IN THE SUPREME COURT OF THE STATE OF NEVADA

CISILIE A. PORSBOLL
fka, CISILIE A. VAILE,

Appellant,

vs.

R. SCOTLUND VAILE,

Respondent.

Supreme Court Case No: 53798
District Court Case No: 98 D230385

RESPONDENT'S ANSWERING BRIEF

R. Scotlund Vaile
Respondent in Proper Person
PO Box 727
Kenwood, CA 95452
(707) 833-2350

Marshal S. Willick, Esq.
Attorney for Appellant
Nevada Bar No. 002515
3591 E. Bonanza Road, Suite 200
Las Vegas, NV 89110-2101
(702) 438-4100

09-24017

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For the reasons set forth below, the district court did not have jurisdiction of this case or controversy.

STATEMENT OF THE ISSUES

1. May a District Court Exercise *Colorable* Personal Jurisdiction After the Nevada Supreme Court Held that the Courts of Nevada Did Not Have Personal Jurisdiction of the Parties?

2. May Two Out-of-State Residents, Neither of Whom Nor Their Children Ever Lived in Nevada, Confer Subject Matter Jurisdiction on the Courts of Nevada for Purposes of Establishing Child Support?

3. May a District Court Exercise Subject Matter Jurisdiction to Retroactively Modify a Child Support Agreement Under UIFSA?

4. Is a Party Judicially Estopped From Making Contrary Arguments in Separate Proceedings?

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6. Was the District Court in Error for Giving Deference to an Agency Tasked with Enforcing a Statute Rather Than Deferring to an Interested Software Vendor?

FACTUAL HISTORY

In 1998, each party hired attorneys in Nevada to help guide them through what began as an uncontested divorce. Mr. Vaile did all he was instructed to do by Las Vegas counsel to establish residency in Nevada, and subsequently adhered to the parties' separation agreement which was incorporated into the decree of divorce, including the payment of child support. However, conflict arose in 1999, when Ms. Porsboll refused to return the parties' two children from Norway after a purported visit to her ill mother. Mr. Vaile requested the Clark County district court, which entered the decree of divorce, to order the return of the children to the U.S. In April 2000, the district court entered a pick-up order and a grant of custody in favor of Mr. Vaile. In May 2000, Mr. Vaile returned the children to the U.S. in compliance with the district court's order.

In response to the children's return to the United States, Ms. Porsboll hired her current Las Vegas counsel who challenged the decree of divorce based on lack of jurisdiction, and requested that the district court make a Hague ruling to send the children back to Norway.[1] Ms. Porsboll's argument was that she should be excused for wrongfully retaining the children in Norway because the decree (and the separation agreement incorporated therein) was invalid. However, the district court agreed to only hear the issue of jurisdiction, and accordingly, allowed Mr. Vaile to brief and argue only this issue in the lower court. The district court found, in October 2000, that Mr. Vaile had done all

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1. Ms. Porsboll argued (then and now) that Mr. Vaile's obedience to the lower court's pick-up order should be considered "kidnapping" or "abduction."

he could to establish residency,[2] that the court had indeed ordered a pick-up for Mr. Vaile to re-secure the children,[3] and that although Ms. Porsboll had been wrongfully retaining the children in Norway,[4] neither party intended a fraud on the court.[5]

Ms. Porsboll petitioned this Court for an emergency writ challenging the lower court's decision. With it, she submitted four volumes of information, most of which was not presented to the district court, to which Mr. Vaile was not given an opportunity to respond. Ms. Porsboll through counsel also argued facts that were not presented before the lower court or which contradicted the record and findings of the lower court.[6]

In April, 2002, this Court held that it did not have personal jurisdiction over the parties or subject matter jurisdiction in the case.[7] Although the Court did not overturn the lower court's finding relative to "fraud," the Court's opinion reversed the jurisdictional holding of the lower court, and strongly implied that Mr. Vaile's intentions were wrongful. The Court repeated the recitation of facts presented by Ms. Porsboll on appeal, even where those facts were inconsistent with the record. The Court appeared to assign

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2. Appx. RSV0003 (¶ 2).
3. Appx. RSV0005 (¶ 7).
4. Appx. RSV0003 (¶ 1).
5. Appx. RSV0003 (¶ 3).
6. For example, Ms. Porsboll argued that Mr. Vaile intended a fraud on the court by responding to the lower court's question of how long the children lived "here," by answering "all their lives." Mr. Vaile understood "here" to mean "the US." On appeal, Porsboll argued that Mr. Vaile told the lower court that the children had lived in Las Vegas their whole lives.
7. Vaile v. Eighth Judicial Dist. Court, 118 Nev. 262, 268 (2002); Appx. RSV0010.

the apparent misconduct (and poor advice) of Mr. Vaile's Las Vegas counsel to Mr. Vaile personally.

Even though the Court held that it lacked personal and subject matter jurisdiction, and despite the fact that the issue had not been briefed or argued in the court below, the Court made a Hague determination as a matter of law, and ordered the parties' children to Norway for custody determinations.[8] When the Norwegian court eventually made its custody determination,[9] it relied on the disparaging language of this Court's decision to deny Mr. Vaile visitation of his children except for two days of supervised visitation every four months in Norway. Aside from a two-week visit from his oldest child (who turned 18-years-old in May, 2009) Mr. Vaile and his children have been apart since this Court's 2002 decision.

Years after achieving the result she desired on every front, Ms. Porsboll (through the same Las Vegas counsel) approached the lower court to argue contrary to the very result that benefited her. She claims now that jurisdiction *is* proper in Nevada. Although she rejected Mr. Vaile's continued offer to uphold the parties' agreement with regard to child support, and informed him under oath that the agreement was "void," she sought and was provided an order from the lower court which retroactively modified the child support

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8. The fact that Mr. Vaile had no opportunity in the course of the proceedings to even present facts on this issue was the basis for a Petition for Writ of Certiorari to the US Supreme Court, which was declined.

