

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF NEVADA

CISILIE A. VAILE,
Petitioner,

S.C. Docket No. 36969

D.C. Case No. D230385

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,

FILED

FEB 16 2001

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY *J. Richards*
CHIEF DEPUTY CLERK

and
R. SCOTLUND VAILE, Real Party in Interest

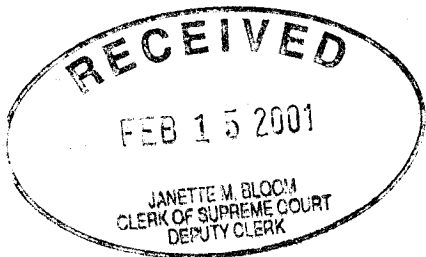
**SUPPLEMENTAL EXHIBITS,
POST ORAL ARGUMENT, FOR
WRIT OF MANDAMUS
AND
WRIT OF PROHIBITION**

Petitioner, CISILIE A. VAILE, by and through her attorneys, the LAW OFFICE OF MARSHAL
S. WILLICK, P.C., submits the following post oral argument supplemental exhibit:

- 1. A translation of the decision by the high court of Norway on Cisilie Vaile's appeal.

DATED this 14th day of February, 2001.

Respectfully submitted by:
LAW OFFICE OF MARSHAL S. WILLICK, P.C.



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[Norwegian Coat
of Arms]

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BORGARTING COURT OF APPEAL - Civil Division

makes known

Exempt from public access

On February 9, in the year 2001 the Court of Appeal, Civil Division, dealt with appeal case no. 01-00281 K/o4.

Vaile - Vaile

The Appellant: Cesilie Vaile

Counsel: Elisabeth Hagen, Attorney-at -Law

Respondent: Robert Scotlund Vaile

Counsel: Elisabeth Bergsland, Attorney-at-Law

Members of the court: 1. Erik Melander, Chief Court of Appeal Judge
 2. Øystein Hermansen, Court of Appeal
 Judge
 3. Karin Stang, Court of Appeal Judge

The following

O r d e r

was pronounced:

The case concerns the question of whether the Oslo Municipal Court is the correct venue in a case concerning physical custody and visitation with joint children pursuant to the Children Act of April 8, 1981 (see Section 64 b of this Act).

On June 6, 1990, Cesilie Anne Vaile, who is a Norwegian citizen, entered into matrimony with Robert Scotlund Vaile, an American citizen, in Salt Lake City, USA. The children of this marriage were Kaia Louise, born May 30, 1991 and Kamilla Jane, born February 13, 1995. Until 1 August 1997 the family lived in the USA. They then moved to London. At the request of Robert Vaile, the Clark County District Court in the state of Nevada, USA, issued a divorce order for the parties on August 10, 1998. The District Court also incorporated in the decision an agreement written in English between the parties to the effect that Cesilie should have physical custody of the children until they reached the age of 10, such that according to the agreement she also undertook to take up residence by July 1, 1999 "within twenty miles" of such residence in the USA as Robert Vaile might choose.

Simultaneously with the English agreement, the parties entered into an agreement in Norwegian concerning physical custody and visitation with the children.

Cesilie Vaile and the children moved from London to Oslo in July 1998. According to information given Robert Vaile moved back to the USA at the end of 1999/beginning of 2000. He is resident in Las Vegas, Nevada.

On February 18, 2000 Robert Vaile made a complaint through the Clark County District Court, Nevada, requiring the return to the USA of the children, and that he should have physical custody.

On March 24, 2000, Cesilie Vaile made a complaint through the Oslo Municipal Court, with the claim that the children should live permanently with her, and that Robert Vaile's

visitation with the children should be stipulated at the discretion of the Court. She petitioned for a temporary decision on the questions pursuant to Section 38 of the Children Act. On May 18, 2000 the Municipal Court imposed an injunction on the children leaving Norway.

On April 12, 2000 the District Court of Clark County, Nevada, issued an order whereby the children were to live permanently with Robert Vaile in the USA.

In his answer of May 22, 2000 to the Municipal Court, Robert Vaile pleaded for the case to be dismissed, alternatively that the Municipal Court cannot make a decision based on the merits of the case before his petition for the children to be delivered to him pursuant to the Haag Convention has been finally decided.

In connection with visitation with the children in Norway in the days around May 17, 2000, Robert Vaile took the children with him out of the country [Norway] and to the USA. On May 29, 2000, the Norwegian Ministry of Justice applied on Cesilie Vaile's behalf for return of the children to Norway pursuant to the rules to this effect in the Haag Convention.

On October 25, 2000, the District Court in Nevada issued an order to the effect that the children should remain in Robert Vaile's custody in Texas, USA. The District Court did not find grounds for reaching a decision in the question of the return of the children pursuant to the Haag Convention. The District Court considered itself to have "emergency jurisdiction" over the children until this question was finally decided by a Norwegian court or a court in Texas.

In the matter of dismissal of the case, the Oslo Municipal Court issued an order on November 9, 2000, with the following conclusion:

Case 00-03031 A/66 is dismissed.

