

FILED

DEC 14 2012

**IN THE SUPREME COURT
OF THE
STATE OF NEVADA**

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Tracie K. Lindeman*
DEPUTY CLERK

ROBERT SCOTLUND VAILE,
Appellant,

vs.

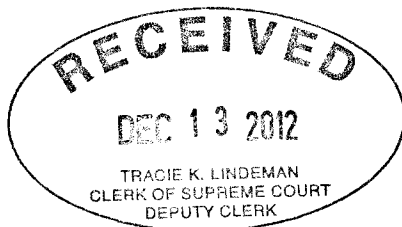
CISILIE A. PORSBOLL,
Respondent.

Supreme Court Case No: 61415

Appeal from
District Court Case No: 98D230385

APPELLANT'S APPENDIX

Robert Scotlund Vaile
2201 McDowell Avenue
Manhattan, KS 66502
(707) 633-4550
Appellant in Proper Person



12-29-12

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LEXSEE 44 P.3D 506, 511

**CISILIE A. VAILE, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT
OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND
THE HONORABLE CYNTHIA DIANNE STEEL, DISTRICT JUDGE, FAMILY
COURT DIVISION, Respondents, and R. SCOTLUND VAILE, Real Party in
Interest.**

No. 36969

SUPREME COURT OF NEVADA

118 Nev. 262; 44 P.3d 506; 2002 Nev. LEXIS 33; 118 Nev. Adv. Rep. 27

April 11, 2002, Decided

SUBSEQUENT HISTORY: [***1] Petition for
Rehearing Denied September 5, 2002.

US Supreme Court certiorari denied by *Vaile v. Porsboll*,
538 U.S. 906, 123 S. Ct. 1483, 155 L. Ed. 2d 225, 2003
U.S. LEXIS 1990 (2003)

Related proceeding at *Porsboll v. Vaile*, 2008 U.S. App.
LEXIS 7309 (9th Cir. Nev., Mar. 26, 2008)

DISPOSITION: Writ of mandamus issued.

COUNSEL: Marshal S. Willick, Las Vegas, for
Petitioner.

Rawlings Olson Cannon Gormley & Desruisseaux and
Peter M. Angulo, Las Vegas, for Real Party in Interest.

JUDGES: AGOSTI, J. ROSE, LEAVITT and BECKER,
JJ., concur. MAUPIN, C.J., and YOUNG, J., with whom
SHEARING, J., agreed, dissented.

OPINION BY: AGOSTI

OPINION

[*265] [**509] BEFORE THE COURT EN
BANC.

OPINION

By the Court, AGOSTI, J.:

Original petition for a writ of mandamus or
prohibition challenging portions of a divorce decree
relating to child custody and visitation and seeking to
compel the district court to make a determination
regarding the "habitual residence" of two minor children
pursuant to the Hague Convention on the Civil Aspects of
International Child Abduction.

In this original petition for extraordinary relief we
are asked to decide two questions: (1) whether the district
court had jurisdiction over one of the parties and over the
subject matter when it entered a decree of divorce; and
(2) whether the district court correctly concluded that it
need not make determinations pursuant to the Hague
Convention on the Civil Aspects of International Child
Abduction¹ regarding the children's habitual residence
and [*266] whether [***2] the children were
wrongfully removed from their habitual residence.

¹ *The Hague Convention on the Civil Aspects of
International Child Abduction will be referred to
throughout this opinion as "the Hague
Convention" or simply as "the Convention."*

I.

In 1989, Petitioner, Cisilie Vaile, a citizen of
Norway, met the Real Party in Interest, Scotlund Vaile, a

RSV001

United States citizen, in Norway. Both were twenty years old. The couple became engaged in early 1990, two weeks after Scotlund, who is fluent in the Norwegian language, had completed his duties as a missionary in Norway. Shortly after becoming engaged, Scotlund returned to live with his father and stepmother in the state of Ohio where he had earlier lived before his assignment to Norway. Cisilie followed within a short period of time. The couple married in Utah in 1990 and then returned to Ohio while Scotlund attended Ohio State University. Scotlund completed his graduate program in 1996; the family then moved to Virginia for Scotlund's employment as [***3] an engineer. The couple's children, Kaia and Kamilla, were born in the United States in 1991 and 1995, respectively. Because of their parents' nationalities, the children enjoy dual Norwegian and United States citizenship. In August 1997, the family relocated to London, England, where Scotlund's engineering firm had transferred him.

By the autumn of 1997, Scotlund and Cisilie were experiencing grave difficulties in their marriage. In the spring of 1998, the couple agreed to divorce. Fearing Scotlund would take the children to the United States, Cisilie turned to the British courts. She ultimately obtained an agreement from Scotlund upon which the British court based an order dated June 8, 1998. The order prohibited Scotlund from removing the children from the United Kingdom and also prohibited him from removing the children from Cisilie's care until July 8, 1998, when the matter could be heard. On July 7, 1998, Scotlund presented Cisilie with a twenty-three-page written agreement. Cisilie signed the agreement, which purported to settle the couple's property and financial affairs, and which also purported to settle matters of child custody, support and visitation. The agreement contained [***4] a provision that the parties would obtain a divorce in Nevada, where Scotlund's mother and stepfather had relocated from Maine in the spring of 1998.

After a hearing in the British court on July 8, 1998, at which both Scotlund and Cisilie appeared, the court entered a written order on July 9 in which Cisilie was granted physical custody of both children and received permission to remove the children permanently from Britain. Scotlund was permitted to have his passport returned to him. The order noted that Scotlund had departed the [**510] United Kingdom to go the United States on the morning of July 9, 1998. Cisilie and the children traveled to Norway on July 13, 1998, and

remained there for nearly two [*267] years, until May 2000. On July 14, 1998, Scotlund signed a verified complaint for divorce, which was filed in the Eighth Judicial District Court in Clark County, Nevada, on August 7, 1998. Cisilie's answer, in proper person, was filed the same day. Scotlund departed Las Vegas on July 22, 1998, and after vacationing briefly in California, returned during the first week of August 1998 to his work in London.

Scotlund's complaint alleged that he, the plaintiff, was a resident of Nevada and that [***5] he had been physically present in Nevada for more than six weeks prior to the filing of the complaint and that he had the intention of making Nevada his home for an indefinite period of time. Of course, this was not true.

The district court in Clark County, without a hearing, entered a decree of divorce on August 10, 1998. The decree incorporated the terms of the parties' twenty-three-page agreement. Among other things, the agreement provided for joint legal custody, with Cisilie to have physical custody until each child is ten years old, after which each child would live for a year with Scotlund and then for a year with Cisilie until each child turned twelve, at which time the child would choose which parent would be the "residential parent." The agreement also obligated Cisilie to move after July 1, 1999, to the United States during the times when she was to be the "Residential Parent," and maintain a residence in proximity to Scotlund's residence.

In November 1999, Scotlund informed Cisilie that he intended to relocate from London, England, to Las Vegas. Scotlund demanded, pursuant to the agreement, that Cisilie relocate with the children to Las Vegas as well. Cisilie then commenced [***6] legal proceedings in Norway to allow her to remain with the children in Norway. Scotlund participated in the Norwegian proceedings.

In February 2000, Scotlund filed a motion in the district court in Clark County, seeking physical custody of the children, a finding that Cisilie was in contempt of the court and an order for the immediate production of the children.

Cisilie did not respond to Scotlund's Nevada motion. Instead she sought, from the Norwegian court, an order for the award of physical custody of the children to her. The Norwegian court appears to have been fully apprised

of all the legal actions taken by each party up to that point. The Nevada district court does not appear to have been so informed.

The Norwegian court ordered Scotlund to respond to Cisilie's complaint. Scotlund instead requested an extension of time to respond. Scotlund meanwhile pursued his Nevada motion. On March 29, 2000, the district court in Nevada entered an order granting Scotlund's motion, no opposition having been filed. The order granted Scotlund custody of the children and held Cisilie in contempt.

[*268] In May 2000, Scotlund and his girlfriend met Cisilie and her fiance and the children at a hotel [***7] in Oslo, Norway. After dining, the four adults and the children went to Scotlund's hotel suite because Scotlund said he wanted to give Kaia a birthday gift. Once inside the suite, Scotlund and his girlfriend took the children into an adjoining room to give them a "surprise." Cisilie and her fiance waited out of view of the children. After a period of time, Cisilie entered the adjoining room and discovered that her children were gone. The room was empty. At the front desk, Cisilie was given an envelope left by Scotlund, which contained the Nevada court's order. Cisilie contacted the Norwegian police, who treated the incident as a kidnapping. She then filed a petition with the Norwegian court, seeking to enjoin Scotlund from leaving Norway with the children. Scotlund filed a response in opposition to her petition, and the Norwegian court swiftly issued an injunction forbidding Scotlund from taking the children out of Norway. Scotlund had already left Norway, however, and had earlier removed the children from Norway and sent them to his new residence in Texas.²

2 The Norwegian court did not decide the issue of custody in its order enjoining Scotlund from removing the children from Norway. Rather, the court acknowledged the Nevada court's order and determined that a full hearing was necessary to address the custody issue.

[***8] [**511] On September 21, 2000, Cisilie filed in the Clark County district court a motion for the Immediate Return of Internationally Abducted Children and Motion to Set Aside Fraudulently Obtained Divorce. In the alternative, Cisilie moved to set aside the order granting Scotlund custody and holding her in contempt and also sought rehearing.