9. The Norwegian court's decision revealed that Ms. Porsboll did not, in fact, initiate legal proceedings in Norway prior to Mr. Vaile initiating them in Nevada, contrary to the testimony Ms. Porsboll had provided to the district in 2000. This Court appeared to rely on her testimony, which turned out to be a false assertion, when it sent the children to Norway in 2002.

provisions contained in the actual agreement, instantly creating an arrearage that would not have existed without the modifications.

On appeal, Ms. Porsboll challenges the method the lower court used to calculate penalties for the modified child support order which was applied retroactively. This puts at issue approximately $40,000 in penalties, depending on which calculation (a software vendor's or the State's) is determined to be correct.

ARGUMENT

I. FIRST THRESHOLD DEFENSE – LACK OF PERSONAL JURISDICTION

THE DISTRICT COURT DID NOT HAVE COLORABLE PERSONAL JURISDICTION AFTER THIS COURT HELD THAT THE COURTS OF NEVADA DID NOT HAVE PERSONAL JURISDICTION OF THE PARTIES

In support of Ms. Porsboll's petition for writ of mandamus in 2000, she submitted four volumes of exhibits in an attempt to convince this honorable Court that the lower court did not have jurisdiction of this case. This court agreed and responded in April 2002 by stating, "[w]e conclude that the district court ***did not have personal jurisdiction over either party,*** nor did it have subject matter jurisdiction over the marital status of the parties when it entered the decree."[10] This Court elaborated that "[t]he children have never lived in Nevada. Neither party has ever lived in Nevada. The children have never had any contact with Nevada, much less substantial contact with the state. Neither do the parents have substantial contact with Nevada."[11]

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[10] *Vaile,* 118 Nev. at 268 (emphasis added); Appx. RSV0010.

[11] *Id.* at 276; Appx. RSV0014.

Almost six years after this Court's decision, Ms. Porsboll abruptly reversed her position in order to support a new objective; she reopened this case to argue that the lower court now has jurisdiction. Unbelievably, instead of upholding this Court's decision on the matter, the district court directly countered this Court's holding with its own contrary finding. In the October 9, 2008 *Final Decision* (hereinafter "*Decision I*"), the lower court found that "[t]he Court ***had personal jurisdiction over the parties*** to order child support at the time of entry of the Decree."[12] The lower court did not offer any explanation for the direct contradiction of this Court's previous holding.

A. THE LOWER COURT MUST FOLLOW THE NEVADA SUPREME COURT'S MANDATE ON JURISDICTION

The district court apparently misapprehended its responsibility to follow this Court's mandate as the *law of the case*, despite this *en banc* Court's recent instructions to the lower courts on how to apply this doctrine:

> Under the law of the case doctrine, when an appellate court states a principle or rule of law necessary to a decision, the principle or rule becomes the law of the case and ***must be followed*** throughout its subsequent progress, both in the lower court and upon subsequent appeal. The law of the case doctrine is designed to ensure judicial consistency and to prevent the reconsideration, during the course of a single continuous lawsuit, of those decisions which are intended to put a particular matter to rest.
>
> Tien Fu Hsu v. County of Clark, 120 Nev. 1228 (2007) (internal quotes omitted, emphasis added).

Regardless of its discord with this honorable Court's decision on the law of personal jurisdiction, it is not the role of a lower court to contradict or re-decide an issue previously determined by this Court. The lower court, and in fact, the Appellate Court

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[12] *Decision I*, ¶ 21(B) (emphasis added); AAP Vol. 2, p. CAV00347.

according to *Tien Fu Hsu,* are bound by the previous decision of this Court whether that decision was believed to be mistaken or not. Without the consistent application of the law of the case doctrine, appellate power and judicial order are compromised, and the rule of law is absent. Based on the law of this case as set forth by this Court, the Nevada courts do not have jurisdiction of the parties. The lower court exceeded its judicial power in attempting to overturn this Court.

B. *COLORABLE* JURISDICTION DOES NOT EXIST ONCE ALL RELEVANT FACTS ARE KNOWN

As a part of its finding on personal jurisdiction in this case, the lower court stated that "the Court finds that there was 'colorable jurisdiction' because Mr. Vaile sought the divorce in Nevada, and he submitted himself to jurisdiction for purposes of paying child support."[13] It is likely that the lower court's determination on personal jurisdiction was influenced by a fundamental misunderstanding of what "colorable" jurisdiction means. Colorable jurisdiction is, of course, jurisdiction "appearing to be true, valid, or right." Black's Law Dictionary (8th ed. 2004), colorable.

In 1998, when the parties applied to the lower court for a divorce, the district court and the parties themselves believed, based on all facts and circumstances before them, that jurisdiction was proper. It is not disputed that "colorable jurisdiction" existed *at that time*. However, once all facts are made known and weighed by a court through the litigation process, colorable jurisdiction is replaced with a final judicial determination on whether jurisdiction was, in fact, proper. This is especially true when the court that

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[13] *Decision I,* ¶ 137; AAP Vol. 2, p. CAV00361.

makes the final determination is the highest appellate court of the State. As this Court previously explained in this case, "when the proof exhibited has a legal tendency to show a case of jurisdiction, then, although the proof may be slight and inconclusive, the action of the court will be valid *until it is set aside by a direct proceeding for that purpose*."[14]

This Court made that final determination in April 2002 when it held with simple clarity that the district court did not have personal jurisdiction over either party. After this Court weighed the facts and made a final determination on the issue, there is no longer room for argument that colorable personal jurisdiction continues. The lower court refused to recognize that this Court had already surveyed the jurisdictional facts, and held that personal jurisdiction did not exist. The lower court was mistaken in its belief that a resurrected finding of *colorable* jurisdiction could provide a valid basis for the exercise of personal jurisdiction over the parties to this case.

