

IN RE ADOPTION OF BABY E.Z.: E.Z. DUZ IT

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INTRODUCTION

On February 10, 2009, Baby Emma was born in Woodbridge, Virginia.¹ Emma's father could not find her because Emma's mother instructed the hospital not to list the mother as a patient.² On February 18, 2009, Emma's father initiated custody proceedings in a Virginia court, because he was concerned the birth mother may give Emma up for adoption.³ The Virginia court issued an order granting custody of Baby Emma to her father.⁴ Unfortunately, two strangers had already taken Emma to Utah and adopted her under Utah law, and even though the adoption would not be complete for another two and a half years, the Virginia order proved too little too late.⁵

On February 23, 2009, these strangers filed an adoption petition in Utah district court.⁶ Emma's father unsuccessfully attempted to intervene in the adoption proceeding. The Utah district court found that Emma's father waived his rights to Baby Emma and his consent to the adoption was not required.⁷ Baby Emma's father continued to fight for her. He appealed the Utah district court's decision and raised an issue of first impression in the Utah Supreme Court—whether the Parental Kidnapping Prevention Act (PKPA or the Act) applies to adoption cases.

Part I of this Note provides the background of the Parental Kidnapping Prevention Act, Baby Emma's custody cases, and the Full Faith and Credit Clause of the U.S. Constitution as it relates to adoption and custody issues. Part II supports the Utah Supreme Court's determinations that the PKPA to adoptions, and that the PKPA did not divest the Utah courts of subject-matter jurisdiction. Finally, Part III examines two possible analytical frameworks and argues that the Virginia order is entitled full faith and credit protection and the Utah order is not.

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¹ *In re Adoption of Baby E.Z.*, 2011 UT 38, ¶ 2, 687 Utah Adv. Rep. 17.

² Sarah Netter, *Searching for Emma: Father Fights for Daughter Given Up for Adoption*, ABCNEWS (Apr. 16, 2010), <http://abcnews.go.com/GMA/baby-emma-father-fights-daughter-adoption/story?id=10392464>.

³ *In re Baby E.Z.*, 2011 UT 38, ¶ 4.

⁴ *Id.* ¶ 6.

⁵ *See id.* ¶¶ 4–5.

⁶ *Id.* ¶ 5.

⁷ *Id.*

I. BACKGROUND

*A. Enactment and Initial Interpretation
of the Parental Kidnapping Prevention Act*

During the 1960s and 1970s, non-custodial parents in shared custody situations frequently took their children across state lines to seek more favorable custody determinations in neighboring forums.⁸ Despite state attempts to rectify this problem through the enactment of the Uniform Child Custody Jurisdiction Act (UCCJA) the practice continued.⁹ Some states elected not to enact the UCCJA and others enacted it with modifications that undermined its goals.

In response to this problem, Congress adopted the PKPA in 1980 and extended the constitutional protection of the Full Faith and Credit Clause to custody determinations.¹⁰ The PKPA defines a custody determination as a “judgment, decree, or other order of a court providing for the custody of a child, and includes permanent and temporary orders, and initial orders and modifications.”¹¹ The PKPA also provides that a state court shall not exercise jurisdiction over a custody matter proceeding in another state.¹² Congress noted the PKPA was intended to reduce litigation between “persons claiming rights of custody and visitation of children” under laws of different states that frequently resulted in inconsistent and conflicting custody decisions.¹³ Congress sought to establish a national system to locate parents who travel between jurisdictions and children who are concealed “in connection with [custody and visitation] disputes”¹⁴ The PKPA does not explicitly refer to adoption proceedings, but is often applied to those situations, as examined in Part II.A below.

In *Thompson v. Thompson*, the Supreme Court held the PKPA does not provide a federal cause of action.¹⁵ The Court rejected the petitioner’s argument that without a federal cause of action the PKPA’s mandates are rendered nugatory.¹⁶ The *Thompson* opinion stated that the Court itself remains the appropriate forum to review conflicting state court custody decisions resulting in “intractable jurisdictional deadlocks.”¹⁷

⁸ *Id.* ¶ 9.

⁹ *Id.* ¶ 9.

¹⁰ 28 U.S.C. § 1738A(a) (2006).

¹¹ *Id.* § 1738A(b)(3).

¹² *Id.* § 1738A(h).

¹³ Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 7(a)(1)–(2), 94 Stat. 3568, 3568.

