IN THE COURT OF APPEALS
OF THE
STATE OF NEVADA

ROBERT SCOTLUND VAILE, Petitioner, vs. CISILIE A. PORSBOLL, Respondent.	Supreme Court Case Nos: 61415, 62797 Appeal from District Court Case No: 98D230385

PETITION FOR REHEARING

Robert Scotlund Vaile
812 Lincoln Street
Wamego, KS 66547
(707) 633-4550
Petitioner in Proper Person

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I. INTRODUCTION

In a petition for rehearing, Rule 40 of the Nevada Rules for Appellate Procedure requires Petitioner to state briefly and with particularity the points of law or fact that the petitioner believes the appellate court has overlooked or misapprehended. Petitioner respectfully submits that the following points of law or fact were overlooked or misapprehended in the Court's *ORDER AFFIRMING IN PART; DISMISSING IN PART; REVERSING IN PART, AND REMANDING* dated December 29, 2015.

II. POINTS AND AUTHORITIES

A. The Norwegian Tribunal Had Jurisdiction Over Vaile

The Court rested its decision to not require the lower court to give full faith and credit to the Norwegian tribunal's child support order because, the Court held, "Norway lacked jurisdiction to modify the child support obligations set forth in the Nevada divorce decree." (Decision, 4). This conclusion followed the Court's determination that the Norwegian court did not have personal jurisdiction over Vaile and that the parties did not file their consents in the Nevada court. The Court has misapprehended the facts surrounding this matter since the Norwegian court did have jurisdiction over Vaile.

As far back as the original Nevada Supreme Court decision in this case, the record contained facts that Vaile hired counsel in Norway, appeared in the Norwegian proceedings, and argued his case before that tribunal. The orders of the Norwegian courts addressing both custody and child support are before the Court,[1] and reflect the appearance of Vaile and arguments that he submitted to those courts. Furthermore, the record contains Kansas orders that show that Vaile

[1] ROA4246, ROA4269, ROA4276.

paid child support to the Norwegian tribunal wholly fulfilling his child support obligations under the Norwegian orders, reflecting Vaile's acquiescence and obedience to the Norwegian tribunal's authority.[2] There has been no debate in this case that the Norwegian tribunal had jurisdiction over Vaile.

The Court may have further misapprehended the legal background to this issue. Porsboll did not challenge the jurisdiction of the Norwegian tribunal over Vaile either in the lower court or on appeal. The record contains no argument, evidence, or lower court findings that the Norwegian tribunal lacked jurisdiction of Vaile. Of course, Porsboll had no standing to challenge personal jurisdiction over Vaile, because the requirement of personal jurisdiction represents an individual right which may be waived. Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 US 694, 703 (1982). That a party may waive personal jurisdiction through appearance is reflected in section 201 of UIFSA, or NRS 130.201(1)(b). A valid basis for personal jurisdiction over a nonresident is when "[t]he nonresident submits to the jurisdiction of this State by consent in a record, by entering a general appearance or by filing a responsive document having the effect of waiving any contest to personal jurisdiction." Since Vaile appeared, participated and filed responsive documents in that tribunal, he submitted to the jurisdiction of that court, and it properly exercised jurisdiction over him.

> The Comments to § 201 of UIFSA 2008 provide further guidance:
>
> [U]nder the Convention, a state tribunal may be called upon to determine whether the facts underlying the support order would have provided the issuing foreign tribunal with personal jurisdiction over the respondent under the standards of this section. In effect, the question is whether the foreign tribunal would have been able to exercise jurisdiction in accordance with Section 201.

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[2] ROA 4242.

By submitting to the jurisdiction, Norway properly exercised jurisdiction over Mr. Vaile. The appellate court misapprehended this fact.

However, Vaile's appearance in the Norwegian proceedings, or the filing of consents in the record in Nevada by the parties is not the only way that the Norwegian court could have asserted power to modify the Nevada decree. The Court overlooked that UIFSA also allows the assertion of modification jurisdiction if no other court has jurisdiction. See NRS 130.6115. The Nevada Supreme Court (in *Vaile II)* held that Nevada did not ever have modification jurisdiction – a pronouncement which would allow Norway to modify at will. The Court of Appeals omitted any discussion of this section of law, overlooking a statute which resolves the matter with finality.

