

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

CISILIE A. VAILE,

Petitioner,

vs.

EIGHTH JUDICIAL DISTRICT  
COURT OF THE STATE OF  
NEVADA, IN AND FOR THE  
COUNTY OF CLARK; FAMILY LAW  
DIVISION, THE HONORABLE  
CYNTHIA DIANE STEEL, DISTRICT  
JUDGE,

Respondent.

and

R. SCOTLUND VAILE,

Real Party in Interest.

S.C. DOCKET NO. 36969  
D.C. CASE NO. D 230385

FILED

DEC 20 2000

BY JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
DEPUTY CLERK

R. SCOTLUND VAILE'S OPPOSITION TO  
EMERGENCY PETITION FOR WRIT OF  
MANDAMUS AND WRIT OF PROHIBITION

COMES NOW, Real Party in Interest, R. SCOTLUND VAILE and submits this  
Opposition to Petitioner's Emergency Petition for Writ of Mandamus and Prohibition,  
subject to the request of this Honorable Court. This Opposition is filed pursuant to the  
provisions of Nevada Rule of Appellate Procedure 21(b). It is respectfully submitted, upon  
reasoned consideration of the following Points and Authorities and the relevant facts, this  
Court will deny the Emergency Petition and sustain the decision of the Honorable Judge  
Steel in rendering a proper adjudication of the matters which were before her.

Specifically, it is clear Judge Steel was not required to enter a ruling on the Motion  
for Return of Internationally Abducted Children. However, her ruling is absolutely correct

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JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
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11-22202

1 in her understanding and analysis of the appropriate factors--should such a ruling be  
2 required. Moreover, Judge Steel's decision on the propriety of the Decree of Divorce and  
3 its surrounding orders was absolutely appropriate--given the evidence and arguments which  
4 were placed before her. Accordingly, the Petition should be denied.

5 DATED this 19 day of December, 2000.

6 RAWLINGS, OLSON, CANNON,  
7 GORMLEY & DESRUISSEAU

8  
9 By 

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POINTS AND AUTHORITIES

I. FACTUAL/PROCEDURAL BACKGROUND

Petitioner, in her haste to malign both her former husband and Judge Steel, chooses to portray for this Court a legal and factual analysis which is unsupported--if not outright denied--by the relevant law and the facts which were presented for Judge Steel at the hearing, whose ultimate decision is the subject of the instant Petition. It is not true, as Petitioner asserts, there was "no factual dispute that is relevant to the jurisdictional questions presented in this Writ Petition." Petition at p. 2, ll. 10-11. To the contrary, Mr. Vaile has significant factual disagreements with the distorted factual and procedural history set forth by Petitioner. It is submitted, however, the relevant factual disagreements between the parties have been subjected to proper analysis and due consideration by Judge Steel--who heard the live testimony. It is of no small moment, therefore, that her factual findings disagree with Petitioner too. Rather than rehash the entire factual or procedural history, the highlights of important disagreements will be cited within this section.

The first major factual disagreement is found on page 5 of the Petition. There, Petitioner claims Mr. Vaile is the individual who selected Nevada as the jurisdiction under which the divorce should take place. However, as seen in the Affidavit of Mr. Vaile, (attached as the first exhibit to Exhibit 15 in Petitioner's Appendix) the decision to select Nevada was made by Petitioner--not Mr. Vaile. Mr. Vaile and Petitioner had previous discussions regarding permanently moving their residence to Nevada while they were still living in England--not because they sought a divorce--but because of the tax benefits relative to residing in Nevada. See Appendix, Exhibit 15, at p. 3, ll. 13-17.<sup>1</sup> In the evidentiary hearing before Judge Steel, credible evidence was presented that Mr. Vaile took sufficient steps to change his residence from the State of Virginia to Nevada *prior to May 12, 1998*. All of his bills (indeed, all his mail) were directed to the State of Nevada--where he planned

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<sup>1</sup>It is apparent from the allegations made by Petitioner that Mr. Vaile's mother resided in Nevada and her address was utilized as his Nevada address until permanent housing could be located.