The parties have, since this Court entered its decision in April 2002, lived outside the state of Nevada. Neither party has taken any actions to establish contacts with the state which would provide a basis for personal jurisdiction to be exercised against them.[15] Since this Court held, in 2002, that the district court did not have personal jurisdiction of the parties, the lower courts necessarily do not have personal jurisdiction against the absent parties today.

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14. *Vaile*, 118 Nev. at 271 (emphasis added); Appx. RSV0012.

15. Neither Ms. Porsboll nor the district court suggested that Mr. Vaile had taken any actions to establish jurisdiction in Nevada since 2002.

II. SECOND THRESHOLD DEFENSE – LACK OF SUBJECT MATTER JURISDICTION OVER THE CASE

TWO OUT-OF-STATE RESIDENTS, NEITHER OF WHOM NOR THEIR CHILDREN EVER LIVED IN NEVADA, MAY NOT CONFER SUBJECT MATTER JURISDICTION ON THE COURTS OF NEVADA FOR PURPOSES OF ESTABLISHING CHILD SUPPORT

In the event that the Court finds that the Nevada courts are not bound by the law of the case as set forth by this Court in April 2002, and that the lack of personal jurisdiction does not readily dispose of this reopened case, then the Court should decide (again) whether a Nevada statute must create a court's subject matter jurisdiction or whether out-of-state parties may confer jurisdiction on the court for purposes of creating a child support order. Mr. Vaile's first responsive filing (a motion to dismiss) to the reopening of this case by Ms. Porsboll emphasized that no Nevada statute provides the court with subject matter jurisdiction to create or modify a child support order for two parties who have never lived in Nevada, whose children have never lived in Nevada, and who have had no substantial contacts with the state. Since "subject matter jurisdiction cannot be waived and may be raised at any time, or *sua sponte* by a court of review,"[16] Mr. Vaile requests that this Court reiterate that subject matter jurisdiction to create and modify a child support order for these parties does not exist in Nevada.

A. PARTIES MAY NOT CONFER SUBJECT MATTER JURISDICTION ON THE COURT BY CONSENT OR BASED ON CONTRACT THEORY

This Court previously held in this case that:

> The children have never lived in Nevada. Neither party has ever lived in Nevada. The children have never had any contact with Nevada, much less substantial contact with the state. Neither do the parents have substantial contact with Nevada. The district court had no subject matter jurisdiction over

16. *Vaile*, 118 Nev. at 276; Appx. RSV0014.

> the issue of child custody. ***Parties may not confer jurisdiction upon the court by their consent when jurisdiction does not otherwise exist.***
>
> . . .
>
> The court may not assume jurisdiction over matters of child custody and visitation based upon its perception of a ***"contract theory"*** or upon its view that because it has asserted personal jurisdiction over the parties, it can order them to do or not do certain things.[17]

This Court rendered a detailed decision exploring the language of the Nevada Revised Statutes which demonstrated that the text of the code itself did not provide the district court with jurisdiction of the subject matter in this case. The Court explained that "[u]nless the court can exercise subject matter jurisdiction according to the terms of the [law] which Nevada has adopted, it is without authority to enter any order adjudicating the rights of the parties with respect to [areas covered by that law.]"[18] This Court's point was that a Nevada court is judicially empowered to act in a case or controversy *only as provided by statute.* Consent by the parties, contract principles, or even a strong desire for subject matter jurisdiction to exist in Nevada is insufficient to empower a court if a statute does not provide subject matter jurisdiction.

Apparently disagreeing with the result that would flow from application of this Court's 2002 decision, the district court limited this Court's requirement that subject matter be based in statute to only child custody and visitation topics. In fact, the lower court found that "the Nevada Supreme Court decision only vacated those portions of the decree relating to child custody and visitation, not child support."[19] With regard to child

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17. *Id.* at 275 (emphasis added); Appx. RSV0014.
18. *Id.* at 275; Appx. RSV0014.
19. *Decision I*, ¶ 136; AAP Vol. 2, p. CAV00361.

support, the district court demonstrated a belief (contrary to this Court's) that principles of ***consent*** and ***contract*** are indeed sufficient to establish subject matter jurisdiction of the Nevada courts on this topic:

> "Based on *part performance* and for purposes of determining a sum certain for the District Attorney to enforce, the fixed amount of $1,300 per month for child support was ordered."
>
> "Under *contract principles*, specifically rescission and reformation, the convoluted portions of the Decree were vacated and modified by the Court to reflect $1,300.00 per month as the 'sum certain' . . . ."

Other than a statement that Plaintiff's motion to dismiss was denied,[20] the statements above are the only holdings in the final decision that address Mr. Vaile's challenge to subject matter jurisdiction. The lower court's exercise of subject matter jurisdiction over child support issues based on either consent[21] or contract principles is in direct defiance of this Court's previous decision in this very case. Neither consent by the parties nor contract principles can confer subject matter jurisdiction on a Nevada court when that jurisdiction is not established in statute.

B. NEITHER UIFSA NOR THE EXERCISE OF PERSONAL JURISDICTION CREATES SUBJECT MATTER JURISDICTION OVER CHILD SUPPORT

The theory on subject matter jurisdiction that Ms. Porsboll presents on appeal and which she argued in the court below is that 1) UIFSA applies in this case, and 2) that under UIFSA, if personal jurisdiction can be exercised over a party, then a Nevada court automatically has subject matter jurisdiction of the controversy. This proposition is

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20. *Decision I,* ¶ 11(A); AAP Vol. 2, p. CAV00346.

