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January 20, 2011

Attorney Name, Esquire[1]
Address

Re: SC/Family Law

File: 28-xxxxx-247 Your File: Gold

Dear Name:

Please find enclosed the memorandum you requested in the Gold case.

The jurisdictional argument in the memorandum is extremely strong. Alabama lost continuing jurisdiction over this case when both parents and the child moved out of state. The continuing presence of the grandmother is clearly not a sufficient basis for jurisdiction. Ala. Code § 30-3B-202 official cmt. (Westlaw 2011); *Peterson v. Peterson*, 965 So. 2d 1096, 1100 (Ala. Civ. App. 2007). Copies of the statute and *Peterson* are enclosed.

It is important to understand, however, that the Uniform Child Custody Jurisdiction and Enforcement Act's jurisdictional rules apply only to the making and modification of custody orders. States without jurisdiction to make a new order are still permitted, and indeed really required, to enforce orders rendered by the state which does have jurisdiction.

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[1]**Names, addresses, and other identifying information have been redacted to protect privacy.**

E.g., Ala. Code § 30-3B-303. Otherwise, it would be too easy to avoid custody orders by crossing state lines.

Because jurisdiction to enforce is different from jurisdiction to modify, the jurisdictional argument made in the memorandum may not prevent the Alabama court from holding your clients in contempt. The memorandum plays fast and loose with the distinction, hoping that the official comment and especially the *Peterson* case will convince the Alabama judge to refrain from doing anything. But the right answer is probably that Alabama does have jurisdiction to enforce the visitation order, which was clearly jurisdictionally valid at the time it was entered, when all relevant parties still lived in Alabama.

Because Alabama probably does have jurisdiction to enforce the grandparent visitation order, it is unfortunate that your clients chose not to appear in Alabama. The result may well be that the Alabama court hears only the testimony of the grandmother, finds that the child's physical safety was not endangered by visitation in Alabama, and holds your client in contempt. It might be difficult to successfully appeal a contempt finding, as your client's explanation for why visitation in Alabama was withheld may not be in the Alabama record. Appearing in Alabama would not prejudice your client's jurisdictional argument, as the official comment to § 30-3B-202 and the *Peterson* case are clear that jurisdiction is lost when both parents and the child leave the state, and only a grandparent with visitation remains. It may not be possible at this late date, but I would strongly advise your client to retain counsel and appear in the Alabama proceedings.

I briefly researched in passing the possibility that the adoption might eliminate the grandmother's visitation rights. Unfortunately, the Alabama Supreme Court has ruled that the U.S. Supreme Court's landmark grandparent visitation decision in *Troxel v. Granville*, 530 U.S. 57 (2000), applies only to natural parents and not to adoptive parents. *Ex parte D.W.*, 835 So. 2d 186 (Ala. 2002) (reversing a contrary decision by Alabama's intermediate appellate court). The order is therefore consistent with Alabama's construction of *Troxel*. Since jurisdiction has changed to South Carolina, you may be able to revisit this issue. But the Alabama order was consistent with Alabama law existing at the time it was rendered.

The second issue in the memorandum makes the best possible defense against contempt. There is not much Alabama law on the state-of-mind requirement for contempt. In particular, the Alabama cases do not insist quite as strongly as the South Carolina cases that contempt must be willful. I have nevertheless argued that the mother's reasonable concern for the safety of the child is a defense. In the absence of squarely on-point law from either Alabama or South Carolina, I did a very brief nationwide search on this point, finding an unpublished Ohio case which was so good that I quoted it. It may not carry much weight, but the quotation is extremely favorable, stating outright that a reasonable concern for the child's safety is a defense to contempt for denial of visitation.

It has been a pleasure assisting you. If you have questions about the work, please feel free to contact me.

Very truly yours,

Brett R. Turner
Senior Attorney

BRT/gb
Enclosure

STATEMENT OF FACTS

The plaintiff in this case, Ruby Silver Gold, married Rock Silver in Alabama. In 2005, Ruby became pregnant with Rock's child. The child was delivered and named Stone Obsidian Silver ("Obsidian"). Unfortunately, before the child was born, Rock committed suicide.

