IN THE SUPREME COURT OF MISSISSIPPI

Diane M. Lewis (Weiss Bruton) Gartrell,	:	
Lisa LeAnn Weiss (Gartrell Johnsey) Aversrush,	:	
and Jodey Jon Weiss (Gartrell),	:	
	:	
Appellants,	:	
	:	
vs.	:	
	:	
M. Kay Gartrell, Executrix	:	**Nos. 2008-IA-01410 and**
Estate of Dorothy Bryan Gartrell,	:	**2008-TS-01495**
	:	**(Consolidated)**
Appellee.	:	

APPEAL FROM THE CHANCERY COURT OF DESOTO COUNTY

BRIEF OF APPELLEE

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Appellee	:	

CERTIFICATE OF INTERESTED PERSONS

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

1. Diane M. Gartrell, Lisa Leann Weiss (Gartrell Johnsey) Aversrush, and Jodey Jon Weiss (Gartrell), Appellants;

2. M. Kay Gartrell, Appellee;

3. John T. Lamar, Jr. & Lamar and Hannford, P.A., Attorney of Record for Appellants;

4. David M. Slocum, Jr. and Slocum Law Firm, P.L.L.C., Attorney of Record for Appellants ;

5. Ronald L. Taylor & Benjamin L. Taylor and Taylor, Jones & Taylor, Trial Attorneys for Appellee

6. Richard C. Roberts III and Law Offices of Richard C. Roberts III, Appellate Attorney for Appellee

7. Honorable Mitchell Lundy, Jr., Chancery Court Judge

SO CERTIFIED this the 17th day of June, 2009

Richard C. Roberts

RICHARD C. ROBERTS III

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CASES

I. STATEMENT OF THE ISSUES

Appellee submits that the only issue presented to the lower court on Motion for Summary Judgment, and the controlling issue submitted for review by this Court, is as follows:

(1) Was the Chancellor correct in ruling as a matter of law that since a Michigan Court had entered an original child custody determination regarding the Weiss children, and had not relinquished its original jurisdiction, the Mississippi Court lacked jurisdiction to entertain the subsequent adoption proceedings, and the *Final Decree of Adoption* was therefore void *ab initio*?

Appellants have presented two additional issues which are stated by Appellants as follows:

(2) Whether the Chancellor erred in allowing the Appellee to collaterally attack a Final Decree of Adoption entered twenty-five (25) years ago.

(3) Whether the principles of equity and judicial estoppel preclude the Appellee's collateral attack on a twenty-five (25) year old adoption.

II. APPELLEE'S STATEMENT OF CASE

A. Nature of the Case, Course of Proceedings and Disposition in the Court below.

This is an appeal from the *Order Determining Heirs at Law of Dorothy Bryan Gartrell, Deceased*, entered August 12, 2008, by the Honorable Mitchell M. Lundy, and from the accompanying *Order* granting Summary Judgment entered July 15, 2008. The Chancellor found that *"the purported adoptions in 1984 by William C. Gartrell, III, of two of the possible heirs, Jodey Jon Weiss (Gartrell) and Lisa LeAnn Weiss (Gartrell) Johnsey, were obtained from a court which lacked jurisdiction to approve such adoptions, and such adoptions were therefore void ab initio."* (Appellee's R.E. 9-12, R. 435).[1] The Chancellor went on to find that there was "no remaining dispute as to the identity of the heirs in this estate", and directed the entry of final judgment pursuant to Rule 54(b) of the Mississippi Rules of Civil Procedure.

B. Appellee's Statement of Background Facts

Dorothy Gartrell died on January 3, 2003. She had two children, William C. Gartrell, III ("Willie") and M. Kay Gartrell ("Kay"). Dorothy named Kay as the Executrix of her estate. Dorothy left her entire estate in equal shares to Kay and Willie *per stirpes*. (Appellee's R.E.13 ; R.10) Willie predeceased Dorothy. Willie had two natural children, Cynthia Anne Gartrell Finn ("Cindy") and William C. Gartrell IV ("Wil")[2] and, purportedly, two adopted children, Jodey Jon Weiss (Gartrell) ("Jodey") and Lisa LeAnn Weiss (Gartrell)(Johnsey) Aversrush, ("Lisa"). Jodey, who was born July

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1 It appears that when the Appellants cite to the "Record" in their Brief they are actually citing to Appellants' Record Excerpts. In this Brief when the Executrix cites to the "Record" (R.) she is citing the Record as produced from the Chancery Court. To avoid confusion, when the Executrix cites to her Record Excerpts (R.E.) she will cite "Appellee's R.E."

2 William IV spells his nickname "Wil" with one "l" and not two as in Appellants' Brief.

3, 1966, was 18, and Lisa, who was born June 12, 1968, was 16, when allegedly adopted by Willie, Diane's third husband, on November 15, 1984. (Adoption Records - Supplemental Record)[3].

As the duly appointed Executrix of her mother's estate, Kay filed her initial Petition to Determine Heirs on March 30, 2004. She named herself, along with Willie's natural children, and Willie's "adopted" children as the putative heirs. (Appellee's R.E.159, R. 64) In order to confirm to the court that the "adopted" children were lawful heirs, Kay requested a copy of the 1984 adoption decree from Diane M. Gartrell, the natural mother of Jodey and Lisa. Diane claimed that she did not have a copy of the adoption decree. The Estate's attorney was able to secure a copy of the DeSoto County adoption record by obtaining a court order on April 19, 2004. (Appellee's R.E. 204) [4]

Kay's examination of the DeSoto County Chancery Court's 1984 adoption records revealed "facts" which were decidedly inconsistent with many "facts" Kay had discussed with Diane over the years within the family regarding Diane's ex-husband. As a result of those inconsistencies, Kay, as Executrix, sought to take the deposition of the natural father, George Weiss. Diane, Jodey and Lisa objected to the deposition and obtained a stay of that deposition from the Mississippi Supreme Court pursuant to an Interlocutory Appeal. That interlocutory appeal was subsequently dismissed by the Mississippi Supreme Court on the ground of mootness after Kay agreed to withdraw her

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3 On June 16, 2009, the parties received notice that the pending Motion to Supplement the Record on Appeal with the Adoption Records and with the deposition of Diane M. Gartrell, which the parties have stipulated were inadvertently omitted from the Record, had been granted. Since these documents have not been numbered, they will be referred to as "Adoption Records."

4 The adoption record was ordered produced in the *Estate of William C. Gartrell, III, Deceased: Cynthia Ann Gartrell Finn v. Diane M. Gartrell*, Cause No.: 02-11-1579M, Chancery Court of DeSoto County, Mississippi. Therefore, the Order (which is a part of the sealed Adoption Record) does not appear in this Record with a stamped number, but is part of the Supplemental Record in this case.

Petition for Commission to take the out of state deposition of Mr. Weiss. *Diane M. Gartrell v. M. Kay Gartrell*, 936 So.2d 915 (Miss. 2006).

After the Appellants filed their interlocutory appeal, the Executrix obtained a certified copy of Diane's divorce records in *Weiss v. Weiss*, Saginaw, Michigan Circuit Court, No. 12,442-3 (1970) (Appellee's R.E. 25-86; R. 266-325). It was in this case that the Michigan Court entered a *"Decree of Divorce, Support and Visitation Order(s)"* determining the custody of Jodey and Lisa.[5]

These records brought into question the validity of the 1984 Mississippi adoption proceedings; specifically, in her sworn Petition for Adoption, Diane stated that the last known address of George Weiss was Birch Run, Michigan, but "whose current whereabouts remains unknown after diligent search and inquiry". (Supplemental Record, Petition for Adoption). The divorce record, however, showed that both George and Diane had moved from Birch Run, Michigan, by the time she filed for divorce in 1970 (Appellee's R.E. 28, 31; R. 268, 271). And when Diane sued George for increased child support in 1978 he was living at 10014 Haack, Reese, Michigan, where he continued to live at the same address through 1984 and afterward. (Appellee's R.E. 58 et seq., 98-100, R. 297 et seq., 337-339). The Affidavit goes on to state that Diane and the Weiss children had lived with Diane's mother, who also resided on Haack Road, in Reese, Michigan. As further shown in his Affidavit, George Weiss' street address and telephone number were listed in the local telephone directory throughout 1984. (Appellee's R.E. 99; R.338).

The last proceeding filed in the Michigan court was a *"Motion to Suspend Support Payments"* filed by George Weiss, as a result of Diane's refusal to allow Mr. Weiss to visit with the

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5 The custody order covered the children until they reached the age of 18 or graduated from high school, whichever occurred later. (Appellee's R.E.55; R. 294.) Neither child had graduated from high school at the time of the adoption proceedings.

children after he had traveled to Mississippi for that purpose in July, 1979, pursuant to the Michigan visitation order. The Michigan Circuit Judge entered an Order on July 20, 1979, terminating Mr. Weiss' support payments as a result of Diane's refusal to allow Mr. Weiss to visit with his children, "until the further Order of the Court". (Appellee's R.E. 86; R. 325). Obviously, these facts called into serious question the ability of the Mississippi Chancery Court to grant a valid Decree of Adoption due to lack of personal jurisdiction over the father of the children.

As a result of her investigation, the Executrix filed an *Amended Petition to Determine Heirs*. She attached a certified copy of the record in *Weiss v. Weiss*, Number 12,422-3, Circuit Court for Saginaw, Michigan (Appellee's R.E. 25-86; R. 265-325) as Exhibit "A" to the *Amended Petition*. As stated in the *Amended Petition*, the Executrix had acquired "information which has forced her to revise her prior statements that she believed that the purported adopted children of William C. Gartrell, III, Jodey Jon, and Lisa LeAnn, are heirs-at-law of the Estate of Dorothy Bryan Gartrell." (Appellee's R.E. 163; R.238). The *Amended Petition*, and the exhibits attached thereto, set forth the Executrix's reasons for doubting the validity of the adoption proceedings (which at that time were based primarily on lack of personal jurisdiction and a potential fraud perpetrated on the Court). The Amended Petition further stated that "her investigation is continuing, but [the Executrix] felt it her duty to advise the Court of the latest developments and correct any mistakes in the original *Petition...*" (Appellee's R.E. 165; R.140).