1 to take up permanent residence. He obtained a Nevada Driver's License and became  
2 registered to vote within this State. Judge Steel was persuasively shown it was Mr. Vaile's  
3 intent to be physically present in Nevada sooner than he actually was.<sup>2</sup> See Appendix,  
4 Exhibit 29 at p. 2.

5 This highlights the second faulty factual assertion contained in the Petition (at p. 5,  
6 ll. 18-23). Mr. Vaile proved he came to Nevada virtually every time he returned to the  
7 United States. The assertion that the longest Mr. Vaile had ever been in Las Vegas was  
8 during the court proceedings immediately leading up to the hearing which is the subject of  
9 appeal is unfounded and incorrect. In fact, Mr. Vaile testified at the hearing he believed he  
10 had spent more than six weeks in Nevada prior to the filing of the Complaint for Divorce.<sup>3</sup>

11 There is no credible evidence of any threat by Mr. Vaile to Petitioner in the record  
12 before this Court or in the evidence before Judge Steel. This argument segues into the  
13 agreement signed by Petitioner. This 23 page document--which Petitioner seeks to  
14 disavow--clearly stated the parties were entering the agreement of their own free will.  
15 Appendix, Exhibit 15 at Exhibit 1. They both agreed, on page 2 of the agreement, that the  
16 parties would file for divorce before a court of competent jurisdiction in the State of Nevada  
17 "before July 31, 1998 or as soon as possible thereafter." On page 20 of the agreement,  
18 Petitioner initialed her admission that she had carefully read the agreement prior to signing  
19 it and entered into the agreement of her own volition with the complete understanding of  
20 all the terms and provisions contained therein. The parties both agreed no modification of  
21 this agreement was possible unless it was in writing and signed by both. Id. Additionally,  
22 on page 21 of the agreement, Petitioner asserted that she had obtained independent legal  
23 advice from counsel of her own selection. While Mr. Vaile was represented by James E.

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24  
25 <sup>2</sup>Judge Steel properly found the restraint placed upon Mr. Vaile from leaving  
26 England (which was mutual to Petitioner also) was occasioned solely by Petitioner's  
unilateral behavior.

27 <sup>3</sup> Indeed, the only concession that could be made was that he was not able to be  
28 physically located in Nevada for six consecutive weeks prior to his filing of the  
Complaint.

1 Smith, Esq., Nevada Bar No. 000052; Petitioner was represented by David A. Stephens,  
2 Esq., Nevada Bar No. 000902. The document was then signed by both Petitioner and Mr.  
3 Vaile and notarized. Id. at p. 23. This agreement was signed prior to the time the  
4 Complaint was filed.

5 One further comment about this agreement should be made. It is within this  
6 agreement that Petitioner covenanted and agreed, upon Mr. Vaile's relocation to the United  
7 States, she would take up residence within 20 miles of his place of residence--with the only  
8 condition being that she would have no obligation to move to the United States to take  
9 residence there before July 1, 1999. In addition, on p. 11, Petitioner agreed she would  
10 have only a temporary residency of the children in Norway--until such time as Mr. Vaile  
11 would be able to arrange to move her and the children to the United States. This  
12 voluntarily signed agreement is yet another promise which Petitioner now sadly seeks to  
13 disavow.<sup>4</sup>

14 Turning to p. 7 of the Petition, Mr. Vaile would note to this Court that while  
15 Petitioner may state she knew nothing of Nevada's residency laws, that assertion was not  
16 believed by Judge Steel nor was it truthful. Indeed, as has been asserted, the short residency  
17 requirements of Nevada was precisely one of the reasons why Petitioner chose Nevada as  
18 the site for the divorce. Mr. Vaile does not dispute his tax obligations; citizens working  
19 overseas have automatic extensions. All that has been obtained, regarding his taxes, are  
20 these automatic extensions.

21 Again, Petitioner makes the scurrilous assertion that Mr. Vaile never lived in Nevada.  
22 Indeed, in testimony before Judge Steel, he stated he did live in Nevada for a period of  
23 time. In fact, he testified on the stand that if one were to add up all the time he had spent  
24 in Nevada, he was confident it would add up to more than six weeks.