21. In the Jurisdictional Statement in Appellant's Opening Brief, Ms. Porsboll appears to take the consent argument one step further by suggesting that *one party* (Mr. Vaile) can establish jurisdiction in Nevada by simply filing papers in the state.

simply incorrect. UIFSA does not apply in this case, and personal jurisdiction does not equate to subject matter jurisdiction.

UIFSA, the Uniform ***Interstate*** Family Support Act is codified in Nevada Law in NRS 130 et al. UIFSA's purpose is to establish uniform enforcement of sister state support judgments. This Court sent the parties' children to Norway in April 2002 where they have resided ever since. Norway is not a state[22] under UIFSA and has not enacted law compatible with UIFSA. No attempt has been made to register either a Norwegian[23] or any other state support order in Nevada, and Ms. Porsboll has not attempted to register a Nevada order elsewhere. In summary, no issues with regard to intrastate child support orders are presented in this case, and UIFSA law is wholly irrelevant.

Although Ms. Porsboll's jurisdictional statement only vaguely identifies the source of subject matter jurisdiction of the case, it does demonstrate that proceedings were brought in the lower court under NRS ch. 130 – Nevada's codification of UIFSA. Since UIFSA does not apply, Appellant's jurisdictional statement is defective, as was the lower court's exercise of subject matter jurisdiction.

Ms. Porsboll's final attempt to intimate that subject matter jurisdiction exists in this case is a reference to NRS 130.201, even though Article 2 of this chapter of the statutes is

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22. NRS 130.10179

23. Although Ms. Porsboll twice testified that a Norwegian support order existed, she has refused to provide it to Mr. Vaile. The lower court rejected Mr. Vaile's attempt to reopen discovery in order to obtain the child support order, and refused to even take judicial notice that any out-of-state order existed on Mr. Vaile's request. *Decision I*, ¶ 11(C); AAP Vol. 2, p. CAV000346; Appx. RSV0031, RSV0033-RSV0034.

titled "Extended Personal Jurisdiction." Porsboll's implication is that subject matter jurisdiction is established if a court can exercise personal jurisdiction over a party.[24] Even if Porsboll's counsel sincerely failed to recognize personal jurisdiction and subject matter jurisdiction are discrete legal concepts, NRS 130.201 discusses *consent* as a valid basis for *personal jurisdiction.* As discussed above, this Court has already rejected the theory that consent can be a basis for *subject matter jurisdiction.* This Court also stated that "[t]he court may not assume jurisdiction over matters . . . based on . . . its view that because it has asserted personal jurisdiction over the parties, it can order them to do or not to do certain things."[25] In short, the exercise of personal jurisdiction is not a basis for subject matter jurisdiction.

Even if the clarity of this Court's previous instructions were lost on Porsboll's counsel and the lower court, the adverse public policy results that would flow from a contrary holding should be obvious. If subject matter jurisdiction was equivalent to personal jurisdiction in Nevada, then any out-of-state party without contacts to Nevada would be permitted to confer subject matter jurisdiction on the Nevada courts for the purpose of child support, by simply initiating a case within its courts. Until the Nevada legislature decides that the Nevada courts should be a forum where child support actions of the non-Nevada world at large are entertained, the lower courts remain confined to the Nevada code as written. Since Nevada statutes do not provide the courts with subject

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24. This theory is precisely what Ms. Porsboll's counsel argued below and to this Court in opposition to Mr. Vaile's Motion for Consolidation.

25. *Vaile*, 118 Nev. at 275; Appx. RSV0014.

matter jurisdiction to judicially determine child support for parties and their children who have never lived in Nevada, the lower court was without judicial power to act in this case.

III. THIRD THRESHOLD DEFENSE – LACK OF SUBJECT MATTER JURISDICTION OF THE ISSUE

THE DISTRICT COURT DID NOT HAVE JURISDICTION TO RETROACTIVELY MODIFY A CHILD SUPPORT AGREEMENT BETWEEN THE PARTIES

In the event that this Court also finds that UIFSA provides subject matter jurisdiction of this case, the question of whether the lower court has subject matter jurisdiction to modify a child support order with retroactive effect must be determined. If the lower court did not have subject matter jurisdiction to modify the parties' agreement with retroactive effect, then no penalties accrued and the merits of this appeal are moot.

The whole of the parties' separation agreement was crafted by a third-party mediator in London, including the child support provisions. These provisions ***did not*** include a requirement that one party pay a fixed amount in child support each month, rather it called for child support to be calculated annually in order to take into account each party's respective income. In order to make the calculation in accordance with the formula in the agreement, the parties were to exchange income tax information each year, and the simple formula was to be used to calculate support for the following year.[26]

After this Court's decision in 2002, Ms. Porsboll refused to provide any income information to Mr. Vaile and refused to respond to his requests that the parties continue to follow the child support provisions in the separation agreement.[27] In November 2003,

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[26] AAP Vol. 1, p. CAV 00018-00019.

[27] Appx. RSV0038-RSV0039.

Mr. Vaile asked Ms. Porsboll under oath why she refused to provide this information. Ms. Porsboll answered that the decree of divorce was voided by this Court in 2002.[28] Ms. Porsboll made clear her intentions that she would never provide this information to Mr. Vaile, but that she would seek child support through the Norwegian system.[29] At no point before or since did Ms. Porsboll ask Mr. Vaile to reinstate child support under the Nevada separation agreement until her attorney filed a request to establish an arrearage in favor of Ms. Porsboll in November 2007.[30]

In response to Ms. Porsboll's counsel's request, the lower court directly modified the child support agreement of the parties by removing the formula and replacing it with a fixed amount of $1,300 per month as suggested by Porsboll's counsel.[31] No calculation under NRS 125B.070, as mandated under NRS 125B.080(1)(a), was made by the court. The court held that the child support obligation would be $1,300 per month based on the doctrine of part performance,[32] even though no evidence was ever offered that Mr. Vaile

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28. Appx. RSV0035, RSV0044.

