

1
2 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

3
4 CISILIE A. PORSBOLL
5 fka, CISILIE A. VAILE,

6 *Appellant,*

7
8 VS.

9
10 R. SCOTLUND VAILE,

11 *Respondent.*
12
13

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

FILED

NOV 12 2009

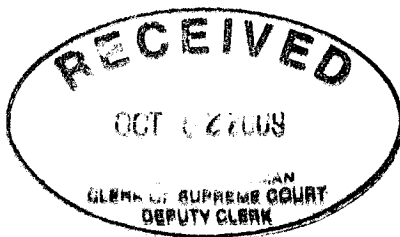
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BY S. Young
DEPUTY CLERK

14 Appeal from a Judgment of the
15 Eighth Judicial District Court, Family Division

16 **RESPONDENT'S APPENDIX**
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23 R. Scotlund Vaile
24 Respondent in Proper Person
25 PO Box 727
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27 (707) 833-2350
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09-24019

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Excepted Transcripts of District Court Hearing	Held September 18, 2008	RSV0030- RSV0046

Eighth Judicial District Court
Order dated October 25, 2000

FILED

OCT 25 2 40 PM '00

Shirley J. Higgins
CLERK

1 ORDER
2 JOSEPH F. DEMPSEY, Esq.
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10 R. SCOTLUND VAILE

11 DISTRICT COURT
12 FAMILY DIVISION
13 CLARK COUNTY, NEVADA

14 R. SCOTLUND VAILE,
15 Plaintiff,

16 vs.

17 CISILIE A. VAILE,
18 Defendant.

CASE NO: D 230385
DEPT. NO: G

DATE OF HEARING: 10-17-2000
TIME OF HEARING: 3:30 p.m.

19 ORDER

20 The DEFENDANT'S MOTION FOR IMMEDIATE RETURN OF INTERNATIONALLY
21 ABDUCTED CHILDREN AND MOTION TO SET ASIDE FRAUDULENTLY OBTAINED
22 DIVORCE. OR IN THE ALTERNATIVE, SET ASIDE ORDERS ENTERED ON APRIL 12, 2000,
23 AND REHEAR THE MATTER, AND FOR ATTORNEY'S FEES AND COSTS having come on for
24 hearing on the above indicated date, the Plaintiff present and represented by his attorney, JOSEPH
25 F. DEMPSEY, ESQ.. of the law firm of DEMPSEY, ROBERTS & SMITH, LTD., and the
26 Defendant present and represented by her attorneys, LAW OFFICE OF MARSHAL S. WILICK, P.C.,
27 appearing before the HONORABLE CYNTHIA DIANNE STEEL and the Court having reviewed
28 al the papers, pleadings and records on file herein, together with the oral argument of counsel and
29 good cause appearing; the Court finds:

1. This Court finds no support restricting it from looking at other issues first before making a Hague Convention decision. This Court makes no Hague Convention determination, but if it did make such a determination, the Court would find that the habitual residence and contracting state for the children would be the State of Nevada ^{pursuant to the Decree of Divorce} and that the Plaintiff, Scotlund Vaile, did not wrongfully take the children, but instead, Defendant, Cisilie Vaile, was wrongfully retaining the children in Norway beyond those agreements which were in place between the parties at that time. Those agreements had not been objected to by anyone at that point in time when Mr. Vaile resecured his children.

2. There is no case that says "If you are living out of country and you want to move from one place to another, that moving your address was not enough." That based upon testimony of the witnesses, that these parties both wanted a divorce and didn't want to wait another year to achieve it. That Mr. Vaile took sufficient steps to change his residence from the State of Virginia to the State of Nevada prior to May 12, 1998. If a billing statement from a credit card company was mailed May 12, 1998, it is absolutely imperative that Mr. Vaile write them a letter long before that time to make certain that the address change is made. Just because a billing statement does not state May 12, 1998, it does not mean that there was no prior conduct by Mr. Vaile to change his address from the State of Virginia to the State of Nevada. Therefore, the Court believes it was Mr. Vaile's intention to remove his residence from the State of Virginia, and move it to the State of Nevada. Since Mr. Vaile's body was neither in Virginia nor Nevada, and because he was restrained by the British authorities in London, he could not be physically present in Nevada. But for those things, Mr. Vaile would have been physically present in Nevada sooner than he was actually present in Nevada. Therefore, the Court believes that it was Mr. Vaile's intent to be physically present in Nevada and the Court relies on Mr. Vaile's changing of address of his legal residence from one place to another.

3. That the Court does not find that Mr. Vaile has intentionally tried to defraud the Court, as the Court does not find Ms. Vaile intentionally trying to defraud the Court. The Court believes that both parties just wanted to be anywhere, without the other. Therefore, the Court finds that there was both personal jurisdiction and subject matter jurisdiction in order to achieve the Decree of Divorce and the separating of whatever properties were separated.

1 4. That the Court also finds merit in the argument of Judicial Estoppel. The Court does not
2 believe that Ms. Vaile signed the Decree of Divorce under duress. The timing is not appropriate for
3 Ms. Vaile to claim duress. The Court does not believe Ms. Vaile felt that Mr. Vaile would take the
4 children from her under some American Law. Ms. Vaile already had forces under British law
5 preventing Mr. Vaile from taking the children and Ms. Vaile had the Decree of Divorce domesticated
6 in Norway as soon as she received a copy of it. The Court believes that Ms. Vaile was pretty
7 comfortable with her legal surroundings in Europe. Therefore, the Court does not believe that Ms.
8 Vaile had any feelings of duress at the time she signed the admissions in the Answer. Further, if Ms.
9 Vaile felt that she had been under duress, or that there was a lack of jurisdiction, at that time, her
10 redress would have been to immediately file something in Norway, England or elsewhere to try to
11 correct it. Ms. Vaile did nothing in this regard. The Court simply does not believe Ms. Vaile was
12 coerced or under any duress whatsoever.

13 5. That when the Court considers the full faith and credit with regard to the residency laws, the
14 Court believes that the Court does not want citizens of the United States forum shopping. This Court
15 does not want somebody who actually lives in Virginia and who could run to the courthouse there,
16 flying to Las Vegas and in a half an hour obtaining a divorce, and flying back to Virginia saying "I
17 beat the rap!" That is the full faith and credit this Court is trying to achieve by adhering to the
18 residency statutes. However, in this case, the Court finds that these parties had left Virginia and
19 neither of them had any intention of ever returning to Virginia. Therefore, the Court believes it was
20 the intent of the parties to relocate to Nevada, be it for tax purposes, or any other purpose. Because
21 Mr. Vaile's mother lived here and he needed some time to "catch his breath," whatever the reason
22 is, they came here and Mr. Vaile had no idea when he was going to leave when he signed the Decree.

23 6. That the Court finds that Ms. Vaile took advantage of the Decree of Divorce, immediately
24 moved to Norway with the children for a year, then decided after a year that she didn't want to live
25 up to the agreement. The appropriate thing for the parties would be to file a motion.

26 7. The Court further finds that the Court never had jurisdiction over the Children, because the
27 children were never present in this state. The Court had jurisdiction over the parties' conduct toward
28 each other with regard to the agreement under a contract theory. He (Mr. Vaile) promised to do

1 certain things and she (Ms. Vaile) promised to do certain things and they did not do those things.
2 When the parties came back to Court the Court, after Ms. Vaile was properly served and the Court
3 gave her extra time to respond, the Court issued the Order that Mr. Vaile could retrieve the children.
4 That Order is a "Pick Up" Order, which are normally followed by another hearing. That didn't
5 happen. The Court had jurisdiction over the conduct of the parties, but it did not have jurisdiction
6 over the children.

7 8. The Court is going to keep emergency jurisdiction over the children until some other court
8 says "I have jurisdiction over the children and I will relinquish you of that responsibility." The two
9 judges from the State of Texas and Norway need to talk to each other and decide who has
10 jurisdiction. The victor court will call this Court and advise of the jurisdictional decision. This
11 Court will then relinquish jurisdiction. This Court will return the children to the State of Texas until
12 it receives the call from Texas or Norway. The court with jurisdiction needs to sign an order.
13 cosigned by the other court, and this Court must receive the countersigned order before it releases
14 jurisdiction. This Court will retain the children's passports and will return Mr. and Ms. Vaile's
15 individual passports. The children are not to be shuttled continually back and forth between Texas
16 and Norway. Whatever visitation Ms. Vaile wants, she can have while the children reside in Texas
17 with Mr. Vaile. This subject matter jurisdiction on behalf of the children is not waivable. The
18 parties have to start a custody and visitation decision "from scratch." What they have now is a
19 contract, but this Court cannot say what to do with the children.

20 The Court having been fully advised in the premises, and good cause appearing therefore:

21 **IT IS HEREBY ORDERED** the Defendant's *MOTION TO SET ASIDE FRAUDULENTLY*
22 *OBTAINED DIVORCE, OR IN THE ALTERNATIVE, SET ASIDE ORDERS ENTERED ON APRIL*
23 *12, 2000, AND REHEAR THE MATTER, AND FOR ATTORNEY'S FEES AND COSTS* is DENIED
24 and the Court makes no Hague Convention determination on the Defendant's *MOTION FOR*
25 *IMMEDIATE RETURN OF INTERNATIONALLY ABDUCTED CHILDREN.*

26 **IT IS FURTHER ORDERED** that the children are to be returned to Texas in the custody
27 of Plaintiff, Scotlund Vaile, on October 25, 2000. That the children's passports will remain in the
28 Custody of this Court until a court of competent jurisdiction issues an order regarding custody of the

1 children. The passports of the Plaintiff and the Defendant, Cisilie Vaile, will be immediately
2 returned by the Court.

3 IT IS FURTHER ORDERED that Defendant, Cisilie Vaile, is awarded liberal visitation
4 with the children while Defendant is in Las Vegas, until October 25, 2000, and then later in Texas
5 while this Court awaits word from another court that will assert jurisdiction over the children.

6 IT IS FURTHER ORDERED that the children shall remain in Plaintiff's temporary custody
7 in Texas until this Court receives and Order from whichever court is deemed to have jurisdiction
8 over the children.