After further examination of the Court Record in *Weiss v. Weiss,* the Executrix came to the inescapable conclusion that the Michigan court had never relinquished jurisdiction over Jodey and Lisa, and that the Mississippi Chancery Court had lacked subject matter jurisdiction under the Uniform Child Custody Jurisdiction Act (adopted by Mississippi in 1982) to grant the *Final Decree of Adoption.*

On February 5, 2008, the Executrix filed her *(Second) Amended Petition for a Final Determination of Heirs at Law* (Appellee's R.E. 168-194; R. 187-212). In this Petition, the Executrix asked the Chancellor to rule that the 1984 adoptions were invalid and to declare Willie's two natural children as heirs to Willie's 1/2 interest in Dorothy's estate. The *(Second) Amended Petition* set forth three reasons to support the Executrix's conclusion that the Mississippi Court lacked jurisdiction to approve the adoptions in 1984. Those reasons were:

(1) Lack of personal jurisdiction (Appellee's R.E. 174; R. 193);

(2) Lack of subject matter jurisdiction (Appellee's R.E. 181 R. 200); and,

(3) The Court's exercise of personal and subject matter jurisdiction was based solely upon a fraud perpetrated upon the Court by Diane. (Appellee's R.E.187; R. 206).

On May 16, 2008, the Executrix filed a *Motion for Summary Judgment for a Final Determination of Heirs*. (Appellee's R.E. 20; R. 261). In her *Motion for Summary Judgment*, the Executrix alleged that on the undisputed material facts, summary judgment was appropriate "on the undeniable legal conclusion that in 1984, the Mississippi Chancery Court lacked subject matter jurisdiction over the adoption petition placed before it by Diane." (Appellee's R.E. 22; R. 263). As stated in the *Motion*, although the Mississippi Court lacked *in personam* jurisdiction over the natural father (as fully explained in the *(Second) Amended Petition to Determine Heirs*), the Motion for Summary Judgment rested solely on the Mississippi Court's lack of *subject matter* jurisdiction under the Uniform Child Custody Jurisdiction Act, and relevant Mississippi case law. (Appellee's R.E. 22; R. 263).

The Court granted the Executrix's *Motion for Summary Judgment* on July 15, 2008, and thereafter entered its *Order Determining the Heirs at Law of Dorothy Bryan Gartrell*. The Court found:

2. As held by this Court in its Order of July 15, 2008, the purported adoptions in 1984 by William C. Gartrell, III of two of the possible heirs, Jodey Jon Weiss (Gartrell) and Lisa LeAnn Weiss (Gartrell) Johnsey, were obtained from a court which lacked jurisdiction to approve such adoptions, and such adoptions were therefore void *ab initio*;

3. The Executrix's Second Petition for Final Determination of Heirs, filed herein February 5, 2008, is granted... ."

(Appellee's R.E.12; R. 435).

C. Appellee's Statement of Undisputed Facts

The relevant and undisputed facts bearing on the single issue upon which the *Summary Judgment* and *Order Determining Heirs* was based, *i.e.*, lack of subject matter jurisdiction, are these:

(1) The Saginaw, Michigan, Circuit Court presided over the divorce, custody, visitation and support matters related to the divorce of Diane and her first husband, George J. Weiss, and all custody and care issues related to their two children, Jodey and Lisa. *Weiss v. Weiss*, Saginaw, Michigan Circuit Court, No. 12,442-3 (1970) (Appellee's R.E.25-86; R. 266-325).

(2) The certified record in *Weiss v. Weiss, supra,* shows that the Michigan court of original jurisdiction never relinquished its jurisdiction over Jodey and Lisa. The most recent order of the Michigan court, prior to the Appellants' filing of the adoption petition in Mississippi, was dated August 16, 1979, and relieved Mr. Weiss of his child support obligation "until the further order of this Court", after Diane refused him visitation with his children as previously ordered by that court. (Appellee's R.E.86; R. 325) [6]

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Mr. Weiss asked the Michigan court to suspend his support payments "until such time as the plaintiff [Diane] complies with the terms of the Order . . . with respect to visitation privileges . . . ." When Weiss went to Mississippi to get his children for a month's court-ordered visitation during July 1979, Diane refused him any contact with his children. (Appellee's R.E. 82, Para. 8-10, R. 321)

(3) The record in the Mississippi adoption court in 1984 establishes that at the time the Appellants filed the adoption petition in Mississippi the Mississippi court was not notified of the Michigan court's jurisdiction or provided any information by Appellants as to the existence of the custody case, *Weiss v. Weiss*, Saginaw, Michigan Circuit Court, No. 12,442-3 (1970).

(4) At the time Appellants filed the adoption petition Mississippi's Uniform Child Custody Jurisdiction Act ("UCCJA"), Miss. Code Ann. §§93-23-1 through 93-23-47 (Supp.1984) required that a Mississippi court defer to the court of original jurisdiction in any custody matter unless the court sought and received a relinquishment of jurisdiction from the original court. [7]

These undisputed facts and these alone require a finding, as the Chancellor recognized, that as a matter of law the Mississippi court did not have subject matter jurisdiction of the Appellants' adoption petition in 1984.

In response to the Executrix's Motion for Summary Judgment the Appellants submitted no evidence to contradict these facts. In this appeal, Appellants have inexplicably failed altogether to even mention the UCCJA in their brief or to address any of the UCCJA-related cases concerning exclusive continuing jurisdiction in the court of original determination of custody regarding Jodey and Lisa.

If the Mississippi adoption court lacked subject matter jurisdiction in 1984, then Chancellor Lundy did not have to reach – and did not reach – either of the other two issues regarding the

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Case law prior to the passage of the UCCJA also required deferral to the court of original custody jurisdiction. *See Hunt v. Hunt*, 629 So.2d 548, 552 (Miss. 1993), holding that even prior to the enactment of the UCCJA it was the law in Mississippi that "a chancery court that enters the original decree has continuing jurisdiction to subsequently modify its custody order even after the parent and child have moved from the state [citation omitted]." *See also Stowers v. Humphrey*, 576 So.2d 138, 141 (Miss. 1991), *Bradshaw v. Bradshaw*, 418 So.2d 64, 65 (Miss. 1982), *Stevens v. Stevens*, 346 So.2d 909, 912 (Miss. 1977).

validity of the purported adoptions. The threshold question of subject matter jurisdiction was, appropriately, determined first, and it is the controlling issue before this Court on review.[8]

III. STANDARD OF REVIEW

The Chancellor's determination that the Chancellor in the 1984 adoption matter lacked subject matter jurisdiction is a question of law, to which this Court applies a *de novo* standard of review. *J.C.N.F. v. Stone County Department of Human Services*, 996 So.2d 762 (Miss. 2008); *A.D.R. v. J.L.H.*, 994 So.2d 177 (Miss. 2008); *Burch v. Land Partners, LP*, 784 So.2d 925, 927 (Miss. 2001).

IV. SUMMARY OF ARGUMENT

The Mississippi court which approved the adoptions of Jodey and Lisa in 1984 did not have subject matter jurisdiction to enter the Decree, and the Decree is therefore void *ab initio*. Under the UCCJA, enacted in Mississippi in 1982, the Saginaw, Michigan , Circuit Court of Appeals, the court of original custody jurisdiction, retained exclusive continuing jurisdiction over all custody proceedings related to Jodey and Lisa .

Since 1982, the UCCJA has been the exclusive determinant of jurisdiction in custody matters. It was the sole basis of the Executrix's Motion for Summary Judgment and the basis of the Chancellor's decision.

In 1984 the relevant section of the UCCJA, Miss. Code Ann. §93-23-11(1), stated:

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The Executrix's *Motion for Summary Judgment* was submitted in conjunction with, and not in lieu of, the *Executrix's (Second) Amended Petition for a Final Determination of Heirs at Law*. The Chancellor did not address the two remaining issues in the *Executrix's (Second) Amended Petition*: (a) whether the 1984 adoption court lacked personal jurisdiction, and (b) whether the 1984 adoption decree was secured by a fraud perpetrated on the court. Those issues were not presented to Chancellor Lundy on summary judgment. The single issue of law regarding subject matter jurisdiction was the only issue addressed by that motion, and it was, in the Chancellor's judgment, determinative of the entire matter.

> A court of this state shall not exercise its jurisdiction under this chapter if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this chapter, unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for other reasons.

Without subject matter jurisdiction a court has no authority to act and its pronouncements are void. Furthermore, the Executrix, or anyone at any time, may challenge the subject matter jurisdiction of a court.

In *Duvall v. Duvall,* 224 Miss. 546, 80 So.2d 752, 755 (1955), this Court stated:

> We consider the sole question of whether the court has jurisdiction of the subject matter. **It is well settled that a judgment rendered by a court having no jurisdiction of the subject matter is void, not merely voidable, and may be attacked directly or collaterally, anywhere, and at any time. Such judgment is a usurpation of power and is an absolute nullity.**

Id. [Emphasis added.] (Quoted with approval in *Roberts v. Roberts*, 866 So.2d 474, 477. (Miss.Ct.App. 2003), discussed *infra.*).

In *Hunt v. Hunt*, 629 So.2d 548, 551 (Miss. 1993), *overruled on other grounds, Powell v. Powell*, 644 So.2d 269 (Miss. 1994), this Court stated:

> Subject matter jurisdiction deals with the power and authority of a court to consider a case, Matter of Adoption of R.M.P.C., 512 So.2d 702, 706 (Miss. 1987). As such subject matter jurisdiction may not be waived and may be asserted at any stage of the proceeding or even collaterally.

Id.

Challenges to adoptions and other decrees are allowed years after entry where the challenge is to the jurisdiction of the court. Just as the Appellants fail to mention the jurisdictional statute which determines the outcome in this case, the UCCJA, they also fail to address the relevant cases. Instead, they advance these arguments:

– *The natural father allegedly "consented" to the adoptions.* If true, this would only be relevant to the issue of personal jurisdiction, but that issue is not before this Court on appeal. Of

course, parties cannot confer jurisdiction on a court by their "consent". *Mississippi Band of Choctaw Indians v. Holyfield et al.* 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989).

– *Adoption is different from custody.* Thus, they claim, it was permitted for Diane to use the Mississippi adoption statute in1984 as the basis for her adoption petition in Mississippi without any reference to the UCCJA. This ignores the plain language of the UCCJA, the cases interpreting it, and would render the UCCJA meaningless. Under this reasoning, a parent could terminate another's parental rights *via* adoption while at the same time not being allowed to modify custody or visitation in a new state without the knowledge and acquiescence of the court of original custody jurisdiction.