29. Appx. RSV0044-RSV0046. To date, Ms. Porsboll has refused to provide Mr. Vaile with a child support order issued by a Norwegian court.

30. Appx. RSV0037, RSV0044-RSV0046.

31. See *Decision I*, ¶ 127; AAP Vol. 2, p. CAV00360.

32. The doctrine of *part performance* is confined to contracts relating to lands, the nonexecution of which would operate as a fraud upon the party who had made partial performance to such an extent that he cannot be reasonably compensated in damages. Nehls v. William Stock Farming Co., 43 Nev. 253, 258 (1919). It is used by courts to bind the ***non-performing*** party to a contract based on equity, not the ***performing*** party. Here, the lower court used the doctrine to suggest that Mr. Vaile, who had faithfully performed in accordance with the agreement when it was known to be valid, should continue to be bound to the agreement, despite Porsboll's refusal to perform.

had ever been bound to pay $1,300 in any month. Ms. Porsboll testified that she thought that the amount was in the agreement,[33] but her counsel admitted to the court that $1,300 was not to be found in the agreement.[34] In short, the amount was arbitrarily established.

After the court modified the parties' child support agreement, the court applied the modifications retroactively back over ten years to the parties' 1998 divorce. Although the court allowed Mr. Vaile credits for payments made, it concluded that Mr. Vaile should have been paying Ms. Porsboll $1,300 per month in child support during the two-year period that the children *lived with him* following his grant of custody by the original lower court.[35] At the same hearing, September 18, 2008, where the modified amount due per month was finally determined by the court, and at which the court established the retroactive period during which the modified amount should have been paid, the lower court required Mr. Vaile to show (unsuccessfully) why he should not be held in contempt of court for not retroactively adhering to the newly modified support agreement.

1. UIFSA Law

Under Nevada's codification of UIFSA, when child support orders are issued in multiple jurisdictions, a *controlling* child support order is "an order issued by a tribunal in the current home state of the child."[36] "A tribunal of this state may not exercise jurisdiction to establish a support order . . . if . . . the other state is the home state of the

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33. Appx. RSV0040.

34. Appx. RSV0024.

35. *Decision I* ¶ 139; AAP Vol 1, p. CAV00361.

36. NRS 130.207(2)(b).

child."[37] "Home state" means the state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months immediately preceding the time of filing a petition or comparable pleading for support . . . ."[38]

Modification means a child custody determination that changes, replaces, supersedes or is otherwise made after a previous determination concerning the same child, whether or not it is made by the court that made the previous determination.[39] Under UIFSA, the court may modify its order, if it is the *controlling* order, ***and*** if one of the parties or children are resident in the state at the time of filing the request for modification, or if the parties consent to continued jurisdiction for the purposes of modification.[40] Retroactive modification of a support order is prohibited by case law and statute in Nevada. Khaldy v. Khaldy, 111 Nev. 374, 377 (1995), NRS 125B.140(1)(a). In a situation warranting modification of child support, the court may make the modification effective either as of the time of filing the petition or as of the date of the decree of modification, or at a time in between, but it may not modify the decree retroactively. Ramacciotti v. Ramacciotti, 106 Nev. 529, 532 (1990).

The *Ex Post Facto* clause of the United States Constitution[41] prohibits modification of obligations in contracts, or *ex post facto* application of the law. Based on this clause,

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37. NRS 130.204(2)(c)

38. NRS 130.10119

39. NRS 125A.115

40. NRS 130.205

41. "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility." US Const. Art. I, § 10, Cl 1.

statutes are not to be given retrospective or retroactive effect if to do so would *impair or destroy contracts*, disturb vested rights, or create new obligations. County of Clark v. Roosevelt Title Ins. Co., 80 Nev. 530, 534 (1964). The *ex post facto* prohibition applies equally to emanations from courts as it does to legislative acts. Bouie v. Columbia, 378 U.S. 347, 353 (1964) (internal cites omitted).

The Nevada child support order could not be a *controlling* support order because Nevada is not now, nor has it ever been the home state or residence of the children. By the district court's own words,[42] the court **modified** the parties' agreement. It was unlawful for the lower court to modify the agreement of the parties because the child support order in Nevada was not the controlling order and because none of the parties or children were ever resident in Nevada, let alone at the time of the filing of the request for modification. Mr. Vaile has not consented to the continued jurisdiction of the lower court for purposes of modification, and even if he had, jurisdiction of the child support matter could not continue where it was never established. In short, UIFSA does not provide the district court with subject matter jurisdiction to modify the parties' agreement.

Even if the district court had jurisdiction to modify, it could not apply those modifications retroactively based on clearly established case law and statute. Obviously, it would have been impossible for Mr. Vaile to retroactively adhere to any order, in any amount. The case law prohibiting retroactive modification is so well established in

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42. "Under contract principles, specifically rescission and reformation, the convoluted portions of the Decree were vacated and **modified** by the court to reflect $1,300 per month as a 'sum certain' . . . ." *Decision I*, ¶ 128 (emphasis added); AAP Vol. 2, p. CAV000360.

Nevada that the district court could quote relevant case law on point: "[U]nder the case of Day vs. Day, I cannot retroactively modify a child support agreement."[43] Despite full knowledge of this Court's precedent prohibiting retroactive modification and of the fact that the court was acting outside its jurisdiction, the lower court not only instituted retroactive modification, it also found Mr. Vaile in contempt of court for not adhering to the modifications retroactively.

