCJEA], a mother and father who sign an acknowledgment that is filed as prescribed by section 5 are***

consenting to the general, personal jurisdiction of the courts of record of this state regarding the issues of the support, custody, and parenting time of the child*.*

Even if the Court does not determine that the statutes should be read together the rules of statutory construction provide that a more recently enacted law has precedence over the older statute. *Malcolm v East Detroit*, 437 Mich 132, 139; 468 NW2d 479 (1991). This rule is particularly persuasive when the one statute is both the more specific and the more recent. *Nat'l Center for Mfg. Sciences, Inc. v Ann Arbor*, 221 Mich App 541, 549; 563 NW2d 65 (1997).

The UCCJEA is both more recent and more specific with regard to the issue of jurisdiction of an interstate child-custody dispute when the child's home state is contested. MCL 722.1010 is five years older than the UCCJEA and is void of any language pertaining to interstate child-custody disputes. Therefore, the UCCJEA has preeminence over MCL 722.1010 for purposes of resolving the instant conflict, if the Court finds that a conflict exists. Unless the Court of Appeals' error is resolved, the UCCJEA will apply to establishing jurisdiction of child-custody disputes for children born to married parents and children born out of wedlock whose parents have not signed an acknowledgment of parentage, while MCL 722.1010 will apply to establishing jurisdiction of child-custody disputes for children born out of wedlock whose parents have signed an acknowledgement of parentage.

C. THE COURT OF APPEALS ERRED BY ASSERTING JURISDICTION PURSUANT TO A 'SIGNIFICANT CONNECTION' ANALYSIS WITHOUT FIRST INVESTIGATING WHETHER THE CHILD HAS A HOME STATE.

Standard of Review: Questions of statutory interpretation are reviewed de novo on appeal. *Polkton v Charter Twp v Pellegrom*, 265 Mich App 88, 98, 693 NW2d 170 (2005). Questions of law in child custody disputes are to be reviewed under the "clear legal error" standard. *Fletcher v Fletcher*, 447 Mich 871, 526 NW2d 889 (1994).

Applicable Law: MCL 722.1101, et seq.

A state can assert jurisdiction under a 'significant connection' analysis only if the home state declines jurisdiction or there is no home state. MCL 722.1202; MCL 722.1201(b)(i). By applying some strange amalgam of the Acknowledgment of Parentage Act and the UCCJEA to conclude that, "by operation of Michigan law" Plaintiff-Appellant already had initial custody, the Court of Appeals effectively made an investigation into a child's home state in an interstate child-custody dispute irrelevant. This is contrary to the heart and soul of the UCCJEA. In fact, the principal difference between the UCCJA [repealed] and the UCCJEA is that the latter places primary importance on a child's home state. The Court of Appeals' opinion that a home state determination can be side-stepped as long as there is a significant connection is a clear legal error.

The first question to be resolved in any interstate child-custody dispute, regardless of whether or not the parents were married and regardless of whether or not they signed an acknowledgment of parentage is: What is the child's home state? MCL 722.1201. By finding that signing an acknowledgment of parentage is a 'child-custody determination' now allows a court to exercise continuing jurisdiction over a case if the

court finds there is a significant connection.[37] This results in a total disregard for the principal purpose of the UCCJEA—to determine a child's home state before making any other decisions on the issue of jurisdiction.[38]

[37] Whether or not there is a significant connection is a question of fact. In this particular case, the trial court never held an evidentiary hearing to determine any jurisdictional issue, yet the Court of Appeals found that in this case there is a record by which to conclude that a significant connection exists. This was an erroneous finding.

[38] It is also important to acknowledge that Defendant-Appellant never had an opportunity to argue against the opinion made by the Court of Appeals, *de novo*, that jurisdiction would be proper based on a Significant Connection analysis as no hearing was conducted including proofs in support of this argument.

D. DETERMINING THE PROPER FORUM FOR JURISDICTION OF AN INTERSTATE CUSTODY DISPUTE BY APPLYING MCL 722.1010 TO *UNMARRIED* PARENTS WHILE APPLYING THE UCCJEA TO *MARRIED* PARENTS VIOLATES THE EQUAL PROTECTION CLAUSE OF THE U.S. AND STATE CONSTITUTIONS AND CAUSES ABSURD RESULTS AND IS AGAINST PUBLIC POLICY.

Standard of Review: Whether a statute violates the state or the federal equal protection clauses is a question reviewed de novo on appeal. *Tolksdorf v Griffith,* 464 Mich 1, 626 NW2d 163 (2001).

Applicable Law: U.S. Const, Am XIV; Const 1963, art 1, §2; MCL 722.1006.