– *The Executrix's motives in investigating the adoptions are impure and inequitable and are grounds for estoppel.* Anyone at anytime may challenge subject matter jurisdiction, because without that no court may issue a valid order. *Duvall v. Duvall,* 224 Miss. 546, 80 So.2d 752, 755 (1955). Personal motives are irrelevant. Indeed, an Executrix's fiduciary responsibility would forbid her silence about information known to be relevant to lawful heirship. Her investigation completed in 2008, the Executrix could not ignore the plain fact that in 1984 the Mississippi court had exercised jurisdiction completely unaware of the prior custody proceedings in Michigan. A seasoned and knowledgeable jurist, Chancellor Dennis Baker, had he been informed, surely would have followed the law of the UCCJA and contacted the Michigan court of original jurisdiction. Had that occurred, of course, Diane's house of cards would have tumbled as Chancellor Baker learned not only of the Michigan court's continuing jurisdiction but also of the natural father's easily located address.

V. ARGUMENT

A. The DeSoto County Chancery Court lacked jurisdiction over the 1984 adoption proceedings.

The Uniform Child Custody and Jurisdiction Act ("UCCJA"), Miss. Code Ann. §§93-23-1 through 93-23-47 (Supp.1984) did not permit a Mississippi court to exercise jurisdiction in an adoption case where a Michigan court had assumed original jurisdiction over the custody of the Weiss children.

The undisputed facts showed that the Michigan Court had entered an original child custody determination which awarded custody to Diane and visitation rights to the father, George Weiss. Subsequent Orders were also entered by the Michigan Court affecting visitation rights. (Appellee's R.E. 78; R. 317). The Michigan Court never relinquished jurisdiction over the children.

Miss. Code Ann. §93-23-25 (Supp. 1984) required this state to recognize and enforce an initial or modified decree of another state regarding custody. Miss. Code Ann. §93-23-11(1) (Supp. 1984), stated:

> A court of this state shall not exercise its jurisdiction under this chapter if at the time of filing the petition a proceeding concerning the custody of the child was pending in a court of another state exercising jurisdiction substantially in conformity with this chapter, unless the proceeding is stayed by the court of the other state because this state is a more appropriate forum or for other reasons.

In *Walker v. Luckey*, 474 So.2d 608 (Miss. 1985), the Court recognized the purpose of the UCCJA was to prevent precisely the kind of forum shopping engaged in by Diane. Diane submitted to the jurisdiction of the Michigan court when she wanted child support in 1978, but then attempted to invoke Mississippi's jurisdiction in 1984 when she wanted to terminate the father's rights without his knowledge and without complying with the UCCJA.

> Mississippi has enacted the UCCJA (Secs. 93-23-1 - 93-23-47, Miss.Code Ann. (Supp. 1984)), and it became effective here on July 1, 1982. The act was designed to prevent the very behavior with which we have been confronted here; namely, the "Interstate Child" phenomenon where a custody decree is entered in one state, and a parent removes the child to another state, to have custody modified . . . . **This court will not countenance the behavior of a parent who submits herself to the jurisdiction of another state when it suits her, then appeals to the courts of Mississippi to assume jurisdiction when that suits her better.**

Id. at 611-612. (Emphasis added.)

In addition to Sec. 93-23-11, quoted *supra*, Miss.Code Ann. § 93-23-27 specifically dealt with custody modification in 1984:

> (1) If a court of another state has made a custody decree, a court of this state shall not modify that decree unless (a) it appears to the court of this state that the court which rendered the decree does not now have jurisdiction under jurisdictional prerequisites substantially in accordance with this chapter or has declined to assume jurisdiction to modify the decree, and (b) the court of this state has jurisdiction.
>
> (2) If a court of this state is authorized under subsection (1) of this section and section 93-23-15 [jurisdiction declined by reason of petitioner's conduct] to modify a custody decree of another state it shall give due consideration to the transcript of the record and other documents of all previous proceedings submitted to it in accordance with section 93-23-43.

The UCCJA required at that time, and still requires[9], that every party in a custody proceeding shall give certain information to the Court under oath, including whether the party "has any information of any custody proceeding concerning the child pending in a court of this or any other state." Had Diane complied with this requirement, and been otherwise forthright with Chancellor Baker, the continuing jurisdiction of the Michigan Court would have been readily apparent, and Mr. Weiss's rights regarding his children would have been protected. Instead, Diane presented the adoption court with a picture of an abandoning father whose whereabouts were unknown since the

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9 The Uniform Child Custody Jurisdiction Act, Miss. Code Ann. §§93-23-1, *et. seq.*, was repealed in 2004 and replaced with the current Uniform Child Custody Jurisdiction and Enforcement Act, §§93-27-101, *et. seq.*

year of his second child's birth, 1968, and who could not be located "after diligent search and inquiry". Appellants now seek to reverse the Chancellor's ruling declaring the Decree of Adoption to be void and seek to have this Court approve Diane's sidestep around the requirements of the UCCJA. This is contrary to well-reasoned cases which hold that the law is otherwise.

Tollison v. Tollison, 841 So.2d 1062 (Miss. 2003), completely discredits the Appellants' argument that an "adoption" is not a "custody proceeding", and therefore, the Michigan court's original and continuing jurisdiction over the custody of Jodey and Lisa did not prevent their adoption in Mississippi in 1984.

The mother in *Tollison* attempted to rely upon the statute governing "termination of parental rights" (Miss. Code Ann. Sec. 93-15-105(1)) to distinguish her case from the prior "custody" proceeding. She argued that the statute which stated, "[A]ny person may file for termination of parental rights in the chancery court . . . of the county in which the defendant or the child resides," gave her the right to file her action to terminate the father's rights in a different court than the court of original custody jurisdiction.

Mrs. Tollison filed a complaint in Lafayette County Chancery Court for termination of the father's rights, and the father moved to dismiss, claiming the court of original jurisdiction in Prentiss County retained continuing exclusive jurisdiction, even though the mother and child had lived in Lafayette County for three years. The Lafayette County Chancery Court took jurisdiction. The Supreme Court reversed, rejecting the mother's reasoning.

> This would be correct if there had not been a previous custody proceeding in Prentiss County with that court having entered its final decree. The Chancery Court of Prentiss County had original jurisdiction in the divorce and decided issues pertaining to custody and visitation in 1998. It thus appears that the Prentiss County Chancery Court has continuing jurisdiction over the matter of contempt and termination of parental rights regarding the child . . . .

Id. at 1064.

In 2007 the Court of Appeals relied on *Tollison* in *C.M., individually and on behalf of R.D.H., Jr., and M.B.V.H. v. R.D.H. Sr.*, 947 So. 2d 1023 (Miss.Ct.App.2007), and also held that the principle of continuing exclusive jurisdiction in the court of the original custody determination cannot be defeated by a disingenuous application of an unrelated jurisdictional statute.

> Filing a petition for termination of parental rights in the county in which the child or defendant resides is only allowed in the absence of a prior custody ruling. *Id.* The Scott County Chancery court entered the initial order of child custody. Therefore, Scott County had continuing jurisdiction over any subsequent modifications of child custody, and the Hinds County Chancery Court properly corrected its previous judgment upon recognizing this defect.

Id. at 1028.

Although *Tollison* and *C.M. et al.* involved courts of different counties in Mississippi, and the case *sub judice* involves the courts of different states, the UCCJA clearly protects the continuing exclusive jurisdiction of the court of a different state if that court is the court of the original custody determination. *Curtis v. Curtis*, 574 So.2d 24 (Miss. 1990) (holding that while the Mississippi court might address an emergency petition alleging child abuse it could not modify Utah's original custody order).

> . . . Utah neither lost nor declined to exercise its jurisdiction over the custody dispute in this case. It follows, that, as a matter of federal law, Mississippi had no subject matter jurisdiction to modify the decree. This is so even though Mississippi might have had jurisdiction to enter an initial custody decree under the facts as they otherwise existed except for Utah's already having done so.

Id. at 28.

> In interstate custody conflicts such as this, the UCCJA [Uniform Child Custody Jurisdiction Act, §§ 93-23-1 - 93-23-47, Miss. Code Ann. (Supp. 1984)] provides the **exclusive** state law source for determining state court subject matter jurisdiction. Walters v. Walters, 519 So.2d 427, 428 (Miss. 1988). The Chancery Courts have no power under the PDA [Protection From Domestic Abuse Act, Miss.Code Ann. Sections 93-21-1, et seq. (Supp. 1990)] that are inconsistent with the jurisdictional injunctions of the UCCJA.

> We have considered as well the provisions of the federal PKPA [Parental Kidnaping Prevention Act, 28 U.S.C. Sec. 1738(A)(g)]. Inasmuch as analysis of the facts of this case under that enactment would lead to the same result we here decree, we pretermit discussion. [citation omitted]
>
> We . . . hold that the Court erred when it ordered custody permanently changed. . . the error being one of jurisdiction and not on the merits of the controversy.

Id. at 30. (Emphasis in original.)

Most recently, on May 19, 2009, the Court of Appeals in *Shadden v. Shadden*, No. 2007-CA-01628-COA, re-affirmed that, as stated in *Curtis v. Curtis*, "[i]n interstate custody conflicts such as this, the UCCJA provides the exclusive state law source for determining state court subject matter jurisdiction." *Shadden* held that even though the mother and children moved to Mississippi and the father to Wyoming, the California court of original custody determination retained exclusive jurisdiction until it relinquished that jurisdiction. *Id.* ¶¶8-10. The father filed a motion for custody modification in California. The mother filed an action in a Mississippi court and ignored a notice of the impending hearing in California. The Mississippi court dismissed the mother's action. The father registered the California custody modification order in Mississippi and the Mississippi court ordered that it be enforced.

Remarkably, the Appellants' Brief makes no mention whatever of the UCCJA. The Appellants place their total reliance on the adoption statute as ""[t]he appropriate code section in regards to subject matter jurisdiction . . . ." and on the single case of *In re: Petition of Beggiani*, 519 So.2d 1208 (Miss. 1988). (Appellants' Brief, p. 7).

Beggiani, they argue, stands for the proposition that, "Custody and adoption are different subject matters, and pending custody actions do not exclude adoption proceedings in a separate court." (Appellants' Brief, p. 9) If that were what the case stood for, it would clearly not now be good law, but *Beggiani* is a case applying the "priority of jurisdiction" rule, the rule applied to

determine which of two courts having concurrent jurisdiction should be given priority. *Copiah Medical Associates v. Mississippi Baptist Health Systems*, 898 So.2d 656, 663-664 (Miss. 2005). According to the *Copiah* Court, in *Beggiani* the youth court and the chancery court had concurrent jurisdiction, that is, the two cases in the two courts involved "two (2) suits between the same parties over the same controversy . . . brought in courts of concurrent jurisdiction . . . . " 898 So.2d at 663. (Emphasis added.).