9 DATED and DONE this 25th day of October 2000.

10 ~~GYRIL M. COLON STEEL~~

11 District Court Judge

12 Respectfully Submitted By:

13 DEMPSEY, ROBERTS & SMITH, LTD.

14 By: *Dempsey*
15 JOSEPH F. DEMPSEY, ESQ.
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20 Attorney for Plaintiff
21 R. SCOTLUND VAILE

22 Approved as to Form and Content by:

23 LAW OFFICE OF MARSHAL S. WILICK, P.C.

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Attorney for Defendant
CISILIE A. VAILE

Robert Cerceo

OCT 20 4 16 PM '00

CLERK OF COURT
FILED

Nevada Supreme Court Decision
decided April 11, 2002



LEXSEE 44 P.3D 506, 511

**CISILIE A. VAILE, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND
THE HONORABLE CYNTHIA DIANNE STEEL, DISTRICT JUDGE, FAMILY
COURT DIVISION, Respondents, and R. SCOTLUND VAILE, Real Party in
Interest.**

No. 36969

SUPREME COURT OF NEVADA

118 Nev. 262; 44 P.3d 506; 2002 Nev. LEXIS 33; 118 Nev. Adv. Rep. 27

April 11, 2002, Decided

SUBSEQUENT HISTORY: [***1] Petition for Rehearing Denied September 5, 2002.

US Supreme Court certiorari denied by *Vaile v. Porsboll*, 538 U.S. 906, 123 S. Ct. 1483, 155 L. Ed. 2d 225, 2003 U.S. LEXIS 1990 (2003)

Related proceeding at *Porsboll v. Vaile*, 2008 U.S. App. LEXIS 7309 (9th Cir. Nev., Mar. 26, 2008)

DISPOSITION: Writ of mandamus issued.

COUNSEL: Marshal S. Willick, Las Vegas, for Petitioner.

Rawlings Olson Cannon Gormley & Desruisseaux and Peter M. Angulo, Las Vegas, for Real Party in Interest.

JUDGES: AGOSTI, J. ROSE, LEAVITT and BECKER, JJ., concur. MAUPIN, C.J., and YOUNG, J., with whom SHEARING, J., agreed, dissented.

OPINION BY: AGOSTI

OPINION

[*265] [**509] BEFORE THE COURT EN BANC.

OPINION

By the Court, AGOSTI, J.:

Original petition for a writ of mandamus or prohibition challenging portions of a divorce decree relating to child custody and visitation and seeking to compel the district court to make a determination regarding the "habitual residence" of two minor children pursuant to the Hague Convention on the Civil Aspects of International Child Abduction.

In this original petition for extraordinary relief we are asked to decide two questions: (1) whether the district court had jurisdiction over one of the parties and over the subject matter when it entered a decree of divorce; and (2) whether the district court correctly concluded that it need not make determinations pursuant to the Hague Convention on the Civil Aspects of International Child Abduction¹ regarding the children's habitual residence and [*266] whether [***2] the children were wrongfully removed from their habitual residence.

¹ *The Hague Convention on the Civil Aspects of International Child Abduction will be referred to throughout this opinion as "the Hague Convention" or simply as "the Convention."*

I.

In 1989, Petitioner, Cisilie Vaile, a citizen of Norway, met the Real Party in Interest, Scotlund Vaile, a

United States citizen, in Norway. Both were twenty years old. The couple became engaged in early 1990, two weeks after Scotlund, who is fluent in the Norwegian language, had completed his duties as a missionary in Norway. Shortly after becoming engaged, Scotlund returned to live with his father and stepmother in the state of Ohio where he had earlier lived before his assignment to Norway. Cisilie followed within a short period of time. The couple married in Utah in 1990 and then returned to Ohio while Scotlund attended Ohio State University. Scotlund completed his graduate program in 1996; the family then moved to Virginia for Scotlund's employment as [***3] an engineer. The couple's children, Kaia and Kamilla, were born in the United States in 1991 and 1995, respectively. Because of their parents' nationalities, the children enjoy dual Norwegian and United States citizenship. In August 1997, the family relocated to London, England, where Scotlund's engineering firm had transferred him.

By the autumn of 1997, Scotlund and Cisilie were experiencing grave difficulties in their marriage. In the spring of 1998, the couple agreed to divorce. Fearing Scotlund would take the children to the United States, Cisilie turned to the British courts. She ultimately obtained an agreement from Scotlund upon which the British court based an order dated June 8, 1998. The order prohibited Scotlund from removing the children from the United Kingdom and also prohibited him from removing the children from Cisilie's care until July 8, 1998, when the matter could be heard. On July 7, 1998, Scotlund presented Cisilie with a twenty-three-page written agreement. Cisilie signed the agreement, which purported to settle the couple's property and financial affairs, and which also purported to settle matters of child custody, support and visitation. The agreement contained [***4] a provision that the parties would obtain a divorce in Nevada, where Scotlund's mother and stepfather had relocated from Maine in the spring of 1998.

After a hearing in the British court on July 8, 1998, at which both Scotlund and Cisilie appeared, the court entered a written order on July 9 in which Cisilie was granted physical custody of both children and received permission to remove the children permanently from Britain. Scotlund was permitted to have his passport returned to him. The order noted that Scotlund had departed the [**510] United Kingdom to go the United States on the morning of July 9, 1998. Cisilie and the children traveled to Norway on July 13, 1998, and

remained there for nearly two [*267] years, until May 2000. On July 14, 1998, Scotlund signed a verified complaint for divorce, which was filed in the Eighth Judicial District Court in Clark County, Nevada, on August 7, 1998. Cisilie's answer, in proper person, was filed the same day. Scotlund departed Las Vegas on July 22, 1998, and after vacationing briefly in California, returned during the first week of August 1998 to his work in London.

Scotlund's complaint alleged that he, the plaintiff, was a resident of Nevada and that [***5] he had been physically present in Nevada for more than six weeks prior to the filing of the complaint and that he had the intention of making Nevada his home for an indefinite period of time. Of course, this was not true.

The district court in Clark County, without a hearing, entered a decree of divorce on August 10, 1998. The decree incorporated the terms of the parties' twenty-three-page agreement. Among other things, the agreement provided for joint legal custody, with Cisilie to have physical custody until each child is ten years old, after which each child would live for a year with Scotlund and then for a year with Cisilie until each child turned twelve, at which time the child would choose which parent would be the "residential parent." The agreement also obligated Cisilie to move after July 1, 1999, to the United States during the times when she was to be the "Residential Parent," and maintain a residence in proximity to Scotlund's residence.

In November 1999, Scotlund informed Cisilie that he intended to relocate from London, England, to Las Vegas. Scotlund demanded, pursuant to the agreement, that Cisilie relocate with the children to Las Vegas as well. Cisilie then commenced [***6] legal proceedings in Norway to allow her to remain with the children in Norway. Scotlund participated in the Norwegian proceedings.

In February 2000, Scotlund filed a motion in the district court in Clark County, seeking physical custody of the children, a finding that Cisilie was in contempt of the court and an order for the immediate production of the children.

Cisilie did not respond to Scotlund's Nevada motion. Instead she sought, from the Norwegian court, an order for the award of physical custody of the children to her. The Norwegian court appears to have been fully apprised

of all the legal actions taken by each party up to that point. The Nevada district court does not appear to have been so informed.

The Norwegian court ordered Scotlund to respond to Cisilie's complaint. Scotlund instead requested an extension of time to respond. Scotlund meanwhile pursued his Nevada motion. On March 29, 2000, the district court in Nevada entered an order granting Scotlund's motion, no opposition having been filed. The order granted Scotlund custody of the children and held Cisilie in contempt.

[*268] In May 2000, Scotlund and his girlfriend met Cisilie and her fiance and the children at a hotel [***7] in Oslo, Norway. After dining, the four adults and the children went to Scotlund's hotel suite because Scotlund said he wanted to give Kaia a birthday gift. Once inside the suite, Scotlund and his girlfriend took the children into an adjoining room to give them a "surprise." Cisilie and her fiance waited out of view of the children. After a period of time, Cisilie entered the adjoining room and discovered that her children were gone. The room was empty. At the front desk, Cisilie was given an envelope left by Scotlund, which contained the Nevada court's order. Cisilie contacted the Norwegian police, who treated the incident as a kidnapping. She then filed a petition with the Norwegian court, seeking to enjoin Scotlund from leaving Norway with the children. Scotlund filed a response in opposition to her petition, and the Norwegian court swiftly issued an injunction forbidding Scotlund from taking the children out of Norway. Scotlund had already left Norway, however, and had earlier removed the children from Norway and sent them to his new residence in Texas.²

2 The Norwegian court did not decide the issue of custody in its order enjoining Scotlund from removing the children from Norway. Rather, the court acknowledged the Nevada court's order and determined that a full hearing was necessary to address the custody issue.

[***8] [**511] On September 21, 2000, Cisilie filed in the Clark County district court a motion for the Immediate Return of Internationally Abducted Children and Motion to Set Aside Fraudulently Obtained Divorce. In the alternative, Cisilie moved to set aside the order granting Scotlund custody and holding her in contempt and also sought rehearing.

On October 10, 2000, and on October 17, 2000, the district court held an evidentiary hearing. On October 25, 2000, the court entered its order denying Cisilie's motions. Among other things, the district court found that Scotlund had satisfied Nevada's residency requirement, even though Scotlund had never lived in Nevada, and had not even been physically present in Nevada for the requisite six-week period. The district court therefore refused to set aside the divorce decree for lack of jurisdiction.

II.

The first question before us is whether the district court had jurisdiction to enter its decree of divorce in 1998. We 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.

NRS 125.020(2) [***9] states, in pertinent part, "no court has jurisdiction [*269] to grant a divorce unless either the plaintiff or defendant has been resident of the state for a period of not less than 6 weeks preceding the commencement of the action." In addition, *NRS 54.010* states that when the court's jurisdiction depends upon the residence of one of the parties to the action, the court shall require corroboration of the evidence. *NRS 10.155* states that the legal residence of a person with reference to his right to maintain a lawsuit is that place where he has been physically present within the state during all of the period for which residence is claimed by him. The statute specifically states that "should any person absent himself from the jurisdiction of his residence with the intention in good faith to return without delay and continue his residence, the time of such absence is not considered in determining the fact of residence." The statute requires actual, physical presence in Nevada during "all of the period" for which residency is claimed. The only exception is for absence with a good faith intention of returning without delay. We note that one cannot [***10] return to a place of residence if one never lived there.

It is a well-settled principle of law in Nevada that residency under *NRS 10.155* encompasses not simply an intent to reside in Nevada for an indefinite period of time, but actual, physical presence in this state for six weeks prior to the filing of the complaint for divorce. In *Fleming v. Fleming*,³ this court had the opportunity to interpret a statute identical in all material aspects to *NRS*

10.155; we stated:

3 36 Nev. 135, 134 P. 445 (1913).