Each of the parties shall bear their own costs.

The Municipal Court concluded that the children are not domiciled in this country (cf. Section 64 b) of the Children Act). For the details of the case, reference is made to the order of the Municipal Court and the Court of Appeals presentation below.

Cesilie Vaile has appealed the decision of the Municipal Court to the Appeals Court within the time limit. She has submitted the following appeal to the Appeals Court:

1. Case no. 00-03031 A/66 before the Oslo Municipal Court must be brought.
2. The Appellant must be awarded the costs of the case.

Robert Vaile has brought a cross-appeal in the case. He has submitted the following appeal before the Appeals Court:

1. The Oslo Municipal Court's order shall be upheld.
2. Robert Scotland Vaile shall be awarded case costs in the amount of NOK 6 000.

Cesilie Vale's arguments to the Appeals Court can be summarised as follows:

The children must be considered to be resident in Norway.

The children have never been resident in the state of Nevada in the USA. The District Court there has taken into account that it does not have jurisdiction in the questions of which of the parents the children should live with and of visitation. The other states in the USA in which the family lived before their move to England in 1997, cannot be relevant either.

Her move with the children to Norway in July 1998 took place according to agreement with Robert Vaile. They settled in Oslo. Kaia Louise started at school, and Kamilla Jane in pre-school. She herself found a position as a teacher. Robert Vaile must have understood

that the move to Norway would be permanent.

When Robert Vaile announced in October 1999 that he would be moving back to the USA, and required that she should move after him with the children, the children had been living in Norway for 16 months. At the time the case was brought before the Municipal Court, the children had lived a further 4 months in the country. The children had established themselves and put down roots in the country, along with her. At the time the case was brought, it was almost three years since the children had left the USA with their parents.

The Municipal Court has correctly disregarded the parties agreement regarding legal venue, which was entered into in connection with their divorce.

According to US law, the children's "home state" is the deciding factor, i.e. the place where the children have lived for the six months prior to the dispute. It must be taken into account that the children are not domiciled in any state in the USA according to US law.

It must be taken into account that Cesilie Vaile lost her green card for the USA in July 1999, since at that time she had been outside the USA for about two years. Robert Vaile must have known this at the time of entering into the agreement in July 1998.

In determining whether the children are resident in Norway pursuant to Section 64 of the Children Act, a holistic assessment must be made. It is a basic principle that a decision based on the merits of the case must be made at the place where the authorities making the decision have the possibility of arriving at a justified opinion of the situation of the children (cf. Norwegian Official Report 1997:35, page 135). It is argued that a Norwegian court has such a possibility in this case.

It is disputed that Cesilie Vaile's behaviour in failing to move with the children to the USA in autumn 1999 can be regarded as a type of self-help. Irrespective of the circumstances, the children had taken up residence in Norway after moving from London in 1998. The

dispute between the parents arose while the children were living there. The fact that the children are now in Texas, USA, with their father, is a result of his self-help. He kidnapped the children in May 2000. The consequence of such an action cannot be that the children's domicile is changed from Norway to the USA.

Robert Vaile refers to the order of the Oslo Municipal Court. His arguments to the Appeals Court can be summarised as follows:

It must be found that the parties' agreement of July 1998 is binding. The point of the agreement was to regulate custody of the children such that the children had proper, regular contact with both parents as they grew up. The fact that Cesilie Vaile failed to move to the USA with the children, which is part of the agreement, has correctly been described by the Municipal Court as a form of self-help which cannot provide grounds for Norway being the judicial district of habitual residence for the children.

It is disputed that Robert Vaile had grounds to assume that the move to Norway would be permanent, in conflict with the agreement. If Cesilie Vaile perceived the situation differently, she deceived Robert Vaile when he accepted the move from London.

If Cesilie Vaile had moved to the USA with the children in July 1999, as agreed, she would not have lost her green card there. If she has now lost her green card, weight cannot be attached to this because she herself is responsible for the situation.

It is disputed that a Norwegian court has a foundation for arriving at a justified opinion concerning the children's situation. The children should have moved to the USA shortly after July 1999, and been resident there from then on. They have lived in the USA previously and, by comparison, for a very short time in Norway.

Robert Vaile fetched the children from Norway in May 2000. His action cannot be described as kidnapping. He fetched them in accordance with the agreement that from 1 July 1999 they were to live in the USA.

The Court of Appeals observes:

In the appeal case, the Court of Appeals must be able to adopt a position on the question of whether the case brought by Cesilie Vaile before the Oslo Municipal Court should be dismissed or not pursuant to Section 64 b) of the Children Act. According to information provided, the dispute between the parties took place in the USA - apparently in the states of both Nevada and Texas. Whether the outcome of these disputes may have a bearing on the competence of the Norwegian courts in the case concerning the children, is a matter that lies outside the scope of the appeal case. For the sake of order, it is mentioned, as was also observed by the Municipal Court, that Norway does not have any convention obligations in relation to the USA with respect to acknowledgement and execution of orders regarding parental responsibility etc. Nor is the matter of the Haag Convention on international child abduction part of the subject of the appeal.