25 Turning to p. 8, the entire first paragraph is false. There was no custody proceeding  
26 entered in Oslo in November of 1999. Instead, there was a mediation session which was

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27  
28 <sup>4</sup>There was a similar agreement written in Norwedian, but it is not in evidence  
before this Court.

1 not court-sponsored. Mr. Vaile never submitted himself to those proceedings. Instead, he  
2 hired counsel to have the case dismissed--which is exactly what happened.

3 On August 7, 1998, a Complaint for Divorce was filed with the Eighth Judicial  
4 District Court in Clark County, Nevada. Appendix, Exhibit 15 at Exhibit 2. In filing her  
5 Answer in Proper Person to the Complaint, Petitioner conceded the relevant facts of the  
6 Complaint--including the assertion that Mr. Vaile had met the residency requirements for  
7 this divorce to take place within the State of Nevada. Appendix, Exhibit 15 at Exhibit 3.  
8 She then signed a verification--which was notarized--saying she had read the Answer and  
9 that the contents thereof were true. Id. at p. 2.

10 As a result of Petitioner's Answer being filed, a Decree of Divorce was entered on  
11 August 21, 1998. Vaile's Supplemental Appendix (hereinafter "Supplement") at Exhibit A.  
12 The Divorce Decree by Judge Steel incorporated the 23 page agreement previously  
13 referenced. Id. That Decree further noted the children would have habitual residence in  
14 the State of Nevada pursuant to NRS 125.510(7)--at the time the Decree was entered.  
15 This Decree was then recognized and ratified by the Governor of Oslo, Norway on October  
16 8, 1998 at Petitioner's request. Appendix, Exhibit 15 at Exhibit 12.

17 Petitioner was apparently content with the divorce and its terms and conditions until  
18 October of 1999. It was then she was informed by Mr. Vaile that he was moving back to  
19 the United States (to Las Vegas) and, pursuant to the agreement, Petitioner needed to  
20 move back to the United States with her children by the end of that year. Although she had  
21 agreed to this fact and although she was acknowledged to be residing with the children only  
22 temporarily in Norway, Petitioner refused to return to the children to Las Vegas--even  
23 though she was required to do so. Supplement at Exhibit B. Her steadfast refusal required  
24 Mr. Vaile to return to Judge Steel and seek a change in the primary physical custody from  
25 Petitioner to himself. Id. The Petition seeking such a change was filed with Judge Steel on  
26 February 18, 2000.

27 Petitioner was properly served with a copy of the document; a verification of service  
28 was filed on March 28, 2000. On April 12, 2000--no answer from Petitioner forthcoming--

1 -Judge Steel entered an Order noting Petitioner was in contempt of the Court for failing to  
2 return the minor children and, therefore, was ordered to immediately return the children to  
3 Mr. Vaile. In addition, Mr. Vaile was awarded primary physical custody of the two minor  
4 children. Supplement at Exhibit C.<sup>5</sup> On April 19, 2000, Notice of Entry of this Order was  
5 filed. Supplement at Exhibit D.

6 Up to this point in time, Petitioner had never challenged the validity or efficacy of  
7 the Decree. To the contrary, she not only accepted the divorce and sought to have it  
8 recognized in Norway, but even went so far as to become engaged to be married.  
9 Appendix, Exhibit 15 at Exhibit 13. The only disagreement she ever evidenced was a  
10 willingness to live up to her contractual promises regarding the domicile of the children.<sup>6</sup>

11 Armed with this valid Order, Mr. Vaile traveled to Norway to legally restore his  
12 relationship with the children over whom he was given proper physical custody. Once the  
13 children were out of her control, Petitioner failed to give notice to the Norwegian police  
14 that Mr. Vaile had been granted lawful custody of the children. Her failure to recognize  
15 that fact, however, could not change the effect of Judge Steel's ruling. In addition, in stark  
16 contrast to the prevacation contained in the Petition, Mr. Vaile did return to Nevada before  
17 proceeding to Texas.

