

1 IN THE SUPREME COURT OF THE STATE OF NEVADA  
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4 CISILIE A. VAILE,

5 Petitioner,

6 vs.

7 EIGHTH JUDICIAL DISTRICT  
8 COURT OF THE STATE OF  
9 NEVADA, IN AND FOR THE  
10 COUNTY OF CLARK; FAMILY LAW  
11 DIVISION, THE HONORABLE  
12 CYNTHIA DIANE STEEL, DISTRICT  
13 JUDGE,

14 Respondent.

15 and

16 R. SCOTLUND VAILE,

17 Real Party in Interest.

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

**FILED**

APR 29 2002

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *[Signature]*  
DEPUTY CLERK

18 **R. SCOTLUND VAILE'S PETITION FOR REHEARING**

19 COMES NOW, Real Party in Interest, R. SCOTLUND VAILE, and through his  
20 attorney of record, PETER M. ANGULO, ESQ., of the law firm of RAWLINGS,  
21 OLSON, CANNON, GORMLEY & DESRUISSEAU, and submits the Petition for  
22 Rehearing.

23 **POINTS AND AUTHORITIES**

24 I. **INTRODUCTION**

25 Pursuant to NRAP 40(a)(1), a party may file a Petition for Rehearing within 18  
26 days after the filing of the Court's decision. In this case, the Court's Order was filed on  
27 April 11, 2002. This makes the date for filing April 29, 2002.

28 The Petition is required to state, briefly, the points of law or fact which in the  
opinion of the petitioner the Court has overlooked or misapprehended. Additionally, the  
petition is required to contain a brief argument in support of that Petition.

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02-07573

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1 It is respectfully submitted this Court's April 11<sup>th</sup> Order erred in two discrete  
2 respects relative to the Hague Convention determination which it entered. In the first  
3 place, this Court's admission that the children were never in Nevada would rob this Court  
4 of jurisdiction to make a Hague determination such as found in the April 11<sup>th</sup> Order.  
5 Second, under the Hague Convention, a specific factual hearing is required and this has not  
6 been achieved with the decision of this Honorable Court. Accordingly, for these reasons, it  
7 is respectfully requested that portion of the Order which dealt with the Hague  
8 determination be vacated.

9 **II. LEGAL ANALYSIS**

10 **A. THIS COURT WAS WITHOUT JURISDICTION TO MAKE**  
11 **A DETERMINATION UNDER THE HAGUE CONVENTION**

12 In Mr. Vaile's Opposition to the Emergency for Petition for Writ of Mandamus and  
13 Writ of Prohibition, he set before this Court (at pp. 15-16 of his Brief) the guiding law for  
14 conducting a Hague determination. Specifically, before judicial proceedings under the  
15 Hague convention could be initiated, the party must commence a civil action by filing a  
16 Petition for relief "in any Court which has jurisdiction of such action and which is  
17 authorized to exercise its jurisdiction in the place where the child is located at the time the  
18 Petition is filed." 42 U.S.C. §11603(b)(emphasis added). Thus, the Court entering a  
19 Hague determination must be one where jurisdiction is vested. In this case, this Court's  
20 decision clearly indicates that it has no jurisdiction over the children. Indeed, this was the  
21 very reason why Judge Steele's decision in this regard was vacated. The language of the  
22 statute clearly indicates that the Court who is to be making the initial Hague determination  
23 for the return of the children must be one which has jurisdiction over the children. By its  
24 own admission this court had no jurisdiction over the children, it has no authority to order  
25 the return of the children to Norway.

26 The failure to have children within the jurisdiction is fatal to the ability to enter such  
27 a decision. See Diorinou v. Mezitis, 237 F.3d 133, 136 (2<sup>nd</sup> Cir. 2001)(the district court in  
28 New York dismissed suit without prejudice for lack of jurisdiction because the children were

1 not within that district). The court considering such a petition has jurisdiction only to  
2 decide the merits of the wrongful removal claim, not of any underlying custody dispute.  
3 Friedrich v. Friedrich, 78 F.3d 1060, 1063 (6<sup>th</sup> Cir. 1996). In Lops v. Lops, 140 F.3d 927  
4 (11<sup>th</sup> Cir. 1998), the court held that jurisdiction exists where the children are located.  
5 Specifically, it indicated that the term “located” “does not require a showing of residency  
6 but contemplates the place where the abducted children are discovered.” Id. at 937. See  
7 also Ohlander v. Larson, 114 F.3d 1531, 1539 (10<sup>th</sup> Cir. 1997); Fabri v. Pritikin-Fabri,  
8 2001 U.S. Dist. LEXIS 10041(N. D. Ill. July 13, 2001).

9 Clearly, as was argued in the original Petition, this decision can only be issued by the  
10 court where the children are presently found. That location could not have been Nevada  
11 since the children were never here and since this Court never had jurisdiction over them.  
12 The children were located in Texas as that is the Court with jurisdiction to consider that  
13 Petition. Accordingly, that portion of the Court’s Order should be stricken.

14 **B. MR. VAILE IS ENTITLED TO AN EVIDENTIARY HEARING**

15 The Order by Judge Steele which was presented before this Court (Appendix to  
16 Appellant’s Emergency Petition, Volume III, at Exhibit 29) it was clear that Judge Steele  
17 did not make a Hague Convention determination. In fact, there is no evidence before this  
18 Court that a Hague hearing was even held. The law is clear that a wrongful removal  
19 hearing is not a discussion of custody rights. Shalit v. Coppe, 182 F.3d 1124, 1128 (9<sup>th</sup>  
20 Cir. 1999). However, there must be an evidentiary hearing which is conducted in  
21 determining where the children should be returned. See 42 U.S.C. §11603(b). Indeed, the  
22 statute requires that Petitioner must establish by a preponderance of the evidence that the  
23 child has been wrongfully removed within the meaning of the Convention. 42 U.S.C.  
24 §11603(e)(1)(A). Thus, concepts of due process apply to ensure that a proper hearing is  
25 conducted where competent, credible evidence must be presented. In this case, however,  
26 the record before this Court does not support such a finding. Indeed, the Judge specifically  
27 noted she did not conduct a Hague consideration due to the lack of jurisdiction over the  
28 children. The plenary decision by this Court on the basis of a cold record, without the

1 benefit of an evidentiary hearing it is respectfully submitted violates the intent of the  
2 operational statutes and deprives the parties of their rights under constitutional notions of  
3 due process. While there was not, necessarily, a requirement for live testimony, both parties  
4 must be afforded ample opportunity to present relevant evidence. It is respectfully this  
5 Court's Order denies that right to Mr. Vaile in this particular case. Thus, to that extent, the  
6 Court's decision and Order is also in err and should be reversed.

7 **CONCLUSION**

8 For the foregoing reasons, Mr. Vaile respectfully requests this Court reconsider its  
9 decision and strike those portions of the Order as indicated herein.

10 RESPECTFULLY SUBMITTED this 26 day of April, 2002.

11  
12 RAWLINGS, OLSON, CANNON,  
13 GORMLEY & DESRUISSEAUX

14 By 

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**CERTIFICATE OF MAILING**

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I HEREBY CERTIFY that on the 26<sup>th</sup> day of April, 2002, I mailed a copy of the foregoing **R. SCOTLUND VAILE'S PETITION FOR REHEARING** to the following counsel at their last known business address, postage fully prepaid thereon:

**MARSHAL S. WILLICK, ESQ.**  
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Attorney for Petitioner

  
An Employee of RAWLINGS, OLSON,  
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