

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.

D230385

FILED

NOV 08 2000

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DEPUTY CLERK

EMERGENCY PETITION FOR WRIT OF MANDAMUS  
AND WRIT OF PROHIBITION

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16 **EMERGENCY PETITION FOR WRIT OF MANDAMUS**  
17 **AND WRIT OF PROHIBITION**  
18

19 Petitioner CISILIE A. VAILE submits this *EMERGENCY PETITION FOR WRIT OF*  
20 *MANDAMUS AND PROHIBITION* with the following Points and Authorities. This Petition is  
21 brought pursuant to NRAP 21(a) for issuance of a writ of mandate directing the district court to make  
22 a Hague Convention ruling, as it is required to do pursuant to international treaty as codified in  
23 federal statutes, and for issuance of a writ of prohibition directing the district court to refrain from  
24 enforcing a decree of divorce granted to a non-resident of this State, which decree the district court  
25 did not have jurisdiction to enter.  
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28

1 The issues presented are whether the lower court was required to make a ruling on the Motion  
2 for Return of Internationally Abducted Children, and whether the Court was prohibited from entering  
3 a Decree of Divorce (and various orders enforcing that Decree), on the basis that neither party was  
4 ever a resident of Nevada.

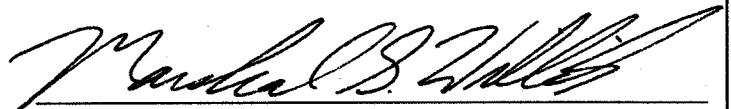
5  
6 The form of this *Petition* is summary in nature, with attachments but without transcripts, in  
7 order to accommodate the emergency needs of the Petitioner and minor children, and the time  
8 constraints formalized in the international treaty to which the United States is a party.<sup>1</sup>

9  
10 There was and is no factual dispute that is relevant to the jurisdictional questions presented  
11 in this Writ Petition. Unfortunately, the District Court Judge has committed jurisdictional error in  
12 both directions, failing to make a decision under the Hague Convention where she was required to  
13 do so, and failing to set aside a divorce decree after being on notice that she was without jurisdiction  
14 to have entered it.

15  
16 The relief sought is this Court's intervention by way of extraordinary writ, requiring entry  
17 of a Hague Convention determination, and prohibiting enforcement of the decree or any orders based  
18 upon it.

19 DATED this 5th day of November 2000.

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

21 

22 MARSHAL S. WILICK, ESQ.  
23 Nevada Bar No. 002515  
24 3551 E. Bonanza Road, Suite 101  
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26 (702) 438-4100

27 <sup>1</sup> Per our discussion with the Clerk's Office Staff, the attachments are set out in the form of an indexed  
28 Appendix to this Writ Petition. The "Exhibit" references are to the documents in the Appendix, which contain all  
documents relevant to the issues in the Writ. Where one document incorporates others, we have included only the  
document incorporating others, to keep the total volume of paper to a minimum.

## POINTS AND AUTHORITIES

### I. CRITICAL TIME DEADLINES JUSTIFYING AN EMERGENCY WRIT

The Hague Convention on the Civil Aspects of International Child Abduction, and its implementing legislation, the International Child Abduction Remedies Act ("ICARA"), 42 U.S.C. §§ 11601-11610, includes the commitment of the contracting states to make a determination under the treaty within six weeks of the initial filing of a petition asserting that children have been wrongfully taken from their habitual residence.<sup>2</sup> Article 11. The six week time deadline for the case before the Eighth Judicial District, Family Law Division, in Case Number D230385 was **November 2, 2000**.

Failure to act within this time period is a violation of a standard embodied in an international treaty, which should be remedied as soon as possible. On October 17, 2000, District Court Judge Cynthia Diane Steel flatly refused to make a Hague Convention determination, and entered an order to that effect which was filed October 25. Exhibit 29. The district court should be directed to make a Hague Convention determination consistent with the undisputed facts from the pleadings and evidentiary hearing.

### II. STANDARD FOR ISSUANCE OF A WRIT

A writ of mandamus will issue to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station, and where there is no plain, speedy, and adequate remedy in the ordinary course of law. *Hickey v. District Court*, 105 Nev. 729, 782 P.2d 1336 (1989); NRS 34.160. A writ of mandamus is available when the respondent has a clear, present legal duty

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<sup>2</sup> See Exhibit 32, letter to Judge Steel from Mary Marshall, Director, United States Central Authority, incorporating copies of the Hague Convention and legal analysis, the implementing legislation (ICARA), and the official commentary (Perez-Vera Report).