18 Petitioner asserts her wrongful custody of the children in Norway terminated on or  
19 about May 17, 2000. However, she waited until September 21, 2000, to bring the issue  
20 before a Nevada court--in an attempt to have the children restored to her. Appendix,  
21 Exhibit 1. After the parties filed the attendant oppositions, replies, and supplemental points  
22 and authorities in evidence, the matter came on for hearing before Judge Steel. The Judge

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24 <sup>5</sup>Petitioner makes some obscure mention to a document that was filed on her  
25 behalf with the Norwegian attorney who was apparently unlicensed to practice in the  
26 State of Nevada. However, this document does not appear in the Appendix.

27 <sup>6</sup>On p. 8 at ll. 12-18 of the Petition Petitioner continues her unverified attack. The  
28 record is clear that long before the Norway proceedings were underway, the Nevada  
proceedings had been filed. Moreover, Mr. Vaile did inform Judge Steel of the  
proceedings in Norway during the hearing on March 29<sup>th</sup>--which Petitioner refused to  
attend.

1 apparently requested additional points and authorities which were provided. At the  
2 conclusion of this supplementation, on or about October 25, 2000, the Honorable Judge  
3 Cynthia Diane Steel issued an Order denying Petitioner's Motion for the immediate return  
4 of her children and her Motion to set aside the allegedly fraudulently obtained divorce. This  
5 Order clearly and concisely set out the court's factual/legal analysis and is correct in all  
6 respects.

7 After this Order was filed and its entry was noticed (Appendix, Exhibit 30), on  
8 November 5, 2000, the instant Emergency Petition was filed with this Honorable Court.<sup>7</sup>  
9 Significantly, this selfsame Order was the subject of a Notice of Appeal on November 22,  
10 2000. Supplement at Exhibit E.

11 One final fact should be brought before the attention of this Court before  
12 proceeding into the legal analysis of the strength of Judge Steel's decision. There has been  
13 much ado about the Norwegian courts and the proceedings which occurred before them.  
14 On November 9, 2000, the Norwegian court ruled on whether it had jurisdiction over the  
15 children. The English translation is attached to the Supplemental Appendix as Exhibit F.  
16 In rendering its order, the Norwegian court set forth the procedural history of the case. It  
17 examined and incorporated in its decision the October 25, 2000, decision of Judge Steel.  
18 The discussion of the court begins on p. 8 of the opinion. In rendering its opinion, the  
19 court cited a July 9, 1998 Norwegian agreement between the parties which contained a  
20 clause that stated that suits could not be raised in Norway and that the parties accepted the  
21 jurisdiction of the State of Nevada. *Id.* at p. 9. It noted "decisive emphasis" must be given  
22 to the parties agreement from July, 1998 and the August 10, 1998 Decree in the Clark  
23 County District Court. According to those agreements Petitioner's stay in Norway was  
24 only to be temporary. It ruled, at p. 10, the temporary stay of approximately one year was

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26 <sup>7</sup>This Court should take notice that the letter from the United States Central  
27 Authority eluded to by Petitioner in the context of her Petition, is dated November 7,  
28 2000. Thus, this letter was not sent to the Judge's attention until two days after the  
Emergency Petition was filed and cannot be the basis for determining the propriety of the  
actions of Judge Steel.



1 an insufficient basis for the children to have domicile in Norway, noting "residence that  
2 occurs through self-help of one of the parents should not be weighed in deciding where the  
3 children shall be considered residence. . . ." *Id.* Accordingly, the children did not have  
4 domicile in Norway and, therefore, the Nevada or Texas courts would be the entities with  
5 sufficient jurisdiction to hear the matter fully. The child custody case was dismissed from  
6 the Oslo District Court.<sup>8</sup>

7 Given the fact the Norway court has specifically disclaimed jurisdiction over the  
8 children and given the nature of Judge Steel's written opinion, it is respectfully submitted  
9 this Petition must be denied.