It was the intention of the legislature to prescribe that actual, physical presence should be imminently essential to constitute a residence for the purpose of making that residence legal, where the party had any right dependent on residence

Giving to the word "resided," as used in the statute, its plain, ordinary significance, it must necessarily be construed to require an actual living in the county for six months preceding the filing [***11] of the suit. The word "resided" in its general acceptance carries with it the idea of permanency as well as continuity. It does not mean living in one place and claiming a home in another; it does not mean a constructive or imaginary residence in Washoe County, while actually living or abiding or being in some other county. ⁴

4 *Id.* at 138-40, 134 P.2d at 447 (citation omitted).

In *Aldabe v. Aldabe*,⁵ this court cited *Fleming* and a host of other Nevada cases for the proposition that "residence is synonymous [*270] with domicile and it is consonant with the many decisions of our court that the fact of presence together with *intention* comprise bona fide residence for divorce jurisdiction."

5 84 Nev. 392, 396, 441 P.2d 691, 694 (1968).

[**512] Applying the principle of actual presence to Scotlund, it [***12] is clear that he had not established a residence in Nevada at the time the complaint was filed sufficient to confer upon the court jurisdiction to grant a divorce. Scotlund signed the verified complaint for divorce only five days after he had arrived in Nevada. Scotlund never resided in Nevada at any other, prior point in time. Scotlund's statement in his verified complaint that he was physically present in Nevada for more than six weeks prior to the commencement of the action is false.

Scotlund also filed the affidavit of a witness to corroborate his residency as required by *NRS 54.010*. The affiant swore as follows: "for more than six weeks I have known Plaintiff and have seen Plaintiff physically present in Clark County, Nevada on an average of 3-4 times weekly, unless stationed out of the state with his

employer." (Emphasis added.) Essentially, the resident witness swore under penalty of perjury that she had known Scotlund for more than six weeks but not that she had seen him in Nevada for more than six weeks. This affidavit does not sufficiently corroborate Scotlund's claim of residency. Also, though not raised in this court by either party, we note [***13] that the district court's reliance upon the affidavit was improper for an additional reason.

Scotlund filed a complaint for divorce and secured and filed Cisilie's proper person answer. The district court may grant a divorce upon affidavit and without a hearing when the defendant has defaulted ⁶ or when the parties have filed a joint petition for divorce that complies with the summary proceedings for divorce set forth at *NRS 125.181* to *NRS 125.184*. In no other circumstances do the domestic relations statutes permit the court to enter a decree of divorce without a hearing. ⁷ The district court was required to hear the live testimony of both Scotlund and his resident witness before entering its decree of divorce. We raise this point because it appears the district court was misled by the language of the complaint and the affidavit. A hearing might have uncovered the truth and the jurisdictional defect in this case.

6 *NRS 125.123*.

7 WDCR 41 permits the submission of an uncontested divorce without a hearing if the parties stipulate to waive the hearing and if the district court approves the waiver. We are unaware of a similar rule in the Eighth Judicial District Court.

[***14] [*271] Residency is a question of fact to be determined by the district court. ⁸ Courts in this state are obligated to determine that the residency requirement has actually been met and that residency is not being established by fraudulent means. ⁹

8 *See Woodruff v. Woodruff*, 94 Nev. 1, 3, 573 P.2d 206, 207 (1978).

9 *McKim v. District Court*, 33 Nev. 44, 52, 110 P. 4, 5 (1910) ("It is the duty of courts in divorce proceedings to see that the proof of residence is clear and convincing, and that a fraud is not being perpetrated upon the court.").

In this case, the district court declined to set aside the decree of divorce based upon its determinations that Scotlund was in fact a resident, and that the court

118 Nev. 262, *271; 44 P.3d 506, **512;
2002 Nev. LEXIS 33, ***14; 118 Nev. Adv. Rep. 27

therefore had personal as well as subject matter jurisdiction. Since we conclude that the court did not have jurisdiction because Scotlund was not a resident, the question becomes whether the decree is void or merely voidable.

To answer this question, we turn to [***15] *Moore v. Moore*.¹⁰ In that case, the appellant argued that the divorce decree was void because the plaintiff in the divorce proceeding had not satisfied Nevada's residency requirement.¹¹ The court determined, however, that because evidence was presented to the district court in the form of testimony from the plaintiff showing that he did, in fact, satisfy Nevada's residency requirement, the divorce decree in that case was not void, but merely voidable.¹² Quoting an 1875 United States Supreme Court decision, the court stated:

10 75 Nev. 189, 336 P.2d 1073 (1959).

11 See *id.* at 191-92, 336 P.2d at 1074.

12 See *id.* at 193, 336 P.2d at 1075.

"That if there be a total defect of evidence to prove the essential fact, and the [**513] court find it without proof, the action of the court is void; but 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 [***16] court will be valid until it is set aside by a direct proceeding for that purpose. Nor is the distinction unsubstantial, as in the one case the court acts without authority, and the action of the court is void; but in the other the court only errs in judgment upon a question properly before the court for adjudication, and of course the order or decree of the court is only voidable."¹³

13 *Id.* (emphases added) (quoting *Lamp Chimney Co. v. Brass & Copper Co.*, 91 U.S. 656, 659-60, 23 L. Ed. 336 (1875)).

Accordingly, we concluded in *Moore* that although inconsistent evidence had been presented to the district court regarding the [*272] plaintiff's residency, the divorce decree was not void, but, instead, merely voidable.¹⁴

14 *Id.* 75 Nev. at 193, 336 P.2d at 1075.

Likewise, we refer to our decision in *Smith v. Smith* [***17].¹⁵ In that case, although it initially appeared to the district court that all the requirements for service of

process were met, it was later determined that the defendant had not been properly served due to a procedural irregularity.¹⁶ We determined that this procedural irregularity did not render the judgment void, but that the decree was merely voidable.¹⁷

15 82 Nev. 384, 419 P.2d 295 (1966).

16 See *id.* at 385, 419 P.2d at 296.

17 See *id.* at 386, 419 P.2d at 296.

In the instant case, the evidence presented to the district court consisted of Scotlund's verified complaint and the affidavit of his resident witness. These documents provided the district court, at the time it entered the decree, with evidence legally tending to show a case of jurisdiction. On their face, these documents supported a finding that the district court had jurisdiction over the marital res. We so conclude, despite the inadequacy of the resident witness's affidavit. [***18] We note the affidavit was cleverly drafted but also legally tends to show a case of jurisdiction even though the proof is slight and not conclusive. Based upon the representations contained in the documents, a colorable case for jurisdiction was made; therefore, the decree is voidable rather than void. Finally, the district court's treatment of the case as a summary proceeding for divorce constituted a procedural irregularity that also renders the decree voidable rather than void.

We are compelled to observe that Nevada has a strong interest in protecting its valid divorce decrees. We recognize that Nevada's liberal six-week residency period makes this state an attractive forum in which to obtain a divorce. It is a sad reality of human nature as evidenced by Scotlund's conduct, that despite the liberality of the law, some will seek to speed their cause along in order to achieve a divorce in a time frame that suits their convenience rather than the requirements of the law. The district courts must be willing and prepared to diligently review each divorce action to remain assured that the integrity of any decrees entered is preserved, and should not hesitate to order the taking of testimony [***19] where necessary or desirable.¹⁸ We are mindful that divorce [*273] decrees granted by our courts affect "collateral rights and interests of third persons."¹⁹ As a matter of policy, district courts should be very interested in ascertaining whether jurisdiction actually exists before granting the decree so that decrees are valid and enforceable [**514] and interested persons can rely on them. Other individual's rights and interests may be

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significantly affected when a divorce decree is granted but subsequently declared to be void.

18 See *NRS 125.123* (providing that the district court is not required to accept a case for default divorce upon submission; court has the discretion to order a hearing and require the presence of the plaintiff and the resident witness).

19 *Self v. Self*, 319 Ark. 632, 893 S.W.2d 775, 778 (Ark. 1995). In *Self*, the Supreme Court of Arkansas stated:

We have stated that judgments in matrimonial cases should be more stable than in others, because matrimonial status draws with it so many collateral rights and interests of third persons. However, we have also held that when divorces have a "mail-order" appearance, we shall not hesitate to set them aside, even though the divorced party remarries in the meantime, as we cannot permit such frauds to be practiced upon the courts of this state.

Id. (citations omitted).

[***20] Having concluded that the decree is voidable, we determine whether the decree ought to be set aside. The district court "found merit" in Scotlund's argument that Cisilie is judicially estopped from asserting that the court lacked jurisdiction to enter the decree of divorce. The district court was not required to reach the issue of judicial estoppel raised by Scotlund since the court had already determined that it had jurisdiction over both the parties and the subject matter. Nevertheless, the district court considered Cisilie's claim that she had been coerced or was under duress when she signed the answer to the complaint and the agreement. The district court determined as a matter of fact that Cisilie was not coerced or operating under duress. In fact, Cisilie had signed an answer to the complaint which admitted the fact of Scotlund's residence. Based upon these findings, which we will not disturb, the district court determined that Cisilie was estopped from attacking the decree's validity.

The rule of judicial estoppel is recognized in Nevada's case law. In *Sterling Builders, Inc. v. Fuhrman*, 20 we noted that according to the rule of judicial estoppel, a party who has stated [***21] an oath in a prior proceeding, "as in a pleading," that a given fact is true, may not be allowed to deny the same fact in a subsequent action. In that case, the court indicated that one of the

rule's purposes is to prevent parties from deliberately shifting their position to suit the requirements of another case concerning the same subject matter.

20 80 Nev. 543, 549-50, 396 P.2d 850, 854 (1964).

As mentioned, Cisilie's answer to Scotlund's complaint admitted that Scotlund was a resident of Nevada. She now asserts a contrary [*274] fact in order to support her motion in the trial court to set aside the decree of divorce. We note that she relied upon the validity of the divorce decree when she decided to remarry. Because the district court determined that she was not operating under duress and was not coerced but did voluntarily sign the answer, her representations of fact contained within the answer are the proper subject for the application of the rule of judicial estoppel. Therefore, the voidable decree [***22] of divorce will not be set aside.

Two separate dissents have been written in this case. Both question our conclusion that Cisilie is judicially estopped from obtaining an order setting aside the decree of divorce based upon the district court's lack of jurisdiction. In brief response, we reiterate that the district court concluded as matters of fact that she was neither coerced nor under duress when she signed the answer and the agreement. The dissent points out that she did not prepare the answer she signed, and the record discloses no evidence that she was aware of Nevada's residency requirement. However, she knew that Scotlund had not resided in Nevada for six weeks when she signed the answer. She took advantage of those aspects of the agreement which allowed her to take custody of the children and she depended upon the decree's validity when she planned to marry again.