If this Court had communicated, in 2002, an intention to reject subject matter jurisdiction over custody and visitation, but to *retain* jurisdiction over child support when it sent the parties' children to Norway over seven years ago, there might be some arguable basis for the lower court's actions below. However, based on the statutes that Porsboll says apply, the lower court's exercise of modification jurisdiction was in error.

IV. DEFENSES TO THE APPLICATION OF PENALTIES

Unless this Court finds that retroactive modification of child support orders is now lawful in Nevada, no child support penalties actually accrued and the merits of this appeal are moot. If retroactive modification is now allowable under the law, the defenses below apply.

This Court has held that equitable defenses such as estoppel or waiver may be asserted by the obligor in a proceeding to enforce or modify an order for child support or to reduce child support arrearages to judgment." Mason v. Cuisenaire, 122 Nev. 43 (2006). Here, the district court retroactively modified the parties' agreement around the

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[43] Appx. RSV0025.

defenses, refused to admit facts relevant to the defenses, and judicially negated the waiver and repudiation of Ms. Porsboll. These actions were in error.

A. ESTOPPEL PREVENTS THE APPELLANT FROM MAKING CONTRARY ARGUMENTS BEFORE THIS COURT

Under the doctrine of judicial estoppel a party may be estopped merely by alleging or admitting an assertion in a former proceeding contrary to the assertion sought to be made in the current litigation. Sterling Builders, Inc. v. Fuhrman, 80 Nev. 543, 549 (1964). Judicial estoppel actually applies to three independent assertions by Ms. Porsboll on appeal. Application of the principles of estoppel to any of the issues disposes of this case in whole.

1. THAT JURISDICTION EXISTS IN THIS CASE AFTER ALL

A party who has taken advantage of the favorable provisions of a judgment or has acquiesced in its terms by enforcing it will not be permitted a review. Culbertson v. Culbertson, 91 Nev. 230 (1975). On emergency appeal to this Court in this case in 2000, Ms. Porsboll claimed that "[s]ince the lower court had no subject matter jurisdiction to enter the Decree, *all* subsequent orders of the District Court seeking to enforce that Decree in any way must be found to be void *ab initio*"[44] By virtue of this Court's 2002 decision in her favor, Ms. Porsboll was able to remove the parties' children to Norway, where they have since remained separated from meaningful contact with their father and large family in the United States. After benefiting from this Court's 2002 judgment, Ms. Porsboll now claims, over seven years later, that the district court did indeed have

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[44] *Emergency Petition*, 16.

jurisdiction of both the case and the parties. This legal flip-flopping is not only ironic, it is also prohibited by the principle of *estoppel*. Ms. Porsboll may not argue against the very result that she sought and obtained from this Court.

2. *That the Penalties Statute is Not Ambiguous*

Ms. Porsboll claims on appeal that the district court erred in finding that the Nevada statute on penalties is ambiguous. This argument is particularly disingenuous given that her counsel agreed, during the proceedings in the court below, with the Attorney General's position that the statute is ambiguous. Ms. Porsboll's counsel stated that, "Mr. Winne argues, and ***correctly***, that the statute could certainly be perceived by a judicial officer as ambiguous."[45] He repeated the assertion that the statute was ambiguous in a letter to the court expounding on the statute.[46] Having argued that the statute was ambiguous below, Ms. Porsboll's argument to the contrary on appeal must be rejected.

3. *That the Parties Agreement is Not Void*

Under the doctrine of judicial estoppel, a party who has stated on oath in former litigation that a given fact is true, will not be permitted to deny that fact in subsequent litigation. Sterling Builders, 80 Nev. at 549.

In the court below, Mr. Vaile testified that during depositions in 2003, Ms. Porsboll testified under oath that the parties' child support agreement was void.[47] She expressed to Mr. Vaile her intention to pursue a support remedy in her home jurisdiction. She made

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45. Appx. RSV0027 (emphasis added).

46. See Willick Letter to court, dated June 20, 2008, p.8.

47. Appx. RSV0035, RSV0044.

that assertion under oath while sitting next to the same counsel who is representing her today. During the September 18, 2008 hearing, Ms. Porsboll did not deny that she made these claims, but only claimed retrospectively that she still wanted Mr. Vaile to pay.[48]

Having claimed the contrary, the principles of estoppel prevent Ms. Porsboll from now arguing that the agreement is not void.

B. Ms. Porsboll Repudiated the Parties' Agreement

These same facts relative to Ms. Porsboll's estoppel support her repudiation of the agreement. A contractual anticipatory repudiation must be clear, positive, and unequivocal. Covington Bros. v. Valley Plastering, Inc., 93 Nev. 355 (1977).

In addition to claiming that the agreement was void, Ms. Porsboll refused to submit any documentation which Mr. Vaile could use, according to the agreement, to calculate the support, thereby making it *impossible* for him to adhere to the agreement.[49] Mr. Vaile submitted into evidence an email, of which Porsboll acknowledged receipt, that communicated his continuing willingness to adhere to the 1998 agreement.[50] Ms. Porsboll testified that she simply refused to answer.[51]

Mr. Vaile also testified regarding assertions made during the Texas proceedings that immediately followed this Court's 2002 decision. There, Mr. Vaile requested that the Texas court enforce provisions of the parties' agreement which had not been clearly

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48. Appx. RSV0036.
49. Appx. RSV0045-RSV0046.
50. Appx. RSV0045-RSV0046.
51. Appx. RSV0038-RSV0039.

thrown out by this Court. In response, Porsboll's Texas counsel, who was in constant contact with Las Vegas counsel in this case, claimed that the entire agreement was void.[52] During the September 18, 2008 hearing, Ms. Porsboll, who was present at the Texas proceedings, admitted that these assertions had been made in the Texas proceedings.[53]

By claiming under oath that the parties' agreement was void, expressing her intention not to be bound by the agreement, and then refusing to provide the necessary input into the formula under which child support was to be calculated under the parties' agreement, Ms. Porsboll clearly, positively, and unequivocally repudiated the parties agreement. Any conclusions of the lower court to the contrary are clear error and contrary to the substantial evidence presented at trial on the matter.