## 10 II. LEGAL ANALYSIS

### 11 A. THE PETITION FOR WRIT OF MANDAMUS/WRIT OF 12 PROHIBITION IS PROCEDURALLY IMPROPER

13 Nevada Rule of Appellate Procedure 21 allows the filing of petitions for writs of  
14 mandamus or writs of prohibition under the appropriate circumstances. The purpose for a  
15 writ of mandamus is to compel action, not to correct errors or to control an arbitrary or  
16 capricious exercise of discretion. Barnes v. Eighth Judicial Dist. Court, 103 Nev. 679, 748  
17 P.2d 483, 485 (1987); State ex rel. Treadway v. Wright, 4 Nev. 119 (1868); N.R.S  
18 34.160. Mandamus never lies for the purpose of correcting judicial acts, however erroneous  
19 or wrong they may be. State ex rel. Office Specialty Mfg. Co. v. Curler, 26 Nev. 347, 67 P.  
20 1075 (1902). Thus, mandamus does not lie to control judicial discretion or to review the  
21 propriety of judicial action--once that action is taken. Walton v. Eighth Judicial District  
22 Court, ex rel. County of Clark, 94 Nev. 690, 586 P.2d 309 (1978).

23 This Court has embraced the position that mandamus only should issue to enforce  
24 performance of high official duties affecting the public at large. See Southwest Gas Corp. v.  
25 Public Service Comm. of Nevada, 92 Nev. 48, 546 P.2d 219, 225 (1976).

27 The court also noted that the divorce which was received on August 12, 1998 was  
28 likewise honored in Norway and, therefore, the divorce was final. Based on these  
decisions, the court dismissed the litigation brought by Petitioner. *Id.* at p. 12.

1 Mandamus is an extraordinary remedy. The normal judicial process is trial  
2 and appeal, not final adjudication on pretrial writs. Generally, a petitioner  
3 must show that continuation of the proceedings would be an exercise in  
4 futility, and that the litigation irrespective of what may transpire at trial is  
5 fore-ordained to its inevitable conclusion. Where such a showing is made,  
6 this court will not hesitate to cut off the district court proceedings, the  
7 continuation of which would be both expensive and meaningless. But the  
8 burden on the petitioner is a heavy one; where such a petition is granted, the  
9 relevant facts are not in dispute and a clear question of law, dispositive of the  
10 suit, is presented.

11 Bottomff v. O'Donnell, 96 Nev. 606, 614 P.2d 7, 8 (1980).

12 By the same token, the purpose of a writ of prohibition is not to correct errors, but  
13 to prevent courts from transcending the limitation of their jurisdiction in the exercise of  
14 judicial power. A writ of prohibition will not issue if the court sought to be restrained had  
15 jurisdiction to hear and determine the matter under consideration. Goicoechea v. Fourth  
16 Judicial Dist. Court, 96 Nev. 287, 607 P.2d 1140, 1141 (1980). It, like a writ of  
17 mandamus, will not issue if there is an adequate remedy by appeal or writ of certiorari.  
18 Silver Peak Mines v. Second Judicial Dist. Court, 33 Nev. 97, 110 P. 503 (1910). Thus, if  
19 an order or judgment is appealable, the writ of prohibition will not issue to prevent its  
20 enforcement. Diotallevi v. Second Judicial Dist. Court, 93 Nev. 633, 572 P.2d 214  
21 (1977).

22 In this case, Petitioner cannot show this Court any drastic need for immediate  
23 action. The Norwegian District Court has already ruled adverse to Petitioner. It disagreed  
24 with her concept of where the children were rightfully residing. Accordingly, it performed  
25 a Hague analysis--assuming one was necessary--and found no need to bring the children  
26 back to Norway or to exercise further jurisdiction over them.

27 Appellant asserts to this Court the late-mailed November 7, 2000 correspondence  
28 (Appendix, Exhibit 32) somehow mandates a hearing within six weeks. That is simply  
untrue. All the Hague Convention requires is expeditious behavior in the proceedings for  
the return of the children. 51 Fed. Reg. 58 (1986) at 10508. Article 11 of the Convention  
allows the applicant or the Central Authority of the requested state the right to request a  
statement from the court of the reasons for delay if a decision on the application has not

1 been made within six weeks from the commencement of the proceedings. Thus, the  
2 proceeding is on no fixed timeline. Moreover, satisfaction of the type anticipated within  
3 Article 11 has already been rendered both by the Norway court and by Judge Steel.