We realize that the posture of this case is unusual and unique since we are refusing to void a decree which was entered, as it turns out, by a court which had no jurisdiction over the parties. However, to reiterate, the decree was entered when the court believed it had jurisdiction. Any person who might review [***23] the district court filings would have no reason but to trust the validity of the court's decree. Under these circumstances, the law and the policies which support it permit no result other than that the decree is voidable, not void. As mentioned and for the reasons previously stated, we decline to declare the decree void.

Ironically, were we to adopt the reasoning of either dissent, then the fears of Justice Young that Scotlund might profit from a fraud upon the court would become a reality. As we will discuss next, we do declare void that portion of the decree which purports to determine the custody and visitation rights of the parties. However, because the decree is voidable and because we decline to declare it void, we are able to require the district court [**515] to make a Hague Convention determination, as we will also discuss in this opinion. Scotlund, as noted, resides now in Texas and he has possession of the children. Were we to set aside the decree in its entirety, we would not be in a position to order the Hague determination. Cisilie would be put in the position of having to begin anew and commence, if she can, a proceeding against Scotlund in Texas.

[*275] The district court, in refusing [***24] to set aside the decree of divorce, also properly determined that it had no jurisdiction over the children. The court nevertheless determined that it had "jurisdiction over the parties' conduct toward each other with regard to the agreement under a contract theory." Based upon that analysis, the district court did not set aside the custody provisions of the divorce decree, and it erred in this regard. 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 the issue of child custody.²¹

21 NRS 125A.050 (setting forth the factors for determining whether a court has jurisdiction to determine child custody).

Parties may not confer jurisdiction upon the court by their consent when jurisdiction does not otherwise exist.
22 The provision in the [***25] parties' agreement selecting Nevada as their forum for a divorce does not bind the court, nor does it confer jurisdiction upon the court. 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. Because the voidable decree has not been set aside, the court had colorable personal jurisdiction over the parties and the subject matter of their marital status. Simply because a court

might order one party to pay child support to another in the exercise of its personal jurisdiction over the parties does not permit the court to extend its jurisdiction to the subject matters of child custody and visitation.

22 *Finley v. Finley*, 65 Nev. 113, 120, 189 P.2d 334, 337 (1948).

Unless the court can properly exercise subject matter jurisdiction according to the terms of the Uniform Child Custody Jurisdiction Act (UCCJA), [***26] which Nevada has adopted, it is without authority to enter any order adjudicating the rights of the parties with respect to custody and visitation. A provision in a divorce decree adjudicating custody and visitation in the absence of subject matter jurisdiction is void, as we held in *Swan v. Swan*.²³

23 106 Nev. 464, 796 P.2d 221 (1990).

In *Swan*, the father moved to Nevada from Utah and, after several months, filed a complaint for divorce in Nevada. After filing his complaint, he returned to Utah, took the children and returned to Nevada with them. The mother filed an answer and contested [*276] the Nevada court's subject matter jurisdiction, but made no further filings or appearances in the action. The court granted the father a divorce and, based upon his testimony that the children resided with him, granted him custody. One and a half years later, the mother moved to vacate the custody provisions of the decree on the basis that the Nevada court had no jurisdiction over the subject [***27] matter under the UCCJA. Her motion was denied, but the district court's decision was reversed on appeal. We analyzed the facts under Nevada's version of the UCCJA and determined first, that Nevada was not the children's home state; second, that the children's residence in Nevada for forty days did not constitute a significant connection with this state; and third, even if dual jurisdiction existed, Utah was the more appropriate forum. Consequently, we concluded that the district court had incorrectly awarded custody as an incident of the default decree without having subject matter jurisdiction, and that the custody portion of the decree was void.²⁴ In our opinion, we noted that subject matter jurisdiction cannot be [**516] waived and may be raised at any time, or *sua sponte* by a court of review.²⁵

24 *Id.* at 469, 769 P.2d at 224.

25 *Id.*

NRS 125A.050, which was adopted as a part of the UCCJA, sets out those circumstances under which a Nevada court has jurisdiction [***28] to make a child custody determination by initial or modifying decree. Under NRS 125A.050(1)(a), this state must be the home state of the children or have been the home state within six months before the action commenced. Neither is the case here. Under NRS 125A.050(1)(b), a Nevada court may exercise jurisdiction if it is in the children's best interest to do so because the children and at least one of their parents have a significant connection with Nevada and substantial evidence is available in Nevada concerning the children's present and future care, protection, training and personal relationships. As neither the children nor the parents have ever lived here or have a significant relationship with Nevada, virtually no information is available in this state to even arguably create jurisdiction under this provision. NRS 125A.050(1)(c) does not apply because it requires the presence of the children in Nevada. Finally, under NRS 125A.050(1)(d), Nevada may exercise jurisdiction if no other state would have jurisdiction or if another state has declined to exercise jurisdiction on [***29] the ground that Nevada is the appropriate forum and it is in the child's best interest that Nevada assume jurisdiction. This section of the statute also provides no basis for the Nevada court's exercise of jurisdiction. At the time the decree was entered, the children's last significant contacts with any state were with Ohio and Virginia. After living in Ohio and then [*277] Virginia, the children moved to the United Kingdom and Norway. Under NRS 125A.050, these countries are both considered states.²⁶ Neither Ohio nor Virginia has declined to exercise jurisdiction. Norway and the United Kingdom have both been involved in custody disputes between the parties.

26 NRS 125A.030 is captioned "Application of chapter to decrees of other nations." The statute states:

The general policies of this chapter extend to other nations. The provisions of this chapter relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.

[***30] The district court lacked subject matter jurisdiction over matters of custody and visitation when it entered the decree of divorce in 1998, and therefore the provisions of the decree which purport to fix the obligations of the parties with respect to custody and visitation are void.

III.

Next, we address petitioner's argument that the district court was required to make a determination, under the Hague Convention on the Civil Aspects of International Child Abduction, regarding the children's habitual residence, and whether the children were wrongfully removed from their habitual residence as those terms are construed under the Convention. The district court incorrectly concluded that it need not make such a determination. First, we note that Nevada has jurisdiction to make the determination. The United States Congress has implemented the Convention by enacting the International Child Abduction Remedies Act ("ICARA").²⁷ Under both the Convention and ICARA, an aggrieved party may institute judicial proceedings in the country to which the children have been removed.²⁸ State and federal courts have concurrent jurisdiction over such disputes.²⁹ Additionally, we conclude, [***31] as a matter of law, that the habitual residence of the children was Norway, and that the children were wrongfully removed from that country. Accordingly, the Hague Convention mandates that the children be promptly returned to Norway so that the courts there can determine the issue of custody.

27 42 U.S.C. §§ 11601-11610 (1988).

28 Hague Convention, arts. 8, 11, 29; 42 U.S.C. § 11601 (1988).

29 42 U.S.C. § 11603 (1988).

[**517] The Hague Convention on the Civil Aspects of International Child Abduction, to which the United States and Norway are signatories,³⁰ [*278] seeks to "secure the prompt return of children wrongfully removed to or retained in any Contracting State."³¹ Furthermore, the primary purpose of the Hague Convention is "to preserve the status quo and to deter parents from crossing international boundaries in search of a more sympathetic court."³² The Hague Convention is meant to "protect children internationally from [***32] the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of habitual residence."³³

30 The United States ratified the Convention in 1988, while Norway ratified the Convention in 1989.

31 Hague Convention, art. 1.

32 *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993) ("*Friedrich I*").

33 Hague Convention, preamble.

To achieve these goals, the Convention requires that, subject to certain exceptions, children who habitually reside in a signatory country and are removed to or retained in another signatory country in breach of the left-behind parent's custody rights shall be promptly returned to the country of their habitual residence.³⁴ The Convention provides that only after the children are returned to the country of their habitual residence will a custody determination be made.³⁵ Therefore, a court considering a petition under the Convention has jurisdiction to decide the merits of [***33] the wrongful removal claim, but not the underlying custody dispute.³⁶

34 Hague Convention, arts. 12, 13.

35 *Id.* art. 19.

36 *Friedrich v. Friedrich*, 78 F.3d 1060, 1063 (6th Cir. 1996) ("*Friedrich II*").

In this case, the district court determined that it was unnecessary to make a Hague Convention determination. The district court said that if it were to make a determination under the Convention, it would find that the children's habitual residence is Nevada, and that Cisilie had wrongfully retained the children in Norway. We disagree with these findings, based upon the uncontroverted fact that neither parent has ever lived in Nevada. We also conclude that the district court should have made a determination under the terms of the Convention.

Habitual residence

First, we examine the question of which country serves as the children's habitual residence. We begin by observing that although a court must identify which country is the children's "habitual [*279] residence," [***34] this term is nowhere defined in the Convention.³⁷ Instead, the term is intended by the Convention's drafters to be applied to the facts and circumstances of each case in a non-technical manner.³⁸

37 See *Miller v. Miller*, 240 F.3d 392, 400 (4th Cir. 2001); *Friedrich I*, 983 F.2d at 1400.

38 See *Friedrich I*, 983 F.2d at 1401 (quoting *In Re Bates*, No. CA 122.89, High Court of Justice, Family Div'n Ct. Royal Court of Justice, United Kingdom (1989) (quoting Dicey & Morris, *The Conflicts of Laws* 166 (11th ed.)), which explained:

"It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common law domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or pre-suppositions."

We are not without guidance, however. Other courts that have addressed this issue have [***35] stated that when determining a child's state of habitual residence, courts must look back in time, not forward.³⁹ In other words, courts must look to the past experiences of the parties, and not to the parties' future intentions.⁴⁰ Furthermore, when conducting this inquiry, the focus is on the child, not the parents.⁴¹ Therefore, any subjective intentions that the parents harbor regarding where the child is to live are irrelevant. [**518] Additionally, any change in geography that would affect a child's habitual residence must occur before the removal at issue.⁴² Although the child's physical whereabouts are central to an inquiry, one parent's "questionable removal" of the child is not determinative when ascertaining habitual residence. Courts also look to where children have a "degree of settled purpose."⁴³ Under this analysis, the child has a degree of settled purpose in "the place where he or she has been physically present for an amount of time sufficient for acclimatization."⁴⁴

39 *Friedrich I*, 983 F.2d at 1401.

40 *Id.*

41 *Id.*

42 *Id.*

43 *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995).