1 to act, or to control an arbitrary or capricious exercise of discretion. *Round Hill Gen. Imp. Dist. v.*  
2 *Newman*, 97 Nev. 601, 637 P.2d 534 (1981). The writ is the appropriate remedy to compel  
3 performance of a judicial act. *Solis-Ramirez v. Eighth Judicial Dist. Court ex rel. County of Clark*,  
4 112 Nev. 344, 913 P.2d 1293 (1996).

5  
6 Similarly, the purpose of a writ of prohibition is not to correct errors, but to prevent courts  
7 from transcending their jurisdiction, and they are issued to arrest the proceedings of a district court  
8 exercising its judicial functions when those proceedings are in excess of the jurisdiction of that court;  
9 it also is to issue where there is no plain, speedy, and adequate remedy at law. *Guerin v. Guerin*, 114  
10 Nev. 127, 953 P.2d 716 (1998); *Gladys Baker Olsen Family Trust v. District Court*, 110 Nev. 548,  
11 874 P.2d 778 (1994); NRS 34.320. The writ is the correct mechanism for prohibiting the use of  
12 enforcement orders effectuating an underlying order that was issued without jurisdiction. *Golden*  
13 *v. Averill*, 31 Nev. 250, 101 P. 1021 (1909).

14  
15 As to both varieties of writs, they are intended to resolve legal, not factual disputes. *Round*  
16 *Hill Gen. Imp. Dist., supra*. The Court may in its discretion treat a petition for writ of mandamus  
17 as one for prohibition, or vice versa, or treat a notice of appeal interchangeably as a Petition for a  
18 Writ. *Messner v. District Court*, 104 Nev. 759, 766 P.2d 1320 (1988); *In re Temporary Custody of*  
19 *Five Minors*, 105 Nev. 441, 777 P.2d 901 (1989).

20  
21 In this case, the essential facts are agreed (although, as noted below, we believe that some  
22 of the lower court's commentary in dicta is unsupportable), and the only disputes are as to matters  
23 of law controlling jurisdiction, going both to a duty to act, and a duty to refrain from acting, both of  
24 which duties we believe have been violated by the lower court, requiring an order by way of an  
25 extraordinary writ from this Court.<sup>3</sup>  
26  
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28  

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<sup>3</sup> To the extent that the Court finds that the requested writ of prohibition would be susceptible to an appeal in the ordinary course, we request that the Court exercise its discretion to entertain it on the writ anyway, noting that the

1       **III.    FACTS AND PROCEDURAL HISTORY**

2           A much more detailed exposition of the facts is set out in Exhibit 1 at pages 3-22. Those  
3 facts, as they relate to jurisdiction (who was where, and when) have not been challenged.<sup>4</sup> For the  
4 purpose of facilitating review, the barest sketch of the facts leading to this Petition follows.  
5

6           The essential undisputed facts are:

7           Scot is American; Cisilie is Norwegian. They met in Norway, and were married in Utah in  
8 1990. They have two minor children, who were born in Ohio. Their first daughter, Kaia, was born  
9 May 30, 1991, and her sister, Kamilla, was born February 13, 1995.  
10

11           In 1996, the family moved to Virginia and established residency. Scot obtained a driver's  
12 license, voted, worked, paid taxes and the parties and their children lived there as a family. Scot's  
13 employer transferred him to London, England, in August 1997; all four went to London.  
14

15           In the Spring of 1998, the parties discussed obtaining a divorce. Scot looked at several  
16 jurisdictions and talked to some lawyers, and selected Nevada. Scot's mother announced her  
17 intention to move to Nevada from Maine, and apparently did so sometime in June, 1998.

18           Neither Scot, nor Cisilie, nor the children, have *ever* lived in this state. Cisilie and the  
19 children had never been in this state, other than a stop for a few days in 1996 while on a family road  
20 trip to San Diego. Scot stayed with his mother for a week or so in July, 1998. Both parties have  
21 been in Las Vegas during the court proceedings of the past few weeks; it was the longest either had  
22 ever been present here.  
23

24           

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25 fact that an appeal may be available does not preclude issuance of a writ of prohibition. *G. & M. Properties v. Second*  
26 *Judicial Dist. Court ex rel. County of Washoe*, 95 Nev. 301, 594 P.2d 714 (1979). Should the Court decline to do so,  
we ask that the writ petition be treated as a notice of appeal.