On October 10, 2000, and on October 17, 2000, the district court held an evidentiary hearing. On October 25, 2000, the court entered its order denying Cisilie's motions. Among other things, the district court found that Scotlund had satisfied Nevada's residency requirement, even though Scotlund had never lived in Nevada, and had not even been physically present in Nevada for the requisite six-week period. The district court therefore refused to set aside the divorce decree for lack of jurisdiction.

II.

The first question before us is whether the district court had jurisdiction to enter its decree of divorce in 1998. We conclude that the district court did not have personal jurisdiction over either party, nor did it have subject matter jurisdiction over the marital status of the parties when it entered the decree.

NRS 125.020(2) [***9] states, in pertinent part, "no court has jurisdiction [*269] to grant a divorce unless either the plaintiff or defendant has been resident of the state for a period of not less than 6 weeks preceding the commencement of the action." In addition, *NRS 54.010* states that when the court's jurisdiction depends upon the residence of one of the parties to the action, the court shall require corroboration of the evidence. *NRS 10.155* states that the legal residence of a person with reference to his right to maintain a lawsuit is that place where he has been physically present within the state during all of the period for which residence is claimed by him. The statute specifically states that "should any person absent himself from the jurisdiction of his residence with the intention in good faith to return without delay and continue his residence, the time of such absence is not considered in determining the fact of residence." The statute requires actual, physical presence in Nevada during "all of the period" for which residency is claimed. The only exception is for absence with a good faith intention of returning without delay. We note that one cannot [***10] return to a place of residence if one never lived there.

It is a well-settled principle of law in Nevada that residency under *NRS 10.155* encompasses not simply an intent to reside in Nevada for an indefinite period of time, but actual, physical presence in this state for six weeks prior to the filing of the complaint for divorce. In *Fleming v. Fleming*,³ this court had the opportunity to interpret a statute identical in all material aspects to *NRS*

10.155; we stated:

3 36 Nev. 135, 134 P. 445 (1913).

It was the intention of the legislature to prescribe that actual, physical presence should be imminently essential to constitute a residence for the purpose of making that residence legal, where the party had any right dependent on residence

Giving to the word "resided," as used in the statute, its plain, ordinary significance, it must necessarily be construed to require an actual living in the county for six months preceding the filing [***11] of the suit. The word "resided" in its general acceptance carries with it the idea of permanency as well as continuity. It does not mean living in one place and claiming a home in another; it does not mean a constructive or imaginary residence in Washoe County, while actually living or abiding or being in some other county. ⁴

4 *Id.* at 138-40, 134 P.2d at 447 (citation omitted).

In *Aldabe v. Aldabe*, ⁵ this court cited *Fleming* and a host of other Nevada cases for the proposition that "residence is synonymous [*270] with domicile and it is consonant with the many decisions of our court that the fact of presence together with intention comprise bona fide residence for divorce jurisdiction."

5 84 Nev. 392, 396, 441 P.2d 691, 694 (1968).

[**512] Applying the principle of actual presence to Scotlund, it [***12] is clear that he had not established a residence in Nevada at the time the complaint was filed sufficient to confer upon the court jurisdiction to grant a divorce. Scotlund signed the verified complaint for divorce only five days after he had arrived in Nevada. Scotlund never resided in Nevada at any other, prior point in time. Scotlund's statement in his verified complaint that he was physically present in Nevada for more than six weeks prior to the commencement of the action is false.

Scotlund also filed the affidavit of a witness to corroborate his residency as required by *NRS 54.010*. The affiant swore as follows: "for more than six weeks I have known Plaintiff and have seen Plaintiff physically present in Clark County, Nevada on an average of 3-4 times weekly, unless stationed out of the state with his

employer." (Emphasis added.) Essentially, the resident witness swore under penalty of perjury that she had known Scotlund for more than six weeks but not that she had seen him in Nevada for more than six weeks. This affidavit does not sufficiently corroborate Scotlund's claim of residency. Also, though not raised in this court by either party, we note [***13] that the district court's reliance upon the affidavit was improper for an additional reason.

Scotlund filed a complaint for divorce and secured and filed Cisilie's proper person answer. The district court may grant a divorce upon affidavit and without a hearing when the defendant has defaulted ⁶ or when the parties have filed a joint petition for divorce that complies with the summary proceedings for divorce set forth at *NRS 125.181* to *NRS 125.184*. In no other circumstances do the domestic relations statutes permit the court to enter a decree of divorce without a hearing. ⁷ The district court was required to hear the live testimony of both Scotlund and his resident witness before entering its decree of divorce. We raise this point because it appears the district court was misled by the language of the complaint and the affidavit. A hearing might have uncovered the truth and the jurisdictional defect in this case.

6 *NRS 125.123*.

7 WDCR 41 permits the submission of an uncontested divorce without a hearing if the parties stipulate to waive the hearing and if the district court approves the waiver. We are unaware of a similar rule in the Eighth Judicial District Court.

[***14] [*271] Residency is a question of fact to be determined by the district court. ⁸ Courts in this state are obligated to determine that the residency requirement has actually been met and that residency is not being established by fraudulent means. ⁹

8 *See Woodruff v. Woodruff*, 94 Nev. 1, 3, 573 P.2d 206, 207 (1978).

9 *McKim v. District Court*, 33 Nev. 44, 52, 110 P. 4, 5 (1910) ("It is the duty of courts in divorce proceedings to see that the proof of residence is clear and convincing, and that a fraud is not being perpetrated upon the court.").

In this case, the district court declined to set aside the decree of divorce based upon its determinations that Scotlund was in fact a resident, and that the court

therefore had personal as well as subject matter jurisdiction. Since we conclude that the court did not have jurisdiction because Scotlund was not a resident, the question becomes whether the decree is void or merely voidable.

To answer this question, we turn to [***15] *Moore v. Moore*.¹⁰ In that case, the appellant argued that the divorce decree was void because the plaintiff in the divorce proceeding had not satisfied Nevada's residency requirement.¹¹ The court determined, however, that because evidence was presented to the district court in the form of testimony from the plaintiff showing that he did, in fact, satisfy Nevada's residency requirement, the divorce decree in that case was not void, but merely voidable.¹² Quoting an 1875 United States Supreme Court decision, the court stated:

10 75 Nev. 189, 336 P.2d 1073 (1959).

11 See *id.* at 191-92, 336 P.2d at 1074.

12 See *id.* at 193, 336 P.2d at 1075.

"That if there be a total defect of evidence to prove the essential fact, and the [**513] court find it without proof, the action of the court is void; but when the proof exhibited has a legal tendency to show a case of jurisdiction, then, although the proof may be slight and inconclusive, the action of the [***16] court will be valid until it is set aside by a direct proceeding for that purpose. Nor is the distinction unsubstantial, as in the one case the court acts without authority, and the action of the court is void; but in the other the court only errs in judgment upon a question properly before the court for adjudication, and of course the order or decree of the court is only voidable."¹³

13 *Id.* (emphases added) (quoting *Lamp Chimney Co. v. Brass & Copper Co.*, 91 U.S. 656, 659-60, 23 L. Ed. 336 (1875)).

Accordingly, we concluded in *Moore* that although inconsistent evidence had been presented to the district court regarding the [*272] plaintiff's residency, the divorce decree was not void, but, instead, merely voidable.¹⁴

14 *Id.* 75 Nev. at 193, 336 P.2d at 1075.

Likewise, we refer to our decision in *Smith v. Smith* [***17].¹⁵ In that case, although it initially appeared to the district court that all the requirements for service of

process were met, it was later determined that the defendant had not been properly served due to a procedural irregularity.¹⁶ We determined that this procedural irregularity did not render the judgment void, but that the decree was merely voidable.¹⁷

15 82 Nev. 384, 419 P.2d 295 (1966).

16 See *id.* at 385, 419 P.2d at 296.

17 See *id.* at 386, 419 P.2d at 296.

In the instant case, the evidence presented to the district court consisted of Scotlund's verified complaint and the affidavit of his resident witness. These documents provided the district court, at the time it entered the decree, with evidence legally tending to show a case of jurisdiction. On their face, these documents supported a finding that the district court had jurisdiction over the marital res. We so conclude, despite the inadequacy of the resident witness's affidavit. [***18] We note the affidavit was cleverly drafted but also legally tends to show a case of jurisdiction even though the proof is slight and not conclusive. Based upon the representations contained in the documents, a colorable case for jurisdiction was made; therefore, the decree is voidable rather than void. Finally, the district court's treatment of the case as a summary proceeding for divorce constituted a procedural irregularity that also renders the decree voidable rather than void.

We are compelled to observe that Nevada has a strong interest in protecting its valid divorce decrees. We recognize that Nevada's liberal six-week residency period makes this state an attractive forum in which to obtain a divorce. It is a sad reality of human nature as evidenced by Scotlund's conduct, that despite the liberality of the law, some will seek to speed their cause along in order to achieve a divorce in a time frame that suits their convenience rather than the requirements of the law. The district courts must be willing and prepared to diligently review each divorce action to remain assured that the integrity of any decrees entered is preserved, and should not hesitate to order the taking of testimony [***19] where necessary or desirable.¹⁸ We are mindful that divorce [*273] decrees granted by our courts affect "collateral rights and interests of third persons."¹⁹ As a matter of policy, district courts should be very interested in ascertaining whether jurisdiction actually exists before granting the decree so that decrees are valid and enforceable [**514] and interested persons can rely on them. Other individual's rights and interests may be

significantly affected when a divorce decree is granted but subsequently declared to be void.

18 See *NRS 125.123* (providing that the district court is not required to accept a case for default divorce upon submission; court has the discretion to order a hearing and require the presence of the plaintiff and the resident witness).

