IN THE SUPREME COURT OF THE STATE OF NEVADA

CASE NO. 76831

IN THE MATTER OF THE VISITATION OF THE PERSONS OF: J.C.B; K.R.B; L.B.B; and L.A.B, MINORS.

PAULA BLOUNT,

Appellant,

vs.

JUSTIN CRAIG BLOUNT,

Respondent.

ON APPEAL FROM THE EIGHTH JUDICIAL DISTRICT COURT
CASE NO. D-18-571209-O

APPELLANT'S REPLY BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a) and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

The following persons / entities are disclosed:

- F. Peter James, Esq.;
- Law Offices of F. Peter James, Esq., PLLC.

As to the Appellant, there are no other parent corporations or publicly-held companies at issue. Appellant is not using a pseudonym.

Dated this 16th day of April, 2019

/s/ *F. Peter James*

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The Court should find that the district court erred in dismissing the Grandparent Visitation Petition for lack of jurisdiction. NRS 125C.050 specifically confers jurisdiction to Nevada in the underlying case. Further, all of the reasons in support of the dismissal of the Petition are legally erroneous. Additionally, the Court should reverse the award of attorney's fees.

The arguments in the Answering Brief are misplaced. Respondent misstates Appellant's positions both on appeal and in the district court. Respondent also outright misstates fact. Respondent is throwing everything in but the proverbial kitchen sink in order to deter the Court from the plain and simple fact that ICWA and the UCCJEA do not apply to grandparent visitation in Nevada.

Incorrect Standard of Review

Respondent is misleading the Court as to the standards of review. Respondent states that the determination to exercise jurisdiction under the UCCJEA is reviewed for an abuse of discretion, citing a Michigan case. (*See* Answering Brief at 4). This assertion is misleading as the legal citation is misplaced. The Michigan court actually stated, "Although the determination whether to exercise jurisdiction under the UCCJEA was within the discretion of the trial court . . . and would not be reversed absent an abuse of that discretion . . .

the question of whether a court has subject-matter jurisdiction to hear a particular claim is a question of law that we review de novo." *Young v. Punturo*, 718 N.W. 366, 370 (Mich.App. 2006) (internal citations omitted).

The issue of subject matter jurisdiction is directly at issue in the present case as it was in the *Young* case. The correct standard of review for the UCCJEA issue is de novo. *See Friedman v. Eighth Judicial District Court*, 127 Nev. 842, 847, 264 P.3d 1161, 1165 (2011).

ICWA Simply Does Not Apply

Respondent argues in circles about ICWA, exhaustion of tribal remedies, and full faith and credit. What Respondent does not address is the ICWA simply does not apply to the present matter, which is a simple grandparent visitation matter.

ICWA applies to very specific "child custody" matters—but not all child custody matters. *See* 25 U.S.C. § 1903(1). The ICWA "child custody" provision only applies to: foster care placement, termination of parental rights, preadoptive placement, and adoptive placement. *Id*. The ICWA "child custody" provision does not apply even to divorce proceedings and child custody proceedings between parents. *See Mitchell v. Preston*, ___ P.3d ___, 2019 WL 1614606 (Wyoming 2019); *see also Application of DeFender*, 435 N.W.2d 717, 721-22 (S.D. 1989), citing U.S. Dep. of the Interior, Bureau of Indian Affairs, Guidelines

for State Courts; Indian Child Custody Proceedings, 44 Fed. Reg. 67584, 67587 B.3(b) (1979) ("Child custody disputes arising in the context of divorce or separation proceedings or similar domestic relations proceedings are not cover by the Act [ICWA] so long as custody is awarded to one of the parents").

Respondent's arguments that the Tribe has jurisdiction is misplaced. ICWA only covers foster care, termination of parental rights, preadoptive placement, and adoptive placement. *See* 25 U.S.C. § 1903(1); *see also Comanche Indian Tribe of Oklahoma v. Hovis*, 53 F.3d 298 (10th Cir. 1995) (termination of parental rights); *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 109 S.Ct. 1597, 104 L.Ed.2d 29 (1989) (adoption); *Matter of Adoption of Halloway*, 732 P.2d 962 (Utah 1986) (adoption); *Navajo Nation v. District Court for Utah County*, 831 F.2d 929 (10th Cir. 1987) (adoption); *Roman-Nose v. New Mexico Dep't of Human Servs.*, 967 F.2d 435 (10th Cir. 1992) (termination of parental rights); *Native Village of Venetie I.R.A. Council v. State of Alaska*, 944 F.2d 548 (10th Cir. 1991) (adoption). Thus, the Tribe has no jurisdiction here.