The lower court omitted any finding relative to 1) Porsboll's assertion under oath that the parties' agreement was void, 2) the intent Ms. Porsboll expressed to Mr. Vaile not to be bound by the agreement, and 3) Ms. Porsboll's refusal to provide the information necessary for Mr. Vaile to calculate support under the agreement. The lower court's decision also omits 4) mention that Ms. Porsboll, who also had first-hand knowledge of the Texas proceedings, testified in concurrence with Mr. Vaile's testimony regarding the events that took place there.

Omitting all the relevant facts, the lower court cited the closing argument of Ms. Porsboll's counsel, who had no first hand knowledge of the Texas hearing, and who

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52. Appx. RSV0043.

53. Appx. RSV0041-RSV0042.

argued contrary to the direct testimony of *both* parties.[54] The lower court adopted counsel's argument over the evidence provided by both parties and concluded that "there was no substantial evidence at trial to support Mr. Vaile's contention."[55]

Despite the fact that the lower court attempted to undo the repudiation of one party to an agreement by failing to recognize direct evidence, by weighing argument of counsel greater than the evidence presented at trial, and by modifying the parties' agreement to remove the repudiating party's obligation with retroactive effect, it is clear that Ms. Porsboll repudiated her agreement and that Mr. Vaile should not be bound to the agreement subsequent to that repudiation.

C. Ms. Porsboll Waived Support

The same facts that support repudiation, also demonstrate that Ms. Porsboll waived her claim to support under the agreement by failing to act. To establish a valid waiver, the party asserting the defense must show that there has been an intentional relinquishment of a known right. McKellar v. McKellar, 110 Nev. 200, 202 (1994). Waiver may be implied from conduct which evidences an intention to waive a right, or by conduct which is inconsistent with any other intention than to waive a right. Parkinson v. Parkinson, 106 Nev. 481, 484 (1990) (finding waiver where custodial parent never made any demand on non-custodial parent, nor pursued her legal right to the funds during five and one-half years since non-custodial parent ceased making payments and the motion

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54. *Decision I*, ¶ 69; AAP Vol. 2, p. CAV 00355.

55. *Decision I*, ¶ 70; AAP Vol. 2, p. CAV 00355.

for support was filed). The party relying upon the waiver must have been misled to his prejudice. Melahn v. Melahn, 78 Nev. 162, 167 (1962).

From the time that Mr. Vaile became the residential parent by order of the lower court in 2000, until a request to establish an arrearage was made in November 2007,[56] Ms. Porsboll never communicated to Mr. Vaile any intention to be bound by the agreement nor has she taken any action to communicate a desire that Mr. Vaile pay support under the tenets of that agreement. She expressed to Mr. Vaile her intention to pursue a support remedy in her home jurisdiction, and made that assertion under oath sitting next to her current counsel. Neither Ms. Porsboll nor her counsel pursued a request of any state or federal agency or court to enforce the parties' 1998 child support agreement. During this entire period, Ms. Porsboll was represented by the same Las Vegas attorney and law firm which is representing her now.

Ms. Porsboll's failure to act on the parties' Nevada agreement, and the unequivocal communication to Mr. Vaile to waive any rights which may have existed under the agreement is the very essence of the law of waiver. It is also clear that Mr. Vaile relied on Ms. Porsboll's assertions to his detriment.[57]

Instead of acknowledging Porsboll's waiver, the lower court established a new standard for waiver and then asserted that Mr. Vaile had not met the new standard. The

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56. This period of time is two years greater than the 5 ½ years of inaction that the *Melahn* Court held established waiver.

57. For example, the lower court held that Mr. Vaile could have paid any amount of child support (other than zero) under protest to avoid contempt of court on the matter. *Decision I*, ¶ 165; AAP Vol. 2, p. CAV 00363.

lower court's standard for waiver was that it is not effective if the waiving party later anticipates receiving support,[58] unless the party has had legal training,[59] unless the party has signed a written agreement,[60] and unless that agreement is placed on the court record by her counsel.[61] None of the requirements listed by the court are conditions for valid and effective waiver under current law.

Ms. Porsboll's waiver was intentional as she not only failed to act for over seven years, she also communicated her intention not to act directly to Mr. Vaile. Ms. Porsboll's waiver was knowing, since she asserted that the Nevada agreement was void while under the advice of her current counsel, and consciously made a decision to refuse the Nevada agreement in favor of an eventual Norwegian order. Her waiver was voluntary because no party forced her to make the decisions that she made. There is no other explanation for the communications that Ms. Porsboll made on this point. As such, Mr. Vaile respectfully requests that the Court enforce this Court's precedent on the subject of waiver rather than allow the standard of the lower court's own making to stand.

V. ARGUMENT ON THE MERITS

THE AGENCY DETERMINATION IS ENTITLED TO GREAT DEFERENCE

Because a retroactive modification of child support was applied to Mr. Vaile in this case, retroactive penalties were also applied. The question raised on appeal is whether

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58. *Decision I*, ¶ 77; AAP Vol. 2, p. CAV 00356.
59. *Decision I*, ¶ 140; AAP Vol. 2, p. CAV 00361.
60. *Decision I*, ¶ 141; AAP Vol. 2, p. CAV 00361.
61. *Decision I*, ¶ 143; AAP Vol. 2, p. CAV 00361.

the attorney's software is in fact calculating penalties correctly, or whether the agency's method as explained by the state Attorney General's Office is the correct formula.