19 *Self v. Self*, 319 Ark. 632, 893 S.W.2d 775, 778 (Ark. 1995). In *Self*, the Supreme Court of Arkansas stated:

We have stated that judgments in matrimonial cases should be more stable than in others, because matrimonial status draws with it so many collateral rights and interests of third persons. However, we have also held that when divorces have a "mail-order" appearance, we shall not hesitate to set them aside, even though the divorced party remarries in the meantime, as we cannot permit such frauds to be practiced upon the courts of this state.

Id. (citations omitted).

[***20] Having concluded that the decree is voidable, we determine whether the decree ought to be set aside. The district court "found merit" in Scotlund's argument that Cisilie is judicially estopped from asserting that the court lacked jurisdiction to enter the decree of divorce. The district court was not required to reach the issue of judicial estoppel raised by Scotlund since the court had already determined that it had jurisdiction over both the parties and the subject matter. Nevertheless, the district court considered Cisilie's claim that she had been coerced or was under duress when she signed the answer to the complaint and the agreement. The district court determined as a matter of fact that Cisilie was not coerced or operating under duress. In fact, Cisilie had signed an answer to the complaint which admitted the fact of Scotlund's residence. Based upon these findings, which we will not disturb, the district court determined that Cisilie was estopped from attacking the decree's validity.

The rule of judicial estoppel is recognized in Nevada's case law. In *Sterling Builders, Inc. v. Fuhrman*, 20 we noted that according to the rule of judicial estoppel, a party who has stated [***21] an oath in a prior proceeding, "as in a pleading," that a given fact is true, may not be allowed to deny the same fact in a subsequent action. In that case, the court indicated that one of the

rule's purposes is to prevent parties from deliberately shifting their position to suit the requirements of another case concerning the same subject matter.

20 80 Nev. 543, 549-50, 396 P.2d 850, 854 (1964).

As mentioned, Cisilie's answer to Scotlund's complaint admitted that Scotlund was a resident of Nevada. She now asserts a contrary [*274] fact in order to support her motion in the trial court to set aside the decree of divorce. We note that she relied upon the validity of the divorce decree when she decided to remarry. Because the district court determined that she was not operating under duress and was not coerced but did voluntarily sign the answer, her representations of fact contained within the answer are the proper subject for the application of the rule of judicial estoppel. Therefore, the voidable decree [***22] of divorce will not be set aside.

Two separate dissents have been written in this case. Both question our conclusion that Cisilie is judicially estopped from obtaining an order setting aside the decree of divorce based upon the district court's lack of jurisdiction. In brief response, we reiterate that the district court concluded as matters of fact that she was neither coerced nor under duress when she signed the answer and the agreement. The dissent points out that she did not prepare the answer she signed, and the record discloses no evidence that she was aware of Nevada's residency requirement. However, she knew that Scotlund had not resided in Nevada for six weeks when she signed the answer. She took advantage of those aspects of the agreement which allowed her to take custody of the children and she depended upon the decree's validity when she planned to marry again.

We realize that the posture of this case is unusual and unique since we are refusing to void a decree which was entered, as it turns out, by a court which had no jurisdiction over the parties. However, to reiterate, the decree was entered when the court believed it had jurisdiction. Any person who might review [***23] the district court filings would have no reason but to trust the validity of the court's decree. Under these circumstances, the law and the policies which support it permit no result other than that the decree is voidable, not void. As mentioned and for the reasons previously stated, we decline to declare the decree void.

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2002 Nev. LEXIS 33, ***23; 118 Nev. Adv. Rep. 27

Ironically, were we to adopt the reasoning of either dissent, then the fears of Justice Young that Scotlund might profit from a fraud upon the court would become a reality. As we will discuss next, we do declare void that portion of the decree which purports to determine the custody and visitation rights of the parties. However, because the decree is voidable and because we decline to declare it void, we are able to require the district court [*515] to make a Hague Convention determination, as we will also discuss in this opinion. Scotlund, as noted, resides now in Texas and he has possession of the children. Were we to set aside the decree in its entirety, we would not be in a position to order the Hague determination. Cisilie would be put in the position of having to begin anew and commence, if she can, a proceeding against Scotlund in Texas.

[*275] The district court, in refusing [***24] to set aside the decree of divorce, also properly determined that it had no jurisdiction over the children. The court nevertheless determined that it had "jurisdiction over the parties' conduct toward each other with regard to the agreement under a contract theory." Based upon that analysis, the district court did not set aside the custody provisions of the divorce decree, and it erred in this regard. The children have never lived in Nevada. Neither party has ever lived in Nevada. The children have never had any contact with Nevada, much less substantial contact with the state. Neither do the parents have substantial contact with Nevada. The district court had no subject matter jurisdiction over the issue of child custody.
21

21 NRS 125A.050 (setting forth the factors for determining whether a court has jurisdiction to determine child custody).

Parties may not confer jurisdiction upon the court by their consent when jurisdiction does not otherwise exist.

22 The provision in the [***25] parties' agreement selecting Nevada as their forum for a divorce does not bind the court, nor does it confer jurisdiction upon the court. The court may not assume jurisdiction over matters of child custody and visitation based upon its perception of a "contract theory" or upon its view that because it has asserted personal jurisdiction over the parties, it can order them to do or not do certain things. Because the voidable decree has not been set aside, the court had colorable personal jurisdiction over the parties and the subject matter of their marital status. Simply because a court

might order one party to pay child support to another in the exercise of its personal jurisdiction over the parties does not permit the court to extend its jurisdiction to the subject matters of child custody and visitation.

22 *Finley v. Finley*, 65 Nev. 113, 120, 189 P.2d 334, 337 (1948).

Unless the court can properly exercise subject matter jurisdiction according to the terms of the Uniform Child Custody Jurisdiction Act (UCCJA), [***26] which Nevada has adopted, it is without authority to enter any order adjudicating the rights of the parties with respect to custody and visitation. A provision in a divorce decree adjudicating custody and visitation in the absence of subject matter jurisdiction is void, as we held in *Swan v. Swan*.²³

23 106 Nev. 464, 796 P.2d 221 (1990).

In *Swan*, the father moved to Nevada from Utah and, after several months, filed a complaint for divorce in Nevada. After filing his complaint, he returned to Utah, took the children and returned to Nevada with them. The mother filed an answer and contested [*276] the Nevada court's subject matter jurisdiction, but made no further filings or appearances in the action. The court granted the father a divorce and, based upon his testimony that the children resided with him, granted him custody. One and a half years later, the mother moved to vacate the custody provisions of the decree on the basis that the Nevada court had no jurisdiction over the subject [***27] matter under the UCCJA. Her motion was denied, but the district court's decision was reversed on appeal. We analyzed the facts under Nevada's version of the UCCJA and determined first, that Nevada was not the children's home state; second, that the children's residence in Nevada for forty days did not constitute a significant connection with this state; and third, even if dual jurisdiction existed, Utah was the more appropriate forum. Consequently, we concluded that the district court had incorrectly awarded custody as an incident of the default decree without having subject matter jurisdiction, and that the custody portion of the decree was void.²⁴ In our opinion, we noted that subject matter jurisdiction cannot be [**516] waived and may be raised at any time, or *sua sponte* by a court of review.²⁵

24 *Id.* at 469, 769 P.2d at 224.

25 *Id.*

NRS 125A.050, which was adopted as a part of the UCCJA, sets out those circumstances under which a Nevada court has jurisdiction [***28] to make a child custody determination by initial or modifying decree. Under NRS 125A.050(1)(a), this state must be the home state of the children or have been the home state within six months before the action commenced. Neither is the case here. Under NRS 125A.050(1)(b), a Nevada court may exercise jurisdiction if it is in the children's best interest to do so because the children and at least one of their parents have a significant connection with Nevada and substantial evidence is available in Nevada concerning the children's present and future care, protection, training and personal relationships. As neither the children nor the parents have ever lived here or have a significant relationship with Nevada, virtually no information is available in this state to even arguably create jurisdiction under this provision. NRS 125A.050(1)(c) does not apply because it requires the presence of the children in Nevada. Finally, under NRS 125A.050(1)(d), Nevada may exercise jurisdiction if no other state would have jurisdiction or if another state has declined to exercise jurisdiction on [***29] the ground that Nevada is the appropriate forum and it is in the child's best interest that Nevada assume jurisdiction. This section of the statute also provides no basis for the Nevada court's exercise of jurisdiction. At the time the decree was entered, the children's last significant contacts with any state were with Ohio and Virginia. After living in Ohio and then [*277] Virginia, the children moved to the United Kingdom and Norway. Under NRS 125A.050, these countries are both considered states.²⁶ Neither Ohio nor Virginia has declined to exercise jurisdiction. Norway and the United Kingdom have both been involved in custody disputes between the parties.

²⁶ NRS 125A.030 is captioned "Application of chapter to decrees of other nations." The statute states:

The general policies of this chapter extend to other nations. The provisions of this chapter relating to the recognition and enforcement of custody decrees of other states apply to custody decrees and decrees involving legal institutions similar in nature to custody institutions rendered by appropriate authorities of other nations if reasonable notice and opportunity to be heard were given to all affected persons.

[***30] The district court lacked subject matter jurisdiction over matters of custody and visitation when it entered the decree of divorce in 1998, and therefore the provisions of the decree which purport to fix the obligations of the parties with respect to custody and visitation are void.

III.