In 2008, Rock's mother, Opal Silver, filed an action in Alabama, seeking grandparent visitation. This action was settled by an agreement, incorporated into a court order, giving Opal visitation rights with Obsidian. The order was silent as to where the visitation would take place.

Ruby subsequently married Granite Gold. In July of 2009, Granite then adopted Obsidian. The adoption decree expressly stated that it did not modify the grandmother's visitation rights under the 2008 order. The adoption decree changed Obsidian's name to Obsidian Gravel Gold.

In May of 2009, Ruby, Granite, and Obsidian moved to South Carolina. For the first few months after the move, Obsidian continued to visit Opal in Alabama.

At that point, however, Obsidian told Ruby and Granite that he had been allowed to handle a loaded handgun while on visitation with Opal. He also told them that he had been allowed to ride in a jeep without adequate child restraints. These reports raised an obvious issue regarding Obsidian's physical safety while on visitation with Opal. Ruby attempted to contact Opal to discuss these reports, but Opal did not respond.

Given Opal's failure to respond, Ruby and Granite no longer felt comfortable allowing visitation at Opal's residence in Alabama. They sent Opal a letter, through counsel, offering to give her an amount of visitation, in South Carolina, that actually *exceeded* the visitation required by the Alabama order. Opal did not respond to this offer.

In 2010, Ruby filed an action in South Carolina, seeking to modify the Alabama grandparent visitation order. In response, Opal filed a contempt action in Alabama.

ARGUMENT

I. EXCLUSIVE JURISDICTION OVER THIS CASE LIES IN THE COURTS OF SOUTH CAROLINA.

Jurisdiction over interstate custody and visitation disputes is determined by the terms of two specific statutes. The first statute is the federal Parental Kidnapping Prevention Act ("PKPA"), 28 U.S.C. § 1738A (Westlaw 2011). The second statute is the relevant state version of the Uniform Child Custody Jurisdiction and Enforcement Act ("UCCJEA"), which has been adopted in both Alabama and South Carolina. *See* Ala. Code §§ 30-3B-101 to -405 (Westlaw 2011); S.C. Code Ann. § 63-15-300 (Westlaw 2011).

The PKPA provides:

> A court of a State shall not exercise jurisdiction in any proceeding for a custody or visitation determination commenced during the pendency of a proceeding in a court of another State where such court of that other State is exercising jurisdiction consistently with the provisions of this section to make a custody or visitation determination.

28 U.S.C. § 1738A(g). Here, the first action filed was Ruby's action in South Carolina to modify the Alabama grandparent visitation order. While that action was pending, Opal then

filed in Alabama. Under the above statute, while the South Carolina action is pending, Alabama cannot make a custody or visitation determination. The only stated exception is if South Carolina is not "exercising jurisdiction consistently with the provisions" of the PKPA. Thus, because the South Carolina action was filed first, the initial question is whether South Carolina has jurisdiction.

On the question of South Carolina's jurisdiction, the PKPA provides:

> A court of a State may not modify a visitation determination made by a court of another State unless the court of the other State no longer has jurisdiction to modify such determination or has declined to exercise jurisdiction to modify such determination.

Id. § 1738A(h). Alabama has not declined to exercise jurisdiction over this case. Thus, South Carolina has jurisdiction only if "the court of the other State [Alabama] no longer has jurisdiction to modify such determination." *Id.*

Alabama unquestionably had jurisdiction over this case at the time it issued the grandparent visitation order in question. But under the PKPA, jurisdiction does not last forever. The PKPA provides:

> The jurisdiction of a court of a State which has made a child custody or visitation determination consistently with the provisions of this section continues as long as the requirement of subsection (c)(1) of this section continues to be met and such State remains the residence of the child or of any contestant.

Id. § 1738A(d). Thus, Alabama's jurisdiction lasts only so long as (1) the child or "any contestant" continues to live in Alabama, and (2) the requirements of § 1738A(c)(1) are met. Opal is a contestant in this case, and she continues to live in Alabama.

Jurisdiction therefore depends upon whether § 1738A(c)(1) is met. That provision requires simply that "such court has jurisdiction under the law of such State." *Id.* § 1738A(c)(1). On the question of Alabama's continuing jurisdiction, therefore, the PKPA expressly defers to Alabama state law.