27           <sup>4</sup> Where the parties are in dispute as to "facts," they are largely matters of subjective intent – whether Scot acted  
28 in "good faith," whether Cisilie was "in fear," etc. The disputes are not relevant to the issues this Writ Petition asks this  
Court to resolve. The parties' respective recitations of facts are set out in Exhibits 1, 15 (at 2-6), 17 (at 2-3), and 18 (at  
2-3).

1 job and apartment, where he would remain until sometime late in 1999. After he had returned to  
2 England, his Nevada attorney filed his Complaint for Divorce here on August 8, 1998.

3 In July, 1998, Scot's Nevada attorney<sup>7</sup> prepared an Answer in Proper Person for Cisilie and  
4 mailed it to her. She signed it. The Answer contained a general admission that Scot's averments  
5 were true. On the stand, Cisilie stated that she knew nothing of Nevada's residency laws, and  
6 believed that the only thing she was agreeing to was that a divorce should occur.

7  
8 From 1998 through the end of 1999, the children lived in Norway with Cisilie and visited  
9 Scot, who lived in London. Scot continued to use his mother's address to maintain a United States  
10 mailing address for at least some bills and other documents, although other than a few personal  
11 effects, all of his belongings remained in London or Virginia. To this day, most of the parties'  
12 marital assets are still stored in Virginia.<sup>8</sup>

13  
14 Scot listed Virginia as his state of residence for his overseas federal tax filing from England  
15 in 1997. He claims that he has not filed any tax returns since. He disputes his tax obligation to the  
16 United States and the State of Virginia for 1998 and 1999, and those returns are still "being  
17 prepared" by his London CPA, an Arthur Anderson affiliate.

18  
19 Scot obtained his Nevada drivers' license the same day he signed his verified Complaint for  
20 divorce (July 14, 1998); he surrendered his Virginia drivers' license, which he had used up to that  
21 date, to the Nevada DMV. Even though Scot has never lived in Nevada, he retains his Nevada  
22 license today.

23  
24  
25  
26 six weeks.

27 <sup>7</sup> James Smith, Esq., who is not currently Scot's attorney in this action.

28 <sup>8</sup> While Scot's testimony was vague, and Cisilie was never asked the question, the lower court found as a matter  
of fact that "neither of them had any intention of ever returning to Virginia." Exhibit 30 at 2.

1 In November, 1999, Cisilie initiated custody and visitation proceedings in Oslo.<sup>9</sup> Scot  
2 submitted to the proceedings, hired counsel, traveled there, and participated in the initial mediation  
3 phases of what would have been a court determination of custody and visitation rights.  
4

5 Scot remained in London until a date he could not specify in late 1999. On the stand, Scot  
6 claimed to have returned to somewhere in the United States after the Oslo proceedings had started,  
7 but he was unwilling or unable to state where he lived between late 1999 and early 2000 (although  
8 he admitted it was not in Nevada). Since sometime in early 2000, Scot has lived in Texas, where  
9 he continues to use his Nevada driver's license.<sup>10</sup> At some point during those travels, he may have  
10 spent some days in Nevada visiting his mother.<sup>11</sup>  
11

12 Unhappy with his progress in the Norwegian courts (and without advising the Nevada court  
13 of those ongoing Norway proceedings), Scot had his Norwegian attorneys delay the proceedings  
14 there, and filed a motion for custody in Las Vegas. By a default order, Scot obtained a Nevada pick-  
15 up order for custody of the children. (Cisilie's Norwegian attorney tried to respond to the motion,  
16 but her response was rejected by the judge's secretary because it looked like a letter, and was not  
17 filed by the clerk until after the default order was issued.)<sup>12</sup>  
18  
19  
20  
21

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22 <sup>9</sup> Because of the perceived threat of a kidnap by Scot, a motion was pending in Norway as of March 24, 2000,  
23 requesting a formal order of temporary custody to Cisilie, with supervised visitation to Scot only. Exhibit 1, at Exhibit  
24 I. There is no question that "custody litigation" was ongoing in Norway on the date Scot abducted the children.