Under the UCCJA, of course, the Mississippi court did not have concurrent jurisdiction with the Michigan court of original custody determination, because the UCCJA specifically states that exclusive continuing jurisdiction resides in the court of original jurisdiction. In any event, in *K.M.K. v. S.L.M. ex rel. J.H.*, 775 So.2d 115 (Miss. 2000), the Supreme Court put to rest any suggestion that *Beggiani* could be applied as Appellants claim to allow an adoption petition filed in a second court to destroy the jurisdiction of the court of original custody determination pursuant to the UCCJA.

In *K.M.K.* the Court held that the chancery court could not exercise jurisdiction over abused or neglected children if there had been a prior hearing in the youth court. Three years later the Court, in *Tollison v. Tollison*, cited *supra* at 14, left no doubt about what *K.M.K.* held:

> In *K.M.K. v. S.L.M. ex rel. J.H.*, 775 So.2d 115 (Miss. 2000), this Court reviewed the denial of a motion to dismiss which alleged improper jurisdiction. S.L.M., by and through her foster parents, filed an action in the Hinds County Chancery Court to terminate the parental rights of her natural mother, *K.M.K. Id.* at 116. K.M.K. filed the motion to dismiss, alleging improper jurisdiction in the Hinds County Chancery Court as the County Court of Hinds County, sitting as the Youth Court, had already taken jurisdiction over the child after making findings of abuse and neglect and placing S.L.M. in the home of foster parents. *Id.* **We held that the chancery court may not exercise jurisdiction over abused or neglected children or any proceeding pertaining thereto over which the youth court may exercise jurisdiction if there has been a prior proceeding in the youth court concerning the same child.**

Tollison v. Tollison, 841 So.2d 1062, 1065 (Miss. 2003). (Emphasis added.)

The majority in *K.M.K.* specifically rejected the argument, based on the *Beggiani* case, that the Chancery Court was authorized to hear the petition because earlier "custody and visitation" issues determined in the Youth Court were "separate and distinct from termination of parental rights . . . ." 775 So.2d at 117. The lone dissent in that case pointed out that "the majority in effect is overruling *Petition of Beggiani*, 519 So.2d 1208 (1988). . . ." *Id.* at 119.

The *K.M.K.* majority, while interpreting the legislative intent of a grant of concurrent jurisdiction to the youth courts, was also concerned with the same principles which underlie the UCCJA – prevention of "forum shopping", "potentially conflicting orders between trial courts dealing with the same issues" and "multiple suits in different courts." *Id.* at 118.

Unquestionably, the cases of *K.M.K.*, *Tollison,* and *C.M., individually and on behalf of R.D.H., Jr., and M.B.V.H. v. R.D.H. Sr.*, 947 So. 2d 1023 (Miss.Ct.App. 2007), discussed *supra*, do not support the proposition for which the Appellants cite *Beggiani* – the proposition that the continuing exclusive jurisdiction in the Michigan court could be defeated without its knowledge by Diane's simply filing an adoption petition in a Mississippi court.

Appellants' argument that custody and adoption are different subject matters which do not preclude forum shopping would lead to the anomalous result that the standard or bar for adoption (which is a permanent termination of all parental rights) could be lower than the standard for custody modification. This is inherently illogical and clearly not the law.

Again, Appellants make this argument (Brief, pp. 7-8) unaccompanied by any acknowledgment of the UCCJA, the law recognized in 1984 as the exclusive determinant of jurisdiction in custody matters. *Walker v. Luckey*, 474 So.2d 608 (Miss. 1985), *Curtis v. Curtis*, 574 So.2d 24 (Miss. 1990), cited *supra*. Diane's attempted use of an unrelated jurisdictional statute in

1984 to avoid the clear applicability of the UCCJA cannot be squared with the Supreme Court's holdings in *Tollison, K.M.K.* and *C.M. et. al.*

Interestingly, but understandably, Appellants ignore cases more recent than *In re Beggiani* which have discussed the interrelationship between the UCCJA and the Mississippi adoption statute. - *In the matter of Adoption: C.L.B. v. D.G.B. et al*, 812 So.2d 980 (Miss. 2002), *In the Matter of the Adoption of D.N.T.: C.T. and S.T. v. R.D.H. and C.A.H.*, 843 So.2d 690 (Miss. 2003), and *In the Matter of the Adoption of a Minor Child*, 931 So.2d 566 (Miss. 2006). In the *C.L.B.* decision, described by the Court as "an issue of first impression" the Court held that the UCCJA would have "limited applicability" in **consensual** adoptions **where all the parties were present**. *C.L.B. v. D.G.B.* , *supra*, at p.16, 18.

Conversely, it is clear from these cases that when the adoption is **not consensual** (as here), and when both parties are **not present** (as here) then the UCCJA **is applicable** in adoption proceedings instituted in a second state after a custody determination has been entered in the first state.

In *C.L.B.* both natural parents had expressly consented to the adoption of their infant child. The natural mother sought to revoke her consent after the final decree, based on claims that the chancellor should have applied the UCCJA, should have appointed a guardian *ad litem* for the infant, and should have considered the natural mother's minor age, lack of education and unstable mental state to find her insufficiently competent to have legally consented to the adoption. The *C.L.B.* Court reviewed other states' decisions, pro and con in their application of their respective UCCJA statutes, and sided with those which did not apply the UCCJA to "[c]onsensual adoptions where all parties are present... ." Id at p. 18. The Court rejected the cases cited by the mother which would have applied the UCCJA in adoption proceedings because:

> [A]ll of the cases cited by the natural mother involved custody determinations arising out of divorce or non-consensual adoptions where not all the interested parties were present. Therefore, those cases were not merely matters of adoption; they also struggled with true custody issues.

(*Id.* at p. 12) (Emphasis added.)

The underlined portion of the Court's opinion above perfectly describes the 1984 adoption proceedings in the case at hand. The custody determination in Michigan emanated from the parents' divorce, and the Michigan proceeding was rife with "true custody issues" - e.g. the mother's petition to leave the state with the minor children (Appellee's R.E. 50; R 289), her petition for increased child support (Appellee's R.E. 58 et seq.; R. 298 et seq.), the father's response seeking increased visitation and custody of both his children (Appellee's R.E. 62-63; R. 301-302), and, the court's order terminating the father's child support obligations until the mother obeyed the court's outstanding visitation orders. (Appellee's R.E. 86; R. 325).

And as in *C.B.L.*, the other two cases holding that the UCCJA did not apply (*In the Matter of the Adoption of D.N.T.: C.T. and S.T. v. R.D.H. and C.A.H.*, 843 So.2d 690 (Miss. 2003), and *In the Matter of the Adoption of a Minor Child*, 931 So.2d 566 (Miss. 2006)),emanated from consensual adoptions, seeking to revoke the express written consents which had been provided to the courts prior to the adoption.

Only in the *D.N.T.* case was another state involved. Arizona had initially approved, at the natural mother's request, appointment of her mother as the infant's guardian. That proceeding was later terminated and jurisdiction relinquished by the court's revocation of the guardianship at the natural mother's request. (The former guardian became an active participant in the subsequent revocation hearing in Mississippi.)

In the case *sub judice* the Michigan court never relinquished jurisdiction over the custody of the children. In fact, the last Order entered by the Michigan Court concerning visitation stated that it was terminating the father's support obligation "until further order of this court." (Appellee's R.E. 86; R. 325). Had Diane re-entered the state of Michigan in 1984 she would have been vulnerable to the Michigan court's contempt powers resulting from its finding that she had disobeyed the court's 1979 order of visitation.

In summary, the key differences in the three cases discussed above and this case are obvious. Those cases involved: (1) consensual adoptions; (2) where all parties were present; (3) where no custody proceedings were pending in another state; and, (4) the very parent who later sought to overturn the adoption had previously executed a voluntary consent.

Appellants also argue, but cite no authority, for the proposition that no custody matter was pending in another jurisdiction due to the fact that "no action had occurred in any custody proceeding concerning Jodey and Lisa within the five (5) years prior to the adoption proceeding." [10] (Brief, p. 9) The amount of time between the most recent Michigan court order and the adoption is irrelevant to the issue of continuing jurisdiction under the UCCJA. No time limit to continuing jurisdiction appears in the UCCJA. Under the UCCJA jurisdiction is geared to the occurrence of events and conditions rather than the mere passage of time between court orders in the court of original jurisdiction.

10

The most recent order of the Michigan court prior to the filing of the adoption petition in Mississippi, dated August 16, 1979, relieved Weiss of child support after Diane refused him court-ordered visitation with Jodey and Lisa. Diane was served by both regular and certified mail but failed to respond or appear at that scheduled hearing. (Appellee's R.E. 83-85;, R. 322-324) She had appeared earlier in 1978-79, of course, when she sought additional support from the Michigan court. (Appellee's R.E. 58 et seq.; R. 298 et seq.).

Even in sympathetic circumstances involving young children, courts have refused to ignore the imperatives of jurisdictional statutes such as the UCCJA. In *Tollison* three years had passed since the most recent order in the original court. In *Mississippi Band of Choctaw Indians v. Holyfield et al.*, 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989) the Supreme Court of the United States lamented the three years' time since the twins' birth, which might prove problematic for their adjustment when returned to the jurisdiction of the Indian court, but held that this time lapse could not be considered as a substitute for proper jurisdiction.

> We are not unaware that over three years have passed since the twin babies were born and placed in the Holyfield home, and that a court deciding their fate today is not writing on a blank slate. . . . [A] separation at this point would doubtless cause considerable pain.
>
> Whatever feelings we might have as to where the twins should live, however, it is not for us to decide that question. We have been asked to decide the legal question of *who* should make the custody determination concerning these children – not what the outcome of that determination should be. The law places that decision in the hands of the Choctaw tribal court.

Id., 490 U.S. at 54, 109 S.Ct. at 1622, 104 L.Ed.2d at 50.

More apposite to this case than the sympathetic cases involving changes in custody of young children is the case of *Estate of Reid: Cupit v. Pluskat*, 825 So.2d 1 (Miss. 2002), in which the court voided an adoption of an adult 15 years earlier. Jodey and Lisa were older teenagers when adopted and, as adults, were soon gone from the adoptive home. And as in the *Reid* case, there is no adoptive relationship to disturb because their "adoptive father", Willie, died in 2002.