¹⁴ *Id.* § 7(b), 94 Stat. at 3568. 28 U.S.C. § 1738A(b) (2006).

¹⁵ *Thompson v. Thompson*, 484 U.S. 174, 187 (1988).

¹⁶ *Id.*

¹⁷ *Id.*

B. The Case(s) of Baby Emma

Baby Emma's biological father, John Wyatt III (Wyatt) and her adoptive parents, the Zarembinskis, each filed separate actions to determine custody of Baby Emma. On February 18, 2009, Wyatt filed in Virginia—five days before the Zarembinskis filed an adoption petition in Utah. The Virginia court found it had exclusive jurisdiction to hear the case pursuant to the PKPA because Virginia was Baby Emma's home state under the Act.¹⁸ The court found the Zarembinskis received sufficient notice of the Virginia proceedings but had not made an appearance through their attorney or otherwise.¹⁹ Finally, the court found Wyatt complied with all requirements under Virginia law to establish his parental rights to Baby Emma.²⁰ On December 11, 2009, the Virginia Court awarded Wyatt with custody of Baby Emma and ordered her returned to Wyatt immediately.²¹

The Utah decision requires more unpacking. The Zarembinskis filed their Utah adoption petition on February 23, 2009.²² On April 28, 2009, Wyatt filed a motion to intervene to contest the adoption, but he neither raised the PKPA nor challenged the Utah district court's jurisdiction to hear the case.²³ On June 11, 2009, the district court denied Wyatt's motion²⁴ and Wyatt appealed.

On appeal Wyatt argued, *inter alia*, that the PKPA deprived the Utah district court of jurisdiction over the adoption proceeding.²⁵ The Zarembinskis argued the PKPA was inapplicable to adoption proceedings or, if the PKPA was applicable, Wyatt had waived his jurisdictional argument under the PKPA below.²⁶ The Utah Supreme Court addressed both issues: first, whether the PKPA applies to adoption proceedings; and second, whether the PKPA divests Utah courts of subject-matter jurisdiction (in which case the argument cannot be waived).²⁷ The court split three to two on whether the PKPA applied to adoption proceedings.²⁸

Justice Parrish, writing for the majority, held the PKPA applied to adoption proceedings. The court based its holding on a plain-language analysis.²⁹ The majority bolstered its conclusion by noting the “vast majority of courts”

¹⁸ *In re Emma Zarembinski*, No. JJ040710-01-00, at 2 (Va. Juvenile & Domestic Relations Ct. 2009), available at http://www.babyemmawyatt.com/Wyatt_Custody.pdf.

¹⁹ *Id.*

²⁰ *Id.* ¶ 5.

²¹ *Id.* ¶¶ 5–6.

²² *In re Adoption of Baby E.Z.*, 2011 UT 38, ¶ 5, 687 Utah Adv. Rep. 17.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* ¶ 11.

²⁶ *Id.* ¶ 12.

²⁷ *Id.* ¶ 25.

²⁸ *Id.* ¶ 13.

²⁹ *Id.* ¶¶ 15–17.

considering the issue applied the PKPA to adoptions based on a plain-language analysis.³⁰

The majority also held the PKPA did not divest the district court of its subject-matter jurisdiction because the district court had the authority to hear the general class of adoption and custody matters.³¹ The court stated that the PKPA limited only the *exercise* of jurisdiction, implying that a district court has the power to hear the case (in other words, it has subject-matter jurisdiction) but should not use that power.³² The court also noted that if the PKPA deprived courts of subject-matter jurisdiction, the Act would undermine the finality and certainty of interstate adoptions.³³ Finality is implicated because subject-matter jurisdiction challenges may be raised at any time and are not subject to forfeiture.³⁴

In their separate concurrences, Justices Durrant³⁵ and Lee asserted the PKPA did not apply to adoptions.³⁶ Justice Lee concluded the PKPA did not apply to adoptions by utilizing a plain-language analysis,³⁷ with a focus on “linguistic context.”³⁸ Justice Durrant found the language ambiguous because the majority and Justice Lee reached opposite results while relying on purportedly “plain” language.³⁹ According to Justice Durrant, the court should have examined the congressional intent behind the PKPA.⁴⁰ Justice Durrant concluded Congress did not intend to apply the PKPA to adoptions.⁴¹ Finally, the concurrences had largely semantic disagreements with the majority’s subject-matter jurisdiction analysis. But every justice agreed that the PKPA did not divest the district court of its subject-matter jurisdiction.⁴²

C. The Full Faith and Credit Clause

The Virginia and Utah custody orders for Baby Emma create a problem under the Full Faith and Credit Clause of the United States Constitution. Two co-equal sovereigns issued conflicting custody orders for the same baby. The Full Faith and Credit Clause provides:

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress

³⁰ *Id.* ¶ 20.