Petitioner can locate no case law in any US court where a court collaterally negates the personal jurisdiction of a foreign court after a party's explicit submission to the foreign court, or over the party's objection. Not only is the Court's holding contrary to US Supreme Court precedent, the implications of the holding are particularly profound in this case. The same assertion of jurisdiction by the Norwegian tribunal over Vaile's person that supported Norway's child support order also previously supported the Norwegian tribunal's modification of custody from Vaile to Porsboll. This Court's decision would appear at odds with the Nevada Supreme Court's determination to send the two American-born children to Norway for a custody determination. To assert now, 14 years later that the Norwegian tribunal really never had jurisdiction to make those determinations appears to overrule the Nevada Supreme Court's precedent on the matter.

B. The Basis for Refusal to Honor the Norwegian Child Support Order is Not Permissible Under NRS 130.607

The Court appears to have overlooked the applicability of NRS 130.607 to this matter. In order to ensure uniformity, UIFSA has limited the bases under

which a party may contest the registration of a foreign child support order in another tribunal. These exclusive bases are articulated in NRS 130.607. The Court has omitted acknowledgement or discussion of the limitations imposed by this statute, even though the statute is determinative of the matter on appeal.

The first available defense by which a non-registering party may contest foreign court order is when "[t]he issuing tribunal lacked personal jurisdiction over the contesting party." As the contesting party, Porsboll did not and could not assert this defense, as she was the party who requested the child support order from the Norwegian tribunal. Instead, Porsboll challenged the procedures that the Norwegian court followed when it allowed ***her*** (not Vaile) to request modification of the Nevada decree. Porsboll has never asserted that her challenge falls under any allowable defenses under NRS 130.607. According to the UIFSA statute, "If the contesting party does not establish a defense under subsection 1 to the validity or enforcement of the order, the registering tribunal **shall issue** an order confirming the order." NRS 130.607(3).

It is clear that the lower court did not follow the mandate to confirm the Norwegian order under NRS 130.607. The Court's decision appears to either allow a lower court discretion to deviate from UIFSA, or carves out an additional judicial exception to UIFSA § 607. While a judicial exception is not unheard of in State law, the implications for departing from UIFSA for the State are significant for two reasons. Firstly, the Court's acquiescence to the lower court's determination that the procedures that Norway uses when it enters child support orders are insufficient, undermines the pronouncement by the nation's Secretary of State and the Secretary of Health and Human Services that Norway's procedures are indeed sufficient enough that Norway was declared a Foreign Reciprocating Country (FRC), and afforded sister-state status. The Court's

finding appears to misapprehends that the Court has preempted and frustrated the federal scheme.

Secondly, the State of Nevada does not have the liberty to diverge from UIFSA, rather it is required to implement UIFSA "verbatim" under Federal law:

> On September 29, 2014 President Obama signed Public Law (P.L.) 113-183, the Preventing Sex Trafficking and Strengthening Families Act. This law amends section 466(f) of the Social Security Act, requiring all states to enact any amendments to the Uniform Interstate Family Support Act "officially adopted as of September 30, 2008 by the National Conference of Commissioners on Uniform State Laws" (referred to as UIFSA 2008). Among other changes, the UIFSA 2008 amendments integrate the appropriate provisions of The Hague Convention on the International Recovery of Child Support and Other Forms of Family Maintenance, which was adopted at the Hague Conference on Private International Law on November 23, 2007, referred to as the 2007 Family Maintenance Convention.
>
> Section 301(f)(3)(A) of P.L. 113-183 requires that UIFSA 2008 must be in effect in every state "no later than the effective date of laws enacted by the legislature of the State implementing such paragraph, but in no event later than the first day of the first calendar quarter beginning after the close of the first regular session of the State legislature that begins after the date of the enactment of this Act."
>
> . . .
>
> All states must enact UIFSA 2008 ***verbatim*** by the effective date noted in P.L. 113-183. Where UIFSA 2008 has bracketed language, states may use terminology appropriate under state law. In addition, P.L. 113-183 requires states to make minor revisions to the state plan which OCSE will address in forthcoming guidance.
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> UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES OFFICE OF CHILD SUPPORT ENFORCEMENT ACTION TRANSMITTAL AT-14-1, DATE: October 9, 2014, contained in UIFSA Comments (2008) - Final Act with Revised Prefatory Note and Comments in 2015 (emphasis added).