B. Whether the Chancellor erred in allowing the Appellee to collaterally attack a final decree of adoption entered twenty five (25) years ago.

Anyone at anytime may challenge the subject matter jurisdiction of the court, for without jurisdiction a court is powerless to issue a valid, lawful order.

Appellants' claim that only a natural parent has standing to question an adoption decree is incorrect where the challenge is based on lack of jurisdiction in the court issuing the decree. The adoption statute itself contains an exception for jurisdictional challenges[11], and it has been held that the natural parent/six month rule thus does not apply to jurisdictional challenges. *In the matter of the Adoption of R.M.P.C.*, 512 So.2d 702, 706 (Miss. 1987) (affirming that a decree issued by a court without subject matter jurisdiction is void).

Lack of jurisdiction is an issue which may be raised at any time, by anyone, because an order from a court without jurisdiction, both subject matter jurisdiction and personal jurisdiction, is void *ab initio*. *Mississippi Band of Choctaw Indians v. Holyfield et al.* 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989), *Duvall v. Duvall*, 224 Miss. 546, 80 So.2d 752, 755 (1955), *Matter of Adoption of R.M.P.C.*, 512 So.2d 702, 706 (Miss. 1987), *Hunt v. Hunt*, 629 So.2d 548, 551 (Miss. 1993), *overruled on other grounds, Powell v. Powell*, 644 So.2d 269 (Miss. 1994), *E.M.C. v.S.V.M.*,695 So.2d 576 (Miss. 1997).

Appellants do not address the host of applicable precedents directly relevant to the jurisdiction issue in the case *sub judice*, many of them cited to the Chancellor, and concerned with the very issue of subject matter jurisdiction under the Uniform Child Custody Jurisdiction Act ("UCCJA"), Miss. Code Ann. §§93-23-1 through 93-23-47 (Supp. 1984). Instead they rely upon the 97-year-old, pre-UCCJA, case of *Adams v. Adams*, 102 Miss. 259, 59 So. 84, 1912 Miss. LEXIS 50 (Miss. 1912), a case which, on its face, is inapposite.

11

Section 93-17-17 of the adoption statutes specifically provides: "For purposes of this chapter, the chancery court shall be a court of general jurisdiction ...and no adoption proceedings shall be permitted to be set aside except for jurisdictional defects ... ." Miss.Code Ann. §93-17-17.

Adams does not concern subject matter jurisdiction. The Court in *Adams* expressed some concern over personal jurisdiction of the natural father (who was not identified and who had not appeared in the adoption proceeding two years earlier) but nevertheless affirmed the lower court's grant of the mother's petition to issue a replacement adoption decree for one lost in a fire. [12]

It is settled beyond question that parties cannot waive subject matter jurisdiction, and they cannot, by their agreement or through counsel, confer subject matter jurisdiction on a court which does not, under law, have jurisdiction. *Mississippi Band of Choctaw Indians v. Holyfield et al.*, 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989).

> Subject matter jurisdiction deals with the power and authority of a court to consider a case, *Matter of Adoption of R.M.P.C.*, 512 So.2d 702, 706 (Miss. 1987). As such subject matter 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. 1993), *overruled on other grounds, Powell v. Powell*, 644 So.2d 269 (Miss. 1994). *See E.M.C. v.S.V.M.*, 695 So.2d 576 (Miss. 1997) (relying on *Hunt v. Hunt*, cited *supra*, and holding that adoption court had no jurisdiction where it failed to comply with mandatory requirement of appointment of guardian *ad litem*).

> If the court is without jurisdiction – subject matter or personal – no one is bound by anything the court may say regarding the (de)merits of the case. *Petters v. Petters*, 560 So.2d 722, 723 (Miss. 1990). A valid judgment requires (1) jurisdiction of subject matter, or of parties and (2) due process of the law. *Bryant v. Walters,* 493 So.2d 933, 938 (Miss. 1986). If a court lacks jurisdiction or the requirements of due process are not met, the judgment is void and must be vacated. *Id.* at 937-38.

Roberts v. Roberts, 866 So.2d 474, 477 (Miss.Ct.App. 2003).

In *Roberts v. Roberts* the wife, who had filed a divorce complaint in DeSoto County Chancery Court, was allowed to challenge the jurisdiction of that very court on appeal. The Court

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12

The *Adams* case has been cited by the Supreme Court only twice, once in a case questioning whether an adopted child could inherit from an adoptive parent, *Brewer v. Browning*, 115 Miss. 358, 76 So.267, 1917 Miss. LEXIS 213 (1917), and once for the proposition that adoption is a matter of statute, not common law, and has been available in Mississippi for more than a century. *In re Adoption of Minor*, 558 So.2d 854 (Miss. 1990).

of Appeals held that even though Mrs. Roberts had brought the suit in Desoto County, and her husband had voluntarily attempted to submit to the jurisdiction, the parties could not confer jurisdiction on the court by agreement. Jurisdiction properly lay in a different county and the DeSoto County divorce decree was void.

Challenges to jurisdiction are never time-barred. Jurisdiction is the basis of a court's authority to act as a court, and its absence must be addressed whenever it is raised.

> It is well settled that a judgment rendered by a court having no jurisdiction of the subject matter is void, not merely voidable, and may be attacked directly or collaterally, anywhere, and at any time. Such judgment is a usurpation of power and is an absolute nullity.

Duvall v. Duvall, 80 So.2d 752, 755 (Miss. 1955)

In the matter of the Adoption of R.M.P.C., 512 So. 2d 702 (Miss. 1987), confirms that even a Decree of Adoption, issued by a court without subject matter jurisdiction, is void and that the natural parent/six month rule of the adoption statute does not apply to jurisdictional challenges.

> Assuming arguendo that these several provisions of the statute were not complied with, our question becomes whether Mars may raise the point(s) more than two years after the adoption decree has been entered. Seen in this light, the question necessitates our consideration of two further statutory provisions. Miss. Code Ann. § 9-17-15 (1972) provides that no action shall be brought to set aside a final decree of adoption after six months have passed following the entry thereof. Miss. Code Ann. § 93-17-17 (1972) then provides that no decree of adoption shall be set aside period, "except for jurisdiction and for failure to file and prosecute the same under the provisions of this chapter."
>
> Read together, these statutes are susceptible to the construction that not even jurisdictional defects may be raised after six months. We have held to the contrary, however, in *Naveda v. Ahumada, 381 So.2d 147 (Miss. 1980)* and quite correctly so. If the court entering the decree was without subject matter jurisdiction or if the child's natural mother had not been subjected to the in personam jurisdiction of the court, the adoption decree would, of course, be subject to post-judgment attack.

Id. at 706.

In *Naveda v. Ahumada*, 381 So.2d 147 (Miss.1980), the adoption was set aside after the six month period where the adopting grandparents had misled the court when they swore they did not know how to contact their daughter, the child's mother. The Supreme Court approved the lower court's ruling that it did not matter "[w]hether or not this jurisdiction was obtained fraudulently or whether the jurisdiction was obtained without proper understanding of what is required." *Id.* at 149. If the adoption court never had proper personal jurisdiction of the mother then the adoption decree was void.

> We hold that the chancellor must be affirmed on the issue of whether or not the Lanes [adoptive grandparents] knew the whereabouts, place of residence, post office and street addresses of appellee [mother], which goes directly to the jurisdiction of the lower court . . . . Further, the lower court was eminently correct in exercising its power to set aside the adoption decree. *Krohn v. Migues*, 274 So.2d 654 (Miss. 1973); *City of Starkville v. Thompson*, 260 So.2d 191 (Miss. 1972); *Whiteway Finance Co. V. Parker*, 226 So.2d 903 (Miss. 1969); Bunkley & Morse, Amis on Divorce and Separation in Mississippi, § 12.20, at 256 (1957).

381 So.2d at149.

Following is a summary of additional cases which held the various described persons entitled to raise the jurisdiction issue, even collaterally and even long after the challenged order was issued. The challenges have been for both lack of subject matter and personal jurisdiction, whether it was because jurisdiction was mistakenly exercised through court error [13] or, as in the case *sub judice*, mistakenly exercised as a result of the court being both uninformed and misinformed by the parties, *e.g.*, a fraud upon the court.[14]

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13 An example of court error would be a lower court attempting to modify an order or issue a new order after an appeal has been filed, e.g., *McNeil v. Hester*, 753 So.2d 1057 (Miss. 2000).

14 The court was uninformed of the prior custody proceedings in Michigan and misinformed as to the father's last known whereabouts. This was part and parcel of a plan to fraudulently induce the Mississippi court to take jurisdiction, as alleged and thoroughly discussed in the Executrix's *(Second)*

1. *Estate of Reid: Cupit v. Pluskat*, 825 So.2d 1 (Miss. 2002) – Heir(s) of an estate could challenge the adoption order which created an additional "heir" more than 15 years earlier. As the product of a fraud on the court, the adoption was void. [15]

2. *Dixon v. Curtis*, 340 So.2d 722 (Miss. 1976) – Potential heirs could claim that a prior chancery court order identifying the sole heir of the deceased had been procured by false and fraudulent testimony and by the admission of a forged will. The will and the prior order were null and void.

3. *Mississippi Band of Choctaw Indians v. Holyfield et al.*, 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989) – The tribe had standing to challenge the jurisdiction of the Mississippi chancery court which approved the adoption of Choctaw parents' twins by non-Choctaw parents. Tribal courts

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Amended Petition for a Final Determination of Heirs. (Appellee's R.E. 187-192; R.187, 206-211.) The issue of fraud was not determined by Chancellor Lundy and is not before this Court. No facts suggested (and the Executrix did not allege) that any others besides the Appellants were aware of or played any part in the fraud – not the attorney, not the chancellor, not the adoptive father. By all appearances they were all victims.

15

Appellants attempt to distinguish *Reid* by saying that no evidence of fraud exists in the case *sub judice*: "There is no evidence of fraud or overreaching in this case." (Appellants' Brief, p. 12), but the Appellants have never responded to the specific factual allegations of fraud in the Executrix's *(Second) Amended Petition for a Final Determination of Heirs* which underlie the claim that there was indeed fraud in the obtaining of the 1984 adoptions. (Appellee's R.E. 187-192; R. 206-211.) Notwithstanding that the law requires specific answers to specific allegations of fraud, the Appellants have responded only with broad general denials, a practice they continue in their appeal brief.