[***36]

44 *Id.*

Ordinarily, a determination of habitual residence is a question of fact which we will not disturb. After reviewing the facts and circumstances of this case, however, we conclude, as a matter of law, that only one country could possibly be the habitual residence. [*280]

The children's state of habitual residence prior to their removal was Norway. The record in this case reveals that in July 1998, when the children were three and seven years of age, they moved from London, England, where they were residing at the time, to Norway. They remained in Norway for twenty-two months until they were removed to the United States by Scotlund in May 2000. While in Norway, the children were registered under Norwegian law as residents of that country. And during their stay in Norway, the children attended school and otherwise conducted their lives as normal children. The children, while living in Norway, had a "degree of settled purpose" to remain there.

Although there is some evidence in the record that Cisilie and Scotlund may have intended that the children would move to the United States at some [***37] time in the future,⁴⁵ the courts are not bound, as we have previously stated, by the intentions of the parents regarding future events.⁴⁶ Furthermore, Scotlund's unilateral act of removing the children from Norway cannot change their state of habitual residence. Therefore, the children's state of habitual residence was Norway at the time Scotlund removed them from that country. Their habitual residence could be nowhere else. It could not be Nevada, as neither they nor their parents ever lived here. It could not be Great Britain, as no evidence exists in the record to support a finding that upon the family's departure from Great Britain, either parent ever expected to return.

45 The children have dual American and Norwegian citizenship.

46 Based upon our thorough review of the record, we harbor grave concerns regarding the validity of Scotlund and Cisilie's "agreement." In any event, because we have determined that the portion of the divorce decree that incorporated the custody and visitation provisions of the agreement is void, we are not bound by those terms.

[***38] *Wrongful removal*

Having concluded that the children's habitual residence was Norway, we must next determine whether Scotlund "wrongfully removed" the children from that country. Under the Hague Convention, removal or retention of a child is wrongful if it violates the custody rights of another person which were actually being exercised at the time of the removal or retention or would have been exercised but for the removal or retention.⁴⁷

47 Hague Convention, art. 3. This article reads:

The removal or retention of a child is to be considered wrongful where -

a it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

[*281] In the underlying case, the [***39] district court concluded that it need not make a Hague Convention determination because Scotlund had not wrongfully removed the children from Norway. Instead, the district court found that Cisilie had wrongfully retained the children in Norway contrary to their [**519] agreement. The district court's determination that Scotlund had not wrongfully removed the children from Norway was improper.

Scotlund arrived in Norway with an order from the district court finding Cisilie in contempt for violating the terms of the Nevada divorce decree. Specifically, the district court had determined that Cisilie was violating the parties' agreement, which had been incorporated into the terms of the divorce decree and which required her to return the children to Scotlund. Accordingly, the district court granted Scotlund custody of the children.

The district court, however, relied upon Scotlund's untruthful representation when it issued its order granting him custody of the children. At the hearing held to decide whether Cisilie was in contempt of court for failing to bring the children to the United States as contemplated by the parties' agreement, the district court asked Scotlund how long he and the children [***40] had lived in Nevada. Scotlund responded that they had lived in Nevada "all their lives." The district court then issued its order holding Cisilie in contempt. This order further stated that Cisilie was to immediately return the children to Scotlund's custody.

Had the district court been apprised of the true facts, the order compelling Cisilie to return the children to Scotlund's custody might not have been granted.

Moreover, the underlying basis for the order, the provision in the divorce decree incorporating the parties' agreement as to custody and visitation, is void and unenforceable.

Accordingly, when Scotlund traveled to Norway to take custody of the children, he did so under an invalid order. Further, Cisilie was properly exercising custody rights over the children when Scotlund arrived in Norway. Because Scotlund removed the children from their habitual residence while Cisilie was validly exercising custody rights over the children, and because he removed the children under the false pretense of a valid custody order, Scotlund wrongfully removed the children from Norway. Under the terms of the Hague Convention, the children must be returned to Norway so that any decision regarding [***41] custody can be made in the courts of that country.⁴⁸

48 Hague Convention, art. 12. We also note in passing that after Cisilie filed her petition in this court, Scotlund informed us that the Norwegian court determined that it does not have jurisdiction to determine custody. The Norwegian court's decision placed "decisive emphasis" upon the parties' twenty-three-page agreement and the district court's decree of divorce. The Norwegian court obviously presumed that the decree was valid in all respects. The crucial provisions of the decree upon which the Norwegian court relied are void.

[*282] IV.

In this case, the district court lacked subject matter jurisdiction over custody and visitation. Furthermore, the district court manifestly abused its discretion by failing to make a determination under the Hague Convention on the Civil Aspects of International Child Abduction regarding the children's state of habitual residence. As the children's state of habitual residence was, as a matter of law, Norway, and as Scotlund [***42] wrongfully removed the children from that country, the district court was required to make these determinations. Accordingly, we grant the petition and direct the clerk of this court to issue a writ of mandamus compelling the district court to vacate those portions of its decree relating to custody and visitation and to order the children's return to Norway, where custody determinations can be made.

ROSE, LEAVITT and BECKER, JJ., concur.

DISSENT BY: MAUPIN; YOUNG

DISSENT

MAUPIN, C.J., dissenting:

I would grant the petition and declare the voidable divorce decree void in its entirety. In granting the petition, I would further conclude that the district court was not authorized to grant relief under NRS 125A.050, nor was it authorized to make findings under the Hague Convention on the Civil Aspects of International Child Abduction.

It is true that petitioner judicially admitted the facts alleged in the original divorce complaint in support of the real party in interest's residency, and thus the primary fact in support of subject matter jurisdiction over [**520] the marriage and the issues related thereto. The majority now concludes that this admission constitutes a judicial [***43] estoppel, which relieves the district court, and therefore this court, from the obligation to declare as void, in its entirety, the admittedly voidable divorce decree. I disagree.

Once the facts of voidability became known, it was incumbent on the district court to void the decree for want of subject matter jurisdiction. As the majority points out, actions of the parties cannot confer subject matter jurisdiction on a court when none otherwise exists. Application of the doctrine of judicial estoppel to these facts would do just that. Since the district court determined that it did have jurisdiction, it is incumbent upon this court to now declare the underlying decree void in its entirety.¹

1 See NRCP 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

[*283] The majority's reliance on our published opinion in *Sterling Builders, Inc. v. Fuhrman*² is misplaced. This is because our application [***44] of judicial estoppel in *Sterling* had nothing to do with subject matter jurisdiction. *Sterling* merely applied the rule of estoppel to prevent a party from denying that a partnership existed in the context of a factual dispute.³ The *Sterling* decision did not apply the doctrine of judicial estoppel to confer jurisdiction where there was none, and we should not do so now.

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2 80 Nev. 543, 396 P.2d 850 (1964).

3 *Id.* at 549-50, 396 P.2d at 854.

The estoppel argument was not sufficient to give any continuing life to the decree. I realize that, under this view, there would be collateral effects on these parties with regard to their post-decree actions and their status as divorced persons. This is particularly unfortunate with regard to petitioner who, at the very least, was a victim of the post-divorce behavior of the real party in interest. This does not, however, alter the fact that the decree was actually voidable in all respects and should be so declared.

No other [***45] remedies are available to petitioner under Nevada law. NRS 125A.050, the Nevada version of the UCCJA, cannot provide relief since Nevada is neither the home state of the children of the parties, nor was it their home state at any time. In point of fact, these children have never had any significant connection with the state. It therefore appears that the district court was seriously misled in its deliberations below, given the real party in interest's statement that the children had lived in Nevada "all their lives."

The district court also does not have jurisdiction to make findings under the Hague Convention on the Civil Aspects of International Child Abduction. This is because actions under the Convention must be made in a "court which has jurisdiction of such actions and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed."⁴

4 42 U.S.C. § 11603(b) (1995) (emphasis added).

It does appear from the record of this case that these children were wrongfully removed from Norway, that Norway was their habitual residence at the time of their abduction and that, under the Convention, they should be returned to the Norwegian tribunal for the appropriate custody determination. It also appears that the Norwegian court was misled into deferring to the voidable Nevada decree.

[***46] YOUNG, J., with whom SHEARING, J., agrees, dissenting:

I disagree with the majority's conclusion that the

decree of divorce is voidable, not void; and I also disagree with the majority that Cisilie is judicially estopped from questioning the decree obtained through Scotlund's fraud.

[*284] 1. The decree of divorce is void, not voidable

In the majority opinion, my colleagues hold that the decree fraudulently obtained by Scotlund without establishing residency is voidable, not void. This holding is contrary to long-established law in this state and undermines Nevada's statutory scheme requiring a six-week residency.

For many years, it has been well settled that a divorce decree issued by a district [**521] court *without* jurisdiction is void.¹ Here, the majority relies on *Smith v. Smith*² where the plaintiff's good faith failure to properly serve the defendant constituted a procedural irregularity rendering the judgment merely voidable, not void.

1 *Milton v. Gesler*, 107 Nev. 767, 771, 819 P.2d 245, 248 (1991) (holding that because the district court acted without jurisdiction, the decree of divorce is void); *La Potin v. La Potin*, 75 Nev. 264, 266, 339 P.2d 123, 123-24 (1959) (same); *Perry v. District Court*, 42 Nev. 284, 288, 174 P. 1058, 1059 (1918) (same).

[***47]

2 82 Nev. 384, 419 P.2d 295 (1966).

Smith is factually distinguishable from the instant case because in that case there was no fraud, merely a procedural irregularity. The plaintiff in *Smith* established residency for the requisite period in Nevada; the testimony of the resident witness was not flawed. A default had been taken after thirteen days from service of process instead of the requisite twenty days. In contrast, here, Scotlund did not attempt to comply with Nevada law requiring six-week residency. Scotlund had resided in Nevada only five days when he signed the complaint. Thus, this case does not involve a mere procedural irregularity as in *Smith*. The majority's reliance on *Smith* is misplaced because here the district court clearly lacked jurisdiction and the decree of divorce was void.³

3 See *Milton*, 107 Nev. at 771, 819 P.2d at 248; *La Potin*, 75 Nev. at 266, 339 P.2d at 123-24; *Perry*, 42 Nev. at 288, 174 P. at 1059.

[***48] Additionally, the majority relies on *Moore v. Moore*.⁴ In *Moore*, the husband obtained a decree of divorce after he had physically resided in Nevada for more than six weeks.⁵ Later, the husband and wife sought to void the decree saying that although the husband had been physically present in Nevada and contrary to his testimony in court, he really had not intended to make Nevada his residence.⁶ To determine whether the decree of divorce was void or voidable, we reviewed the "manner in which the trial court had exercised its authority to resolve the factual problem confronting it [the issue of residency]." ⁷ Specifically, we noted that a decree [*285] is void when there is "a total defect of evidence to prove the essential fact, and the court finds it without proof."⁸ Under such circumstances, "the court acts without authority, and the action of the court is void."⁹ In *Moore*, the husband's testimony that he had been a bona fide resident in Nevada for more than six weeks was sufficient to make the decree of divorce merely voidable.¹⁰

⁴ 75 Nev. 189, 336 P.2d 1073 (1959).