Disputes as to whom the children should live with permanently and visitation with the children may be brought before a Norwegian court if the children are resident in Norway (see Section 64 b) of the Children Act). The question that the Appeals Court has to adopt a position on is thus whether the two daughters of Cesilie and Robert Vaile can be regarded as domiciled in Oslo.

The concept of domicile in Section 64 of the Children Act is not defined in detail elsewhere in the Act, or in the preparatory works for the Children Act. The concept must to some extent be determined by the purpose, such that in case of dispute it will have to depend on a discretionary holistic assessment. The place where the children are currently staying cannot simply be the deciding factor. As a rule it must be required that the children's stay is of a permanent nature, objectively viewed, and that in a subjective respect the intention is to remain there over time. See for example Backer: Barneleven (The Children Act) (1982) page 390. The evaluation must take as its point of departure the time when the case was brought, here the complaint to the Oslo Municipal Court on March 24, 2000.

Cesilie Vaile moved with the children from London to Oslo in July 1998. The parents agreed in advance on the move (see Art IV point 5 in the English agreement between the parties, dated July 9, 1998). The provision in the agreement must naturally be interpreted in the light of the fact that the parties had decided that their marriage should be dissolved. The family had lived in London for barely a year, and it was uncertain both when Robert Vaile would move back to the USA, and in which state in the USA he would take up residence. According to the assessment of the Court of Appeal, there cannot be any doubt that the parties regarded Cesilie Vaile and the children's stay in Oslo as temporary, when the agreement was entered into. This follows directly from Art. IV point 4 of the agreement, in which Cesile Vaile undertook - according to more detailed conditions which it is not necessary to enter into here - to move to the USA with the children at four weeks' notice from Robert Vaile, however not before July 1, 1999.

Although it must thus be taken into account that the move to Oslo took place under agreed, temporary conditions, this in itself cannot be a deciding factor for the right to bring the case. It must equally be possible to view the stay in Oslo and the circumstances associated with it such that the stay changed to take on such a nature of permanency that the conclusion following from a holistic assessment is domicile in Oslo pursuant to Section 64 b) of the Children Act.

The Court of Appeal finds that the children rapidly settled in the dwelling in Gøteborggaten 1 in Oslo. The eldest, Kaia Louise, was seven years old when she arrived. She started at school, while Kamilla Jane began in pre-school. Cesilie Vale's procuring a position as teacher is also a factor, and the Appeals Court takes into account that she thereby secured herself and the children a financial basis for continuing to stay here in Norway. When Robert Vaile informed his former wife around Christmas 1999 that he now intended to move to the USA, the situation was such that the elder daughter was half way through her second school year. The younger one still went to pre-school. It must naturally be taken into account that both children had put down roots in the country, including that they fully mastered Norwegian as a language. In this situation, Cesilie Vaile

chose to disregard the agreement with her former husband to move with the children, incidentally to a state in the USA which none of them had had any links with before.

The Appeals Court further takes into account that from a subjective perspective, Cesilie Vaile found it best for the children to remain living permanently in Oslo, and that this motivated her decision to disregard the parties' agreement from 1998. Viewed in this light, her decision can hardly be regarded as a form of self-help, and therefore - as the Municipal Court saw it - as irrelevant at the outset when judging the question of domicile.

Norwegian law regarding children recognises that the parents' agreement as to whom the children should live with permanently, and the extent of visitation, may be subject to revision if this is best for the children. If the parents do not reach agreement, the question of revision may be submitted to the courts for a decision (see Sections 39 and 47, last paragraph, of the Children Act).

The question of whether the Oslo Municipal Court will be able to reach a substantively correct decision in the case of the children, is primarily a question of whether it can be assumed that the case will be sufficiently elucidated for the Municipal Court. In such an assessment, which must be made in connection with the bringing of the suit, it is natural also to look at the situation at the time of the decision. Factually, it must be based on the assumption that the children and their mother still live in Oslo, with the claim of living here permanently. Robert Vaile's action around May 17, 2000, see also below, must in this connection be disregarded. In the view of the Appeals Court, the Municipal Court will have a perfectly good basis for making a judgement.

Following an overall evaluation, the Appeals Court cannot see arrive at any conclusion other than that it must be possible for Cesilie Vaile to bring the case before the Oslo Municipal Court according to the venue rule in Section 64 b) of the Children Act. Robert Vaile's action of May 17, 2000, whereby he succeeded in taking the children out of the country, cannot be accorded significance. It is sufficient to refer to Backer: Barneoven (The Children Act), page 391.

The appeal has been successful. The question of costs should be left until the decision that closes the case (cf. Section 179, first paragraph of the Civil Disputes Act).

The decision is unanimous.

Conclusion:

1. The case shall be brought before the Oslo Municipal Court.
2. Case costs are to be left until the decision that winds up the case.

Erik Melander
Stang

Øystein Hermansen

Karin

Confirmed for the

Chief Court of Appeal Judge: Anine K. Knutsen [sig]

[stamp] BORGARTING
COURT OF
APPEALS