> A bill or petition charging fraud must do so in terms of fact, specifically stated . . . and the answer thereto must respond in like terms. **An answer is not sufficient in containing a general denial of fraud. Every allegation from which fraud may be reasonably inferred must be distinctly answered.**

Graham v. Lee, 37 So.2d 735 (Miss. 1948). (Emphasis added.) Quoting Griffin.Miss.Chan.Prac. Sec. 354, p. 360. (Adoption vacated. A proceeding to adopt child without making the presumptive father a party is invalid under the due process provisions of both state and federal constitutions.)

Regardless, the issue of fraud was not addressed by the chancellor, which was unnecessary in light of his conclusion that the court lacked **subject matter** jurisdiction. *Naveda v. Ahumada*, 381 So.2d 147 (Miss. 1980).

have exclusive jurisdiction over custody proceedings involving an Indian child domiciled on an Indian reservation under the Indian Child Welfare Act of 1978. The parents could not, by agreement, confer jurisdiction on the courts of the State of Mississippi. The adoption was void.

4. *Tirouda v. Miss. Board of Health*, 919 So.2d 211 (Miss.Ct.App. 2005) – The court itself, on its own motion, challenged its own previous order upon realizing that a fraud had been perpetrated upon the court.

5. *M.A.S. v. Mississippi Dept. of Human Services*, 842 So.2d 527 (Miss. 2003) – The alleged natural father, after nine years of paying child support, was entitled to raise the issue of lack of proper jurisdiction in the court ordering child support after a DNA test proved he was not the child's father.

6. *Krohn v. Migues*, 274 So.2d 654 (Miss. 1973) – The biological mother who had put her child up for adoption three years earlier, without notification to her husband, was allowed to raise the issue of lack of personal jurisdiction over the father, thus nullifying the adoption, even though it was she who had lied to the court that she was the only living parent of the child. [16]

C. Whether principles of equity and judicial estoppel preclude the appellee's collateral attack on a twenty five (25) year old adoption.

As the cases cited above demonstrate, no one is estopped from raising the jurisdiction issue, either directly or collaterally, because a court without jurisdiction is powerless to issue a lawful

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16

The *Krohn* case completely discredits the argument of the Appellants that lack of personal jurisdiction is not an issue which the Executrix may raise because it was waived by the natural father, Weiss. (Appellants' Brief, pp. 9-10.) Personal jurisdiction is also a requirement of due process. If the court wrongly exercises personal jurisdiction when it has none the resulting proceeding is invalid, as *Krohn* illustrates. The lack of personal jurisdiction in the adoption court in this case is not before this Court on this appeal, as the Chancellor did not address that issue, having concluded that the Mississippi Chancery Court lacked subject matter jurisdiction in 1984.

order. Appellants cite no authority for a claim that the Executrix, unlike everyone else on the planet, should be estopped from raising the issue of the court's lack of jurisdiction.

Appellants' equitable and judicial estoppel arguments are as follows[17]:

Appellants state that the initial Petition to Determine Heirs is binding on the Executrix and the courts and that the Executrix should be estopped from reaching any conclusion which contradicts her initial Petition which included Jodey and Lisa among the potential heirs of Dorothy's Estate. The Executrix's initial Petition itself, after listing the "purported heirs", "prays that upon presentation of proper evidence to the Court in accordance with Miss. Code Ann. §91-1-27 (1972) and Miss. Code Ann. §91-1-29 (1972), the Court . . . adjudicate the heirs-at-law of Dorothy Bryan Gartrell, Deceased." (Appellee's R.E.161; R. 64.) (Emphasis added.) The initial Petition clearly anticipated that the Executrix would collect and confirm facts relevant to the determination of rightful heirship. Indeed, this is the crux of her duty to the Estate, to the rightful heirs, and to the court.

The rule for which appellants are lobbying, but for which they cite no applicable legal authority, is that an executrix is bound by her initial petition to determine heirs despite the facts to the contrary she may later learn in the performance of her duties. Such a rule is nonsensical on its face and would preclude any administrator from performing her fiduciary duty of investigating and confirming the legitimacy of claims against the estate. Indeed, to do less than perform such investigation would be a breach of the Executrix's fiduciary duty to protect the assets of the Estate

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17 It is difficult to discern when, and whether, the Appellants distinguish between these types of estoppel. They seem to claim that judicial estoppel applies to the Executrix's initial Petition to Determine Heirs, but they also make a claim that they have relied to their detriment on that initial Petition, an element of equitable estoppel but not, generally, of judicial estoppel. Their arguments in either case are not supported by either the facts or the law.

from unlawful claims. The Executrix certainly is not bound by an initial determination of reputed heirs which may be revealed, upon investigation, to have been in error. *See, Shepherd v. Jones ex rel. Jones,* 678 So.2d 660 (Miss. 1996) (It is the duty of administratrix to contest all claims against estate that may properly and in good faith be contested).

After substantial efforts of trying to get the facts to confirm the validity of the adoptions, the Executrix reached the inescapable opposite conclusion that the court which issued the adoption decree did not have proper subject matter or personal jurisdiction and its decree was void *ab initio*. The Appellants seem to claim that either equitable estoppel or judicial estoppel should prohibit either the factual investigation which took place or the conclusion reached therefrom.

Thomas v. Bailey, 375 So.2d 1049, 1052 (Miss. 1979), a leading case on equitable and judicial estoppel, stated the applicable rule:

> In order to establish equitable estoppel, a party must show a change of position in reliance upon the conduct of another and detriment caused thereby. *Birmingham v. Conger*, 222 So.2d 388 (Miss. 1969). In the case *sub judice*, there was no change in position by the appellant in reliance upon appellees' conduct nor has the appellant suffered any detriment or injury. . . .

Id. (Emphasis added.)

The Court in *Thomas* continued:

> [J]udicial estoppel does not require evidence of reliance and injury, as does equitable estoppel, and is based on expedition of litigation between the same parties by requiring orderliness and regularity in pleadings. [citation omitted] It arises from the taking of a position by a party to a suit that is inconsistent with a position previously asserted in prior litigation. [citations omitted]
> ...
>
> **In the cases in which this Court has invoked the doctrine of judicial estoppel, the party against whom the estoppel was sought, knowingly, with full knowledge of the facts, asserted a position which was inconsistent with a position in prior judicial proceedings.**
> ...

> In the present case, the prior averments were made because of the mutual mistake as to a fact which all believed to exist, and was in a non-adversary proceeding. **This Court has refused to apply judicial estoppel where the averments in the first proceeding were the result of ignorance of a material fact. (Citation omitted)**

Id. at 1052-1053. (Emphasis added.)[18]

Appellants do not state facts which might support their claim of "detrimental reliance" (Appellants' Brief, p.15) on the initial Petition. Perhaps they experienced "hope" but not "reliance". They did not "change their position" based on the initial Petition to Determine Heirs. They claimed they were heirs and they still claim to be heirs. Just as in the *Thomas* case, however, the Executrix's inclusion of Jodey and Lisa in the list of purported heirs in the initial Petition was the result of not having "full knowledge of the facts", a result of a "mistake as to a fact which all believed to exist". If estoppel applied it would have the anomalous result of allowing the putative heirs to take advantage of prior misrepresentations which caused the Executrix to believe they were rightful heirs when they were not.

18

The *Thomas* case makes clear that the inconsistency must be between the case *sub judice* and "prior proceedings". *Accord Daughtrey v. Daughtrey*, 474 So.2d 508 (Miss. 1985), *Butcher v. Cessna Aircraft Co.*, 850 F.2d 247 (5th Cir. 1988). Subsequently, estoppel was raised in cases where the alleged inconsistency was at different stages in the same case. *O'Neill v. O'Neill*, 551 So.2d 228 (Miss. 1989) (judicial estoppel did not apply where wife moved to set aside a first partition which was not in accord with the court's order, and equitable estoppel was inapplicable because the husband could not establish his good faith reliance on wife's advertisement of the first partition sale).

In the matter of the Estate of Bryce Blanton, 824 so.2d 558 (Miss. 2002), again affirms the Supreme Court's rejection of the estoppel argument where there are not multiple litigations.

> Further, the parties have not been involved in multiple litigations; this is the only proceeding in which the children and the siblings have been in an adversarial position. Therefore, judicial estoppel is not applicable to this case.

Id. At 563-564.

In *Dockins v. Allred et al.*, 849 So.2d 151 (Miss. 2003), a case cited by Appellants, the Court reversed the lower court's application of estoppel principles within the same litigation, rejecting application of judicial estoppel as well as equitable estoppel where it was not established that a "benefit" accrued to the party who was estopped from changing an earlier position. In a dispute over attorneys' fees, the Court said this:

> Judicial estoppel precludes a party from asserting a position, benefitting from that position, and then, when it becomes more convenient or profitable, retreating from that position later in the litigation. Dockins's claim that the entire amount was in controversy (to the extent such a claim was made) does not face such a bar. "**When the party making the prior statement, which is inconsistent with his position in the present action, has not benefitted by the assertion, the doctrine should not be applied.**" *Mauck v. Columbus Hotel Co,* 741 So.2d 259, 265 (Miss. 1999) (citing *Thomas v. Bailey*, 375 So.2d 1049, 1053 (Miss. 1977)). Dockins did not benefit from his assertion that there was more than 21.53% of the fee in controversy.

Id. at 155. (Emphasis added).

In this case Kay did not acquire any "benefit" from originally asserting that Jodey and Lisa were rightful heirs. Moreover, the claim that Kay "changed her position" in November 2005 because she "acquir[ed] the interests" of her niece Cindy and nephew Wil is false. Kay "changed her position" regarding Jodey and Lisa as rightful heirs, based on her investigation of the facts which clearly revealed they were not rightful heirs, as the Chancellor found.[19]

Appellants incorrectly claim that the Executrix will personally benefit if the adoptions are invalid. Appellants twice state that Kay's inheritance will increase if the adoptions are invalid:

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Kay has not acquired any additional interest in the estate of her mother other than a security interest resulting from assignments executed by Cindy and Wil to secure a personal loan to them from their Aunt Kay. No secret was made of these loans and the related assignments. They were filed of record in this case in 2004 and also provided to Appellants' counsel at the time of filing. As security, the assignments, by their terms, become null and void upon repayment of the loans in full, just as mortgage notes and deeds of trust become void upon payment of the full mortgage. (Appellee's R.E.196,198; R. 71,73.)