Naturally, all states must give full faith and credit to a tribe which has a qualifying order under ICWA. The only issue with the present case is that there is no qualifying order for ICWA to have jurisdiction in this case. Even if it did, the UCCJEA would govern over parental custody. Yet, neither actually applies as Nevada's grandparent visitation statute confers jurisdiction to Nevada when

the child / children at issue reside in Nevada. *See* NRS 125C.050(1).

Accordingly, ICWA does not apply here.

The Six Month Rule Does Not Govern Even if UCCJEA Applies

The UCCJEA has a famous "six month" rule that is quite often misapplied. The six month rule is to determine which state is the *de facto* home state. *See* NRS 125A.085. Respondent argues that Appellant did not meet the six month rule for jurisdiction. Never mind the fact that the UCCJEA does not even apply, if it did, the six month rule is not determinative. The analysis of this is delineated in the Opening Brief at 5:17 – 10:17. Respondent does not even address this analysis. The full UCCJEA analysis, if the act even applied, would give Nevada jurisdiction.[1]

The UCCJEA Does Not Apply

Here, there is only one parent of two of the minor children at issue as the mother of the oldest two has passed away. (1 JA 8). As to the two oldest, the UCCJEA does not apply as there is no other parent with whom to have an interstate jurisdictional argument. As to the two youngest, both parents reside in Nevada, which automatically and instantaneously confers jurisdiction over the

[1] Respondent claims that Appellant conceded UCCJEA jurisdiction. Such is not the case.

two youngest children to Nevada. (*See* Opening Brief at 5:17 – 10:17).

The reason the UCCJEA exists is to determine which state has jurisdiction over child custody when the parents reside in different states. Specifically, the principles of the UCCJEA are to:

> (1) Avoid jurisdictional competition and conflict with courts of other States in matters of child custody which have in the past resulted in the shifting of children from State to State with harmful effects on their well-being;
>
> (2) Promote cooperation with the courts of other States to the end that a custody decree is rendered in that State which can best decide the case in the interest of the child;
>
> (3) Discourage the use of the interstate system for continuing controversies over child custody;
>
> (4) Deter abductions of children;
>
> (5) Avoid relitigation of custody decisions of other States in this State;
>
> (6) Facilitate the enforcement of custody decrees of other States;
>
> UCCJEA § 101 cmt. (1997).

Kalman v. Fuste, 52 A.3d 1010, 1017 (Md. App. 2012).

Given that the sole reason the UCCJEA exists is to determine which state has jurisdiction over a child custody matter, it begs the question, that when there is only one parent living or if both parents live in the same state, the UCCJEA does not apply.

The Grandparent Visitation Jurisdiction Clause Makes Sense

NRS 125C.050(1) confers jurisdiction to Nevada in grandparent visitation cases when the children at issue reside in Nevada. This makes sense.

Hypothetical: mom and dad live in Nebraska and divorce. Mom relocates to Nevada with the children. Dad remains in Nebraska but only has three weeks of visitation a year. Nebraska retains UCCJEA jurisdiction. Dad's parents live in Nevada and would like visitation with the children, but mom will not permit it. The paternal grandparents must now file for grandparent visitation with the children.

Under this hypothetical, it is proper and common sense that the paternal grandparents would file in Nevada, not Nebraska. The children live 49 weeks a year in Nevada. Bringing mom and the paternal grandparents to Nebraska would be ridiculous.

Under Respondent's argument, he would have everyone go to Nebraska to litigate grandparent rights that would take place in Nevada. The argument is that Nebraska has UCCJEA jurisdiction. Tribes are treated like any other state in a UCCJEA analysis. *See* NRS 125A.215(2); *see also Schirado v. Foote*, 785 N.W.2d 235, 239 (N.D. 2010) (North Dakota's UCCJEA statutes also treat tribes as another state in a UCCJEA analysis).

NRS 125C.050 gives jurisdiction to Nevada to award grandparent

visitation when the children live in this state. NRS 125C.050 does not address the UCCJEA and it does not address ICWA—as neither apply to Nevada's jurisdiction to award grandparent visitation when the children reside in Nevada.[2]

Respondent cites an unpublished Illinois Appellate Court case (*Carolyn v. Baarson*, 2013 WL 120402-U (Ill. App. 2013)) as to a purported grandparent visitation case in support of his claim that Nevada's grandparent visitation statute does not confer jurisdiction to Nevada. (*See* Answering Brief at 20). This case and its application are completely misplaced.