³¹ *Id.* ¶¶ 33–34.

³² *Id.* ¶ 35; *see infra* Part II.B.

³³ *In re Baby E.Z.*, 2011 UT 38, ¶ 37.

³⁴ *Id.* ¶ 25.

³⁵ *Id.* ¶ 46.

³⁶ *Id.* ¶ 53 (J. Lee concurring in part).

³⁷ *Id.* ¶ 71 (J. Lee concurring in part).

³⁸ *Id.* ¶¶ 85–105 (J. Lee concurring in part).

³⁹ *Id.* ¶ 48.

⁴⁰ *Id.* ¶ 49.

⁴¹ *Id.* ¶ 50.

⁴² *Id.* ¶ 68 (J. Lee concurring in part).

may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved and the Effect thereof.⁴³

Although the Full Faith and Credit Clause has been part of American law since the Articles of Confederation, the clause remained something of a mystery for centuries.⁴⁴ The purpose articulated by the U.S. Supreme Court is that the clause seeks to “alter the status of the several states as independent foreign sovereignties . . . to make them integral parts of a single nation”⁴⁵

Despite the stated purpose of the Full Faith and Credit Clause, the Supreme Court held the PKPA does not provide an implied federal cause of action.⁴⁶ The *Thompson* Court expected the States to enforce the PKPA as regularly and faithfully as they had enforced the Full Faith and Credit Clause in other contexts.⁴⁷ Thus, only the U.S. Supreme Court can provide a remedy for an alleged violation of the Full Faith and Credit Clause, such as when the PKPA results in conflicting judgments from two states.⁴⁸

Full faith and credit precedent provides three guiding principles. First a state’s statutes are not entitled to full faith and credit in another state.⁴⁹ Second, a state’s public policy cannot override the full faith and credit owed to a foreign judgment.⁵⁰ Finally, the Full Faith and Credit Clause operates as a national *res judicata* policy precluding reconsideration of an issue already decided and involving the same parties.⁵¹

Baby Emma’s case is best resolved under the national *res judicata* application of the Full Faith and Credit Clause. Such resolution must include thorough analysis of the PKPA because only proceedings compliant with the PKPA receive Full Faith and Credit Clause protection.

II. ANALYSIS OF *IN RE BABY E.Z.*

The majority of the Utah Supreme Court reached the correct result in *In re Adoption of Baby E.Z.* The PKPA applies to adoptions and the PKPA did not deprive the Utah district court of subject-matter jurisdiction to hear the case.

⁴³ U.S. CONST. art. IV, § 1.

⁴⁴ Robert H. Jackson, *Full Faith and Credit—The Lawyer’s Clause of the Constitution*, 45 COLUM. L. REV. 1, 2–3 (1945).

⁴⁵ *Baker v. General Motors*, 522 U.S. 222, 232 (1998) (citing *Milwaukee County v. M. E. White Co.*, 296 U.S. 268, 277 (1935)).

⁴⁶ *Thompson v. Thompson*, 484 U.S. 174, 187 (1988).

⁴⁷ *Id.*

⁴⁸ *See id.* at 182–83.

⁴⁹ *Baker*, 522 U.S. at 232.

⁵⁰ *Id.* at 233.

⁵¹ *Id.*

A. *The Majority Correctly Concluded the PKPA Applies to Adoptions Based on Statutory Language and Legislative Purpose and Intent*

The PKPA applies to adoptions according to its plain language as interpreted by Utah and other state courts. The PKPA's findings and purposes further indicate Congress intended the Act to apply to adoptions. This subsection addresses (1) the statute's plain language; (2) Congress' stated findings and purposes; and (3) linguistic context.