25 <sup>10</sup> Scot evaded every question asked him on the stand as to his residency, or even physical location, from the  
26 time he left London in late 1999, although he conceded that he never lived in Nevada. He reports that today he lives  
27 on a ranch in Texas, claiming that he owns no car, but uses the Nevada license, and refused to admit owning anything,  
28 anywhere.

<sup>11</sup> Upon direct questioning by the lower court judge, Scot conceded that all the time he has ever spent in  
Nevada, put together, does not add up to six weeks.

<sup>12</sup> Color timelines showing the exact order of the various events are set out in Exhibit 3 (these events are set  
out in the second timeline in that set, listed as Exhibit BB).



1 Scot, his brother, and some friends traveled to Norway to take the children, who they  
2 removed bodily without recourse to any legal process in Norway. The Oslo Police reported the  
3 kidnap to Interpol, but Scot slipped them across several international borders and eventually removed  
4 them to the United States. Within days, and without ever coming to Nevada, the children were  
5 relocated to Texas.<sup>13</sup>

7 Cisilie reported the children kidnaped,<sup>14</sup> and filed an Application to the Norwegian Ministry  
8 of Justice, which requested assistance from the United States Department of State on May 29, 2000.  
9 Exhibit 1, at Exhibits Q, R. The case was ultimately referred to undersigned counsel.<sup>15</sup>

11 Cisilie filed her Hague Convention petition on September 21, 2000, and the children were  
12 returned to Nevada from Texas on September 30, 2000, under a pick-up order from the Nevada  
13 court. An initial hearing, explicitly restricted by the lower court judge to the issue of state court  
14 jurisdiction, was held October 17.<sup>16</sup>

16 Judge Steel issued an order, filed on October 25, 2000, containing eight findings. Exhibit  
17 29. She found that she would not make a Hague Convention determination, that Scot's intent to  
18 move to Las Vegas permitted him to file for divorce here, that since neither party tried to defraud the  
19 court, the court had subject matter and personal jurisdiction, that the doctrine of judicial estoppel  
20 applied so that Cisilie could not claim that Nevada lacked subject matter jurisdiction, that because  
21 both parties had left Virginia and Scot's mother lived in Nevada, he could declare it his residence

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23 <sup>13</sup> The lower court judge refused to characterize Scot's removal of the children from Norway as a kidnap,  
24 despite the circumstances set out in detail in Exhibit 1 at 18-21.

25 <sup>14</sup> Exhibit 1, at Exhibit M.

26 <sup>15</sup> I am privileged to be the Nevada contact attorney for the National Center for Missing and Exploited Children,  
27 which coordinates the securing of counsel for the American Central Authority in international kidnaping cases.

28 <sup>16</sup> Despite the urging of counsel, Judge Steel expressed the opinion that she could not make a Hague Convention  
ruling, and refused to do so before holding a hearing on the matter of Nevada subject matter jurisdiction, to which she  
limited the hearing.

1 by intent, that Cisilie took advantage of the divorce decree by moving to Norway, that the Nevada  
2 courts never had jurisdiction over the children, but that the court was going to keep emergency  
3 jurisdiction until judges in Texas and Norway confer and decide who will assert jurisdiction over the  
4 children.

5  
6 This writ petition followed.

7  
8 **IV. THE DISTRICT COURT WAS REQUIRED TO MAKE A HAGUE CONVENTION**  
9 **DECISION**

10 The Order issued by District Court Judge Steel refused to make a Hague Convention  
11 determination:

12 *This Court finds no support restricting it from looking at other issues first before making*  
13 *a Hague Convention decision. This Court makes no Hague Convention determination,*  
14 *but if it did make such a determination, the Court would find that the habitual residence and*  
15 *contracting state for the children would be the State of Nevada pursuant to the Decree of*  
16 *Divorce and that the Plaintiff, Scotlund Vaile, did not wrongfully take the children, but*  
17 *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.*

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

22 Exhibit 29 at 2, 4 (emphasis added).

23 Respectfully, this ruling is legally indefensible. The United States is a signatory nation to  
24 the Hague Convention, which was signed by President Reagan on October 30, 1985, and  
25 unanimously ratified by the U.S. Senate on October 9, 1986. ICARA, the implementing legislation  
26 obligating all courts of the United States to obey the terms of the Convention, was enacted on April  
27 29, 1988. Pub. L. No. 100-300, 42 U.S.C. 11601 *et seq.* The Convention was in full force in this  
28

1 Country as the supreme law of the land, on par with the Constitution of the United States, as of July  
2 1, 1988.<sup>17</sup> See Exec. Order No. 12648 (Aug. 11, 1988); Exhibit 32. It has not been amended or  
3 repealed.