4 Finally, this Petition is only appropriate if it is not subject to an appeal. However,  
5 Petitioner has already filed her Notice of Appeal in an attempt, ostensibly, to obtain a  
6 second bite at the apple. The filing of the Notice of Appeal renders moot the need for  
7 either Mandamus or Prohibition writs. Accordingly, this Petition should be denied.

8 **B. THE LOWER COURT HAD JURISDICTION TO ENTER**  
9 **ITS DIVORCE DECREE AND THE ORDER SUBSEQUENTLY**  
10 **FOLLOWING THEREFROM**

11 Assuming this Court wishes to proceed further, it is respectfully submitted Judge  
12 Steel was absolutely correct in rendering the decision she did and in deciding she had  
13 sufficient jurisdiction to enter the divorce decree and make her subsequent rulings.  
14 Petitioner challenges the ability of Judge Steel to act in this manner on the grounds the  
15 consensual divorce which occurred over two years before she challenged its sufficiency was  
16 void "ab initio." In her October 25, 2000 Order, Judge Steel addressed these concerns.  
17 She noted the evidentiary testimony before her established both Petitioner and Mr. Vaile  
18 desired a divorce and did not wish to delay achieving it. Appendix, 29 at p. 2. She also  
19 determined Mr. Vaile took sufficient steps to change his residence to the State of Nevada  
20 prior to May 12, 1998. From the evidence placed before her she believed it was his  
21 intention to remove his residence permanently to the State of Nevada. She did not believe  
22 his behavior was an intent to defraud the court. Instead, it was simply parties attempting to  
23 establish the proper jurisdiction so the divorce could be resolved to their liking.

24 In addition, the Court found merit to the argument of judicial estoppel. She found  
25 no evidence Petitioner signed the Decree of Divorce or her agreements under duress. In  
26 short, listening to the live testimony, Judge Steel failed to believe Petitioner's version of the  
27 events as they occurred--the same version that she now hopes to foist upon this Court. It is  
28 respectfully submitted both these decisions by Judge Steel were appropriate.

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In this case, the evidence which was presented before Judge Steel established the fact of residence. It was clear Mr. Vaile had every intent of making Nevada his permanent home. He changed his address so that all mail would be sent to his residence here in

- 12 -

1 Nevada. He visited Nevada on numerous occasions and came to Nevada directly once he  
2 was allowed to leave England. His only departure from Nevada was in an attempt to locate  
3 employment. However, he continued to return to Nevada. Judge Steel correctly noted he  
4 had both the physical location and the intent to stay within Nevada for an indefinite period  
5 of time at the time he began his residency and at the time the lawsuit itself was instituted.  
6 Thus, Judge Steel had the proper authority and jurisdiction to enter the original Divorce  
7 Decree.

8 **2. Petitioner Is Estopped From Raising the Issue of**  
9 **Subject Matter Jurisdiction**

10 The law in this state is exceptionally clear. If one seeks to attack a decree based upon  
11 lack of residency, one must come to the argument with "clean hands." Thus, a wife who  
12 sought to vacate a divorce decree which had been rendered over a year previously on  
13 jurisdictional grounds was precluded from maintaining her action on the grounds that she  
14 was not an unwitting party to the deficient allegations of residency and, therefore, was both  
15 the party and the actor in any fraud which may have been perpetrated upon the court.  
16 Confer v. District Court, 49 Nev. 18, 24, 234 P. 688 (1925). This Court has consistently  
17 maintained that position throughout its published decisions.

18 Morse v. Morse, 99 Nev. 387, 663 P.2d 349 (1983), summarily dealt with an  
19 allegation by a party who had filed a Petition for Adoption in Clark County but later argued  
20 the order was void for lack of subject matter jurisdiction because the respondent had not  
21 met a statutory residency requirement for filing such a Petition and, therefore, that no  
22 subject matter existed to allow the Petition to be entered. This position was rejected by this  
23 Court--which argued there was substantial evidence the party acted freely and with  
24 understanding in stipulating to those facts that granted jurisdiction. Accordingly, the  
25 petitioner was stopped from challenging jurisdiction. A similar result was had in Boisen v.  
26 Boisen, 85 Nev. 122, 451 P.2d 363 (1969). There, a husband who did not contest the  
27 issue of jurisdiction and residency until the appeal was estopped from challenging the issue  
28 of residency for his wife in their divorce. Finally, in Grant v. Grant, 38 Nev. 185, 147 P.