[***49]

⁵ *Id.* at 192, 336 P.2d at 1074.

⁶ *Id.* at 190-92, 336 P.2d at 1073-74.

⁷ *Id.* at 193, 336 P.2d at 1075.

⁸ *Id.* (quoting *Lamp Chimney Co. v. Brass & Copper Co.*, 91 U.S. 656, 659-60, 23 L. Ed. 336 (1875)).

⁹ *Id.* (quoting *Lamp Chimney*, 91 U.S. at 660).

¹⁰ *Id.* at 192-93, 336 P.2d at 1074-75.

In contrast, the facts before this court indicate that there was a total defect of evidence proving that Scotlund was a resident of Nevada. Three facts are significant. First, the majority admits that Scotlund's statement concerning residency in the verified complaint was false. In fact, when the complaint was signed, Scotlund had been in the state for a period of only five days. Second, the affidavit of the resident witness did not corroborate Scotlund's claim of residency by "clear and convincing evidence" as required by law.¹¹ The affidavit was cleverly worded to indicate that the affiant had known Scotlund for "six weeks"-but *not* during the six weeks he was claiming residency [***50] in Nevada. The affiant further stated that she had seen Scotlund physically present in Nevada "on an average of 3-4 times weekly." It was signed when Scotlund had been in Nevada only six days, not for a period of six weeks. Third, the district court entered the decree in chambers without a hearing.

At the time the decree was signed, Scotlund was thousands of miles away in England. It is abundantly clear that Scotlund had not established a residence in Nevada at the time the complaint was filed sufficient [**522] to confer jurisdiction upon the district court to grant a divorce.

11 *McKim v. District Court*, 33 Nev. 44, 52, 110 P. 4, 5 (1910).

Unlike *Moore*, there was a total defect in the evidence presented to the district court. Hence, based on the lack of residency, the decree of divorce is void, not merely voidable.

Adopting the majority's view would undermine Nevada's statutory scheme requiring a six-week residency. A non-resident plaintiff seeking an expedient divorce could travel to Nevada, [***51] file a complaint the same day, and obtain a decree of divorce immediately. The problem with holding that such a decree is voidable, as we are urged to do in the majority opinion, is that individuals could commit fraud upon our courts and reap the dubious benefits of a voidable divorce decree, which is what Scotlund is doing here.

[*286] 2. Judicial estoppel

Scotlund attempts to breathe life into a void decree by alleging that Cisilie is judicially estopped to question the validity of the void decree. If we hold the decree of divorce to be void, we need not reach the question of whether Cisilie is judicially estopped. However, since the majority reached this question, I feel obliged to convey my concerns about the application of judicial estoppel under the circumstances before this court.

The United States Supreme Court has stated that judicial estoppel is designed to "protect the integrity of the judicial process"¹² in order to "prohibit[] parties from deliberately changing positions according to the exigencies of the moment."¹³ It follows that the doctrine of judicial estoppel is an equitable doctrine applied by a court at its discretion.¹⁴

¹² *New Hampshire v. Maine*, 532 U.S. 742, 749, 149 L. Ed. 2d 968, 121 S. Ct. 1808 (2001) (quoting *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982)).

[***52]

¹³ *Id.* at 750 (quoting *U.S. v. McCaskey*, 9 F.3d

368, 378 (5th Cir. 1993)).

14 *Id.*

In this case, I submit the district court erred by finding that Cisilie was not coerced or operating under duress when she signed the answer (prepared by Scotlund's Nevada divorce attorney) admitting to Scotlund's claim of residency.¹⁵ The record shows that Scotlund had threatened Cisilie that he would take the couple's children away from her if she did not cooperate with the divorce.¹⁶ It was a threat that was later carried out when Scotlund kidnapped the children in Norway by trickery and deceit and flew to the United States. The district court abused its discretion by invoking the doctrine of judicial estoppel against Cisilie.

15 When Cisilie received the answer, she was unknowingly recruited by Scotlund to participate in the perpetration of fraud upon the district court. I see no evidence to the contrary.

16 Cisilie could reasonably believe that Scotlund would carry out his threats and that she would never see her children again based on Scotlund's family history. Cisilie was aware that Scotlund's mother had kidnapped him and his siblings to another state, changed their last name, and the father kidnapped them back.

[***53] Moreover, a court has discretion not to apply judicial estoppel when "a party's prior position was based on inadvertence or mistake."¹⁷ In this case, Cisilie is not judicially estopped because there is no evidence to suggest that she was aware of Nevada's residency requirement. In fact, she had never resided in Nevada. The answer that she signed was prepared by her husband's attorney in Nevada and sent by airmail to her in Norway for immediate signature. She had planned on remarriage; but when an attorney in Norway advised her that there might be some doubt as to the [*287] validity of the Nevada decree, Cisilie cancelled the marriage ceremony. She has spent thousands of dollars in fees and travel expenses in an effort to set aside the admittedly fraudulent decree and will presumably have to spend thousands of additional dollars to regain custody of her children illegally taken from her in Norway by Scotlund. Thus, the district court incorrectly applied the doctrine of judicial estoppel because Cisilie's admission to Scotlund's claim of residency was not knowingly made and certainly not a representation that Scotlund [**523] could rely on to prove his residency under Nevada law or prevent her

[***54] from questioning the residency requirement.

17 *New Hampshire*, 532 U.S. at 753 (quoting *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 29 (4th Cir. 1995)).

Finally, we have stated that the "purpose of the doctrine of judicial estoppel is to suppress fraud . . . and to eliminate the prejudice that would result to the administration of justice if a litigant were to swear one way one time and a different way another time."¹⁸ In this case, invoking judicial estoppel against Cisilie protects Scotlund from the consequences of his fraud upon the district court and inhibits the administration of justice. Scotlund was the sole architect of the scheme to perpetrate fraud on the district court. He should not be allowed to harvest the benefits of such fraud. Our court should not close the doors of justice to the innocent and reward the wrongdoer in the name of judicial estoppel.

18 *Sterling Builders, Inc. v. Fuhrman*, 80 Nev. 543, 550, 396 P.2d 850, 854 (1964) (quoting 31 C.J.S. *Estoppel* § 121, at 649, 650).

[***55] 3. *Digression (the state of our legal system)*

I am disturbed about the conduct of Scotlund's divorce attorney in this case. The attorney prepared a complaint that falsely alleged Scotlund's residency in Nevada. The divorce attorney knew or should have known that Scotlund had not been a resident of Nevada for six weeks when he signed the complaint.¹⁹ Further, the affidavit signed by the resident witness was cleverly drafted by the divorce attorney in a misleading manner in an effort to corroborate residency.

19 *The record indicates that the divorce attorney and Scotlund were communicating about the divorce case when Scotlund was living in England, just days before he flew to Las Vegas.*

CONCLUSION

I strongly disagree with the conclusion of the majority that the decree of divorce was merely voidable, not void. The decree of divorce is void because the district court lacked jurisdiction to grant a divorce. To hold the decree voidable will lead to absurd results and undermines Nevada's statutory [***56] scheme requiring residency [*288] of at least six weeks. Moreover, in my opinion, the court need not reach the question of judicial

118 Nev. 262, *288; 44 P.3d 506, **523;
2002 Nev. LEXIS 33, ***56; 118 Nev. Adv. Rep. 27

estoppel because the decree is void. Nonetheless, I strongly disagree with the conclusion that Cisilie is somehow judicially estopped. She was the victim, not the wrongdoer. Finally, the district court lacked subject matter jurisdiction to make findings under the Hague Convention. Scotlund lied to the district court, during the custody hearing, when he testified that the children had lived in Nevada "all their lives." The fact is that the children had never resided in Nevada and apparently after being kidnapped in Norway were flown to Texas where presumably they now live.²⁰

20 I would refer this matter to the State Bar of Nevada for investigation of the conduct of Scotlund's divorce lawyer. *See* NCJC Canon

3D(2) (imposing upon a judge an affirmative obligation to take appropriate action upon receiving information indicating substantial likelihood that a lawyer has committed a violation of the Nevada Rules of Professional Conduct). Furthermore, I am disturbed with Scotlund's behavior. Accordingly, I would refer this matter to the Clark County District Attorney's Office for investigation. The clerk of this court shall provide a copy of this opinion and dissent to the State Bar of Nevada and to the Clark County District Attorney's Office.

[***57]

Excerpts from Hearing
held March 3, 2008

1 reference? Hold on. I'm looking at page 18.

2 MR. WILLICK: That -- I'm sorry, Your Honor. I don't
3 have it right in front of me right now. It's been too -- too
4 long.

5 THE COURT: Well, I'd like to see that 1,300. If it's
6 not in there, then you probably can't --

7 MR. WILLICK: That -- that number is not in there.
8 Only the --

9 THE COURT: Oh, the number's not in there.

10 MR. WILLICK: -- formula is there. I'm sorry, let me
11 restate that.

12 THE COURT: Yeah, the formula is 25 percent.

13 MR. WILLICK: All it says is a -- a --

14 THE COURT: Yeah, but do you understand the argument?

15 MR. WILLICK: Yes.

16 THE COURT: I mean, the question I'm posing to you is,
17 if he had a pattern --

18 MR. WILLICK: 25 percent -- 25 percent of his actual
19 income would be over \$2,000 a month without question.

20 THE COURT: But he'd cap out at -- yeah, 500 per kid.

21 MR. WILLICK: Would be a thousand dollars --

22 THE COURT: A thousand.

23 MR. WILLICK: -- applying the presumptive cap.

24 THE COURT: But he paid 1,300.

1 -- what those amounts were?

2 THE COURT: In other words, can you provide proof of
3 your income of what you made in 1998?

4 MR. VAILE: Sure. And of course, the children lived
5 with me from 2000 to 2002.

6 MR. WILLICK: (Indiscernible).

7 MR. VAILE: And so who would require documentation
8 from Ms. Porsboll during that period.

9 THE COURT: Well, under the Day vs. Day (phonetic)
10 case, I can't give you credit for the kids living with you from
11 '00 to '02. There's no retroactive modification of support
12 order, unless it's specifically requested by a party.

13 MR. VAILE: I'm sorry, I couldn't hear you.

14 THE COURT: Under the case of Day versus Day, I cannot
15 retroactively modify a child support agreement. In other words,
16 no credit for them living with you for '00 to '02.