1. *Plain-Language*

Justice Lee concluded the PKPA should not apply to adoptions based on "the statutory and linguistic context of the terms of the Act."⁵² Justice Lee found the PKPA superfluous as applied to adoptions because final adoption orders already receive full faith and credit.⁵³ The majority examined the same plain language and decided the PKPA applied to adoptions due to the Act's broad language.⁵⁴

The majority was correct. Congress drafted the PKPA broadly, applying the Act to "any proceeding for a custody determination."⁵⁵ Precedent in several states, including Utah, supports interpreting the PKPA to include adoptions. A majority of states considering the issue applied the PKPA to adoptions, utilizing a plain-language analysis.⁵⁶

Utah case law further supports applying the PKPA to adoptions. While the Utah Supreme Court had not considered the application of the PKPA to adoptions, the Utah Court of Appeals had previously considered the issue. In *In re E.H.H.*, the court of appeals recognized that "[t]he Utah Supreme Court has decreed that an order terminating a party's parental rights necessarily modifies prior orders granting that party visitation or custody rights."⁵⁷ Relying on this decree, the Utah Court of Appeals applied the PKPA to an adoption petition seeking to terminate the natural father's rights.⁵⁸ In *Baby Emma's* case, the adoption order sought to terminate Wyatt's parental rights and should likewise be subject to the PKPA under the *In re E.H.H.* analysis.

Further, the PKPA is not superfluous as applied to adoption proceedings and any resulting custody orders. According to the Supreme Court, final adoption orders receive Full Faith and Credit Clause protection.⁵⁹ However, the PKPA is not

⁵² *In re Adoption of Baby E.Z.*, 2011 UT 38, ¶ 71, 687 Utah Adv. Rep. 17 (J. Lee concurring in part).

⁵³ *Id.* ¶ 81 (J. Lee concurring in part).

⁵⁴ *Id.* ¶ 21.

⁵⁵ *Id.* ¶ 16 (internal quotations omitted) (quoting 28 U.S.C. § 1738(A)(g) (2006)).

⁵⁶ *Id.* ¶ 20 (citing decisions of numerous State courts that applied the PKPA to adoptions).

⁵⁷ *In re E.H.H.*, 2000 UT App 268, ¶ 9, 16 P.3d 1257.

⁵⁸ *Id.* ¶ 10.

⁵⁹ *Hood v. McGehee*, 237 U.S. 611, 614 (1915).

superfluous because the Act alters the mechanism by which permanent orders receive full faith and credit.⁶⁰ Further, as the majority argues, the PKPA is not superfluous as applied to temporary adoption orders which did not previously receive full faith and credit protection.⁶¹

Additionally, Emma's case itself illustrates why the PKPA should be applied to adoptions. The Virginia and Utah proceedings were contemporaneous and incomplete, so the Full Faith and Credit Clause could not reach either proceeding in a meaningful way without the Act. The PKPA affords protection because it applies to ongoing but incomplete judicial proceedings that will result in a custody decision.⁶² The PKPA, when applied properly, provides a useful tool for states involved in interstate adoption disputes. Both concurrences fail to respond to the majority's assertion that the PKPA is not superfluous with regard to temporary orders and incomplete proceedings, present in the case at bar.

2. Legislative Findings and Purposes

The majority and concurrences disagree as to the proper role of legislative findings and purposes but each opinion reaches the question.⁶³ Justice Lee concludes the legislative history indicates Congress did not intend to apply the PKPA to adoptions because the term "adoption" does not appear in the legislative history.⁶⁴ The majority concludes the broad language of the stated Congressional findings and purposes provide further support for applying the PKPA to adoptions.⁶⁵

The findings and purposes expressed in the Act itself also use broad language indicating that Congress intended to apply the PKPA to adoptions. As noted above, adoptions temporarily and permanently affect custody rights. In this case, Baby Emma's biological mother hid Emma from Wyatt by refusing to allow the hospital to list the mother as a patient. Later, the adoptive parents took Emma to Utah. Baby Emma was therefore "concealed in connection with [a custody] dispute[]" between "persons claiming rights of custody . . . under the laws, and in the courts, of different [s]tates . . ." ⁶⁶ This and other broad language used in the findings⁶⁷ and purposes of the PKPA support Congress's intent to apply the Act to adoptions—particularly those similar to Baby Emma's adoption.

⁶⁰ See *infra* Part III.B.2.

⁶¹ *In re Baby E.Z.*, 2011 UT 38, ¶ 18.

⁶² 28 U.S.C. § 1738A(g) (2006).