Treating unmarried persons differently than married persons with regard to proper subject-matter jurisdiction of custody disputes is clearly a violation of the equal protection of the rights of the unmarried couple who sign acknowledgments of parentage. Parental rights and the right to the care, custody, and control of one's children are fundamental rights. *Troxel v Granville*, 530 US 57, 120 S Ct 2054 (2000). Equal protection is guaranteed under both the federal and state constitutions. U.S. Const, Am XIV; Const 1963, art 1, §2. *Frame v Nehls*, 452 Mich 171, 183; 550 NW2d 739 (1996). Equal protection guarantees that people similarly situated will be treated alike. *Yaldo v North Pointe Ins. Co.*, 217 Mich App 617, 623; 552 NW2d 657 (1996). Therefore, MCL 722.1010 must be subjected to a strict scrutiny analysis as applied to the facts of this case.

MCL 722.1006 states:

> After a mother and father sign an acknowledgment of parentage, the mother has initial custody of the minor child, **without prejudice to the determination of either parent's custodial rights, until otherwise determined by the court** or otherwise agreed upon by the parties in writing and acknowledged by the court. This grant of initial custody to

> the mother **shall not, by itself, affect the rights of either parent in a proceeding to seek a court order for custody or parenting time.** [Emphasis added.]

It cannot be disputed that this issue involves a fundamental right protected by the Michigan Legislature and both the State and Federal Constitutions—a right that the Court of Appeals' opinion hastily side-steps in furtherance of achieving absolutely no governmental interest.[39]

The strict scrutiny test is as follows: 1) the law must be justified by a compelling government interest, 2) the law must be narrowly tailored to the government interest, and 3) the law must be the least restrictive means of achieving that interest. *Doe v Department of Social Services*, 439 Mich 650, 662; 487 NW2d 166 (1992). In this matter, and with any other similar matter, MCL 722.1010 is not justified by a compelling government interest because the government, which has recognized that illegitimate children are not afforded fewer rights than children born of wedlock, has no compelling interest in treating unmarried parents or children born out of wedlock different than married parents based on the child being born out of wedlock, particularly when both parents signed a voluntary acknowledgment of paternity. Even if MCL 722.1010 is justified by a compelling government interest, it is still unconstitutional because it fails the other two prongs of the strict scrutiny test. MCL 722.1010 is not narrowly tailored and there is absolutely no indication by the legislature that it intended to define unmarried parents as a specific class of people to be treated differently than others similarly situation. Finally, MCL 722.1010 is not the least restrictive means as

[39] See the House Legislative Analysis Section Report dated February 15, 2007 at http://www.legislature.mi.gov/documents/2005-2006/billanalysis/House/htm/2005-HLA-4161-6.htm which explains that the purpose of adding "without prejudice to either parent's rights" was to avoid the very problem the Court of Appeals has created with its opinion.

evidenced by the adoption of the UCCJEA, which is less restrictive on unmarried parents' rights than MCL 722.1010. Therefore, MCL 722.1010 fails strict scrutiny.

A finding that MCL 722.1010 controls subject-matter jurisdiction for a custody dispute between unmarried couples, while married couples may avail themselves of the UCCJEA, is wholly inconsistent with the constitutional protections afforded married parents by the United States Constitution. Accordingly, applying MCL 722.1010 to this case by finding that it governs subject-matter jurisdiction of this custody dispute is a violation of the parties' equal protection rights.

What is most disturbing about the Court of Appeals' analysis is that according to its rationale: Parents of children born out of wedlock who don't sign an acknowledgment of parentage are treated differently than parents of children born out of wedlock who do sign the same acknowledgment. As a result, parents of children born out of wedlock who **do not** sign an acknowledgment of parentage (and thus cannot avail themselves of the Acknowledgment of Parentage Act) are treated the same as married parents, namely initial jurisdiction of their interstate custody disputes are governed by the UCCJEA, while parents who **do** sign an acknowledgment of parentage have initial jurisdiction of their interstate custody disputes governed by the a different statute. This is absurd and must be corrected as **it is totally against public policy for parents of children born out of wedlock to have an incentive not to have the father sign an acknowledgment of parentage**. According to the Court of Appeals decision in this case, if parents of children born out of wedlock want the UCCJEA to apply to the first determination of custody, they literally have to keep a child legally fatherless. The last

thing our society needs right now is an incentive for fathers to avoid establishing paternity of children born out of wedlock.