> "Her [the Executrix's] change of position is clearly due to her potential for acquisition of a larger share of Dorothy's estate if the adoptions are void." (Appellants' Brief, p. 15)
>
> "Should the Appellee [the Executrix] be able to nullify the adoption of Lisa and Jodey, then she would obtain the right to the entire estate of Dorothy instead of the child's share to which she is currently entitled." (Appellants' Brief, p. 16)

Were this factually correct, it would violate no principle of law, so long as the Executrix faithfully fulfilled her fiduciary duties. However, it is not correct. Under the terms of Dorothy's Will, Kay will inherit only ½ of her mother's Estate, not more and not less, no matter whether the adoptions of Lisa and Jodey are valid or invalid. (Dorothy's Last Will and Testament, Appellee's R.E.13; R. 10) Neither is Kay an heir or potential heir to any part of her brother Willie's estate, no matter whether the adoptions are valid or invalid. Appellants' contrary assertion is wrong as a matter of undisputed facts. Appellants know full well that the Executrix "changed her position" from her initial understanding that the adoptions were lawful because she received new information, correct information, which compelled the position ultimately presented to the Chancellor. **Of course, none of these facts has any bearing on or relevance to the controlling issue on appeal in this case – whether the Mississippi court had subject matter jurisdiction of the adoption petition in 1984.**

The case upon which Appellants chiefly rely is that of *In the matter of the Estate of Richardson et al. v. Cornes et al.*, 903 So.2d 51 (Miss. 2005). It is readily distinguishable from the case *sub judice*. A case of heirs dividing wrongful death proceeds, the decedent's mother/executrix, Richardson, joined with decedent's father, Cornes, and decedent's siblings, in settling the wrongful death claim and jointly petitioning the court for a determination of heirs (including them all) and determination of wrongful death beneficiaries (including them all). After the court decreed that they were all beneficiaries of the estate and of the settlement proceeds, and after the court ordered that the executrix distribute the proceeds of the settlement equally between Richardson, her children,

Cornes (the father), and his children, Richardson not only failed to distribute the proceeds, but also, six months later, filed a petition that asked the trial court to disinherit Cornes.

In that petition, for the first time, Richardson claimed that Cornes should be disinherited from his illegitimate daughter's estate because "Cornes did not openly treat Kela (his decedent daughter) as his child and did not provide any financial or emotional support to Kela" in violation of Miss. Code Ann. §91-1-15(3)(D)(I) (Rev. 2004). *Id.*, at 52, P3. The trial court held that Richardson should be estopped from raising that issue for the first time at that juncture. The Court of Appeals reversed the trial court. *In re Richardson*, 2004 Miss.Ct.App. LEXIS 448, 2004 WL 1099993 (Miss.Ct.App. 2004). The Supreme Court reversed and reinstated the trial court's application of estoppel to thwart the belated disinheritance. The Supreme Court noted that, "Had Richardson and Turnage [her attorney] taken a different procedural route, i.e., shown candor and honesty with the chancellor, a different result may have been obtained." *Id.* at 56. Not only had the estate been closed six months when the petition to disinherit was filed, but both the Court of Appeals and the Supreme Court expressed concern about another important aspect of fundamental unfairness in the case. The Supreme Court stated:

> In both the estate action and the wrongful death action, Richardson was represented by attorney Ellis Turnage. Turnage assisted Cornes and his children in filing their waivers of process and joinders to the petition for authority to settle a claim of the estate and wrongful death beneficiaries filed by Richardson to receive authority to settle Kela's wrongful death claim. Turnage also represented Cornes in creating a guardianship for his minor child for purposes of handling the settlement proceeds. [note 3] [20]

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The Supreme Court here included a note that Judge Griffis of the Court of Appeals was especially concerned by the "several hats" worn by Turnage, who represented Richardson and all other participants in the litigation. The Supreme Court's note:

> Ellis Turnage apparently wore several hats. He represented Richardson in the administration of Kela's estate. He represented the wrongful death beneficiaries in the

903 So.2d at 53.

The Supreme Court in *Richardson* was obviously concerned over Turnage's conflicting loyalties. After the heirs were officially determined in the estate matter, he joined with his one client, Richardson, in launching an attack on his other client in the wrongful death litigation!

The *Richardson* case is clearly inapplicable here. The Executrix kept the Chancellor informed of her investigation into the adoption question, openly requested information about the adoption from the Appellants in 2004, and, most important, during her investigation she recorded her serious concerns about the adoptions in November 2005 in her Amended Petition to Determine Heirs, years before her request for a final determination of heirs in February 2008.[21] There was nothing secretive or duplicitous about her investigation of the facts.

In an apparent effort to bolster their estoppel argument, more than once in their Brief the Appellants allege that the Executrix has not been forthright and honest with them and with this Court. These allegations are reckless and groundless. They are both unsupported and contradicted by the record in this case and the record in the 2005 interlocutory appeal.

> wrongful death action. He also represented Virgil Cornes, Jr. and Virgil Cornes, III, in establishing a guardianship for Virgil Cornes, III. **According to the Cornesses' brief, Turnage remains as the attorney of record for the guardianship of Virgil Cornes, III, a minor whose interest he is directly opposed in the petition to disinherit.** While Turnage's apparent conflicting loyalties will be a topic for a different forum, it clearly evidences that **the Corneses relied on Turnage to believe that no further proceedings were required to establish their rights as Kela's legal heirs and wrongful death beneficiaries.**

Id., at 53. [Emphasis added.]

21

This was noted by the Chancellor in his August 12, 2008, *Order Determining Heirs*, where he stated: "On or about November 22, 2005, the Executrix herein amended her *Petition to Determine Heirs* and advised this Court that the legality of the purported 1984 adoptions was in question." (Appellee's R. E.11; R. 434).

The Appellants charge that the Executrix has "unclean hands" (Appellants' Brief, pp. 5, 13, 16, 17), that her "inconsistent representations" [between her initial petition and her final amended petition] have constituted "misuse of the courts" (Appellants' Brief, p. 14), that she has not fulfilled her responsibility of "[c]andor and honesty with the chancellor" (Appellants' Brief, pp.15, 16), that she wrongly made "attestations to the [Supreme] court that she was not contesting the adoptions of Jodey and Lisa". They charge that the Executrix induced this Court to dismiss the previous interlocutory appeal and imply she has been unethical and dishonest: "The Appellee must act ethically and honestly towards Jodey, Lisa and this honorable Court." (Appellants' Brief, pp. 15-17.) (Emphasis added.)

Appellants imply that Kay's filing of the *Amended Petition to Determine Heirs* in November 2005 was in some manner surreptitious because it was filed during "the pendency of the interlocutory appeal" (Appellants' Brief, p. 4), which Appellants had filed in April 2005. In fact, at the same time the Executrix filed the *Amended Petition to Determine Heirs* in the Chancery Court (in which she called into question the legality of the adoptions), the Executrix provided to this Supreme Court the identical documentation provided to the Chancery Court. (Appellee's Record Excerpts 25-95, attached to Appellee's Brief in *Gartrell v. Gartrell*, Docket No. 2005-IA-00747, 936 So.2d 915 (2006); *see* Docket at Appellee's R.E. 6-7.) Furthermore, in her brief in the 2005 interlocutory appeal the Executrix advised this Court that "her investigation is not complete" but these documents were provided "as . . . necessary to convey a fair, accurate, and complete account of what transpired in the trial court. . . . pursuant to Rule 10(f), Miss.R.App.Proc." (Appellee's Brief, pp. 5-6. *Gartrell v. Gartrell*, 936 So.2d 915 (2006)).

Contrary to Appellants' claim in this appeal that the Executrix's (first) Amended Petition "sought to contest the adoption and remove Lisa and Jodey as heirs" (Appellants' Brief, p. 4), that

first Amended Petition filed on November 22, 2005, served only to alert the Chancery Court that the Executrix had come into possession of the Michigan court record in *Weiss v. Weiss*, which constituted the custody/visitation/support proceeding related to Jodey and Lisa, and that court record had "forced her to revise her prior statements that she believed that the purported adopted children . . . are heirs at law of the Estate . . . ." She further stated "that her investigation is continuing, but felt it her duty to advise the Court of the latest developments and correct any mistakes in the original Petition . . . ." (Appellee's R.E.163-165; R.138-140.)

Similarly, Appellants' implication that the Executrix's affidavit of October 24, **2005**, filed in the interlocutory appeal a month before the Amended Petition filed in the chancery court, was in some manner insincere or disingenuous is a deliberate misinterpretation. The Executrix stated in her affidavit that she "has not made a determination of heirs of her mother's Estate" and "has not mounted any challenge to the adoptions". (Affidavit, ¶¶9,10, Appellee's R.E. 201; R. 252.) It was not until more than two years later that the Executrix concluded her investigation and reported to the Chancellor, in her *(Second) Amended Petition for a Final Determination of Heirs*, filed on February 5, **2008** (Appellee's R.E.168 et seq.; R. 187 et seq.), that she had determined that Jodey and Lisa were not rightful heirs. After investigation, she concluded that the adoptions were invalid for lack of jurisdiction (both personal and subject matter) in the adoption court and because they were the product of a fraud perpetrated on the Mississippi court in 1984.

By her October 24, **2005**, affidavit the Executrix honestly advised this Court that, although she had not reached a conclusion regarding the adoptions, she was waiving her rights under the commission granted by the DeSoto County Chancery Court to take Mr. Weiss's deposition and withdrew her subpoena to Mr. Weiss. (Affidavit ¶11, Appellee's R.E. 201; R. 252-253.)

In conformity with her representation, the Executrix made no subsequent attempt to take Mr. Weiss's deposition, but she did continue her investigation. The Appellants' allegation that the Executrix's affidavit constituted a dishonest inducement to this Court does not make sense. The affidavit was dated October 24, 2005 and it was not until nearly an entire year later, in August 2006, that the Supreme Court dismissed the April 2005 interlocutory appeal.

Appellants seek to impugn the Executrix's motives by charging that she amended her petition in November 2005 because of personal loans she had made to her niece Cindy and her nephew Wil in 2004.

> The Appellee asserted her belief that Jodey and Lisa were heirs-at-law of Willie on March 30, 2004 and again on April, 1, 8, and 15, 2004. (R. 17-21). [22] **The Appellee changed her position only after acquiring the interests of Cindy** on August 26, 2004 **and Will (sic)** on September 9, 2004 to the estate of Dorothy **and receiving a dismissal of the prior interlocutory appeal based primarily on her attestations to the court that she was not contesting the adoptions of Jodey and Lisa.**

Appellants' Brief, p. 15. (Emphasis added.)