⁶³ *In re Baby E.Z.*, 2011 UT 38, ¶¶ 22, 49, 85.

⁶⁴ *Id.* ¶ 114 (J. Lee concurring in part).

⁶⁵ *Id.* ¶ 22.

⁶⁶ Parental Kidnapping Prevention Act of 1980, Pub. L. No. 96-611, § 7(a)-(b) (1980).

⁶⁷ See *e.g.*, *id.* § 7(a)(3) (custody cases "contribute to a tendency of parties involved in such disputes to frequently resort to seizure, restraint, concealment, and interstate transport of children, the disregard of court orders, excessive relitigation of cases, obtaining of conflicting orders by the courts of various jurisdictions . . .").

Further, the PKPA should apply to adoption orders because those orders are more permanent than other custody orders. The PKPA undoubtedly applies to disputes involving modifiable custody orders.⁶⁸ These modifiable custody orders merely alter the terms of visitation and custody between two parties and such orders are easily changed by courts along with malfeasance easily corrected. Adoption orders cut off custody and visitation completely—forever. If the protection of the PKPA is not extended to adoptions, children may be kidnapped from their biological fathers and taken away forever. A biological mother, along with the adoptive parents, can permanently deprive a biological father of custody and visitation rights to a child in the most far-flung jurisdiction possible. Thus, application of the PKPA is even more important in adoption cases like Baby Emma's than to ordinary custody cases.

3. *Linguistic Context*

Justice Lee, using the Corpus of Contemporary American Usage (COCA), determined “custody” does not include adoptions because the words “custody” and “divorce” are ten times more likely to be used together in a sentence than “custody” and “adoption.”⁶⁹ The majority counters that frequency of association has no correlation to a word's meaning.⁷⁰

Justice Lee also errs by failing to consider judicial assumptions underlying traditional linguistic analysis and because the COCA “proves” very little. Judges may reasonably refer to dictionaries because legislators and the general public are likely do the same when attempting to understand statutory language. Legislators and citizens do not resort to the COCA. Justice Lee's reliance on Lexis Nexis compounds the error. Lexis Nexis is not a tool used to define words; rather, it is a tool used to find case law. Justice Lee's reliance on the COCA allows that project to dictate a statute's meaning without any evidence or rational inference that legislators had that definition or methodology in mind or that the public might do the same to ascertain the meaning of a law. Further, the COCA did not indicate custody is unrelated to adoption—only that it related to adoption less often than to divorce.

Finally, adoptions are less likely to coincide with custody because the focus in a traditional adoption case is not on custody matters. In an ideal adoption case, loving adoptive parents seek to adopt a child after the child's biological parents voluntarily relinquish their parental rights. This case is quite another matter. Here, a biological parent is fighting an interstate custody dispute to keep his child. In either case, custody is necessarily modified and implicated but, in the former case, need not be explicitly addressed.

⁶⁸ *In re Baby E.Z.*, 2011 UT 38, ¶¶ 49, 53.

⁶⁹ *Id.* ¶ 89 (J. Lee concurring in part).

⁷⁰ *See id.* ¶ 19 n.2 (“If the word ‘car’ is ten times more likely to co-occur with the word ‘red’ than with the word ‘purple,’ it would be ludicrous to conclude from this data that a purple car is not a ‘car.’”).

For the reasons stated above, the majority correctly concluded the PKPA applies to adoptions.

B. The Utah Court Had Subject-Matter Jurisdiction to Decide this Case

Wyatt argued the PKPA divested the district court of subject-matter jurisdiction to decide the case.⁷¹ Precedent from the Utah Court of Appeals strongly supported Wyatt's argument.⁷² However, the majority overruled the court of appeals and held that the district court had subject-matter jurisdiction because it had the "authority to adjudicate the general class of cases to which this case belongs."⁷³ Justice Lee argues this proves only that the district court initially had subject-matter jurisdiction, and the majority should have examined whether the PKPA deprived the district court of its jurisdiction.⁷⁴ According to Justice Lee, that question turns on whether the PKPA deprived the district court of the competency to hear the case, or merely related to the propriety of the district court in exercising its power.⁷⁵ The careful observer will note the court only disagreed about *why* Wyatt's argument failed. The majority held the PKPA did not divest the Utah district court of jurisdiction because the Act simply confers full faith and credit to some judgments, rather than preemptively depriving courts of jurisdiction to hear such cases.⁷⁶