Alabama state law is Alabama's version of the UCCJEA. Continuing jurisdiction is addressed in Alabama Code § 30-3B-202(a). That statute provides:

> (a) Except as otherwise provided in Section 30-3B-204, a court of this state which has made a child custody determination consistent with Section 30-3B-201 or Section 30-3B-203 has continuing, exclusive jurisdiction over the determination until:
>
> > (1) A court of this state determines that neither the child, nor the child and one parent, nor the child and a person acting as a parent have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; or
> >
> > (2) A court of this state or a court of another state determines that the child, the child's parents, and any person acting as a parent do not presently reside in this state.

Ala. Code § 30-3B-202(a). Thus, continuing jurisdiction ends if *either* (1) "the child, the child's parents, and any person acting as a parent do not presently reside in [Alabama]," or (2) none of the persons stated has a significant connection with Alabama.

The first point is dispositive in this case. The child and both parents clearly do not presently reside in Alabama. The grandmother, however, does reside in Alabama. The key point is therefore whether she is "a person acting as a parent." That term is defined in Alabama Code § 30-3B-102:

> (13) Person acting as a parent. A person, other than a parent, who:
>
> a. Has physical custody of the child or has had physical custody for a period of six consecutive months, including any temporary absence, within one year immediately before the commencement of a child custody proceeding; and
>
> b. Has been awarded legal custody by a court or claims a right to legal custody under the law of this state.

Id. § 30-3B-102(13). Opal has visitation rights with the child at issue in this case, but she has never been awarded any right to custody. The official comment to § 30-3B-202 states expressly that a grandparent with only visitation rights is *not* a "person acting as a parent":

> The continuing jurisdiction provisions of this section are narrower than the comparable provisions of the PKPA. That statute authorizes continuing jurisdiction so long as any "contestant" remains in the original decree state and that state continues to have jurisdiction under its own law. This Act eliminates the contestant classification. *The Conference decided that a remaining grandparent or other third party who claims a right to visitation, should not suffice to confer exclusive, continuing jurisdiction on the state that made the original custody determination after the departure of the child, the parents and any person acting as a parent*. The significant connection to the original decree state must relate to the child, the child and a parent, or the child and a person acting as a parent. This revision does not present a conflict with the PKPA. The PKPA's reference in § 1738(d) to § 1738(c)(1) recognizes that states may narrow the class of cases that would be subject to exclusive, continuing jurisdiction.

Id. § 30-3B-202 official cmt. (emphasis added).

The emphasized language states very clearly that "a remaining grandparent . . . who claims a right to visitation" does not fall within the definition of "any person acting as a parent." The emphasized language further states that if the child and both parents leave the state, *the mere presence of a grandparent in the state is not a sufficient basis for continuing jurisdiction*, where the grandparent has only visitation rights and not custody. Therefore,

under the express terms of § 30-3B-202(a), Alabama has lost continuing jurisdiction over this case.

The Alabama Court of Civil Appeals reached this exact result in *Peterson v. Peterson*, 965 So. 2d 1096 (Ala. Civ. App. 2007):

> Although the evidence established that the children were in the physical custody of their maternal grandparents for a period of six consecutive months within one year immediately before the mother's petition was filed in December 2004, there is no evidence in the record tending to establish that the maternal grandparents had been awarded legal custody or claimed a right to legal custody of the children, as required by § 30-3B-102(13)b. *Cf. Patrick v. Williams*, 952 So.2d 1131, 1139 (Ala.Civ.App.2006) (concluding that a maternal grandmother met the definition of a "person acting as a parent" because she had physical custody of the children and had claimed a right to their custody). Therefore, *the children's maternal grandparents are not "person[s] acting as . . . parent[s]" as defined by § 30-3B-102(13)*. Moreover, the record does not contain any evidence establishing the existence of any other "person acting as a parent." Consequently, *§ 30-3B-202(a)(2) deprived the Mobile Circuit Court of continuing, exclusive jurisdiction over the mother's petition*.

Id. at 1100 (emphasis added). Given *Peterson*, it is absolutely clear that Opal is not a "person acting as a parent." Because the child and both parents no longer reside in Alabama, Alabama's continuing jurisdiction has ended.