The comments indicate that enactment of UIFSA 2008 as written is both essential to federal funding of state child support programs, and also necessary in order for the United States to fulfill its treaty obligations under the Hague

Maintenance Convention of November 23, 2007. The Court's departure from the UIFSA requirements appears to misapprehend the potential legal repercussions for the State and Nation.

C. Porsboll's Inconsistent Legal Positions Were Intentional

The Court declined to apply judicial estoppel to Porsboll's challenge to her own judicial actions in Norway because it surmised that Porsboll's actions were neither intentional nor meant to gain an unfair advantage. The Court assumed that Porsboll "was simply unsure of how to pursue her rights to child support under UIFSA." In so doing, the Court overlooked key facts surrounding her actions, and the representation of her counsel on this matter.

Firstly, Petitioner requests the Court to take notice that Porsboll (herself law-trained in Norway) has been represented since 2000 continuously by a Las Vegas attorney who fashions himself a family law expert. Porsboll had this representation in Nevada, as well as legal representation in Norway at the time that she sought to modify the Nevada decree in the Norwegian tribunal. Even if willful legal ignorance could not be imputed to Porsboll personally, it would be incorrect to assume that a "Certified Family Law Specialist" in Nevada cannot figure out how to properly register a foreign order under UIFSA.

Even if we assume that Nevada counsel is incapable of reading UIFSA, additional facts outlined in Vaile's appellate briefs indicate intentional conduct by her Nevada counsel to mislead the Court on this matter. For example, in response to Vaile's repeated requests to produce the Norwegian child support orders in the lower court proceedings, Porsboll's counsel vigorously objected.[3] Porsboll's counsel then fabricated the story that Porsboll did not actually request the child support orders from the Norwegian court but that they were auto-generated by a

[3] Had the orders been produced as requested, the second trip to the Nevada Supreme Court would have been wholly unnecessary.

Norwegian agency. Finally, Porsboll's counsel argued that the Norwegian orders were not intended to be enforced outside Norway. When Vaile finally obtained the orders from the Norwegian authorities, the orders demonstrated that Porsboll's counsel misrepresented each and every one of these material facts about them. The orders state with clarity that Porsboll sought the orders[4], that they were intended to apply to Vaile in the US,[5] and even that Porsboll sought further modification of the Norwegian orders while Nevada counsel was seeking a competing order in Nevada.[6] The Court overlooked the facts that demonstrate that Porsboll and her counsel carried on with methodical intention to mislead the courts regarding Porsboll's inconsistent positions in the Norwegian and Nevada courts. Porsboll's actions support a finding of judicial estoppel by the Court.

D. Consideration of Waiver and Prevention Was Not Necessary to the Nevada Supreme Court's Previous Decision

The Court has misapprehended the Nevada Supreme Court's decision by assuming that Vaile's defenses of waiver and prevention were previously rejected by the Court. The record contains an admission by Porsboll that she made an unequivocal waiver of child support under the Nevada decree. And the Court acknowledged that Porsboll has still not to this date provided Vaile with the income information necessary for him to determine the proper amount of child support.[7] Nevertheless, this Court rejected these defenses by inferring that the Nevada Supreme Court's silence on the matters in *Vaile II* indicate rejection of the defenses.

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[4] ROA4247.

[5] ROA5211.

[6] ROA4276.

[7] The Court's decision demonstrates that all elements of Vaile's defense of prevention have been present until the present.