17 MR. VAILE: So will the -- are you proposing to make a
18 -- an agreement --

19 THE COURT: Since the court --

20 MR. VAILE: -- retroactive to 2002?

21 THE COURT: Well --

22 MR. WILLICK: It hasn't changed since 1998.

23 THE COURT: We have plan A or plan B, and I'm going to
24 rule on one of these. Plan A is to let him reopen and prove his

Excerpts from Hearing
held July 11, 2008

1 MR. WILLICK: -- for that --

2 THE COURT: Objection's noted.

3 MR. WILLICK: -- to continue using their outdated
4 computer program methodology. And they got what they asked for.
5 As a political matter, that's a little questionable, but it
6 surely does not make the math or logic embedded in the outdated
7 computer program anymore compelling than it was on the date the
8 penalty provision was passed, because the computer program is
9 exactly the same thing that was in place then.

10 THE COURT: I would like to focus on your position of
11 the statute is ambiguous.

12 MR. WILLICK: All right. Now -- okay. I -- I've got
13 that right here.

14 THE COURT: Or you can argue both ways.

15 MR. WILLICK: Yes, I can.

16 THE COURT: Okay.

→17 MR. WILLICK: But I'm going to. Mr. Winne argues, and
18 correctly, that the statute could certainly be perceived by a
19 judicial officer as ambiguous. And I say that, because he has
20 himself come up with a plausible, if in my opinion illogical,
21 alternative application of the statute in order to bend over
22 backwards to rationalize how the State is capable of doing it.
23 So we built in a switch so that the user can make the program
24 perform the calculations in different ways. Switches.

1 MR. FOWLER: Oh, I'm sorry.

2 MR. WILLOCK: Because we know that we don't know what
3 the Nevada Supreme Court would say if this matter was completely
4 and squarely developed, we built an entire table full of
5 switches into the program to allow the court to do different
6 things -- well the user, regardless of the court. For instance,
7 when the program was first developed, it would -- there had not
8 yet been a formal holding by the Nevada Supreme Court that
9 interest should never be compounded. So I built in a switch
10 that would allow like a bank would do compound interest on a --
11 on a credit card, we built in the capacity to do compound
12 interest calculations, but we turned it off as a default,
13 because I did not believe that that's the way the law would
14 develop. In fact --

15 MS. MUIRHEAD: You know -- I'm sorry, Your Honor. I -
16 - I would like you to make a finding that Mr. Willock is
17 testifying as to how the Marshal (ph) program works.

18 THE COURT: Well, he's the creator of the program,
19 yes.

20 MS. MUIRHEAD: So he is testifying. Would you --
21 would you agree with that statement, Your Honor?

22 THE COURT: He's arguing the nature of his program.

23 MS. MUIRHEAD: And who better to argue with it than
24 the creator? Therefore, he's testifying and he's a witness.

1 MR. WILLICK: In the unfortunate event --

2 THE COURT: My ruling is, it's the -- this judge and
3 all the other judges have accepted in prior cases the Marshal
4 (ph) law program. We're here to decide if it is in line with
5 the statute and as to its -- well, I don't know the word,
6 accuracy or validity or conformity with the statute.

7 MR. WILLICK: Thank you, Your Honor.

8 MS. MUIRHEAD: So he needs to get --

9 MR. WILLICK: There's a --

10 MS. MUIRHEAD: -- in the witness box and testify about
11 the program.

12 THE COURT: I don't need his testimony. He can
13 explain to me how the program works. I've never had an in depth
14 explanation until today on that -- on that program.

15 MR. WILLICK: Your Honor -- okay. Thank you, Your
16 Honor.

17 THE COURT: Okay.

18 MR. WILLICK: There is a number of possible
19 modifications that could be made. We, wherever possible, used
20 what the Nevada Supreme Court had actually said in its interest
21 cases, because there was no penalty provision at the beginning
22 in its interest cases as -- as the clue for how to do the
23 calculations. The reason, for example, that the default is
24 applied payments -- well, applied payments to the oldest amount

Excerpts from Hearing
held September 18, 2008

1 A Yes, I did.

→ 2 Q Is there a Norwegian child support order?

3 A There -- it -- there existed an order like if -- if
4 you were not to pay child support through -- through Mr.
5 Willick, then -- then the Norwegian government would try to get
6 it, you know, from you otherwise. There will be years that --
7 that you did not pay child support, I know that -- that they
8 have some officials in -- in the U.S. looking for you, but
9 haven't succeeded finding you.

→ 10 Q Did Norway issue child support orders to your
11 knowledge?

12 A Yes.

13 MR. VAILE: Your Honor, at this point --

14 THE COURT: Yes?

15 MR. VAILE: -- I'd -- I would like the court to please
16 take judicial notice that Cisilie has testified that there is a
17 child support order in Norway. Under NRS 130.207, this court
18 would be required to make a determination of which order is
19 controlling.

20 MR. WILICK: It's already been fully briefed.

21 THE COURT: But controlling order has only to do with
22 modification. We're not hearing modification. We're hearing --
23 we're here on an initial order for child support, unless you're
24 arguing that it -- it was. I mean, this -- Nevada came first.

1 MR. VAILE: I'll -- I'll continue, but I just wanted
2 you to take judicial notice of -- of the order if you would be
3 willing.

4 THE COURT: The request is denied at this time. I
5 don't see any basis to right now. Okay. Proceed.

6 MR. VAILE: Okay.

7 Q I wanted to ask you a quick question along a tangent
8 with regard to the -- the United States District Court and the
9 district in Nevada the -- the findings of fact that were issued
10 from that court. Have you --

11 A Okay.

12 Q -- have you read those, Cisilie?

13 A I -- I didn't understand the question. I'm sorry.

14 Q Have you -- have you read the -- the order that --
15 that was issued by the -- the federal district court?

16 A Well, which order? Or when?

17 Q The -- the findings of fact specifically that were
18 issued on March 13th of 2006.

19 A I have probably read it a long time ago as -- as I do
20 with all the other legal documents, but you know, the -- the leg
21 -- the American legal language is -- takes a long time for me to
22 understand. So I just --

23 Q I was just asking if you read --

24 A -- probably briefly read it through, just -- you know,

1 Q Cisilia, my question was --

2 A -- could -- could manage to do.

3 Q -- my question was if that statement is true, did
4 Norway independently issue support orders?

5 A Yes, they -- they issued support orders, yes. Since
6 you were not paying child support, I -- I thought that the
7 Norwegian authorities could try to -- to find you.

8 Q Okay. I'd like to go back to our -- our discussion of
9 the -- of the deposition.

10 MR. VAILE: And Your Honor, I'd just renew my request
11 for judicial notice that Norway has entered the support orders
12 for the record.

13 THE COURT: The response from opposing counsel?

14 MR. WILLICK: It's -- it's totally irrelevant. It's -
15 - anything currently before this court and certainly doesn't
16 have anything to do with the alleged reason for the calling of
17 this witness.

18 THE COURT: Is it -- it says temporary. Is it a
19 temporary order? Does it have any impact?

20 MR. VAILE: It's temporary custody.

21 THE COURT: Temporary custody and temporary child
22 support and temporary visitation orders, paragraph 20.

23 MR. VAILE: I'm not sure --

24 THE COURT: The question is if it's temporary, is it

1 relevant if it's temporary versus permanent. And didn't the
2 permanent order come from the decree in '98?

3 MR. WILLOCK: Yes. There's absolutely nothing in this
4 entire line of questioning --

5 THE COURT: So --

6 MR. WILLOCK: -- which is relevant to any issue
7 currently before the court.

8 MR. VAILE: The -- it -- there is in fact -- it is
9 relevant. If -- if you remember --

10 THE COURT: The definition of a controlling order is
11 it comes out of a divorce decree or a permanent order was made.
12 The finding by the federal district court here was says it was a
13 temporary order.

14 MR. WILLOCK: The fact that the federal district court
15 said, right here --

16 THE COURT: So if it's temporary, it's made without
17 prejudice subject to any -- any other order I guess that may
18 supercede it or was already in effect.

19 MR. WILLOCK: And the knowledge of the federal
20 district court is to what had or hadn't been issued in Norway is
21 irrelevant to the issue of whether Mr. Vaile has violated his
22 1998 duty to pay child support pursuant to the Nevada decree of
23 divorce.

→ 24 THE COURT: Okay. The request is denied. We'll

1 proceed.

2 Q I'd like to -- to continue with the -- the language
3 from the -- from the deposition.

4 A Okay.

5 Q This is on -- again, on page 297 of the deposition,
6 line 19. Question, did you tell them that we had an agreement,
7 had arranged child support provisions as part of our 23 page
8 agreement? Answer, no, because at the time the agreement was
9 void by the court, so that agreement didn't exist anymore.
10 Question, can you specify what court voided our agreement with
11 regard to child support? Answer, the Nevada Supreme Court.

12 MR. WILICK: It's a technical matter, Your Honor. I
13 should probably interpose an objection that there's been no
14 published deposition and this deposition wasn't taken in this
15 case and is not properly admitted in this action. To the degree
16 that he's attempting to cross examine her based on it will
17 eventually get to the same point and I'm trying not to make
18 procedural objections.

19 THE COURT: And depositions are only to be used for
20 impeachment purposes.

21 MR. VAILE: Your Honor, this language that -- that
22 Cisilie communicated to me goes directly to whether or not --

23 THE COURT: Well, that's the content but procedurally
24 I think you have to first get her to say something, then you can

1 MR. WILLOCK: Rephrased the witness's actual comment.

2 THE COURT: It misstated the -- the witness's
3 testimony. Sustained. You can ask --

4 MR. VAILE: In -- in what manner? She specifically
5 said the Nevada Supreme Court --

6 THE COURT: I don't get into objections with -- I
7 mean, I don't get into arguments with you. Just ask -- rephrase
8 the question so it doesn't misstate her testimony or ask a
9 related question I guess. There's other ways to ask -- go about
10 and ask the question.

11 Q When you said specifically, and I quote, that the --
12 that agreement didn't exist anymore, was it your expectation
13 that I would continue to adhere to the agreement?

14 A Well, I -- I expected you to pay child support. And
15 the -- and the fact that I contacted the Norwegian authorities
16 is not because I necessarily wanted, you know, them to sort of
17 throw away any --

18 MR. VAILE: Your Honor --

19 A -- child support --

20 MR. VAILE: -- I'm going to object.

21 A -- you know, that you were supposed to pay and the --
22 the --

23 THE COURT: What's the objection?

24 A -- fact that I contacted --

1 could not do such a thing even if they wanted to.