Ruby notes in passing that Opal cannot create jurisdiction by asserting a claim for custody. In *Baker v. Baker*, 25 So. 3d 470 (Ala. Civ. App. 2009), the father, the mother, and the children all moved to Georgia. The father then returned to Alabama. The appellate court held that when the parents and the children left Alabama, Alabama's jurisdiction ended, and that it could not be retroactively restored when the father moved back into Alabama:

> The Comment [to § 30-3B-202] further states that "[e]xclusive, continuing jurisdiction is not reestablished if, after the child, the parents, and all persons

> acting as parents leave the state, the non-custodial parent returns." Hence, the fact that the father had resumed residing in Alabama by the time of the trial does not alter the conclusion that the trial court had lost continuing, exclusive jurisdiction.

Id. at 473. Likewise, when the parents and the child left Alabama in this case, no relevant parties resided in Alabama. Opal was not *then* asserting a claim for custody, and she was not *then* a person acting as a parent. Her filing of a custody claim now would have no greater effect than did the father's return to Alabama in *Baker*.

Because Alabama lacks continuing jurisdiction, South Carolina is not barred from hearing this case by the negative prohibition in 28 U.S.C. § 1738A(h). That provision prevents South Carolina from acting only if Alabama retains continuing jurisdiction; positive authority for South Carolina jurisdiction must be sought elsewhere. The PKPA further provides:

> (c) A child custody or visitation determination made by a court of a State is consistent with the provisions of this section only if—
>
> (1) such court has jurisdiction under the law of such State; and
>
> (2) one of the following conditions is met:
>
> (A) such State (i) is the home State of the child on the date of the commencement of the proceeding, or (ii) had been the child's home State within six months before the date of the commencement of the proceeding and the child is absent from such State because of his removal or retention by a contestant or for other reasons, and a contestant continues to live in such State[.]

28 U.S.C. § 1738A(c)(1)–(2)(A). Thus, to have jurisdiction, South Carolina must (1) have jurisdiction under its own law, and (2) be the child's home state on the date of filing of the

South Carolina action. (There are additional alternatives to home state jurisdiction, but they are not relevant on these facts.)

Addressing the second requirement first, "home state" is defined in 28 U.S.C. § 1738A:

> (4) "home State" means the State in which, immediately preceding the time involved, the child lived with his parents, a parent, or a person acting as parent, for at least six consecutive months, and in the case of a child less than six months old, the State in which the child lived from birth with any of such persons. Periods of temporary absence of any of such persons are counted as part of the six-month or other period[.]

Id. § 1738A(b)(4). There is no doubt that the child lived in South Carolina for six or more consecutive months before this action was filed. Thus, South Carolina has home state jurisdiction under the PKPA.

Second, South Carolina must have jurisdiction under its own law—South Carolina's version of the UCCJEA. Under South Carolina Code § 63-15-330(a)(1), South Carolina law recognizes the same home-state rule as does the PKPA. Because South Carolina is the child's home state, South Carolina has jurisdiction under its own state law.

In sum, under the PKPA and both relevant versions of the UCCJEA, this case belongs in South Carolina. Alabama had jurisdiction once, but it lost jurisdiction when the child and both parents moved out of Alabama. The fact that the grandmother continues to reside in Alabama does not matter, as a grandparent with only visitation rights is expressly excluded from the definition of a person acting as a parent. Ala. Code § 30-3B-202 official cmt.; *Peterson*, 965 So. 2d 1096. South Carolina acquired positive jurisdiction when it became the child's home state. This case must therefore be heard in South Carolina.

II. RUBY IS NOT IN CONTEMPT OF THE ALABAMA GRANDPARENT VISITATION ORDER.

Regardless of which court has jurisdiction here, Ruby is not in contempt of the Alabama grandparent visitation order.

To begin with, the Alabama order states only that Opal shall be entitled to visitation. The order does not state *where* the visitation shall occur. Ruby notified Opal through counsel that she was ready and willing to offer liberal visitation with Obsidian in South Carolina. Opal never even contacted Ruby to discuss this offer. Any lack of visitation results from Opal's refusal to accept Ruby's offer, not from any action of Ruby's.

There was good cause for Ruby's refusal to permit further visitation in Alabama. Obsidian told Ruby and Granite that Opal had allowed him to handle a loaded handgun on his last trip to Alabama. Since Obsidian is only four years old, allowing him to use a loaded handgun is grossly unsafe. Obsidian also told Ruby that Opal had transported him in a jeep without proper child safety restraints.