4  
5 The district court's decision that she need not make a Hague Convention determination at  
6 all, and need not reach it first before moving on to other matters, is incorrect on the face of the  
7 Convention. Article 16 of the Convention states that the question of return must be decided *before*  
8 any custodial matters are litigated:

9  
10 After receiving notice of a wrongful removal or retention of a child in the sense of Article  
11 3, the judicial or administrative authorities of the Contracting State to which the child has  
12 been removed or in which it has been retained shall not decide on the merits of rights of  
13 custody until it has been determined that the child is not to be returned under this  
14 Convention or unless an application under this Convention is not lodged within a reasonable  
15 time following receipt of the notice.

16  
17 First among the legal errors below was the refusal of Judge Steel to order return of the  
18 children to their state of habitual residence, and her choice instead to pass on a substantive custodial  
19 determination, including commentary as to the legitimacy of the London "agreement." As the  
20 federal courts have repeatedly emphasized, any such determination is to be reached, if at all, by the  
21 courts of the country *from which the children were taken*:

22  
23 custodial determinations [are] to be made - if at all possible - by the court of the child's  
24 home country. As the Hague Convention's Reporter has explained,  
25 "it would be advisable to underline the fact that . . . the Convention does not seek  
26 to regulate the problem of the award of custody rights. On this matter, the  
27 Convention rests implicitly upon the principle that any debate on the merits of the  
28 question, i.e. of custody rights, should take place before the competent authorities  
in the State where the child had its habitual residence prior to its removal . . ."

Perez-Vera Report, *supra*, ¶ 19.

24  
25 *Blondin v. Dubois, supra*, \_\_\_ F.3d \_\_\_ (No. 98-2834, 2d Cir., Aug. 17, 1999), ¶ 25. The federal  
26 court explored the Convention source materials further, noting that:

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27  
28 <sup>17</sup> The Nevada Legislature has recognized the supremacy of our treaty obligations under the Convention. NRS  
125.510(7).

1 the "whole structure of the Convention" depended on the institutions of the abducted-to state  
2 generally deferring to the forum of the child's home state. . . . As noted above, such  
3 deference is necessary to preserve "the spirit of mutual confidence which is [the  
4 Convention's] inspiration."

5 *Id.* at ¶26; accord, *Currier v. Currier*, 845 F. Supp. 916, 923 (D. N.H. 1994); W. Michael Reisman,  
6 *Necessary and Proper: Executive Competence to Interpret Treaties*, 15 Yale. J. Int'l L. 316, 325  
7 (1990) ("the interpretation of a treaty given by the institutions of the United States will likely affect  
8 the other signatories' pattern of interpreting that treaty in cases involving the United States or its  
9 interests: All other treaty parties engage in performance-interpretation when they perform or when  
10 they react to other parties' performance-interpretations and then themselves decide whether to  
11 protest, insist on a modification, declare the treaty void, or acquiesce. . . .")

12 The lower court has violated the policy, enacted as federal policy, to defer substantive  
13 custodial decisions to the children's home State, and in so doing has violated the "spirit of mutual  
14 confidence" spoken of by the federal appeals court in *Blondin*.

15 It is in the context of international comity that the lower court's refusal to obey the mandate  
16 of the treaty to allow the state of the children's habitual residence to determine their custody is most  
17 alarming; given the substantial publicity this case has received throughout northern Europe,<sup>18</sup> there  
18 is the possibility that if left uncorrected, the lower court's determination could endanger the ability  
19 of the United States to obtain the return from those countries of children that have been kidnaped  
20 from here.<sup>19</sup>

21  
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23  
24 <sup>18</sup> The original kidnaping was national news in Norway, and the Norwegian government has funded the efforts  
25 through our courts to have the children returned. Our local media, reviewing the foreign news coverage (they have sent  
26 news crews to Las Vegas for follow up coverage) have noted the "outrage" of the Norwegian government at the refusal  
27 of the lower court to honor the United States' treaty obligation. Las Vegas Sun, Oct. 26, 2000, at 1B, 7B.