NRS 125C.050 specifically confers subject matter jurisdiction to Nevada

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[2] Nevada's version, as stated, does address ICWA as it might affect the UCCJEA analysis. *See* NRS 125A.215(2). That NRS 125C.050 omitted reference to the UCCJEA and ICWA is telling. The tenant of statutory construction "*expressio unius est exclusion alterius*" (the expression of one thing is the exclusion of another) has been repeatedly confirmed in Nevada. *See Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967). In other words, since the legislature, who is presumed to know the law, did not mention the UCCJEA or ICWA in NRS 125C.050 (when it did in other child-related acts), it is presumed they meant to omit reference to them. *See e.g. Sonia F. v. Eighth Judicial District Court*, 125 Nev. 495, 499, 215 P.3d 705, 708 (2009).

to award grandparent visitation rights when the children live in Nevada. Respondent does not do any analysis of the facts of Carolyn or what the Illinois grandparent visitation statute (if any exists) might say as to jurisdiction. The Illinois grandparent visitation statute (if one even exists) might say that the UCCJEA jurisdictional requirements apply to that statute. Respondent has not provided any information as to this, and the Court should disconsider this argument (especially since it is from an out-of-state unpublished opinion from an appellate court, which would not even be acceptable if it were a Nevada unpublished opinion). *Cf. Cuzze v. Univ. and Community College System of Nev.*, 123 Nev. 598, 604, 172 P.3d 131, 135 (2007) (if the appellant does not provide the necessary parts of the record, then it is presumed the missing parts do not support the appellant's position).

As such, the Nevada grandparent visitation statute specifically confers jurisdiction to Nevada to award such visitation when the children reside in Nevada. The grandparent visitation statute does this without reference to the UCCJEA and without reference to ICWA, as they simply do not apply.

There is no Six Month Residency Requirement Under NRS 125C.050

Respondent's argument that there is a six month residency requirement under NRS 125C.050 is preposterous and unsupportable. Respondent argues that, as there is no stated residency timeframe, that the UCCJEA six month

residency requirement applies. (*See* Answering Brief at 20-21).

NRS 125C.050 does not give a timeframe for residency of the children to confer jurisdiction to Nevada to award grandparent visitation. This is unambiguous. When statutes are clear on their face and there is no ambiguity, there is no room for interpretation and the courts should give the stated language its ordinary meaning and not go beyond it. *See Nev. Dept. of Corrs. v. York Claim Servs.*, 131 Nev. ___, 348 P.3d 1010, 1013 (2015).

Yet, Respondent wants the Court to read into the statute a six month residency requirement. This argument is preposterous and goes against well-settled law on statutory construction. Moreover, this was never argued in the lower court. As such, it may not now be argued. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

There is No Conflict Between the Acts

Respondent asserts that, under Appellant's arguments, there is conflict between ICWA, UCCJEA, and NRS 125C.050. (See Answering Brief at 22-24). There is no conflict.

As stated, ICWA does not apply to any child matter outside of foster care, termination of parental rights, preadoptive proceedings, and adoptive proceedings. *See* 25 U.S.C. § 1903(1). The UCCJEA applies to resolve which state has jurisdiction in child custody proceedings when the parents live in

different states.

That Nevada confers subject matter jurisdiction as to grandparent visitation over children who reside in Nevada is wholly proper and common sense, as stated herein. There is no conflict between the acts.

Moreover, Nevada has jurisdiction over the children if the UCCJEA were to apply, which it does not. Thus, there is no conflict to be had.

Appellant May Have Visitation with the Two Younger Children

Nevada has a catch-all section to its grandparent visitation statute for when the petitioner satisfies the threshold requirements as to some of the children, but not all. This is as follows:

> 1. Except as otherwise provided in this section, if a parent of an unmarried minor child:
>
> (a) Is deceased;
>
> (b) Is divorced or separated from the parent who has custody of the child;
>
> (c) Has never been legally married to the other parent of the child, but cohabitated with the other parent and is deceased or is separated from the other parent; or
>
> (d) Has relinquished his or her parental rights or his or her parental rights have been terminated,
>
> the district court in the county in which the child resides may grant to the great-grandparents and grandparents of the child **and to other children of either parent of the child** a reasonable right to visit the child during the child's minority.

NRS 125C.050 (emphasis added). This portion of the statute specifically gives a petitioner the right to visit with other siblings / half-siblings of a qualifying child.

Yet, Respondent would have the Court believe that there is no right to visit with the younger two children. (*See* Answering Brief at 25-27). Respondent argues that this is absurd. What is absurd would be to grant visitation with some children and not all—thus separating the children.

Petitioner bases her claim to be able to visit with the two younger children upon the plain language of the grandparent visitation statute.