Next, we address petitioner's argument that the district court was required to make a determination, under the Hague Convention on the Civil Aspects of International Child Abduction, regarding the children's habitual residence, and whether the children were wrongfully removed from their habitual residence as those terms are construed under the Convention. The district court incorrectly concluded that it need not make such a determination. First, we note that Nevada has jurisdiction to make the determination. The United States Congress has implemented the Convention by enacting the International Child Abduction Remedies Act ("ICARA").²⁷ Under both the Convention and ICARA, an aggrieved party may institute judicial proceedings in the country to which the children have been removed.²⁸ State and federal courts have concurrent jurisdiction over such disputes.²⁹ Additionally, we conclude, [***31] as a matter of law, that the habitual residence of the children was Norway, and that the children were wrongfully removed from that country. Accordingly, the Hague Convention mandates that the children be promptly returned to Norway so that the courts there can determine the issue of custody.

²⁷ 42 U.S.C. §§ 11601-11610 (1988).

²⁸ Hague Convention, arts. 8, 11, 29; 42 U.S.C. § 11601 (1988).

²⁹ 42 U.S.C. § 11603 (1988).

[**517] The Hague Convention on the Civil Aspects of International Child Abduction, to which the United States and Norway are signatories,³⁰ [*278] seeks to "secure the prompt return of children wrongfully removed to or retained in any Contracting State."³¹ Furthermore, the primary purpose of the Hague Convention is "to preserve the status quo and to deter parents from crossing international boundaries in search of a more sympathetic court."³² The Hague Convention is meant to "protect children internationally from [***32] the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of habitual residence."³³

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30 The United States ratified the Convention in 1988, while Norway ratified the Convention in 1989.

31 Hague Convention, art. 1.

32 *Friedrich v. Friedrich*, 983 F.2d 1396, 1400 (6th Cir. 1993) ("*Friedrich I*").

33 Hague Convention, preamble.

To achieve these goals, the Convention requires that, subject to certain exceptions, children who habitually reside in a signatory country and are removed to or retained in another signatory country in breach of the left-behind parent's custody rights shall be promptly returned to the country of their habitual residence.³⁴ The Convention provides that only after the children are returned to the country of their habitual residence will a custody determination be made.³⁵ Therefore, a court considering a petition under the Convention has jurisdiction to decide the merits of [***33] the wrongful removal claim, but not the underlying custody dispute.³⁶

34 Hague Convention, arts. 12, 13.

35 *Id.* art. 19.

36 *Friedrich v. Friedrich*, 78 F.3d 1060, 1063 (6th Cir. 1996) ("*Friedrich II*").

In this case, the district court determined that it was unnecessary to make a Hague Convention determination. The district court said that if it were to make a determination under the Convention, it would find that the children's habitual residence is Nevada, and that Cisilie had wrongfully retained the children in Norway. We disagree with these findings, based upon the uncontroverted fact that neither parent has ever lived in Nevada. We also conclude that the district court should have made a determination under the terms of the Convention.

Habitual residence

First, we examine the question of which country serves as the children's habitual residence. We begin by observing that although a court must identify which country is the children's "habitual [*279] residence," [***34] this term is nowhere defined in the Convention. Instead, the term is intended by the Convention's drafters to be applied to the facts and circumstances of each case in a non-technical manner.³⁸

37 See *Miller v. Miller*, 240 F.3d 392, 400 (4th Cir. 2001); *Friedrich I*, 983 F.2d at 1400.

38 See *Friedrich I*, 983 F.2d at 1401 (quoting *In Re Bates*, No. CA 122.89, High Court of Justice, Family Div'n Ct. Royal Court of Justice, United Kingdom (1989) (quoting Dicey & Morris, *The Conflicts of Laws* 166 (11th ed.))), which explained:

"It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common law domicile. The facts and circumstances of each case should continue to be assessed without resort to presumptions or pre-suppositions."

We are not without guidance, however. Other courts that have addressed this issue have [***35] stated that when determining a child's state of habitual residence, courts must look back in time, not forward.³⁹ In other words, courts must look to the past experiences of the parties, and not to the parties' future intentions.⁴⁰ Furthermore, when conducting this inquiry, the focus is on the child, not the parents.⁴¹ Therefore, any subjective intentions that the parents harbor regarding where the child is to live are irrelevant. [**518] Additionally, any change in geography that would affect a child's habitual residence must occur before the removal at issue.⁴² Although the child's physical whereabouts are central to an inquiry, one parent's "questionable removal" of the child is not determinative when ascertaining habitual residence. Courts also look to where children have a "degree of settled purpose."⁴³ Under this analysis, the child has a degree of settled purpose in "the place where he or she has been physically present for an amount of time sufficient for acclimatization."⁴⁴

39 *Friedrich I*, 983 F.2d at 1401.

40 *Id.*

41 *Id.*

42 *Id.*

43 *Feder v. Evans-Feder*, 63 F.3d 217, 224 (3d Cir. 1995).

[***36]

44 *Id.*

Ordinarily, a determination of habitual residence is a question of fact which we will not disturb. After reviewing the facts and circumstances of this case, however, we conclude, as a matter of law, that only one country could possibly be the habitual residence. [*280]

The children's state of habitual residence prior to their removal was Norway. The record in this case reveals that in July 1998, when the children were three and seven years of age, they moved from London, England, where they were residing at the time, to Norway. They remained in Norway for twenty-two months until they were removed to the United States by Scotlund in May 2000. While in Norway, the children were registered under Norwegian law as residents of that country. And during their stay in Norway, the children attended school and otherwise conducted their lives as normal children. The children, while living in Norway, had a "degree of settled purpose" to remain there.

Although there is some evidence in the record that Cisilie and Scotlund may have intended that the children would move to the United States at some [***37] time in the future, ⁴⁵ the courts are not bound, as we have previously stated, by the intentions of the parents regarding future events. ⁴⁶ Furthermore, Scotlund's unilateral act of removing the children from Norway cannot change their state of habitual residence. Therefore, the children's state of habitual residence was Norway at the time Scotlund removed them from that country. Their habitual residence could be nowhere else. It could not be Nevada, as neither they nor their parents ever lived here. It could not be Great Britain, as no evidence exists in the record to support a finding that upon the family's departure from Great Britain, either parent ever expected to return.

⁴⁵ The children have dual American and Norwegian citizenship.

⁴⁶ Based upon our thorough review of the record, we harbor grave concerns regarding the validity of Scotlund and Cisilie's "agreement." In any event, because we have determined that the portion of the divorce decree that incorporated the custody and visitation provisions of the agreement is void, we are not bound by those terms.

[***38] *Wrongful removal*

Having concluded that the children's habitual residence was Norway, we must next determine whether Scotlund "wrongfully removed" the children from that country. Under the Hague Convention, removal or retention of a child is wrongful if it violates the custody rights of another person which were actually being exercised at the time of the removal or retention or would have been exercised but for the removal or retention. ⁴⁷

47 Hague Convention, art. 3. This article reads:

The removal or retention of a child is to be considered wrongful where -

a it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

[*281] In the underlying case, the [***39] district court concluded that it need not make a Hague Convention determination because Scotlund had not wrongfully removed the children from Norway. Instead, the district court found that Cisilie had wrongfully retained the children in Norway contrary to their [**519] agreement. The district court's determination that Scotlund had not wrongfully removed the children from Norway was improper.

Scotlund arrived in Norway with an order from the district court finding Cisilie in contempt for violating the terms of the Nevada divorce decree. Specifically, the district court had determined that Cisilie was violating the parties' agreement, which had been incorporated into the terms of the divorce decree and which required her to return the children to Scotlund. Accordingly, the district court granted Scotlund custody of the children.

The district court, however, relied upon Scotlund's untruthful representation when it issued its order granting him custody of the children. At the hearing held to decide whether Cisilie was in contempt of court for failing to bring the children to the United States as contemplated by the parties' agreement, the district court asked Scotlund how long he and the children [***40] had lived in Nevada. Scotlund responded that they had lived in Nevada "all their lives." The district court then issued its order holding Cisilie in contempt. This order further stated that Cisilie was to immediately return the children to Scotlund's custody.

Had the district court been apprised of the true facts, the order compelling Cisilie to return the children to Scotlund's custody might not have been granted.

Moreover, the underlying basis for the order, the provision in the divorce decree incorporating the parties' agreement as to custody and visitation, is void and unenforceable.

Accordingly, when Scotlund traveled to Norway to take custody of the children, he did so under an invalid order. Further, Cisilie was properly exercising custody rights over the children when Scotlund arrived in Norway. Because Scotlund removed the children from their habitual residence while Cisilie was validly exercising custody rights over the children, and because he removed the children under the false pretense of a valid custody order, Scotlund wrongfully removed the children from Norway. Under the terms of the Hague Convention, the children must be returned to Norway so that any decision regarding [***41] custody can be made in the courts of that country.⁴⁸

48 Hague Convention, art. 12. We also note in passing that after Cisilie filed her petition in this court, Scotlund informed us that the Norwegian court determined that it does not have jurisdiction to determine custody. The Norwegian court's decision placed "decisive emphasis" upon the parties' twenty-three-page agreement and the district court's decree of divorce. The Norwegian court obviously presumed that the decree was valid in all respects. The crucial provisions of the decree upon which the Norwegian court relied are void.

[*282] IV.

In this case, the district court lacked subject matter jurisdiction over custody and visitation. Furthermore, the district court manifestly abused its discretion by failing to make a determination under the Hague Convention on the Civil Aspects of International Child Abduction regarding the children's state of habitual residence. As the children's state of habitual residence was, as a matter of law, Norway, and as Scotlund [***42] wrongfully removed the children from that country, the district court was required to make these determinations. Accordingly, we grant the petition and direct the clerk of this court to issue a writ of mandamus compelling the district court to vacate those portions of its decree relating to custody and visitation and to order the children's return to Norway, where custody determinations can be made.