Petitioner first observes that it would be inconsistent for the Nevada Supreme Court to omit discussion and completely ignore defenses which would be a complete bar to Porsboll's request for retroactive child support. But more importantly, the high Court did not determine the validity of those defenses because they were not necessary to its decision, and impossible to apply at that point in time. In *Vaile II*, the Nevada Supreme Court required the lower court to determine whether a Norwegian order existed, and to assess its bearing on the Nevada decree. Until the lower court made a determination as to which order was controlling, and during which time frames, resolving the effect of the waiver and prevention would have been impossible. A party could not waive child support nor prevent calculation under an order which was not controlling at the time. A determination of effective waiver and prevention simply can not precede the determination of controlling order. To conclude that the Nevada Supreme Court intended the lower court to determine the valid order on remand and to determine appropriate support amounts, but to prospectively ignore all defenses which may apply in any unforeseen scenario is an untenable legal conclusion. This Court misapprehended the Nevada Supreme Court's silence on matters not necessary to its decision to be a rejection of those matters.

E. Vaile Had Primary Custody of the Children Under the Lower Court's April 2000 Order

The Nevada district court granted Vaile custody of the parties' children in April 2000, and a pick-up order to deliver the children from Norway where they were being wrongfully retained by Porsboll at the time. The children lived with Vaile from May 2000 until April 2002 when the Nevada Supreme Court overturned Vaile's grant of custody by the lower court, and required the children to be sent to Norway for child custody determinations. The Court

misapprehended the law to require Vaile to pay support to Porsboll during the two years that the children lived with him.

The Court rested its decision to require Vaile to pay support on the legal conclusion that the children's removal from Norway was "wrongful" by the Nevada Supreme Court. The Supreme Court determined that the removal was wrongful based on two key facts presented by Porsboll to the Court at the time. The first assertion of fact was that Porsboll began legal proceedings in Norway in hopes to legally retain the children there in November 1999, prior to Vaile's request in February 2000 to the Nevada court to order the return the children to the US. In October 2000, Porsboll testified in the Nevada family court that she made a filing to the Norwegian court signaling the beginning of proceedings in that country. Nevertheless, the family court upheld Vaile's custody, and Porsboll appealed. After the case had been fully briefed and submitted to the Nevada Supreme Court, the Norwegian court issued a decision that indicated that Porsboll's case in Norway actually began in March 2000, *after* Vaile initiated proceedings in Nevada. Clearly, Porsboll's assertions to the contrary had been false, but the high Court had already relied on it.

The second fact that the Nevada Supreme Court relied on in finding that the return of the American-born children to the US was "wrongful" was that Vaile had been untruthful to the Nevada lower court when he requested custody of the children. Porsboll's counsel represented on appeal that Vaile told the lower court that the children lived in "Las Vegas" and "Nevada" all their lives – and the Nevada Supreme Court even repeated those assertions as if they were fact in its opinion. In actuality, the family court judge asked Vaile how long they lived "here," to which Vaile answered that "We lived here [in the US] all their [the children's] lives." Although the family court held that no party had intended a fraud on the court, the Nevada Supreme Court relied on the misrepresentation by

Porsboll's counsel on appeal. Porsboll later admitted in deposition that Vaile never asserted that the children lived Las Vegas or Nevada. Even though the misrepresentations resulted in the change of custody from Vaile to Porsboll 14 years ago, there is no reason to propagate the untruths into the child support realm.

Regardless, Vaile was properly exercising custody of the children during the two years that they lived with him, and was the residential parent, until the Nevada Supreme Court overturned that status based on the false facts outlined above. Because it is undisputed that Vaile paid 100% of the children's support costs while they lived with him from May 2000 to April 2002, the Court's determination that Vaile should pay child support to Porsboll while he was already supporting the children can only be interpreted as punitive.

> The child support system is not meant to serve a punitive purpose. Rather, the system is an economic one, designed to measure the relative contribution each parent should make – and is capable of making – to share fairly the economic burdens of child rearing.
>
> Lambert v. Lambert, 861 NE 2d 1176 (Ind 2007).

Furthermore, requiring Vaile to pay Porsboll funds not used to support the children is "solely and exclusively punitive in character," or an unconditional criminal penalty which is prohibited in civil proceedings. Hicks v. Feiock, 485 US 624, 633 (1988). The Court of Appeals misapprehended the factual history and that US Supreme Court precedent prevents its decision on this point.

