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. D230385

FILED

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CLERK OF SUPREME COURT
BY
DEPUTY CLERK

EMERGENCY PETITION FOR WRIT OF MANDAMUS AND WRIT OF PROHIBITION

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00-19668

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EMERGENCY PETITION FOR WRIT OF MANDAMUS AND WRIT OF PROHIBITION

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

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

The form of this *Petition* is summary in nature, with attachments but without transcripts, in order to accommodate the emergency needs of the Petitioner and minor children, and the time constraints formalized in the international treaty to which the United States is a party.[1]

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

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

DATED this 5th day of November 2000.

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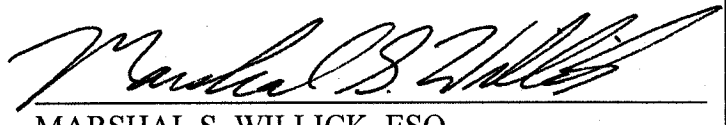

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[1] Per our discussion with the Clerk's Office Staff, the attachments are set out in the form of an indexed Appendix to this Writ Petition. The "Exhibit" references are to the documents in the Appendix, which contain all documents relevant to the issues 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.

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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.[2] 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

[2] *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).

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

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

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

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

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[3] 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

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III. FACTS AND PROCEDURAL HISTORY

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

The essential undisputed facts are:

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

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

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

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

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fact that an appeal may be available does not preclude issuance of a writ of prohibition. *G. & M. Properties v. Second 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.

[4] Where the parties are in dispute as to "facts," they are largely matters of subjective intent – whether Scot acted 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).

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

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

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

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

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

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six weeks.

[7] James Smith, Esq., who is not currently Scot's attorney in this action.

[8] 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.

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In November, 1999, Cisilie initiated custody and visitation proceedings in Oslo.[9] Scot submitted to the proceedings, hired counsel, traveled there, and participated in the initial mediation phases of what would have been a court determination of custody and visitation rights.

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

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

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

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

[11] 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.

[12] 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).

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

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

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

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

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

[14] Exhibit 1, at Exhibit M.

[15] I am privileged to be the Nevada contact attorney for the National Center for Missing and Exploited Children, which coordinates the securing of counsel for the American Central Authority in international kidnaping cases.

[16] 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.

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

This writ petition followed.

IV. THE DISTRICT COURT WAS REQUIRED TO MAKE A HAGUE CONVENTION DECISION

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

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

Exhibit 29 at 2, 4 (emphasis added).

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

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

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

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

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

> custodial determinations [are] to be made - if at all possible - by the court of the child's home country. As the Hague Convention's Reporter has explained,
>
> > "it would be advisable to underline the fact that . . . the Convention does not seek to regulate the problem of the award of custody rights. On this matter, the Convention rests implicitly upon the principle that any debate on the merits of the 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.

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

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[17] The Nevada Legislature has recognized the supremacy of our treaty obligations under the Convention. NRS 125.510(7).

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

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

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

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

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

[19] 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"

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

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

The lower court was required to make a Hague Convention determination, and refused to do so. There is no plain, speedy, and adequate remedy at law. Accordingly, intervention by way of extraordinary writ of mandamus is required, directing the lower court to entertain the Hague Convention application, and to enter an order in accordance with international and federal law,

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determination, and it is to be hoped that the dicta in question would not be made a finding upon remand. If the Court believes the lower court might do what it indicated, then the writ should be granted with instructions to the lower court to make a finding of habitual residence in accordance with international law – that the children were habitually resident where they ***lived*** for the years before their removal. *See* Exhibit 1 at 22-32; Exhibit 20 [copies of multiple Hague Convention decisions]; Exhibit 32.

[20] 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.

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returning the children from Nevada[21] to their State of Habitual Residence for the purpose of allowing the courts of that State to make a custodial determination on the merits.[22]

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

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

> 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***

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[21] The minor children are now in Texas with Scot. He took the children to Texas on the morning of October 25, 2000, about six hours before the District Court entered its order granting him temporary custody under the emergency jurisdiction of the court. As of October 30, 2000, Cisilie was attempting visitation in accordance with the Order, but without much success, since Scot immediately filed for a temporary restraining order in Denton County, Texas, to prevent her access to the children. Before relinquishing jurisdiction to the Oslo court, the lower court here should compel Scot to return the children to Nevada so they can be returned to Oslo without requiring Cisilie to domesticate this Court's mandate in any other states.

[22] The Writ should specifically vacate the entirety of the remainder of the Order of October 25, as having been issued in derogation of the Article 16 requirement to abstain from any substantive rulings until ***after*** a Hague determination has been made and the children have been returned to the appropriate State.

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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.

. . . .

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

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

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

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

[24] 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).

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

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

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

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

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

There are a host of other clear errors on the face of the Order,[26] but it is not necessary to address them in order to frame the essential jurisdictional issue on the basis of which a writ of prohibition is requested.

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

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

[26] The lower court found both that it had no jurisdiction to issue custody orders relating to the children (Exhibit 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 that Cisilie "took advantage of the Decree" by moving to Norway (Exhibit 29 at 3), when Cisilie and the children had 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.

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prohibited from granting a divorce to a non-resident, and setting aside all orders entered by the district court seeking to enforce that improvidently-granted decree.[27]

VI. CONCLUSION

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

DATED this 5th day of November, 2000.

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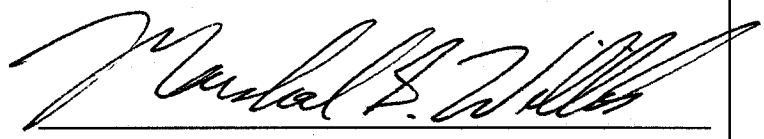

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[27] As set out above, to the degree this Petition is better seen as an application for a writ of mandamus, seeking an order to set aside a decree entered without requisite subject matter jurisdiction, then it should be so viewed.

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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
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