28 <sup>19</sup> In passing, we note the lower court's dicta during rendition of her oral ruling that if she *did* make a ruling  
under the Convention, she would rule that the children, who lived for years in Norway before the kidnap, and have *never*  
lived in this state, would be found to "habitually resident" here. Exhibit 29 at 2. When signing her findings, the lower  
court judge interlineated into that sentence the words "pursuant to the Decree of Divorce." Of course, as extensively  
briefed below, it is *impossible* under the entirety of Hague Convention cases to date to make any such "factual"

1 We note that the Norwegian court and Norwegian Ministry of Justice have *already*  
2 *determined* that the children were habitually resident there, and that their removal was in violation  
3 of Cisilie's rights of custody under the law of the country from which they were removed and  
4 therefore wrongful under the meaning of the Convention. Exhibit 1, at Exhibit P, pages 3-5, and at  
5 Exhibit R, page 2.  
6

7 Article 11 of the Hague Convention requires that the court charged with making a  
8 determination on the wrongful taking of children from the place of their habitual residence (a fact  
9 determination based upon physical presence in a country for six months or more), must be made  
10 within six weeks.<sup>20</sup>  
11

12 The lower court was required to make a Hague Convention determination, and refused to do  
13 so. There is no plain, speedy, and adequate remedy at law. Accordingly, intervention by way of  
14 extraordinary writ of mandamus is required, directing the lower court to entertain the Hague  
15 Convention application, and to enter an order in accordance with international and federal law,  
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22  
23 determination, and it is to be hoped that the dicta in question would not be made a finding upon remand. If the Court  
24 believes the lower court might do what it indicated, then the writ should be granted with instructions to the lower court  
25 to make a finding of habitual residence in accordance with international law – that the children were habitually resident  
26 where they *lived* for the years before their removal. See Exhibit 1 at 22-32; Exhibit 20 [copies of multiple Hague  
27 Convention decisions]; Exhibit 32.

28 <sup>20</sup> It is not clear from the face of the Convention whether or not this time period was to include appellate  
proceedings, but the various cases indicate that appellate courts are to expedite their review to the degree possible. See,  
e.g., *Blondin v. Dubois*, \_\_\_ F.3d \_\_\_ (No. 98-2834, 2d Cir., Aug. 17, 1999), ¶ 14 (expressing as "unfortunate" that  
neither party had requested expedited briefing and argument). Article 2 of the Convention requires the contracting  
States to use "the most expeditious procedures available," which would appear to encompass appellate, as well as trial  
level, adjudications.

1 returning the children from Nevada<sup>21</sup> to their State of Habitual Residence for the purpose of allowing  
2 the courts of that State to make a custodial determination on the merits.<sup>22</sup>

3  
4  
5 **V. THE DISTRICT COURT SHOULD BE PROHIBITED FROM ENFORCING ITS**  
6 **DECREE, WHICH WAS ENTERED WITHOUT SUBJECT MATTER**  
7 **JURISDICTION AND WAS VOID AB INITIO**

8 The rule requiring a person seeking a divorce in this state to be physically and corporeally  
9 present has been the law since 1861, from the inception of the state. The uncontroverted facts show  
10 there was no presence by either party in this state for the requisite period. District Court Judge Steel  
11 acknowledged that Scot was not present in Nevada for the six week period, but ruled that it did not  
12 matter:

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

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1 *to be physically present in Nevada and the Court relies on Mr. Vaile's changing of*  
2 *address of his legal residence from one place to another.*

3 . . . .  
4 5. That when the Court considers the full faith and credit with regard to the residency  
5 laws, the Court believes that the Court does not want citizens of the United States forum  
6 shopping. This Court does not want somebody who actually lives in Virginia and who could  
7 run to the courthouse there, flying to Las Vegas and in a half an hour obtaining a divorce,  
8 and flying back to Virginia saying "I beat the rap!" That is the full faith and credit this  
9 Court is trying to achieve by adhering to the residency statutes. *However, in this case, the*  
10 *Court finds that these parties had left Virginia and neither of them had any intention of*  
11 *ever returning to Virginia. Therefore, the Court believes it was the intent of the parties*  
12 *to relocate to Nevada, be it for tax purposes, or any other purpose. Because Mr. Vaile's*  
13 *mother lived here and he needed some time to "catch his breath," whatever the reason is,*  
14 *they came here and Mr. Vaile had no idea when he was going to leave when he signed the*  
15 *Decree.*

16 Exhibit 29 at 2, 3 (emphasis added). The error embodied in these paragraphs requires issuance of  
17 an extraordinary writ of prohibition for the purpose of "arresting proceedings of a district court that  
18 clearly are in excess of the jurisdiction of that court."