The posture of this case is unique in that neither of the parties are residents of the State, and besides the monetary sums at issue, neither has a vested interest in how the penalties matter is ultimately resolved. However, the attorney representing Ms. Porsboll in this case, Mr. Willick, is also the creator and vendor of the computer program used to calculate penalties against Mr. Vaile. He apparently has a significant personal interest in this case on behalf of both his software's and his professional reputation.[62] The only evidence presented by Ms. Porsboll to the lower court on the manner in which the software calculates penalties was the testimony of Mr. Willick himself, who claimed to have personal first-hand knowledge of both the software program's inner workings and the legislative interpretation of the statute in question.[63] He is, in effect, the self-proclaimed expert, witness and attorney all at the same time.

Mr. Vaile has already briefed this Court on the obvious conflict of interest and ethical violation caused by Mr. Willick's testimony and self-representation in this case. In response to Mr. Vaile's request for disqualification of this attorney, Mr. Willick claimed that the testimony that he provided to the lower court was not testimony at all, but only first-hand "argument" on point. Interestingly, what follows is that Ms. Porsboll is

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62. The reputation threat is particularly poignant given that in addition to discovering the error in penalties inherent in Mr. Willick's software, Mr. Vaile's unbundled attorney, Greta Muirhead, Esq., also discovered errors in the calculation of principle in an amount exceeding $40,000 in this case. Mr. Willick conceded these errors, but has vigorously defended the penalties errors.

63. Appx. RSV0027-RSV0029.

appealing a decision of the lower court in a matter in which she (or rather her attorney) presented no evidence at all, only the "argument" of an interested software vendor. One can hardly complain of the lower court getting the facts wrong when Ms. Porsboll countered expert evidence by Nevada's own Attorney General's Office, with only self-serving argument by her counsel.

Even if Mr. Willick's argument could have "officially" been considered testimony by the lower court, his arguments represent the interests only of a single party, despite claims that he represents the interests of the "private bar" on this matter. Neither a single party's, nor a software vendor's, interpretation of a statute is entitled to a level of legal persuasion that outweighs the substantial deference that the state agency is due.

If a statute is capable of being understood in two or more senses by reasonably well-informed persons, then the statute is ambiguous. Thompson v. First Judicial District Court, 100 Nev. 352, 354 (1984). An agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent to administrative action and great deference shall be given to the agency's interpretation when it is within the language of the statute. State v. Morros, 104 Nev. 709, 713 (1988). The state agency's decision shall be presumed correct, and the party challenging it shall have the burden of proving error. US v. State Engineer, 117 Nev. 585, 589 (2001).

If we assume, arguendo, that Mr. Willick is well-informed on the matter and that the claimed practices of Best Buy have applicability to Nevada's child support penalties, the disagreement between Mr. Willick and the Deputy Attorney General on the interpretation

of the statute only demonstrates that the statute is, indeed, ambiguous. This is especially true where both individuals appear to have been present at key legislative events where the statute in question was discussed. The fact that Mr. Willick himself claimed that the statute was ambiguous in the court below, and now claims that it is not, further solidifies this fact.

When a statute is ambiguous, the great deference and presumption in favor of the agency's interpretation of the statute, as represented by the Attorney General's office becomes all the more relevant.[64] Ms. Porsboll's analogies to buying on consumer credit or the practices of banks and department stores are not helpful or persuasive in determining legislative intent on child support penalties. The interpretation offered by the agency is neither arbitrary nor capricious, but rather well thought out and reasonable given the legislative history. Given the dependencies established throughout the state on the agency's reasoned interpretation of the statute, together with Mr. Willick's admission that it is a simple matter for him to reprogram his software,[65] public policy would dictate that the lower court be affirmed on this matter if resolution is necessary for disposal of this case.

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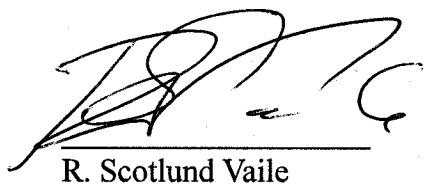
64. That this result follows may be one of the reasons that Mr. Willick changed his position on the "ambiguous" question.

65. See *Opening Brief*, fn 24.

CONCLUSION

For the reasons stated above, Mr. Vaile respectfully requests that the Court uphold the law of the case and dismiss this case for lack of personal jurisdiction and lack of subject matter jurisdiction. In the alternative, Mr. Vaile requests that the Court acknowledge and enforce his defenses against application of retroactive child support penalties against him. In the final alternative, Mr. Vaile requests that the Court uphold the interpretation of the child support penalties statute as put forth by the agency tasked with enforcement of it.

Respectfully submitted,



R. Scotlund Vaile
PO Box 727
Kenwood, CA 95452
(707) 833-2350
Respondent in Proper Person

CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this answering 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 NRAP 28(e) which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the 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 30th day of SEPTEMBER, 2009.

R. Scotlund Vaile
PO Box 727
Kenwood, CA 95452
(707) 833-2350
Respondent in Proper Person

CERTIFICATE OF SERVICE

I certify that I am the Respondent in this action, and that on the 30th day of SEPTEMBER, 2009, I served a copy of the foregoing Respondent's Answering Brief, by placing the document in

___ U.S. Mail, postage prepaid; or

✓ National courier (Fedex or UPS) with expedited delivery prepaid,

and addressed as follows:

Marshal S. Willick, Esq.
Nevada Bar No. 002515
3591 E. Bonanza Road, Suite 200
Las Vegas, NV 89110-2101
Attorney for Appellant

R. Scotlund Vaile
PO Box 727
Kenwood, CA 95452
(707) 833-2350
Respondent in Proper Person