F. Contempt Determinations Require Review

The Court of Appeals has misapprehended the law in determining that a finding of contempt and the impositions of sanctions are unappealable. By way of review, Vaile argued on appeal that the Nevada district court abused its discretion by:

1. Withdrawing its permission allowing Vaile to appear telephonically one business day before a hearing, refusing a continuance, and then entering a default, sanctions, and a bench warrant against him for failure to appear;
2. Holding Vaile in contempt for failure to notify the Court of his change in employment despite the fact that no order ever required him to notify the Court;
3. Holding Vaile in contempt for filing a notice of address change two days late, despite Vaile filing a Notice of Address Change within 30 days of relocating;
4. Holding Vaile in contempt for paying Porsboll child support directly for 11 months instead of through her Nevada counsel;
5. Holding Vaile in contempt for not retroactively paying child support in a manner inconsistent with the Nevada divorce decree (and this Court's instant decision); and
6. Imposing a punishment for the combined contempt of a fixed sentence consisting of "a mandatory 275 days of criminal incarceration in the Clark County Detention Center without bail."

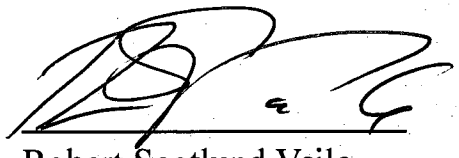
When a party is sentenced to imprisonment for a definite period, the punishment falls under criminal contempt; however, criminal penalties may not be imposed on someone who is not afforded Constitutional criminal proceedings including the requirement that the offense be proved beyond a reasonable doubt. Hicks v. Feiock, 485 US 624, 632, 637 (1988). The lower court here has clearly imposed criminal contempt from within civil proceedings, with none of the Constitutional guarantees afforded a criminal defendant, clearly prohibited by the US Supreme Court. Not only is this Court allowing the criminal sentence imposed on Vaile to stand, it has gone so far as to hold that the criminal contempt orders that include incarceration are not appealable to the appellate court.

Aside from being startling from a Constitutional perspective, this holding encourages lower courts to act at their own discretion, even to deprive a party of the Constitutional liberties and imposing arbitrary criminal sanctions in the name of contempt, for which the appellate Court is without power to act. Petitioner respectfully requests that the Court reconsider whether it has power to ensure that parties are provided Due Process and basic Constitutional guarantees within the Nevada court system.

III. CONCLUSION

Petitioner respectfully submits that the Court of Appeals misapprehended or overlooked several key facts, statutes, binding precedent, and Constitutional guarantees in issuing its recent decision. Petitioner requests that the Court review the matters in light of the facts and law outlined herein.

Respectfully submitted this 15th day of January, 2016.

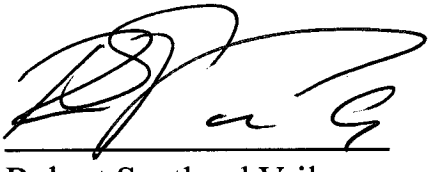


Robert Scotlund Vaile
812 Lincoln Street
Wamego, KS 66547
(707) 633-4550
Petitioner in Proper Person

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this petition for rehearing complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using LibreOffice in 14-point size Times New Roman type style.
2. I further certify that this petition complies with the type-volume limitations of NRAP 40 because it is proportionately spaced, has a typeface of 14 points or more, and contains 4,112 words as reported by LibreOffice.
3. Finally, I hereby certify that I have written and read this petition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that it complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page number, if any, of the record on appeal or to the appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying petition is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 15th day of January, 2016.



Robert Scotlund Vaile
812 Lincoln Street
Wamego, KS 66547
(707) 633-4550
Petitioner in Proper Person

CERTIFICATE OF MAILING

I hereby certify that on January 15, 2016, I deposited in the United States Mail, postage prepaid, at Santa Rosa, CA, a true and correct copy of *Petition for Rehearing* addressed as follows:

Marshal S. Willick, Esq.
Willick Law Group
3591 E. Bonanza Road, Suite 200
Las Vegas, NV 89110-2101
Attorney for Respondent

Dated this 15th day of January, 2016.

Robert Scotlund Vaile
812 Lincoln Street
Wamego, KS 66547
(707) 633-4550
Petitioner in Proper Person