ROSE, LEAVITT and BECKER, JJ., concur.

DISSENT BY: MAUPIN; YOUNG

DISSENT

MAUPIN, C.J., dissenting:

I would grant the petition and declare the voidable divorce decree void in its entirety. In granting the petition, I would further conclude that the district court was not authorized to grant relief under NRS 125A.050, nor was it authorized to make findings under the Hague Convention on the Civil Aspects of International Child Abduction.

It is true that petitioner judicially admitted the facts alleged in the original divorce complaint in support of the real party in interest's residency, and thus the primary fact in support of subject matter jurisdiction over [**520] the marriage and the issues related thereto. The majority now concludes that this admission constitutes a judicial [***43] estoppel, which relieves the district court, and therefore this court, from the obligation to declare as void, in its entirety, the admittedly voidable divorce decree. I disagree.

Once the facts of voidability became known, it was incumbent on the district court to void the decree for want of subject matter jurisdiction. As the majority points out, actions of the parties cannot confer subject matter jurisdiction on a court when none otherwise exists. Application of the doctrine of judicial estoppel to these facts would do just that. Since the district court determined that it did have jurisdiction, it is incumbent upon this court to now declare the underlying decree void in its entirety.¹

1 See NRCP 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.").

[*283] The majority's reliance on our published opinion in *Sterling Builders, Inc. v. Fuhrman*² is misplaced. This is because our application [***44] of judicial estoppel in *Sterling* had nothing to do with subject matter jurisdiction. *Sterling* merely applied the rule of estoppel to prevent a party from denying that a partnership existed in the context of a factual dispute.³ The *Sterling* decision did not apply the doctrine of judicial estoppel to confer jurisdiction where there was none, and we should not do so now.

2 80 Nev. 543, 396 P.2d 850 (1964).

3 *Id.* at 549-50, 396 P.2d at 854.

The estoppel argument was not sufficient to give any continuing life to the decree. I realize that, under this view, there would be collateral effects on these parties with regard to their post-decree actions and their status as divorced persons. This is particularly unfortunate with regard to petitioner who, at the very least, was a victim of the post-divorce behavior of the real party in interest. This does not, however, alter the fact that the decree was actually voidable in all respects and should be so declared.

No other [***45] remedies are available to petitioner under Nevada law. NRS 125A.050, the Nevada version of the UCCJA, cannot provide relief since Nevada is neither the home state of the children of the parties, nor was it their home state at any time. In point of fact, these children have never had any significant connection with the state. It therefore appears that the district court was seriously misled in its deliberations below, given the real party in interest's statement that the children had lived in Nevada "all their lives."

The district court also does not have jurisdiction to make findings under the Hague Convention on the Civil Aspects of International Child Abduction. This is because actions under the Convention must be made in a "court which has jurisdiction of such actions and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed." ⁴

4 42 U.S.C. § 11603(b) (1995) (emphasis added).

It does appear from the record of this case that these children were wrongfully removed from Norway, that Norway was their habitual residence at the time of their abduction and that, under the Convention, they should be returned to the Norwegian tribunal for the appropriate custody determination. It also appears that the Norwegian court was misled into deferring to the voidable Nevada decree.

[***46] YOUNG, J., with whom SHEARING, J., agrees, dissenting:

I disagree with the majority's conclusion that the

decree of divorce is voidable, not void; and I also disagree with the majority that Cisilie is judicially estopped from questioning the decree obtained through Scotlund's fraud.

[*284] 1. The decree of divorce is void, not voidable

In the majority opinion, my colleagues hold that the decree fraudulently obtained by Scotlund without establishing residency is voidable, not void. This holding is contrary to long-established law in this state and undermines Nevada's statutory scheme requiring a six-week residency.

For many years, it has been well settled that a divorce decree issued by a district [**521] court *without* jurisdiction is void. ¹ Here, the majority relies on *Smith v. Smith* ² where the plaintiff's good faith failure to properly serve the defendant constituted a procedural irregularity rendering the judgment merely voidable, not void.

1 *Milton v. Gesler*, 107 Nev. 767, 771, 819 P.2d 245, 248 (1991) (holding that because the district court acted without jurisdiction, the decree of divorce is void); *La Potin v. La Potin*, 75 Nev. 264, 266, 339 P.2d 123, 123-24 (1959) (same); *Perry v. District Court*, 42 Nev. 284, 288, 174 P. 1058, 1059 (1918) (same).

[***47]

2 82 Nev. 384, 419 P.2d 295 (1966).

Smith is factually distinguishable from the instant case because in that case there was no fraud, merely a procedural irregularity. The plaintiff in *Smith* established residency for the requisite period in Nevada; the testimony of the resident witness was not flawed. A default had been taken after thirteen days from service of process instead of the requisite twenty days. In contrast, here, Scotlund did not attempt to comply with Nevada law requiring six-week residency. Scotlund had resided in Nevada only five days when he signed the complaint. Thus, this case does not involve a mere procedural irregularity as in *Smith*. The majority's reliance on *Smith* is misplaced because here the district court clearly lacked jurisdiction and the decree of divorce was void. ³

3 See *Milton*, 107 Nev. at 771, 819 P.2d at 248; *La Potin*, 75 Nev. at 266, 339 P.2d at 123-24; *Perry*, 42 Nev. at 288, 174 P. at 1059.

[***48] Additionally, the majority relies on *Moore v. Moore*.⁴ In *Moore*, the husband obtained a decree of divorce after he had physically resided in Nevada for more than six weeks.⁵ Later, the husband and wife sought to void the decree saying that although the husband had been physically present in Nevada and contrary to his testimony in court, he really had not intended to make Nevada his residence.⁶ To determine whether the decree of divorce was void or voidable, we reviewed the "manner in which the trial court had exercised its authority to resolve the factual problem confronting it [the issue of residency]." ⁷ Specifically, we noted that a decree [*285] is void when there is "a total defect of evidence to prove the essential fact, and the court finds it without proof."⁸ Under such circumstances, "the court acts without authority, and the action of the court is void."⁹ In *Moore*, the husband's testimony that he had been a bona fide resident in Nevada for more than six weeks was sufficient to make the decree of divorce merely voidable.¹⁰

4 75 Nev. 189, 336 P.2d 1073 (1959).

[***49]

5 *Id.* at 192, 336 P.2d at 1074.

6 *Id.* at 190-92, 336 P.2d at 1073-74.

7 *Id.* at 193, 336 P.2d at 1075.

8 *Id.* (quoting *Lamp Chimney Co. v. Brass & Copper Co.*, 91 U.S. 656, 659-60, 23 L. Ed. 336 (1875)).

9 *Id.* (quoting *Lamp Chimney*, 91 U.S. at 660).

10 *Id.* at 192-93, 336 P.2d at 1074-75.

In contrast, the facts before this court indicate that there was a total defect of evidence proving that Scotlund was a resident of Nevada. Three facts are significant. First, the majority admits that Scotlund's statement concerning residency in the verified complaint was false. In fact, when the complaint was signed, Scotlund had been in the state for a period of only five days. Second, the affidavit of the resident witness did not corroborate Scotlund's claim of residency by "clear and convincing evidence" as required by law.¹¹ The affidavit was cleverly worded to indicate that the affiant had known Scotlund for "six weeks"-but *not* during the six weeks he was claiming residency [***50] in Nevada. The affiant further stated that she had seen Scotlund physically present in Nevada "on an average of 3-4 times weekly." It was signed when Scotlund had been in Nevada only six days, not for a period of six weeks. Third, the district court entered the decree in chambers without a hearing.

At the time the decree was signed, Scotlund was thousands of miles away in England. It is abundantly clear that Scotlund had not established a residence in Nevada at the time the complaint was filed sufficient [***522] to confer jurisdiction upon the district court to grant a divorce.

11 *McKim v. District Court*, 33 Nev. 44, 52, 110 P. 4, 5 (1910).

Unlike *Moore*, there was a total defect in the evidence presented to the district court. Hence, based on the lack of residency, the decree of divorce is void, not merely voidable.

Adopting the majority's view would undermine Nevada's statutory scheme requiring a six-week residency. A non-resident plaintiff seeking an expedient divorce could travel to Nevada, [***51] file a complaint the same day, and obtain a decree of divorce immediately. The problem with holding that such a decree is voidable, as we are urged to do in the majority opinion, is that individuals could commit fraud upon our courts and reap the dubious benefits of a voidable divorce decree, which is what Scotlund is doing here.

[*286] 2. Judicial estoppel

Scotlund attempts to breathe life into a void decree by alleging that Cisilie is judicially estopped to question the validity of the void decree. If we hold the decree of divorce to be void, we need not reach the question of whether Cisilie is judicially estopped. However, since the majority reached this question, I feel obliged to convey my concerns about the application of judicial estoppel under the circumstances before this court.

The United States Supreme Court has stated that judicial estoppel is designed to "protect the integrity of the judicial process"¹² in order to "prohibit[] parties from deliberately changing positions according to the exigencies of the moment."¹³ It follows that the doctrine of judicial estoppel is an equitable doctrine applied by a court at its discretion.¹⁴

12 *New Hampshire v. Maine*, 532 U.S. 742, 749, 149 L. Ed. 2d 968, 121 S. Ct. 1808 (2001) (quoting *Edwards v. Aetna Life Ins. Co.*, 690 F.2d 595, 598 (6th Cir. 1982)).