As already noted, these loans are secured by assignments of potential interests and become null and void when the loans are repaid. And the claim that Kay "changed her position" from that in her initial Petition filed **March 30, 2004**, to that of her Amended Petition filed **November 22, 2005,** because of assignments she received 14 months earlier, in **August-September 2004**, but also **after** "receiving a dismissal of the prior interlocutory appeal based primarily on her attestations to the court that she was not contesting the adoptions of Jodey and Lisa" is simply too convoluted to make sense. The dismissal of the interlocutory appeal did not occur until **August 2006**, almost a

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22 The four alleged occasions on which Kay supposedly "asserted her belief" in the adoptions consisted of the initial Petition to Determine Heirs and the required attendant publications of the notice of the Petition in the newspaper.

year after the Executrix filed her Amended Petition in **November 2005** (which had been provided to the Supreme Court contemporaneously with the filing in Chancery). She could hardly have "changed her position" in 2005 as a result of the dismissal of the interlocutory appeal which did not occur until 2006.

Finally, it is unclear why Appellants discuss the "consent" issue in this appeal. Mr. Weiss's Corrected Affidavit dated August 24, 2007, clarified the confusion raised by his 2005 Affidavit and put to rest any suggestion that he had, as Appellants claimed, "consented" to the adoptions in 1984. The 2005 and 2007 affidavits are, respectively, Exhibits "C" and "D" to the Executrix's *(Second) Amended Petition For A Final Determination of Heirs At Law*. (Appellee's R.E.97-100; R. 336-339.)

Yet Appellants continue to claim that Weiss "consented" to the 1984 adoptions. The entire subject of "consent" is irrelevant to the issue of subject matter jurisdiction in the adoption court and thus irrelevant to this appeal.

It is unclear if they believe their "consent" discussion supports their claim of estoppel, and they do not explain any connection. In any event, the "consent" issue is addressed here only because the Appellants' Brief contains a fair amount of "consent" discussion and it must be pointed out that Appellants have presented conflicting and irreconcilable positions with regard to this issue.

In 1984 Diane swore to the Mississippi court that she could not locate the father "after diligent search and inquiry" and thus had not notified him of the proposed termination of his parental rights and adoption of his only children by another man.[23] (Adoption Records - Supplemental

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Her "diligent search and inquiry" apparently did not include calling telephone company information for Reese, Michigan. Weiss lived in Reese at the same address where she had served him with notice of her petition for increased support in 1978. (Appellee's R.E. 57; R. 296). Her "inquiry" also did not include a phone call to the Saginaw Circuit Court Clerk for Mr. Weiss's last known address (which he was

Record). The Mississippi court accepted her sworn statement as the basis for its exercising personal jurisdiction over the natural father despite his absence from the proceeding and her admission that he had not been notified of the petition.

In 2005 Appellants presented an affidavit to Chancellor Lundy in their attempt to persuade him to cancel his Commission allowing the Executrix to take Mr. Weiss's out-of-state deposition. The 2005 affidavit, drafted by Appellants' attorney and signed by Weiss, stated, "I am aware of, and consented to, the adoption proceedings wherein William C. Gartrell, III, adopted my natural children, Jodie (sic) Jon Gartrell and Lisa LeAnn Gartrell Johnsey ." (Appellee's R.E. 97; R. 336). When Mr. Weiss learned that Appellants presented his 2005 Affidavit to Chancellor Lundy, and subsequently to the Supreme Court, to "prove" his consent in 1984 at the time of the adoptions, he executed the "CORRECTED AFFIDAVIT OF GEORGE JOSEPH WEISS" dated August 14, 2007 (Appellee's R.E. 98-100; R. 337-339), in which he explained that the interpretation that he "consented to the adoptions of my minor children at the time of the adoptions in 1984" was "factually incorrect, and I do not wish to mislead the court." (Affidavit, ¶¶ 3-4, Appellee's R.E. 98; R. 337.) He affirmed that he "was not aware of the adoptions until well after they were approved by the court on November 15, 1984." *Id.* He further stated:

> 5. I have now read the Amended Petition for Adoption filed by Diane on September 10, 1984, through her attorney D. Russell Jones, Jr., which stated that to her knowledge my last known address was in Birch Run, Michigan in 1968, and that my "post office address and street address was unknown after diligent search and inquiry to ascertain the same".
>
> 6. These are factually incorrect statements. I had already moved from Birch Run when Diane sued me for divorce (and I countersued) in 1970-71. By that

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required to update as appropriate because he was paying child support). (Appellee's R.E. 45; R. 284). It, apparently, did not include a phone call to her own relatives still living in Reese, including her mother who lived on the same road as Mr. Weiss in 1984. (Appellee's R.E. 99; R. 338).

> time Diane and our children lived with her mother on Haack Road in Reese, Michigan. And in 1979, when Diane petitioned for an increase in child support in Saginaw Circuit Court, Saginaw, Michigan, I lived at the same address where I continued to live throughout 1984 and afterward, 10014 Haack Road, Reese, Michigan. Also, throughout 1984 my street address and telephone number were listed in the local telephone directory. [24]

Appellee's R.E. 99; R. 338.

What had Mr. Weiss meant when he signed the 2005 affidavit using the word "consent"? He explained:

> 9. Since I did not know about the adoptions in 1984, I could not have objected then. Long after 1984, when my wife and I learned of the adoptions, we discussed it and decided not to hire an attorney and file litigation.

Appellee's R.E. 100; R 339.

These critical facts demonstrate beyond question that Mr. Weiss could not have "consented" to the adoptions as that term is defined at law.

Appellants have never acknowledged the obvious inconsistency in their positions – if it were true that Mr. Weiss "consented" to the adoptions (in the legal sense of that term, after proper timely notice in 1984), then the sworn affirmation of Diane in 1984 that she was unable to locate him was clearly a false statement. If, on the other hand, her affirmation of her inability to locate him in 1984 were true, then a statement that Weiss "consented" to the adoptions must be false. Both cannot be true, and in reality **both** are false. Diane's affirmation in 1984 was false and the claim that Mr. Weiss "consented" to the adoptions in any meaningful legal sense was also not true.

How have Appellants handled the inconsistency in their positions? They represent that the 2005 Affidavit and 2007 Corrected Affidavit by Mr. Weiss are in agreement, a curious interpretation

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24 It will be recalled that Diane sued George in Michigan in 1978, serving him at the same address where he lived in 1984. (Appellee's R.E.58-79; R. 297-318).

in view of the fact that the second one is styled a "Corrected Affidavit"and directly disputes and corrects the 2005 Affidavit's inclusion of the word "consent". Appellants view is that, "The Corrected Affidavit recounted some of his statements from the original Affidavit, but affirmed the fact that he does not contest the adoption." (Brief, p. 3) [Emphasis added.] Note that the Appellants have now changed their argument that Weiss "consented" to the adoption – a theme which flows through all their court papers – to the phrase that Weiss "does not contest the adoption".

Compounding the Appellants' confusing positions, further along in their Brief they state, "Incidentally, the natural father **appeared in this cause of action and filed two (2) affidavits** on separate occasions, both of which affirmed that he has not contested nor does he have any intention of contesting the adoptions." (Appellants' Brief, p. 10) [Emphasis added.] Appellants well know that Mr. Weiss never "appeared" in this action. It was they who **prevented** his appearance, at a scheduled deposition, *via* their interlocutory appeal in 2005. Clearly, affidavits do not constitute an "appearance", and Appellants understand this. They do not state that Weiss appeared **by** affidavit but rather that "[he] appeared in this cause of action **and** filed two (2) affidavits. . . ." [Emphasis added.]

Both of Mr. Weiss's affidavits are, of course, related to the issue of whether the Mississippi court properly exercised personal jurisdiction over Mr. Weiss in 1984 and have no bearing on the question of whether the Chancery Court had subject matter jurisdiction of the adoption petition in 1984 - the determinative issue before this Court on appeal.

VI. CONCLUSION

Appellants say that strong public policy arguments exist which forbid any challenge to adoptions, e.g., the policy protecting bonds between adoptive parent and adoptees, the passage of time, etc. Even stronger is the public policy against protecting a decree issued as a result of the

issuing court mistakenly believing it had proper jurisdiction when it did not *(Mississippi Band of Choctaw Indians v. Holyfield et al.* 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989)) and the similar public policy against protecting a decree issued as a result of a fraud perpetrated on the issuing court. *Tirouda v. Miss. Board of Health*, 919 So.2d 211 (Miss.2005).

Appellants make much of the fact that the sheer passage of time should shield their "adoptions" from question – even if approved by a court which did not have jurisdiction. Simply stated, this is not the law. Even in sympathetic circumstances courts are not permitted to ignore that an order is void because it issued from a court without jurisdiction. *Mississippi Band of Choctaw Indians v. Holyfield et al.*, cited *supra.* In *Curtis v. Curtis*, discussed *supra,* the Mississippi Supreme Court expressed sympathy for the children but would not violate clear jurisdictional imperatives.

> We hold the Utah courts never lost jurisdiction of the matter of the permanent custody of the children. ... In doing this almost three years after the fact, we have no illusion that we have ability to put Humpty Dumpty back together again. We hope from this fall all may know of our seriousness of purpose that the law's injunction be respected.

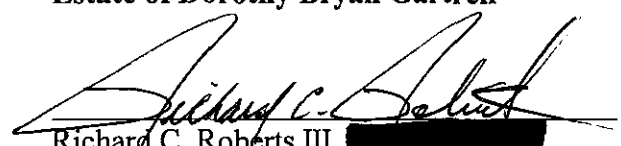
574 So.2d at 25.

A court which does not have both subject matter jurisdiction and personal jurisdiction has no power or authority to act. The Appellants would have this Court adopt the view that because this void decree of adoption was shielded from the light of day for more than 20 years its invalidity should be ignored, and the void decree (granted by the court in 1984 when it had no jurisdiction), should be honored by this Court. The law does not allow this.

The Chancellor's *Order* granting Summary Judgment and his *Order Determining Heirs at Law of Dorothy Bryan Gartrell, Deceased*, should be affirmed.

Respectfully submitted,

M. Kay Gartell, Executrix
Estate of Dorothy Bryan Gartrell

By: 

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