2 THE COURT: Sustained.

3 A I haven't either.

4 THE COURT: Cisilia, if I say sustained, don't answer
5 the question..

6 A Okay. I'm sorry. I didn't hear it. I'm sorry.

7 THE COURT: Okay. She didn't hear.

8 Q Between -- between the communications that we had in
9 November of 2003 at your deposition and November of 2007 --

10 A Yes?

11 Q -- you and I didn't communicate about child support;
12 did we?

13 A Not as far as I can remember.

14 THE COURT: What time period, Mr. Vaile?

15 MR. VAILE: November of 2003 when -- when Cisilia said
16 that the child support --

17 THE COURT: What's the time period?

18 MR. VAILE: -- agreements were avoid and November of
19 2007.

20 THE COURT: Okay. And your answer was? Did you
21 communicate with him or not on child support?

22 MR. VAILE: Not that she can remember.

23 THE COURT: Okay.

24 A I -- I can't remember if we had --

1 THE COURT: Can't remember. Okay.

2 A -- communicated.

3 THE COURT: Okay.

4 A Not that -- we didn't communicate much about anything
5 in the entire time frame.

6 Q Was it your choice to wait to request child support
7 from this court?

8 A If it was my choice to wait? I trusted Marshal
9 Willick to -- to try to have you pay child support and -- and
10 that I trust his sort of schedule as well. And then only reason
11 I -- yeah. Yeah, that's basically the -- the answer, yes.

12 Q What prompted you to make a request for child support
13 in November 2007?

14 A You hadn't been paying child support. And I hadn't
15 been getting any for many years.

16 Q Did the timing of the request for this court to
17 enforce child support provisions have anything to do with my
18 suit of Marshal Willick in Virginia?

19 A I haven't thought specifically about timing, no.

20 Q Do you remember me asking you for your income and tax
21 statements, Cisilia?

22 A I don't remember, but that could have been true.

23 Q I'd like to ask you a little bit about an e-mail
24 message that I sent to you in February, February 5th, 2008 where

1 I said if I had -- if you had wanted to determine child support
2 under our original agreement, you need only to have notified me
3 of this. I'm happy for us to continue to uphold all aspects of
4 this agreement. Do you remember receiving that e-mail, Cisilie?

5 A Yes.

6 Q And what was your response?

7 A I -- as far as I can remember, I don't think I
8 responded.

9 THE COURT: Did Marshal get one?

10 MR. VAILE: Yes.

11 THE COURT: Okay.

12 MR. VAILE: I'd like to move this into evidence, Your
13 Honor.

14 THE COURT: First you have to have the clerk mark it
15 and put a sticker on it. And she'll tell me what number that
16 is, it's a blue sticker -- or yellow sticker. And now he moves
17 it into evidence. Do you have any objection, Mr. Willick?

18 MR. WILICK: Huh. I guess my only objection would be
19 relevance, because this isn't a communication from the witness,
20 but to the witness.

21 THE COURT: It's written by Mr. Vaile to Cisilie.

22 MR. VAILE: I -- I --

23 MR. WILICK: Allegedly. What she has just testified
24 to is not even that she got this document, that -- that she got

1 were paid 11,000 kroners a month?

2 A Yeah, I think so.

3 Q So if -- if you were paid 11,000 kroners a month, does
4 that mean that the dollar amount actually changed each month?

5 A Yeah, I -- when I said that 11,000 kroners, that was
6 the approximate amount, because I guess the dollar or the
7 exchange rate didn't vary that much -- but -- but, you know,
8 it's varied a few pennies, you know, from month to month.

9 Q Do you remember which if any month I paid \$1,300?

10 A I -- I don't have much recollection of that.

11 Q Do you -- do you know where of the -- the number 1,300
12 came from?

13 A I believe it was the agreement.

14 Q It's your -- it's your recollection that the \$1,300 is
15 specified in our agreement?

16 A As far as I can remember.

17 Q Okay. Cisilia, do you have a -- any preference for
18 whether I work or not?

19 A Yes.

20 Q And what's your preference?

21 A I think all dads should work so they can support their
22 children.

23 Q Are you support of any -- are -- are you -- are you in
24 support of any efforts made to keep me from working?

1 THE COURT: I think he's trying to her if she
2 remembers or not first.

3 MR. WILLICK: Well, no. What he just asked is do you
4 of any time that I was working that you didn't get child
5 support.

6 THE COURT: Oh, right.

7 MR. WILLICK: And he already got --

8 THE COURT: It might be a foundational problem as
9 well.

10 MR. WILLICK: Exactly. He already got her to say that
11 she didn't know when he was working.

12 THE COURT: Sustained. First establish a foundation
13 if she has any recollection from March '06 forward.

14 Q So during -- from March 2006 until my current
15 employment, do you know when I was working and when I was not?

16 A No.

→ 17 Q Okay. So the -- the -- sorry. I'll rephrase. In --
18 in April of -- of 2002, after the Nevada Supreme Court issued
19 its decision, there was a hearing in Texas where you were
20 present. Do you remember that?

21 A Yes. Uh-huh.

22 Q And during that hearing in Texas, my attorney asked
23 the court to uphold our separation agreement. Do you remember
24 that?

1 A No.

2 Q Do you remember your attorney opposing the upholding
3 of the child support agreement?

4 A I -- I think that could be reasonable that he would
5 have done that. I was -- I was basically in shock in that --
6 that week and I was most worried about my children. I -- I
7 didn't --

8 Q That's okay. Just yes or no is fine.

9 A -- I wasn't paying too much attention about what was
10 going on in court as long as I had my children returned, but
11 that -- that seems reasonable that he could have said that.

12 MR. WILLICK: Your Honor, I notice that it is now noon
13 and we are now one hour into this examination. May I --

14 THE COURT: Yeah.

15 MR. WILLICK: -- inquire as to how much longer this is
16 going to go?

17 THE COURT: How much more do you have?

18 MR. VAILE: I have one more question.

19 THE COURT: You do? Oh, okay.

20 Q Cisilia, were you advised of -- of Heather's filing of
21 bankruptcy?

22 A Yes.

23 Q Okay.

24 MR. VAILE: That's all I have, Your Honor.

1 domesticated in Texas, they each had their own attorneys. And
2 who requested continued enforcement --

3 A So --

4 Q -- of the Nevada Supreme Court?

5 A -- after the Nevada Supreme Court made their
6 determination with regard to custody, my attorney in Texas asked
7 that the remaining parts of the separation agreement, including
8 the child support provisions, be -- you know, continued to be
9 enforced, because, you know, there is a possible reading under -
10 - of the Nevada Supreme Court decision that only parts of the
11 separation agreement were thrown out.

12 Q Okay.

13 A And Cisilia's attorney opposed that and argued to the
14 judge that a -- that sort of an agreement could not be enforced
15 unless it was a part of a -- a valid decree. And the judge
16 ruled in Cisilie's favor. So basically my understanding of that
17 issue at the time was that, based on what the judge held in
18 Texas --

19 Q But the whole thing was --

20 A -- but the whole agreement was -- was thrown out. And
21 that is precisely what Cisilie's attorney argued.

22 Q Is there any -- was there a judgment, an actual Texas
23 judge signing an order to that effect?

24 A I'm not sure what findings --

1 A The depositions took place in 2003.

2 Q Okay.

3 A And -- and that is when I asked Cisilia if she was
4 pursuing child support through the Norwegian system. She said
5 yes. And I asked her if she had provided them the 23 page
6 agreement that contained child support provisions. You know,
7 just in the event that she -- she believed that the -- the
8 agreement was still valid. And she said that it was void, that
9 it didn't exist anymore. And that -- that put me on notice that
10 she wasn't seeking child support in accordance with the -- the
11 Nevada order. And -- and again, it was -- it was communicated
12 that she also as we discussed earlier wouldn't be providing me
13 any of the income information that I needed to have in order to
14 calculate child support under our agreement. So the -- the
15 first notice I was given that Cisilia wanted to, you know, from
16 -- from that -- that whole time, you know, that whole time
17 period that we discussed, the first notice I was given that she
18 wanted to -- or that she had changed her mind and decided to --
19 to ask for support under the Nevada agreement that she
20 previously said had been thrown out was in -- in 2 -- in
21 November of 2007 when the first -- it was -- the first filing
22 was made in this case. You know, the federal -- the federal
23 court complaint didn't ask for anything to do with child support
24 or arrears. And during this time, I -- I might just mention

1 THE COURT: Did he not give it to you earlier?
2 MR. WILLICK: He did.
3 THE COURT: Oh, okay.
4 MR. WILLICK: Somewhere in the going to lunch and
5 getting back --
6 THE COURT: Faster if you copy this?
7 MR. WILLICK: Possibly, I'm sorry, Your Honor.
8 THE COURT: Go ahead.
9 A May I? I can testify without being admitted.
10 Q I want him to look at it. If he has no objection, I'm
11 going to admit it. If he has an objection, I have to deal with
12 that, but we're -- we're on authentication right now.
13 MR. WILLICK: I apologize. I just misplaced the
14 paper.
15 THE COURT: No problem. It's only one page.
16 (WHEREUPON THE COURT CONFERS WITH THE BAILIFF AND CLERK)
17 THE COURT: Any objection to Plaintiff's Exhibit 1?
18 MR. WILLICK: I don't believe so.
19 THE COURT: Thank you. That will be admitted.
20 (Plaintiff's Exhibit 1 admitted)
21 Q Okay. Now you can talk about the contents.
22 A Okay. It's -- really the relevant part is -- is
23 section -- or paragraph three. And -- and I just reiterated to
24 her that I understood from her deposition that she wasn't

1 seeking support under the -- under the Nevada order, but the --
2 that -- that she was going to pursue it through -- through
3 Norwegian channels. And I -- I think I've communicated fairly
4 openly in my willingness to adhere to our original agreement. I
5 said if you hadn't wanted to determine child support under our
6 original agreement, you need only to have notified me of this.
7 I'm happy for us to continue to uphold all aspects of this
8 agreement. And then, I go onto ask -- ask for her to please
9 provide all the documentation regarding her gross income. And -
10 - and I said that I would be happy to provide the same to her.
11 I mean, I would have liked to have resolved this through
12 amicable channels.

13 Q Okay.

14 A Basically, like she said, she didn't -- she chose not
15 to -- not to respond. So when -- when this court issued an
16 order -- I mean, I -- I've adhered it at all times when I
17 believe that -- that a -- a valid child support order was
18 issued, I -- I have adhered -- I have adhered to that order.

19 Q Any payments that you made voluntarily at any time
20 since the divorce?

21 A When you're -- when you -- when you say voluntarily,
22 are you --

23 Q Post April 2000 other than garnishment, did you
24 voluntarily --