Attorney's Fees are Unwarranted in the Case

Appellant stated her case against attorney's fees in the Opening Brief. The dismissal was wholly improper and district court made reversible error as to award that was made, notwithstanding the first argument. Respondent makes wild arguments and attempts to mislead the Court into believing that the district court properly awarded fees.

Appellant argued in part that the district court erred in awarding fees under a prevailing party theory under NRS 18.010. (Opening Brief at 19). The district court specially awarded Respondent attorney's fees as follows:

- Under NRS 18.010 under the prevailing party theory; and
- Under EDCR 7.60 based on the frivolous nature of Petitioner's filings.

(2 JA 318, lines 13-15).

As stated, there was no request for fees under EDCR 7.60, so an award of fees under that legal theory is impermissible. So, the only legal theory under which fees may be brought is NRS 18.010, under which Respondent did request fees. Further, Respondent brings up on appeal (with no cross appeal) other theories under which fees may be awarded that were not argued in the lower court. (*See* Answering Brief at 31-32) (citing to NRCP 11 and NRS 7.085, which were not raised in the district court). These claims are meritless and are impermissible on appeal as they were not argued in the district court. *See Old Aztec Mine, Inc.*, 97 Nev. at 52, 623 P.2d at 983.

The district court stated that fees were being awarded under NRS 18.010 under the prevailing party theory—no other reason. (2 JA 318, lines 13-15). NRS 18.010(2)(b) requires a finding that a claim was brought without reasonable ground or to harass. No such finding was made as to the award under NRS 18.010—the district court parsed out its findings as to which applied to what legal theory of the award. The district court specifically awarded fees under NRS 18.010 as to prevailing party—nothing else. As such, a money judgment must be at issue to award fees under a prevailing party theory. *See Valley Electric Ass'n v. Overfield*, 121 Nev. 7, 10, 106 P.3d 1198, 1200 (2005).

Moreover, the underlying petition was not brought without reasonable ground and was not brought to harass. The petition was meritorious and should

be reinstated by this Court. A reversal which revives the grandparent visitation action necessarily means the award of fees would be reversed as it is based on the dismissal of the petition. That aside, the petition was not frivolous. The extensive briefing and amount of legal research involved establishes the good-faith basis upon which the matter was brought.

As such, the Court should reverse the award of attorney's fees.

Confession of Error as to the Joinder Issue

Appellant addressed the joinder issue in the Opening Brief. (*See* Opening Brief at 16-17). Respondent did not address this issue in the Answering Brief. (*See generally* Answering Brief). The Court should construe this as a confession of error. *See* NRAP 31(d)(2); *see also Polk v. State*, 126 Nev. 180, 184, 233 P.3d 357, 359-60 (2010) (holding that NRAP 31(d) permits the court to consider failure to respond to an argument as "a confession of error"); *Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (same).

As such, the Court should consider Respondent's failure to address the joinder issue as a confession of error.

CONCLUSION

The Court should reverse the district court and reinstate the petition for grandparent visitation. The UCCJEA and ICWA do not apply. NRS 125C.050 specifically confers subject matter jurisdiction to the Nevada courts to award

grandparent visitation to children residing in Nevada. This is a common-sense rule. The Court should consider Respondent's failure to address the joinder issue as a confession of error. The award of attorney's fees should also be reversed as stated.

Dated this 16th day of April, 2019

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ROUTING STATEMENT

Pursuant to NRAP 3E(d)(1)(H), Appellant submits the following routing statement:

- This appeal is not presumptively retained by the Supreme Court pursuant to NRAP 17(a);
- This appeal is presumptively assigned to the Court of Appeals pursuant to NRAP 17(b)(5) as it is a family law matter not involving termination of parental rights or NRS Chapter 432B proceedings; and
- Appellant asserts that the matters should be routed to the Court of Appeals as there are no issues that would keep the matter with the Supreme Court.
- Dated this 16th day of April, 2019

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CERTIFICATE OF COMPLIANCE (Rule 28.2)

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a page reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 16th day of April, 2019

/s/ *F. Peter James*

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CERTIFICATE OF COMPLIANCE (Rule 32)

1. I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because:

   [X] This brief has been prepared in a proportionally spaced typeface using 14 point Times New Roman in MS Word 2013; or

   [ ] This brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

2. I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

   [X] Proportionately spaced, has a typeface of 14 points or more and contains 3,369 words (limit is 7,000 words); or

   [ ] Monospaced, has 10.5 or fewer characters per inch, and contains ___ words or ___ lines of text; or

   [X] Does not exceed 15 pages (exclusive of the routing statement, certificates of compliance, and certificate of service).

Dated this 16th day of April, 2019

/s/ *F. Peter James*

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The following are listed on the Master Service List and are served via the Court's electronic filing and service system (eFlex):

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