These reports gave Ruby and Granite an absolutely understandable reason to fear for the safety of their child at Opal's home in Alabama. To the extent that visitation was withheld at all (and Ruby has continually expressed her willingness to permit liberal visitation in South Carolina, where she can be assured of Obsidian's physical safety), the motive for that withdrawal was not to defy the order, but rather to protect Obsidian's physical safety.

In both Alabama and South Carolina, a defendant cannot be found in contempt unless a court order is violated *intentionally*. Any violation of the Alabama order was motivated

solely by a desire to keep Obsidian away from a situation which threatened his physical safety. Such a violation is not contempt. *See* Ala. R. Civ. P. 70A(a)(2)(C)(ii) (defining contempt as "*[w]illful* disobedience or resistance of any person to a court's lawful writ" (emphasis added)); *Shellhouse v. Bentley*, 690 So. 2d 401, 403 (Ala. Civ. App. 1997) (father was not in contempt of visitation order, where "[t]here was no evidence to indicate that the father has willfully or intentionally interfered with the visitation schedule"); *cf. Spartanburg County Dep't of Soc. Servs. v. Padgett*, 296 S.C. 79, 82-83, 370 S.E.2d 872, 874 (1988) (contempt must be willful, and a willful act must done "'with bad purpose either to disobey or disregard the law'" (quoting *Black's Law Dictionary* 1434 (5th ed. 1979))).

More specifically, actions taken out of legitimate concern for the physical safety of a minor child do not constitute willful violation of a court order. The defendant's purpose is protection of the child, not willful disobedience of the order. "[W]e fail to see the equity in finding a mother in contempt for refusing to allow the children to visit the father on his family property when the trial court, in its final order, ultimately imposed this very limitation for the safety and welfare of the children." *S.R.E. v. R.E.H*, 717 So. 2d 385, 388 (Ala. Civ. App. 1998). As an Ohio court noted, "a custodial parent has a defense [to contempt] if she has a reasonable, good faith belief that she must deny visitation to protect the safety of the child." *Hensley v. Hensley*, 2009-Ohio-1738, 2009 WL 975907, at ¶ 22 (Ct. App.).

Ruby does not go so far as to argue that any denial of visitation is automatically exempt from contempt merely because the defendant alleges that he or she acted to preserve

the safety of the child. As *Hensley* noted, the custodial parent must act in subjective good faith, and her actions must be objectively reasonable on the facts.

But when a grandmother allows the child to play with a loaded handgun, fails to transport the child in the restraint system required by law, and refuses to discuss these matters at all with the parents, surely the custodial parent is justified in fearing for the child's safety if visitation continues at the grandparent's residence. Again, Ruby did not deny visitation entirely; she only insisted that visitation must take place in South Carolina, until and unless she had been properly reassured as to her child's physical safety in Alabama. If this course of conduct was in violation of the Alabama order at all, it was not willful and deliberate violation.

Ruby notes that she attempted to contact Opal to discuss the apparent risk to Obsidian's physical safety posed by visitation in Alabama. Had Opal responded, perhaps this matter could have been resolved out of court. But without any response or explanation from Opal, Ruby was not willing to allow Obsidian to visit a home in which he has been allowed to handle a loaded handgun, and from which he has been transported without a proper child safety seat.

Ruby was not required, under the circumstances of this case, to present her concerns to an Alabama court. Opal's failure to keep Obsidian in safe conditions is a valid basis for seeking modification of the Alabama order. But jurisdiction to modify lies only in South Carolina, as Alabama's continuing jurisdiction has ended. Ruby's proper course of action was

therefore to seek modification of the Alabama order in South Carolina—which she has now done.

In short, Ruby had reasonable cause to fear for Obsidian's safety if visitation occurred in Alabama. She therefore insisted that visitation take place only in South Carolina. This insistence was reasonable and justified on the facts, especially since nothing in the Alabama order requires visitation in Alabama. Ruby offered Opal visitation in South Carolina exceeding the visitation ordered by the Alabama court. The lack of visitation results only from Opal's failure to accept Ruby's offer. Ruby is therefore not in contempt of the Alabama order.