The language of the PKPA indicates the Utah district court had subject-matter jurisdiction. Specifically, the PKPA provides that a State "shall not *exercise* jurisdiction . . ." over a custody or visitation determination pending in another state.⁷⁷ By instructing a court not to exercise jurisdiction, the language of the PKPA assumes the state otherwise has subject-matter and could obtain personal jurisdiction. Justice Lee is wrong when he says the majority missed this point. While the majority spills less ink on the subject, they analyze the PKPA's language and conclude "it does not divest a court of its underlying subject matter jurisdiction."⁷⁸

Additionally, other Full Faith and Credit Clause claims do not divest a court of jurisdiction and such claims are subject to waiver in Utah.⁷⁹ Further, federal decisions interpreting the clause show no intention to deprive a court of subject-matter jurisdiction. In *Thompson*, the Supreme Court did not indicate that either state court that decided the custody issue lacked subject-matter jurisdiction. The

⁷¹ *In re Baby E.Z.*, 2011 UT 38, ¶ 1.

⁷² *Curtis v. Curtis*, 789 P.2d 717, 725–26 (Utah Ct. App. 1990) (overruled by *In re Adoption of Baby E.Z.*, 2011 UT 38).

⁷³ *In re Baby E.Z.*, 2011 UT 38, ¶ 34.

⁷⁴ *Id.* ¶ 57 (J. Lee concurring in part).

⁷⁵ *Id.* ¶ 55 (J. Lee concurring in part).

⁷⁶ *See infra* Part III.A. This distinction is critical because subject-matter jurisdiction may be raised at any time in Utah courts, unlike Full Faith and Credit challenges.

⁷⁷ 28 U.S.C. § 1738(g) (2006) (emphasis added).

⁷⁸ *In re Baby E.Z.*, 2011 UT 38, ¶ 35.

⁷⁹ *O'dea v. Olea*, 2009 UT 46, ¶ 20, 217 P.3d 704.

Court stated the PKPA merely provides a rule for state courts to use to determine whether to accord full faith and credit to another state's judgment.⁸⁰

Finally, public policy militates against interpreting the PKPA's mandates to divest subject-matter jurisdiction because adoption proceedings will lack finality. As the majority mentions, if the PKPA divests courts of subject-matter jurisdiction, a parent could come back essentially any time, even after judgment is entered, and void the adoption by showing he initiated custody proceedings in another state prior to the adoption proceedings.⁸¹ This raises the concern of potential instability in the lives of adopted children. Putative fathers might return many years later and void the adoption. Such a lack of finality also poses problems with inheritance cases involving adopted children, as well as medical decisions decided amongst adopted and natural children. Potentially, years after adoption, a litigant with no direct interest in the adoption itself can launch a collateral attack on the adoption order. Once voided, many legal relationships can be undone, with far-reaching consequences. Thus, based on the language of the PKPA, precedent, and the underlying social policies, the PKPA does not divest a state of subject-matter jurisdiction to decide an adoption case.

Because the Utah District Court had subject-matter jurisdiction, and Wyatt first raised his jurisdictional challenge on appeal, he had already forfeited that challenge.

III. FULL FAITH AND CREDIT

Two additional issues remain unresolved. First, the conflicting decisions of the Utah and Virginia courts create a Full Faith and Credit Clause problem because two final orders from co-equal sovereigns directly conflict. So, which state's order is entitled to full faith and credit protection under the Federal Constitution? Second, what standard governs that determination?

This section analyzes Wyatt's choice to not raise a full faith and credit argument in the Utah Supreme Court, examines the case under two possible governing standards, and concludes the Virginia order is entitled to full faith and credit.

A. Wyatt Forfeited His Full Faith and Credit Clause Claim under Utah Law

Wyatt likely did not raise a Full Faith and Credit Clause argument in the Utah Supreme Court because he did not preserve the claim. In *O'dea v. Olea*, the Utah Supreme Court held full faith and credit challenges are subject to forfeiture.⁸² In most circumstances, a claim that is both subject to forfeiture and not raised in the

⁸⁰ *Thompson v. Thompson*, 484 U.S. 174, 183 (1988).

⁸¹ *In re Baby E.Z.*, 2011 UT 38, ¶ 37.