1 451 (1915), a party who had asserted jurisdiction through the issue of residency to obtain a  
2 divorce was held to be estopped from subsequently disclaiming that jurisdictional matter  
3 when the divorce decree was not to his liking. In making its decision, this Court cited  
4 Gamble v. Silverpeak, 35 Nev. 319, 133 P. 936 (1912) for the proposition that  
5 jurisdictional questions, while they may be raised at any time, may be precluded by a party's  
6 conduct.

7 In the instant case, no different result should be obtained. The evidence before  
8 Judge Steel established the intent of the parties--including Petitioner--was to take up  
9 residence in Nevada sufficient to allow the parties to be divorced. She signed an agreement  
10 predating the Complaint itself wherein she specifically affirmed that, of her own free will,  
11 she wanted the divorce to take place in Nevada. When the Complaint was filed, she  
12 submitted a verified Answer wherein she conceded that Mr. Vaile had met the residency  
13 requirements of Nevada to allow the divorce to go forward. She took the divorce and filed  
14 it with the Governor of Oslo, Norway. She proceeded to act, in all pertinent respects, as  
15 though she were a divorced woman--even to the extent of becoming engaged to another  
16 individual. If this Court concludes a potential error existed on the issue of residency, it is  
17 respectfully submitted the line of authority established within this state clearly holds when a  
18 party has acted in a manner similar to Petitioner, they are estopped from later raising the  
19 jurisdictional issue--when matters no longer go their way.

20 It is of further import to note Petitioner never challenged the jurisdiction of the  
21 divorce until two years after it was initiated. Surely, if she did not desire to be divorced,  
22 this issue would have been raised much earlier. Judge Steel recognized this fact and  
23 embraced it. It is respectfully submitted the Judge did not act in excess of her jurisdiction  
24 in making this decision. Rather, she made a reasoned evidentiary determination based on  
25 the testimony which was presented to her at the hearing of this matter. There has been no  
26 argument or evidence raised before this Court in the context of this Petition which would  
27 warrant a different result than that which was reached by Judge Steel. Accordingly, her  
28 decision should be sustained.

1           C.     **JUDGE STEEL CORRECTLY CHOSE NOT TO MAKE**  
2                   **A FORMAL RULING UNDER THE HAGUE CONVENTION**

3           The final issue for resolution before this Court in the context of this Emergency  
4     Petition is whether Judge Steel erred in reaching the decision she did relative to the Hague  
5     Convention. In rendering her proper decision, she noted several crucial facts. First, while  
6     declining to make a Hague Convention determination, she noted that if she were required  
7     to do so, she would "find that the habitual residence in contracting state for the children  
8     would be the State of Nevada pursuant to the Decree of Divorce and that [Mr. Vaile] did  
9     not wrongfully take the children in Norway beyond those agreements which were in place  
10    between the parties at the time." At Paragraph 7 of her Order, however, the Judge  
11    articulates why it is that a Hague Convention determination was not possible. She stated  
12    she lacked physical jurisdiction over the children because they were never present in this  
13    State. Appendix, Exhibit 29 at p. 3. The jurisdiction which Judge Steel held was over the  
14    interaction between the Petitioner and Mr. Vaile. It was the relationship between the two  
15    of them she sought to control and referee. This was the correct decision.

16           Under the Hague Convention and its implementing legislation (the International  
17    Child Abduction Remedies Act, 42 U.S.C. §11601, et seq. (1994)), the United States  
18    courts can determine only rights under the Convention--not the merits of an underlying  
19    custody dispute. 42 U.S.C. §11601(b)(4). The purpose of the Hague Convention is to  
20    promptly return children who are wrongfully removed or retained--unless certain express  
21    narrow exceptions apply. 42 U.S.C. §11601(a)(4); see Ohlander v. Larson, 114 F.3d 1531  
22    (10<sup>th</sup> Cir. 1997).