The Court of Appeals attempts to invoke *In re AH*, 245 Mich App 77, 82, 627 NW2d 33 (2001) to justify the argument that the equal protection guarantee does not require that persons under different circumstance be treated the same. While that is what that case states, it is incorrectly applied to the facts of this and all other cases of this nature. The parents of children born out of wedlock (regardless of whether they sign acknowledgments of parentage), while in a different circumstance because they are not married are in the exact same circumstance when it comes to proper jurisdiction of interstate custody disputes. They need to determine the child's home state and they need to have a court assert continuing exclusive jurisdiction over the issues involved. They are all in the exact same circumstance under the law regardless of their marital status or whether or not they signed acknowledgments of parentage. If the UCCJEA was meant to exempt children born out of wedlock, it would have been written that way.

To distinguish between married and unmarried parents is irrational in that doing so would amount to treating parents differently based on a contractual relationship, namely marriage, while ignoring the quality of the relationship between the parents and the child; as the UCCJEA is concerned with custody, whether or not unmarried parents are similarly situated to married parents would best be determined from the perspective of the children. And in either case, married or unmarried, the principal purpose of the Child Custody Act is to determine the best interests of the child. MCL 722.25. In this case, both unmarried parents lived together since the child's birth, the father participated in caring for the child and teaching the child life skills, the parents and child

visited each other's families together, the child has the father's last name, and the child participated in the father's religious ceremonies where the father and mother practice different religions. In fact, it is easy to imagine married parents that are less involved in their child's life than the unmarried father in this case. Therefore, it is clear that the practical effect of distinguishing unmarried parents from married parents for the purposes of an equal protection analysis of the UCCJEA would be to distinguish one parent from another on grounds wholly immaterial to the parent's actual relationship with the child, which again, ignores the fact that the best interests of children involved in these cases is the controlling issue.

Further, the Parentage act fails even a rational basis test. Under rational-basis review, courts will uphold legislation as long as that legislation is rationally related to a legitimate government purpose. *Harvey v State, Dept. of Management and Budget, Bureau of Retirement*, 469 Mich 1, 7, 664 NW2d 767 (2003), citing, *Dandridge v Williams*, 397 US 471, 485, 90 S Ct 1153, 25 L Ed 2d 491 (1970). To prevail under this highly deferential standard of review, a challenger must show that the legislation is "arbitrary and wholly unrelated in a rational way to the objective of the statute." *Smith v Michigan Employment Sec. Com.*, 410 Mich 231, 271, 301 NW2d 285 (1981). A classification reviewed on this basis passes constitutional muster if the legislative judgment is supported by any set of facts, either known or which could reasonably be assumed, even if such facts may be debatable. *Shavers v Attorney General*, 402 Mich 554, 613-614, 267 NW2d 72 (1978). Rational-basis review does not test the wisdom, need, or appropriateness of the legislation, or whether the classification is made with "mathematical nicety," or even whether it results in some inequity when put into

practice. *O'Donnell v State Farm Mut Automobile Ins Co*, 404 Mich 524, 542, 273 NW2d 829 (1979). Rather, the statute is presumed constitutional, and the party challenging it bears a heavy burden of rebutting that presumption. *Shavers*, *supra*.

In this case, Michigan's clearly stated public policy demonstrates the shear *irrationality* of the Parentage Act serving as a 'child-custody determination' for purposes of establishing jurisdiction of an interstate child-custody dispute. It is well-accepted that public policy favors fathers paying support for their children. The Acknowledgment of Parentage Act is irrational in that it incentivizes fathers not to sign Affidavits of Parentage in order to attempt to evade support obligations. Interpreting the Acknowledgment of Parentage Act as a proper means to establish a UCCJEA 'child-custody determination' not only lacks a rational basis, but is in fact totally irrational because it is destructive to Michigan's public policy goals and only enables the reckless, child-harming forum shopping the UCCJEA was meant to limit as a matter of public policy.

Conclusion

The trial court erred by ruling that the Acknowledgment of Parentage was the proper law to establish subject matter jurisdiction of an interstate child-custody dispute. The Court of Appeals erred by ruling that signing an acknowledgment of parentage is by default a 'child-custody determination' and thereafter, asserting exclusive continuing jurisdiction based on a 'significant connection' between the child and the State of Michigan after it allowed the trial court to skip the requirement of determining the child's home state was further error.

These rulings fly in the face of the UCCJEA and will result in absurd and prejudicial results all over the country. The Court of Appeals was wrong in concluding that the UCCJEA should apply to some interstate child-custody disputes but not others. The UCCJEA should apply to all interstate child-custody disputes regardless of the marital status of the parents and regardless of whether the parents of children born out of wedlock signed acknowledgments of parentage. The Court of Appeals decision should be vacated and the child's home state should be determined to be the State of Illinois.

Dated: October 27, 2009

By: _____

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