[***52]

13 *Id.* at 750 (quoting *U.S. v. McCaskey*, 9 F.3d

368, 378 (5th Cir. 1993)).

14 *Id.*

In this case, I submit the district court erred by finding that Cisilie was not coerced or operating under duress when she signed the answer (prepared by Scotlund's Nevada divorce attorney) admitting to Scotlund's claim of residency.¹⁵ The record shows that Scotlund had threatened Cisilie that he would take the couple's children away from her if she did not cooperate with the divorce.¹⁶ It was a threat that was later carried out when Scotlund kidnapped the children in Norway by trickery and deceit and flew to the United States. The district court abused its discretion by invoking the doctrine of judicial estoppel against Cisilie.

15 When Cisilie received the answer, she was unknowingly recruited by Scotlund to participate in the perpetration of fraud upon the district court. I see no evidence to the contrary.

16 Cisilie could reasonably believe that Scotlund would carry out his threats and that she would never see her children again based on Scotlund's family history. Cisilie was aware that Scotlund's mother had kidnapped him and his siblings to another state, changed their last name, and the father kidnapped them back.

[***53] Moreover, a court has discretion not to apply judicial estoppel when "a party's prior position was based on inadvertence or mistake."¹⁷ In this case, Cisilie is not judicially estopped because there is no evidence to suggest that she was aware of Nevada's residency requirement. In fact, she had never resided in Nevada. The answer that she signed was prepared by her husband's attorney in Nevada and sent by airmail to her in Norway for immediate signature. She had planned on remarriage; but when an attorney in Norway advised her that there might be some doubt as to the [*287] validity of the Nevada decree, Cisilie cancelled the marriage ceremony. She has spent thousands of dollars in fees and travel expenses in an effort to set aside the admittedly fraudulent decree and will presumably have to spend thousands of additional dollars to regain custody of her children illegally taken from her in Norway by Scotlund. Thus, the district court incorrectly applied the doctrine of judicial estoppel because Cisilie's admission to Scotlund's claim of residency was not knowingly made and certainly not a representation that Scotlund [**523] could rely on to prove his residency under Nevada law or prevent her

[***54] from questioning the residency requirement.

17 *New Hampshire*, 532 U.S. at 753 (quoting *John S. Clark Co. v. Faggert & Frieden, P.C.*, 65 F.3d 26, 29 (4th Cir. 1995)).

Finally, we have stated that the "purpose of the doctrine of judicial estoppel is to suppress fraud . . . and to eliminate the prejudice that would result to the administration of justice if a litigant were to swear one way one time and a different way another time."¹⁸ In this case, invoking judicial estoppel against Cisilie protects Scotlund from the consequences of his fraud upon the district court and inhibits the administration of justice. Scotlund was the sole architect of the scheme to perpetrate fraud on the district court. He should not be allowed to harvest the benefits of such fraud. Our court should not close the doors of justice to the innocent and reward the wrongdoer in the name of judicial estoppel.

18 *Sterling Builders, Inc. v. Fuhrman*, 80 Nev. 543, 550, 396 P.2d 850, 854 (1964) (quoting 31 C.J.S. *Estoppel* § 121, at 649, 650).

[***55] 3. *Digression (the state of our legal system)*

I am disturbed about the conduct of Scotlund's divorce attorney in this case. The attorney prepared a complaint that falsely alleged Scotlund's residency in Nevada. The divorce attorney knew or should have known that Scotlund had not been a resident of Nevada for six weeks when he signed the complaint.¹⁹ Further, the affidavit signed by the resident witness was cleverly drafted by the divorce attorney in a misleading manner in an effort to corroborate residency.

19 *The record indicates that the divorce attorney and Scotlund were communicating about the divorce case when Scotlund was living in England, just days before he flew to Las Vegas.*

CONCLUSION

I strongly disagree with the conclusion of the majority that the decree of divorce was merely voidable, not void. The decree of divorce is void because the district court lacked jurisdiction to grant a divorce. To hold the decree voidable will lead to absurd results and undermines Nevada's statutory [***56] scheme requiring residency [*288] of at least six weeks. Moreover, in my opinion, the court need not reach the question of judicial

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estoppel because the decree is void. Nonetheless, I strongly disagree with the conclusion that Cisilie is somehow judicially estopped. She was the victim, not the wrongdoer. Finally, the district court lacked subject matter jurisdiction to make findings under the Hague Convention. Scotlund lied to the district court, during the custody hearing, when he testified that the children had lived in Nevada "all their lives." The fact is that the children had never resided in Nevada and apparently after being kidnapped in Norway were flown to Texas where presumably they now live.²⁰

20 I would refer this matter to the State Bar of Nevada for investigation of the conduct of Scotlund's divorce lawyer. *See* NCJC Canon

3D(2) (imposing upon a judge an affirmative obligation to take appropriate action upon receiving information indicating substantial likelihood that a lawyer has committed a violation of the Nevada Rules of Professional Conduct). Furthermore, I am disturbed with Scotlund's behavior. Accordingly, I would refer this matter to the Clark County District Attorney's Office for investigation. The clerk of this court shall provide a copy of this opinion and dissent to the State Bar of Nevada and to the Clark County District Attorney's Office.

[***57]

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT SCOTLUND VAILE,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, AND THE HONORABLE
CHERYL MOSS, DISTRICT JUDGE,
FAMILY COURT DIVISION,

Respondents,

and

CISILIE A. PORSBOLL F/K/A CISILIE
A. VAILE,

Real Party in Interest.

No. 55446

FILED

JUL 20 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER GRANTING STAY AND GRANTING MOTION TO EXPEDITE

Having reviewed the motion for a stay, the opposition, and the reply,¹ we conclude that a stay is warranted, pending our consideration of this and related matters. NRAP 8(c); Fritz Hansen A/S v. District Ct., 116 Nev. 650, 6 P.3d 982 (2000). Accordingly, we stay all proceedings in District Court Case No. D230385, pending further order of this court. We also grant petitioner's motion to expedite this matter, and we will expedite

¹Petitioner's motion for leave to file a reply is granted. The reply's text was included in the motion, and we direct the clerk of this court to file the motion provisionally received on March 10, 2010. We defer ruling on all other motions at this time.

our resolution of this petition to the extent that this court's docket permits.

It is so ORDERED.

Hardesty, J.
Hardesty

Douglas, J.
Douglas

Pickering, J.
Pickering

cc: Hon. Cheryl B. Moss, District Judge, Family Court Division
Robert Scotlund Vaile
Willick Law Group
Eighth District Court Clerk

128 Nev., Advance Opinion 3

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT SCOTLUND VAILE,
Appellant,
vs.
CISILIE A. PORSBOLL, F/K/A CISILIE
A. VAILE,
Respondent.

No. 53687

FILED

JAN 26 2012

TRACIE A. LINDSEY
CLERK OF SUPREME COURT
BY *[Signature]*
CHIEF DEPUTY CLERK

No. 53798

CISILIE A. PORSBOLL, F/K/A CISILIE
A. VAILE,
Appellant,
vs.
ROBERT SCOTLUND VAILE,
Respondent.

Consolidated appeals from a district court post-divorce decree order imposing statutory penalties on child support arrearages under NRS 125B.095. Eighth Judicial District Court, Family Court Division, Clark County; Cheryl B. Moss, Judge.

Reversed and remanded.

Robert Scotlund Vaile, Kenwood, California,
in Proper Person.

Willick Law Group and Marshall S. Willick, Las Vegas,
for Cisilie A. Porsboll.

Catherine Cortez Masto, Attorney General, and Donald W. Winne, Jr.,
Deputy Attorney General, Carson City,
for Amicus Curiae State of Nevada, Division of Welfare and Supportive
Services, Child Support Enforcement Program.

BEFORE SAITTA, C.J., HARDESTY and PARRAGUIRRE, JJ.

RSV018

OPINION

By the Court, HARDESTY, J.:

In these appeals, we address the district court's authority to enforce or modify a child support order that a Nevada district court initially entered, when neither the parties nor the children reside in Nevada. We conclude that, under the Uniform Interstate Family Support Act, because no other jurisdiction has entered an order concerning child support, the Nevada order controls and the district court retains subject matter jurisdiction to enforce the Nevada order, but since the parties and children do not reside in Nevada and the parties have not consented to the district court's exercise of jurisdiction, the district court lacks subject matter jurisdiction to modify the support order. On this latter point, we take this opportunity to explain the distinction between a family court order that modifies a prior order and one that merely clarifies the prior order. Because we conclude that the district court in the present case impermissibly modified the child support obligation set forth in the divorce decree, we reverse the district court's order and remand this matter to the district court for further proceedings.

BACKGROUND

In 1998, Robert Scotlund Vaile and Cisilie A. Porsboll were granted a divorce in a Nevada district court proceeding. The divorce decree adopted and incorporated the terms of the parties' separation agreement with regard to, among other things, the payment of child support. Under the agreement, Vaile was obligated to pay Porsboll monthly child support according to a specific formula that was calculated based on the parties' annual exchange of tax return information or income statements to determine their combined income. Although the parties'

RSV019

compliance with the provision is not entirely clear from the documents before us, the district court found that the parties never exchanged tax returns or otherwise complied with the requirements of this agreement, but that Vaile nonetheless paid \$1,300 a month in child support from August 1998 to April 2000. The district court further found that, thereafter, Vaile ceased voluntarily paying child support.