23           In order to initiate judicial proceedings under the Hague Convention, a party must  
24    commence a civil action by filing a Petition for relief "in any court which has jurisdiction of  
25    such action and which is authorized to exercise its jurisdiction in the place where the child is  
26    located at the time the Petition is filed." 42 U.S.C. §11603(b). Thus, the party filing the  
27    Petition is required to show, with affirmative proof beyond a preponderance of the  
28

1 evidence, whether the child was wrongfully removed from its habitual residence. Zuker v.  
2 Andrews, 2 F. Supp. 2d 134 (D. Mass.), affd. 181 F.3d 81 (1<sup>st</sup> Cir. 1998).

3 The child's "habitual residence" is best understood as being the location of residence  
4 for the proper custodial parent. See In Re Prevot, 855 F. Supp. 915 (W. D. Tenn. 1994).  
5 The term "wrongful removal or retention," as used in the Convention, means a removal or  
6 retention of a child before the entry of a custody order regarding that child. 42 U.S.C.  
7 §11603(f)(3). Wrongful removal or retention of a child occurs when the act violates the  
8 custody rights of the individual who was exercising those rights--and would have continued  
9 to do so had the child not been wrongfully retained. Roszkowski v. Roszkowski, 644 A.2d  
10 1150 (N.J. Super. Ct. 1993). If a removal or retention is wrongful, then the court must  
11 order the child returned to its habitual residence for a custody determination. Shalit v.  
12 Coppe, 182 F.3d 1124, 1128 (9<sup>th</sup> Cir. 1999).

13 Given these considerations, Judge Steel correctly analyzed her responsibility in the  
14 case. In the absence of the children living within this jurisdiction, it was impossible for her  
15 to enter a ruling. She clearly indicated, however, she believes this is not a case of wrongful  
16 removal but, instead, wrongful retention. In this regard, Judge Steel is in agreement with  
17 the Norway court. She noted there is not only a Divorce Decree but also Custody Decree  
18 based on that wrongful retention by Petitioner. All that Mr. Vaile did was utilize "self-  
19 help" to assist him in restoring his relationship with his children. Judge Steel, reaching  
20 these correct conclusions, then held it was up to the Texas or Norwegian court to determine  
21 who had jurisdiction in this case over the physical bodies of the children. It now appears  
22 that will be the Texas court.

23 At any rate, it is singularly amazing that Petitioner can cry to this Court about the  
24 technical niceties of subject matter jurisdiction for divorces (when she acquiesced to those  
25 representations) and yet chide Judge Steel for refusing to exercise jurisdiction where she  
26 clearly had none. One final comment under this area should be made. If this Court were to  
27 remand this matter back to Judge Steel and direct her to enter a ruling under the Hague  
28 Convention, this Court is already apprised that Judge Steel believes there was no wrongful



1 removal here. Accordingly, she would remand the children to the custody of their proper  
2 custodial parent pursuant to the custody order and the written agreement between the  
3 parties. That individual would be Mr. Vaile--who already has possession of the children.  
4 Therefore, this Petition is without substance and must be denied.

5 CONCLUSION

6 For the foregoing reasons Mr. Vaile respectfully requests this Court dismiss the  
7 Petition with prejudice.

8 DATED this 19 day of December, 2000.

9 Respectfully submitted,

10 RAWLINGS, OLSON, CANNON,  
11 GORMLEY & DESRUISSEAU

12 By 

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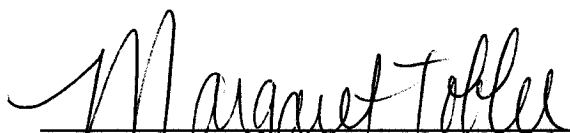
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CERTIFICATE OF MAILING

I HEREBY CERTIFY that on the 19<sup>th</sup> day of December, 2000, I mailed a copy of the foregoing **R. SCOTLUND VAILE'S OPPOSITION TO EMERGENCY PETITION FOR WRIT OF MANDAMUS AND WRIT OF PROHIBITION** to the following counsel at their last known business address, postage fully prepaid thereon:

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