⁸² *O'dea*, 2009 UT 46, ¶ 20. The court indicates such claims are subject to waiver, but for the reasons set forth by Justice Lee, forfeiture is a more accurate term. See *In re Baby E.Z.*, 2011 UT 38, ¶ 51 n.1 (J. Lee concurring in part).

district court cannot be raised for the first time on appeal.⁸³ Wyatt raised the PKPA and subject-matter jurisdiction for the first time on appeal.⁸⁴ Thus, Wyatt forfeited his Full Faith and Credit Clause claim under Utah law.

B. Wyatt's Potential Federal Remedy

Wyatt may have one last resort. The Supreme Court in *Thompson* retained the ability to review cases where courts of two states enter conflicting judgments and orders.⁸⁵ Existing Full Faith and Credit Clause precedent allows for two possible standards: (1) the last-in-time doctrine, and (2) national res judicata.

1. Last-in-Time

First, the Court could apply the “last-in-time” doctrine. The doctrine provides that when courts of different jurisdictions reach different results, the more recent judgment controls.⁸⁶ The Supreme Court of Vermont, however, held that the last-in-time doctrine is not applicable to child custody matters.⁸⁷ The Vermont Court recognized that the doctrine would effectively afford greater full faith and credit protection to a more recent foreign judgment when a litigant subsequently attempts to enforce the foreign order in the first state in an attempt to supersede the original, unfavorable judgment.⁸⁸ Indeed, the last-in-time doctrine *encourages* the behavior the PKPA seeks to prevent. A parent, adoptive or otherwise, would be incentivized to forum shop to get a second, hopefully more favorable, order. Thus, the last-in-time doctrine cannot control because it undermines the purposes of the PKPA.

2. Res Judicata

Second, the Supreme Court can and should apply the Full Faith and Credit Clause as a national doctrine of res judicata.⁸⁹ The exact implications of res judicata vary slightly depending upon what jurisdiction's law applies, but generally the doctrine bars re-litigation of issues that were, could, or should have been litigated in a prior action.⁹⁰ Under this standard, when the first court exercises jurisdiction, a second court is precluded from considering the same issue involving the same parties. However, this approach requires preliminary analysis under the PKPA because only the first proceeding initiated in compliance with the PKPA would be entitled to full faith and credit protection. A proceeding initiated first in

⁸³ See *O'dea*, 2009 UT 46, ¶¶ 19–24.

⁸⁴ *In re Baby E.Z.*, 2011 UT 38, ¶ 1.

⁸⁵ *Thompson*, 484 U.S. at 187.

⁸⁶ *Medveskas v. Karparis*, 640 A.2d 543, 546 (Vt. 1994).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Riley v. N. Y. Trust Co.*, 315 U.S. 343, 349 (1942).

⁹⁰ *Bates v. Devers*, 202 S.E.2d 917, 920–21 (Va. 1974); *Macris & Assoc., Inc. v. Neways, Inc.*, 2000 UT 93, ¶ 19, 16 P.3d 1214.

time, but noncompliant with the PKPA, would not enjoy full faith and credit protection.

Recently, the Colorado Supreme Court, sitting en banc, examined an interstate custody dispute and analyzed a foreign state's compliance with the PKPA. Utilizing *Thompson*, the Colorado court held that a Nebraska custody order was not entitled to full faith and credit because the Nebraska court failed to comply with the requirements of the PKPA.⁹¹

Under this PKPA analysis, the Virginia order is entitled to full faith and credit because Virginia exercised jurisdiction first and qualified as Baby Emma's home state. The PKPA not only affords Full Faith and Credit Clause protection to orders made in compliance with the Act,⁹² it prohibits a state from exercising jurisdiction in any proceeding once another state has already exercised jurisdiction pursuant to the PKPA.⁹³

Here, there is no question Virginia exercised jurisdiction (and issued an order) earlier than Utah.⁹⁴ The only remaining questions are whether the Virginia or Utah court exercised jurisdiction consistent with the PKPA, and if both complied, which did so first.

Virginia first exercised jurisdiction pursuant to the PKPA as Baby Emma's home state. Under the PKPA, a child under six months old has a home state where the child is born, so long as any party to the dispute remains.⁹⁵ Baby Emma was less than six months old, born in Virginia, and one of the contestants (Wyatt) remained in that state. This meets the PKPA's requirements for home state jurisdiction. Conversely, the Utah court violated the PKPA by exercising jurisdiction subsequent to the Virginia court.⁹⁶ Thus, the Virginia court correctly determined the PKPA conferred exclusive jurisdiction for determining custody of Baby Emma to the Virginia court. As a result, the Virginia order is entitled to preclusive effect under the Full Faith and Credit Clause.