In November 2007, Porsboll, through counsel, filed in the district court a motion seeking "to establish a sum certain due each month in child support" and to "reduce arrears in child support to judgment." Porsboll's motion asked the district court to establish a fixed monthly child support obligation for Vaile based on Nevada's child support statute without regard to the parties' agreed-upon formula adopted in the decree, to calculate arrears, and to reduce those arrears to judgment. In particular, the motion sought to have the support set at the \$1,300 amount that Vaile had previously paid. The district court granted Porsboll's motion, set Vaile's monthly child support obligation at \$1,300 and used that figure to calculate his support arrearages, which it then reduced to judgment. The district court subsequently imposed penalties on the arrearages amount under NRS 125B.095. When Porsboll filed her motion, neither the parties nor the children resided in Nevada.¹ Both Vaile and Porsboll filed separate appeals challenging the district court's rulings, and the parties' appeals were consolidated for the purpose of this court's appellate review.

In the appeal pending in Docket No. 53687, Vaile, proceeding in proper person, raises various challenges to the district court's child

¹Based on the parties' filings in this court, Vaile currently resides in California, and Porsboll and the children live in Norway.

support and penalty determinations, including an assertion that the district court impermissibly modified the support award contained in the divorce decree, as it lacked subject matter jurisdiction to do so.² In Docket No. 53798, Porsboll challenges the methodology used by the district court to determine the statutory penalty amount imposed on Vaile under NRS 125B.095 and the ensuing penalties.

DISCUSSION

The primary issue presented in these appeals is whether the district court had subject matter jurisdiction to enforce or modify its child support order when the parties and their children do not reside in Nevada. Nevada's version of the Uniform Interstate Family Support Act (UIFSA), NRS Chapter 130, controls our resolution of this issue. After concluding that the district court had subject matter jurisdiction to enforce the Nevada child support order, we then consider whether the district court's determination that Vaile owes \$1,300 per month in child support constitutes a modification or a clarification of the initial support obligation.

Subject matter jurisdiction

Enacted in all 50 states, the UIFSA creates a single-order system for child support orders, which is designed so that only one state's support order is effective at any given time. Unif. Interstate Family Support Act prefatory note (2001), 9/IB U.L.A. 163 (2005); see also Lunceford v. Lunceford, 204 S.W.3d 699, 702 (Mo. Ct. App. 2006). To

²We reject Vaile's attempt to resurrect challenges to Nevada's personal jurisdiction over the parties, which were previously determined in Vaile v. District Court, 118 Nev. 262, 268-77, 44 P.3d 506, 511-16 (2002). Moreover, the Nevada district court retains continuing personal jurisdiction over the parties under NRS 130.202.

RSV021

facilitate this single-order system, UIFSA provides a procedure for identifying the sole viable order, referred to as the controlling order, required for UIFSA to function. See NRS 130.207 (addressing the recognition and determination of the controlling child support order); Unif. Interstate Family Support Act § 207 cmt. (2001), 9/IB U.L.A. 198-99 (2005). Under UIFSA's statutory scheme, a court with personal jurisdiction over the obligor has the authority to establish a child support order and to retain jurisdiction to enforce or modify the order until certain conditions occur that end the issuing state's jurisdiction and confer jurisdiction on another state.³ Jurado v. Brashear, 782 So. 2d 575, 579 (La. 2001); see also Upson v. Wallace, 3 A.3d 1148, 1156 (D.C. 2010) ("Although the UIFSA never speaks explicitly of 'subject matter jurisdiction,' the terms that it does use—'jurisdiction' and 'continuing exclusive jurisdiction'—are simply alternative ways of referring to subject matter jurisdiction . . .").

One such condition that calls the issuing state's jurisdiction into question occurs when the parties and the children for whose benefit the support order has been entered do not reside in the issuing state when a motion concerning child support is filed. See NRS 130.205(1)(a). Under these circumstances, the fact that the parties and the children do not reside in the issuing state does not divest the issuing state of jurisdiction to enforce its support order when that order is the controlling order and has not been modified by another state in accordance with UIFSA. See NRS 130.206 (discussing continuing jurisdiction to enforce a child support

³NRS 130.10139 defines "issuing state" as a "state in which a tribunal issues a support order . . ."

order); Sidell v. Sidell, 18 A.3d 499, 510-11 (R.I. 2011); Nordstrom v. Nordstrom, 649 S.E.2d 200, 204 (Va. Ct. App. 2007); Unif. Interstate Family Support Act § 206 cmt. (2001), 9 U.L.A. 196 (2005) (noting that “the validity and enforceability of the controlling order continues unabated until it is fully complied with, unless it is replaced by a modified order issued in accordance with [UIFSA],” and that “even if the individual parties and the child no longer reside in the issuing State, the controlling order remains in effect and may be enforced by the issuing State or any responding State”). But even when the issuing state’s order has not been modified by another state and the order remains controlling, if the parties and the children do not reside in the issuing state, the issuing state lacks authority to modify the support order. See NRS 130.205(1)(a); Dept. of Economic Sec. v. Tazioli, 246 P.3d 944, 946 (Ariz. Ct. App. 2011); Brown v. Hines-Williams, 2 A.3d 1077, 1081 (D.C. 2010); McLean v. Kohnle, 940 So. 2d 975, 978-79 (Miss. Ct. App. 2006); Lilly v. Lilly, 250 P.3d 994, 998-1003 (Utah Ct. App. 2011); Nordstrom, 649 S.E.2d at 202-05; but see NRS 130.205(1)(b) (providing that the parties may consent to the issuing state exercising subject matter jurisdiction to modify a child support order).

Here, there is only one child support order, the order issued by the Nevada district court as part of the divorce decree.⁴ Thus, the Nevada

⁴Although the parties’ appellate filings and various parts of the appellate record allude to a possible child support order entered by a Norway court, no such order is contained in the appellate record, nor does it appear that the district court was provided with any such order. Consequently, on remand, the district court must determine whether such an order exists and assess its bearing, if any, on the district court’s enforcement of the Nevada support order.

order controls. NRS 130.207(1) (providing that, "[i]f a proceeding is brought under this chapter and only one tribunal has issued a child-support order, the order of that tribunal controls and must be so recognized"). Moreover, it is undisputed that neither the parties nor their children resided in Nevada when Porsboll filed her child support motion, and no party asserts that he or she consented to the Nevada court's continued exercise of jurisdiction. As a result, the Nevada district court lacked subject matter jurisdiction to modify the support obligation contained in the divorce decree. NRS 130.205(1). Thus, we must determine whether the district court impermissibly modified the child support obligation under UIFSA when it imposed a sum certain payment of \$1,300 per month as Vaile's child support obligation, or if that determination was a clarification of the child support order for the purpose of enforcement.

Modification versus clarification

On appeal, Vaile contends that setting his support payments at the sum certain of \$1,300 per month constitutes a modification of the support obligation contained in the divorce decree. Porsboll disagrees, asserting that the district court merely clarified, rather than modified, the support obligation. The district court's order shows that the court initially concluded, without explanation, that setting the \$1,300 support payment was a clarification. In a subsequent order, however, the district court stated that "the convoluted portions of the [divorce decree had been] vacated and modified...to reflect \$1,300.00 per month as a 'sum

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certain.”⁵ In that same order, the district court later returned to describing its setting of the \$1,300 payment as having “clarified the child support order.” This court has not addressed the distinction between a modification and a clarification of a prior district court order in the family law context.

Other courts that have addressed the issue look to whether the challenged order changes the parties’ rights under the earlier order or merely defines the parties’ existing rights. In Collins v. Billow, 592 S.E.2d 843, 844-45 (Ga. 2004), the Georgia Supreme Court addressed whether the establishment of a sum certain payment amount of \$140 per week constituted a modification of a divorce decree provision that required the wife to pay the husband child support in the amount of 23 percent of her annual income or \$115 per week. The court concluded that the establishment of the \$140 per week payment constituted a modification because, if the sum certain amount had been based on a calculation of 23 percent of the wife’s current income in accordance with the decree, that would have resulted in a weekly payment of \$158.⁶ Id. at 845; see also In

⁵The phrase “sum certain” in this context comes from NRS 125B.070(1)(b) (defining “obligation for support” as “the sum certain dollar amount determined according to” a schedule provided in that statute).

⁶But see Paschal v. Paschal, 117 S.W.3d 650, 652 (Ark. Ct. App. 2003) (concluding, in a case where a sum certain payment amount was required by administrative order but the divorce decree did not provide such a figure, that a subsequent order establishing sum certain child support payments using Arkansas’s child support charts was a clarification rather than a modification because an order that “fails to recite the amount of support . . . has no sum certain . . . capable of modification,” but nonetheless noting that the decree was “unambiguous in that the parties intended to set child support in accordance with the child-support chart”).