19 The full recitation of the holdings of this Court during the past 100 years that have repeatedly  
20 upheld the primary importance of physical residency as a precondition to obtaining a divorce in this  
21 state is contained in Exhibit 24. We note that the official Nevada "Children and Family Law" binder  
22 has some seven pages of annotations, from Nevada and a number of other states, stating largely the  
23 same holding in different ways.<sup>23</sup> The United States Supreme Court has stated that the jurisdictional  
24 principle of requiring residence for divorce is of constitutional importance.<sup>24</sup>

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25 <sup>23</sup> See pages 214 to 222, including cases from California to Delaware, and from 1910 to 1980. It should be  
26 stressed that this is not a "substantial evidence" case - everyone involved agrees that neither party has *ever* lived here  
27 for six weeks, at most having visited intermittently for some days over the past several years.

28 <sup>24</sup> Under our system of law, judicial power to grant a divorce--jurisdiction, strictly  
speaking--is founded on domicile. The framers of the Constitution were familiar  
with this jurisdictional prerequisite, and since 1789 neither this Court nor any other  
court in the English-speaking world has questioned it. Domicile implies a nexus  
between person and place of such permanence as to control the creation of legal  
relations and responsibilities of the utmost significance. The domicile of one  
spouse within a State gives power to that State, we have held, to dissolve a  
marriage wheresoever contracted.

*Williams v. North Carolina*, 325 U.S. 226, 229 (1945).

1 The implications of the ruling by the court below are staggering, since the holding is that any  
2 person, anywhere, who is out of his state of residence or restrained from coming to Nevada, can  
3 become a resident here by claiming to *desire* to do so. By this reasoning, prisoners throughout the  
4 world could forward a single piece of mail to an invalid Nevada address, claim that "but for" being  
5 restrained by the authorities elsewhere they *would have* come to this state, and obtain all the rights  
6 and privileges of Nevada citizens. It is precisely that sort of result that this Court has repeatedly  
7 claimed it was trying to avoid. See e.g., *Lewis v. Lewis*, 50 Nev. 419, 425, 264 P. 981 (1928).

8  
9 Respectfully, the lower court's ruling defies both the face of the controlling statute (NRS  
10 125.020) and the entirety of this Court's holdings for a century upholding and approving that statute  
11 and its predecessors. Exhibit 24 at 3-7; *Swan v. Swan*, 106 Nev. 464, 468, 796 P.2d 221 (1990)  
12 (failure of subject matter jurisdiction cannot be waived).

13  
14 The six week residency requirement is a very simple test. The subject matter jurisdiction of  
15 Nevada's courts over a marriage can be obtained by one party simply staying in this state for at least  
16 six weeks with an intention to stay indefinitely. Scot cannot meet this test, and has admitted, in  
17 writing, and on the stand, that he never did. Since the lower court had no subject matter jurisdiction  
18 to enter the Decree, *all* subsequent orders of the District Court seeking to enforce that Decree in any  
19 way must be found to be void *ab initio*.

20  
21 The lower court attempted to seize on a secondary ground of finding "subject matter  
22 jurisdiction by estoppel" (Exhibit 29 at 3), but as pointed out in the authorities submitted in the lower  
23 court, subject matter jurisdiction cannot be waived, the doctrine of estoppel cannot supply subject  
24 matter jurisdiction where it is admittedly absent, and on these facts "estoppel" could not be  
25 legitimately applied against the non-moving, unrepresented party who did not know the residency  
26 laws, in any case. Exhibit 24 at 7-10.



1 Our research after the hearing has confirmed that the commentators, and other states, agree  
2 with the Nevada case law we cited to the lower court – the parties could not have conferred subject  
3 matter jurisdiction upon the lower court even if they had explicitly *agreed* to do so, and courts have  
4 uniformly refused to recognize divorces granted on a “tourist basis.”<sup>25</sup> See *Uniform Divorce*  
5 *Recognition Act* 1, comment (c), 9 U.L.A. 358 (1988). Thus, it was legally impossible to find subject  
6 matter jurisdiction by *implying* Cisilie’s “consent” on the basis of her signature of the proper person  
7 Answer prepared by Scot’s attorney.  
8

9  
10 There are a host of other clear errors on the face of the Order,<sup>26</sup> but it is not necessary to  
11 address them in order to frame the essential jurisdictional issue on the basis of which a writ of  
12 prohibition is requested.