Finally, the Supreme Court should not resolve this case by holding that Wyatt forfeited his full faith and credit argument. Justice Lee suggested this approach during oral argument.⁹⁷ Yet such treatment does not resolve the conflict between Virginia and Utah. Here, each party could assert that the other forfeited their full faith and credit argument: Wyatt failed to raise the issue in the Utah trial court, and the Zarembinskis failed to respond at all to the Virginia action. Moreover, the two courts cannot split the baby, leaving no option to visit some amount of prejudice on each party.

⁹¹ *In re L.S.*, 257 P.3d 201, 209–10 (Colo. 2011).

⁹² 28 U.S.C. § 1738A(a) (2006).

⁹³ *Id.* § 1738A(h).

⁹⁴ *In re Adoption of Baby E.Z.*, 2011 UT 38, ¶ 4–5, 687 Utah Adv. Rep. 17.

⁹⁵ 28 U.S.C. § 1738A(b)(4) (2006).

⁹⁶ Likewise, Utah did not meet any alternative bases for exercising jurisdiction under the PKPA. *See* 28 U.S.C. § 1738A(c)(2)(B)–(D) (2006).

⁹⁷ Oral Argument at 33:18, *In re Adoption of Baby E.Z.*, 2011 UT 38, 687 Utah Adv. Rep. 17, available at http://www.utcourts.gov/audio/supreme_audio/2010/9/CFTR%20TempInReBabyEZ20090625_3626.mp3.

Worse yet, to hold that Wyatt but not the Zarembinskis forfeited a full faith and credit argument would allow the clause to operate as a trap for the unwary. Wyatt would be deprived of his child likely because his lawyer failed to find a piece of *federal* legislation related to family law and raise the issue in a trial court when state law typically governs questions of family law. Meanwhile, the Zarembinskis would receive a windfall for ignoring Virginia proceedings. This unfairness is magnified because Baby Emma herself is in dispute, not something trivial or fungible like money. Thus, forfeiture cannot appropriately remedy such a conflict.

CONCLUSION

In sum, the Utah Supreme Court correctly determined the PKPA applies to adoptions, and it does not deprive any state court of subject-matter jurisdiction. Current Full Faith and Credit Clause precedent must be considered in conjunction with the PKPA's mandates. This offers the best solution to this case and any other case where courts of two different states issue conflicting custody orders.

The real difficulty with Baby Emma's case lies beyond the legal analysis above. This Note ends where it began—with Baby Emma. The facts of this case are difficult and the legislative and judicial decisions have been painful for Emma's biological father. Any judicial decision to undo those decisions now would be painful for the Zarembinskis—the only parents Emma has known since birth. Each and every decision harms Baby Emma.

Baby Emma is now almost three-years-old. For three years she has lived with the Zarembinskis; Baby Emma is a Zarembinski. However, Baby Emma was born to a father who loved her, but lost her to a system with low regard for unwed fathers. These discordant facts mean Baby Emma has difficult realizations ahead of her. Imagine for a moment you find yourself in Baby Emma's position several years from now. Imagine you learn that you were adopted—great start. But then, you discover your adoption took place over your biological father's protests (not to mention his interstate legal battle to keep you). Your adoptive parents refused to let your biological father have any contact with you whatsoever. Alternatively, imagine that one day you learn that when you were three-years-old, your biological father took you from adoptive parents. Those adoptive parents loved you and fought hard to be with you. Then your father never let you see those parents again. Your father thought only of himself.

If the Zarembinskis deny Baby Emma access to her biological father, she will learn the facts of her case eventually and justifiably feel betrayed by her adoptive parents. Likewise, if a court grants Wyatt custody now and he takes Baby Emma away from her parents, she will learn the facts and grow to resent him. The best solutions lie outside the courts.

The Zaremebinskis should allow some contact between Baby Emma and Wyatt. Wyatt should respect any limitations placed on this contact, and vice versa. If Wyatt gets custody of Baby Emma, he needs to make arrangements for the easiest possible transition for his three-year-old daughter. The three adults must do what the courts cannot: reach a result that is most fair to Baby Emma.