RSV025

Re Marriage of Jarvis, 792 P.2d 1259, 1261-62 (Wash. Ct. App. 1990) (addressing whether a trial court had modified or clarified a provision providing for child support while one of the children was enrolled as a full-time student in college and applying the rule that a divorce decree is modified when parties' rights are extended or reduced beyond those set forth in the decree, while a clarification involves the definition of rights previously awarded). Also useful to our consideration is a North Dakota Supreme Court case, Stoelting v. Stoelting, 412 N.W.2d 861, 862-63 (N.D. 1987), that addressed the propriety of a trial court's alteration of a divorce decree, which changed the nature of certain payments made by one party from payments for the purpose of property settlement to alimony and separate maintenance payments. In rejecting an argument that this action was not a modification, but instead constituted a mere clarification of the decree, the Stoelting court noted that the distinction between a modification and a clarification is that a clarification provides definition to the parties' obligations, but leaves the parties' substantive rights unchanged. Id. at 863; see also Boucher v. Boucher, 191 N.W.2d 85, 89 (Mich. Ct. App. 1971) (noting that the distinction between a modification and a clarification in the context of a divorce decree turns on whether changes are made to the parties' substantive rights); Ulrich v. Ulrich, 400 N.W.2d 213, 218 (Minn. Ct. App. 1987) (recognizing that, in the property-division context, a trial court has the authority to clarify and construe a divorce decree so long as the parties' substantive rights are not altered). We find these decisions instructive, and therefore conclude that in the family law context a modification occurs when the district court's order alters the parties' substantive rights, while a clarification involves the district court defining the rights that have already been awarded to the

RSV026

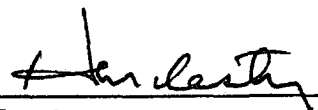
parties. Compare NRS 125A.115 (providing in the child-custody-jurisdiction-and-enforcement context that "modification" "means a child custody determination that changes, replaces, supersedes or is otherwise made after a previous determination concerning the same child . . .").

Applying this approach to the district court's order in this case establishing the \$1,300 per month sum certain support obligation, we conclude that this determination constituted a modification of the support obligation. Pursuant to the parties' separation agreement, which was adopted and incorporated into the divorce decree, the monthly support payment was to be redetermined each year and the parties were required to exchange tax return information or a certified statement of their income, which would then be used to determine the monthly child support obligation using the agreed-upon formula.⁷ Thus, under the decree's terms it was possible for Vaile's monthly support obligation to change from year to year. By setting Vaile's monthly support payment at the fixed amount of \$1,300 per month, the district court substantively altered the parties' rights, such that the district court modified, rather than clarified,


⁷Because the parties' agreement was merged into the divorce decree, to the extent that the district court purported to apply contract principles, specifically, rescission, reformation, and partial performance based on Vaile's initial payments of \$1,300 and Porsboll's acceptance of these payments to support its decision to set the payments at \$1,300, any application of contract principles to resolve the issue of Vaile's support payments was improper. See Day v. Day, 80 Nev. 386, 389-90, 395 P.2d 321, 322-23 (1964) (concluding that when a support agreement is merged into a divorce decree, the agreement loses its character as an independent agreement, unless both the agreement and the decree direct the agreement's survival).

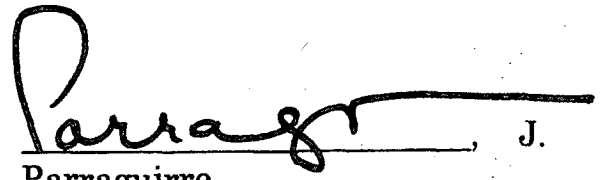
the support obligation contained in the divorce decree and thereby exceeded its jurisdiction in violation of NRS 130.205(1).⁸

Because we conclude that the district court's establishment of a \$1,300 per month sum certain for Vaile's child support obligation constituted an impermissible modification of the original support obligation, we reverse the district court's order setting Vaile's support payment at \$1,300, and we further reverse the arrearages calculated using the \$1,300 support obligation and the penalties imposed on those arrearages. We remand the matter to the district court for further proceedings consistent with this opinion.⁹


Hardesty, J.

We concur:


Saitta, C.J.


Parraguirre, J.

⁸Given that the district court lacked subject matter jurisdiction to modify the support obligation, the assertion that the district court's establishment of a "sum certain" figure for Vaile's support payments was made to comply with the 2001 amendment to NRS 125B.070(1)(b) is unavailing.

⁹With regard to Vaile's remaining challenges to the district court's decision, to the extent they are not explicitly addressed herein, we have considered Vaile's arguments and conclude that they lack merit. Additionally, in light of our resolution of this matter, we do not reach Porsboll's challenge, in Docket No. 53798, to the methodology employed by the district court to calculate Vaile's statutory penalties and the ensuing penalties.

RSV028

IN THE SUPREME COURT OF THE STATE OF NEVADA

ROBERT SCOTLUND VAILE,
Appellant,
vs.
CISILIE A. VAILE N/K/A CISILIE A.
PORSBOLL,
Respondent.

No. 61415✓

ROBERT SCOTLUND VAILE,
Appellant,
vs.
CISILIE A. VAILE N/K/A CISILIE A.
PORSBOLL,
Respondent.

No. 61626

FILED

OCT 22 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY *Angel*
DEPUTY CLERK

ORDER

These are two proper person appeals challenging district court post-divorce decree orders regarding child support.

Administrative closure of Docket No. 61626

In Docket No. 61415, appellant appeals from a July 10, 2012, order reducing arrearages and interest on child support to judgment and redetermining appellant's monthly support payment in accordance with the parties' divorce decree. Because this order did not resolve the entry of child support penalties against appellant, however, it did not fully resolve all of the child support issues remanded to the district court by this court's opinion in Vaile v. Porsboll, 128 Nev. ___, 268 P.3d 1272 (2012), and thus, this notice of appeal was premature. The district court subsequently entered an order awarding attorney fees and costs to respondent on August 16, 2012, and, on August 17, 2012, it resolved the last remaining child support issue pending below by entering an order reducing child support penalties to judgment. This August 17 order perfected this court's jurisdiction, under NRAP 4(a)(6), over the premature notice of appeal in

RSV029

12-33333

Docket No. 61415. Appellant later filed an amended notice of appeal from the August 16 and August 17 orders. Upon this court's receipt of this amended notice of appeal, that document was inadvertently docketed as a new case, Docket No. 61626. Accordingly, the clerk of this court is directed to administratively close the appeal pending in Docket No. 61626 and to transfer the September 5, 2012, notice of appeal filed under that docket number to Docket No. 61415.¹ As a result, this court will consider appellant's challenges to the July 10, August 16, and August 17 orders in the context of that appeal.

Transmission of record on appeal

Having reviewed the documents on file in this proper person appeal, we conclude that our review of the complete record is warranted. See NRAP 10(a)(1). Accordingly, within 30 days from the date of this order, the clerk of the district court shall transmit to the clerk of this court a certified copy of the trial court record in District Court Case No. D230385. See NRAP 11(a)(2) (providing that the complete record shall contain each and every paper, pleading and other document filed, or submitted for filing, in the district court, as well as any previously prepared transcripts of the district court proceedings). The record shall not include any exhibits filed in the district court.

Motions filed in Docket No. 61415

Appellant has filed a number of motions in this appeal, which we address in turn. First on August 15, 2012, appellant filed a motion to defer payment of cost bond and to allow full briefing, which respondent

¹In light of this order, we deny as moot all requests for relief pending in Docket No. 61626.

opposes.² With regard to the bonds for costs on appeal, requests to vary the amount of the \$500 bond required to cover costs on appeal must be made in the district court. NRAP 7(b). Accordingly, appellant's motion to defer payment of that bond is denied. As for the motion for full briefing, having considered the motion and opposition, we grant appellant's motion in part, for the limited purpose of allowing appellant to file an opening brief. Appellant's opening brief shall comply with NRAP 28³ and NRAP 31(c), except that, with regard to NRAP 28(e), the brief may cite to either the record on appeal or any appendices submitted with the opening brief. Appellant shall have 50 days from the date of this order to file and serve his opening brief. Respondent need not file an answering brief unless directed to do so by this court. We note that this court will generally not grant relief without providing respondent with an opportunity to respond.

On September 4, 2012, appellant filed a motion to stay enforcement of the orders he challenges in this appeal and to stay any further activity in the underlying matter. Respondent opposes the motion and appellant has submitted a reply.⁴ Having considered the parties'

²On September 12, 2012, appellant filed in Docket No. 61415 a motion seeking to consolidate Docket Nos. 61415 and 61626 and to defer payment of the filing fee and cost bond in Docket No. 61626. As we have directed that the appeal pending in Docket No. 61626 be administratively closed, this motion is denied as moot.

³Proper person parties need not file the attorney certificate required by NRAP 28(a)(11).


⁴The clerk of this court is directed to file appellant's reply, which was provisionally received in this court on September 20, 2012, and appellant's supplemental reply, which was provisionally received on September 26, 2012. As we have directed the filing of these documents, we deny as moot appellant's October 1, 2012, motion to waive deficiency in reply brief or to authorize the filings of an amended reply brief.

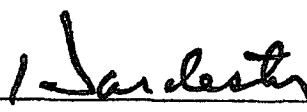
RSV031


filings in light of the factors set forth in NRAP 8(c), we conclude that a stay is not warranted and we therefore deny appellant's motion for a stay.

Finally, on September 26, 2012, appellant submitted a motion for leave to proceed on appeal in forma pauperis.⁵ Respondent has not opposed the motion. Nonetheless, having considered the motion for leave to proceed in forma pauperis, we conclude that it should be denied.

It is so ORDERED.⁶

 J.
Saitta

 J.
Hardesty

 J.
Parraguirre

cc: Hon. Cheryl B. Moss, District Judge, Family Court Division
Robert Scotlund Vaile
Willick Law Group
Eighth District Court Clerk

⁵The clerk of this court is directed to file appellant's motion, which was provisionally received in this court on September 26, 2012.

⁶With regard to the relief requested by appellant through a letter filed in this court on September 4, 2012, as relief must ordinarily be requested by way of a motion filed in this court in accordance with NRAP 27, In re Petition to Recall Dunleavy, 104 Nev. 784, 769 P2d 1271 (1988), no action will be taken on appellant's letter.

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