13 It is respectfully submitted that the lower court’s rationalizations for granting the benefits of  
14 our divorce laws to someone who was admittedly never a resident of this state are inadequate, and  
15 require a finding that the proceedings sought to be prohibited are in excess of the jurisdiction of that  
16 court. A writ of prohibition should enter, directing the lower court to enter an order that it is  
17

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18  
19 <sup>25</sup> The same thought has been expressed in several ways. “Where the requisite of bona fide domicile of at least  
20 one of the parties is wanting, the court is without jurisdiction, even if the parties consent.” *Ainscow v. Alexander*, 39  
21 A.2d 54, 56 (Del. Super. Ct. 1944). “Jurisdiction over divorce proceedings of residents of California by the courts of  
22 a sister state cannot be conferred by agreement of the litigants.” *Roberts v. Roberts*, 185 P.2d 381, 385 (Cal. Dist. Ct.  
23 App. 1947), overruled on other grounds in *Spellens v. Spellens*, 317 P.2d 613 (Cal. 1957). See generally 27C C.J.S.  
24 Divorce 781 (1986).

25 <sup>26</sup> The lower court found both that it had no jurisdiction to issue custody orders relating to the children (Exhibit  
26 29 at 3), and that the pick-up order used by Scot to legitimize his kidnap was valid (Exhibit 29 at 4). The court found  
27 that Cisilie “took advantage of the Decree” by moving to Norway (Exhibit 29 at 3), when Cisilie and the children had  
28 moved to Norway before Scott ever *filed* for divorce in Nevada (Exhibit 2 at Exhibit AA). The court found that Scot  
had “no idea when he was going to leave when he signed the Decree” (Exhibit 29 at 3), although he had a return ticket  
to London in his pocket when he briefly stopped in Las Vegas to sign the papers. The court made rulings about Cisilie’s  
state of mind, finding no coercion or duress (Exhibit 29 at 3), but the court prohibited counsel (several times) from  
eliciting any evidence on those points, repeatedly claiming that the hearing was restricted to state jurisdiction, and that  
no such information would be relevant. The court entirely ignored the admitted fact that Scot was still exercising the  
incidents of Virginia residence (such as using his driver’s license) up to and *including* the day he filed for divorce in  
Nevada. These “findings” were clearly erroneous, and would warrant reversal in an appeal, but it is not necessary to  
reach them if the essential point – the lower court was prohibited from granting a divorce to a non-resident – is the basis  
of a corrective Writ.

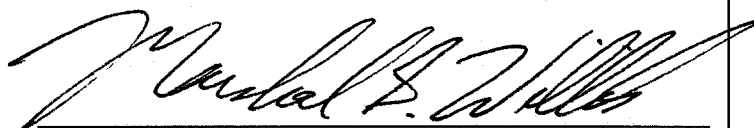
1 prohibited from granting a divorce to a non-resident, and setting aside all orders entered by the  
2 district court seeking to enforce that improvidently-granted decree.<sup>27</sup>  
3

4  
5 **VI. CONCLUSION**

6 Two writs – one of mandate, and another of prohibition – should be issued forthwith,  
7 directing the lower court to do that which is required by law, and to cease doing that which is  
8 prohibited by law.

9 DATED this 5<sup>th</sup> day of November, 2000.  
10

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

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28 <sup>27</sup> As set out above, to the degree this Petition is better seen as an application for a writ of mandamus, seeking  
an order to set aside a decree entered without requisite subject matter jurisdiction, then it should be so viewed.

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## CERTIFICATE OF SERVICE

I hereby certify that I am an employee of LAW OFFICE OF MARSHAL S. WILLICK, P.C., and on the 17th day of November, 2000, service of a copy of the foregoing was sent via first class mail, postage prepaid, and addressed as follows:

Hon. Cynthia Dianne Steel  
Family Court, Dept. G  
601 North Pecos  
Las Vegas, NV 89101-2408

JOSEPH F. DEMPSEY, ESQ.  
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(Counsel for Real Party in Interest)

  
An Employee of the LAW OFFICE OF MARSHAL S. WILLICK, P.C.

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