IN THE SUPREME COURT OF THE STATE OF NEVADA

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OLENA KARPENKO, Petitioner, vs. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE DAWN THRONE, DISTRICT COURT JUDGE, Respondents, and ENRIQUE SCHAERER; and DOES I through X, Real Party in Interest.	S.C. No.: D.C. Case No.: D-21-628088-C

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

Pursuant to NRAP 21 and NRS 34.160, Petitioner, Olena Karpenko through her attorney, Marshal S. Willick, Esq., of the WILLICK LAW GROUP, submits this *Petition for Writ of Mandamus or Prohibition* directing the district court to allow for the immediate DNA testing of the presumed father in accordance with the procedural

guidelines of the International Academy of Family Lawyers in determining the paternity of the minor male child Andrii Karpenko, born July 28, 2021.

Additionally, the district court should be directed to allow a representative from Ukraine to attend the hearings (virtually) in accordance with Article 5 of the Vienna Convention on Consular Relations dated April 24, 1963, effective March 19, 1967 and ratified by the United States on December 24, 1969.

ROUTING STATEMENT

This case is presumptively assigned to the Court of Appeals per NRAP 17(b)(10) as it involves family law matters other than the termination of parental rights or NRS Chapter 432B proceedings.

However, the Nevada Supreme Court should retain this Petition as the issues concern principal issues of statewide public importance and an issue of first

impression concerning application of a ratified treaty of the United States of America in the courts of Nevada as a matter of federal preemption.

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following persons and entities described in NRAP 26.1(a) must be disclosed. In the course of these proceedings leading up to this appeal, Petitioner has been represented by the following attorneys:

a. Marshal S. Willick, Esq., and Richard L. Crane, Esq., of the WILLICK LAW GROUP

b. Tin Hwang, Esq., and Linda Lay, Esq., of the HWANG LAW GROUP.

c. Jason Onello, Esq., of ROBBINS & ONELLO.

There are no corporations, entities, or publicly-held companies that own 10% or more of Petitioner's or Respondent's stock, or business interests.

DATED this 29th day of December, 2021.

Respectfully Submitted By:
WILLICK LAW GROUP

/s/ Marshal S. Willick, Esq.
MARSHAL S. WILLICK, ESQ.
Nevada Bar No. 2515
3591 E. Bonanza Road, Suite 200
Las Vegas, NV 89110-2101
Attorneys for Appellant

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On September 23, 2021, the Hon. Dawn Throne, District Court Judge, entered an *Order After Motion Hearing* stating that "potential vulnerabilities in accurate and credible DNA collection and paternity testing exist in Ukraine, and the Court will not under any circumstances rely on a Ukrainian laboratory for those purposes."[1] There is an interlineation after that statement reading: "Given the facts of this case, it is imperative that the parties have scientifically reliable maternity testing of the minor child that is produced for testing and then paternity testing."[2]

On November 10, 2021, the district court entered an *Order from the November 10, 2021, Hearing* confirming that the Court would not allow a representative from the Ukrainian Consulate in San Francisco to (virtually) attend and observe the hearing

[1] See I OK67.

[2] *Id.*

as required by Article 5 of the Vienna Convention on Consular Relations dated April 24, 1963, effective March 19, 1967 and ratified by the United States on December 24, 1969.

II. STATEMENT OF ISSUES PRESENTED AND OF THE RELIEF SOUGHT

A. Issues

Whether, without any evidence taken as to the claimed "corruption of the DNA testing facilities" in Ukraine, the Court erred in not proceeding with a finding of presumed paternity and then paternity testing at all based upon finding that there are "potential vulnerabilities in accurate and credible DNA collection and paternity testing in Ukraine?"

Whether the Court erred in refusing to allow a representative of the Ukranian Consulate to attend the hearings concerning paternity and support of the minor child?

B. Relief Sought

An order of mandate requiring the district court to enforce Nevada parentage statutes and then allow collection of DNA samples from Olena and the minor child to be taken by an accredited laboratory in Ukraine with those samples sent to a mutually agreeable laboratory in Nevada. At the same time, an accredited laboratory in Nevada to take a DNA sample from Enrique with it being transferred to the testing lab in Ukraine. Proof by direct observation and video that each of the parties who are tested are who they purport to be. Prompt testing of all samples by labs in both countries and reporting of results.

Additionally, mandate that the district court comply with the Article 5 of the Vienna Convention on Consular Affairs and allow a representative of the Ukrainian Consulate to (virtually) attend all future hearings in this matter.

C. Damages Caused by Not Granting the Writ

If this matter is not addressed by way of writ petition, the paternity of the minor child may be falsely determined in the negative by default as Olena and the infant child cannot travel to the United States for DNA testing. Throughout what will be a minimum of years of delays, the child will be deprived of child support.

Additionally, Enrique has made countless claims that the government and thus (somehow) the medical testing facilities of Ukraine are "corrupt." These unsupported claims – which the district court has adopted – should be observed by the Consulate

of Ukraine as that government has requested to see how Olena, a Ukrainian citizen, is being treated in a Nevada court.

Failure to require consular observation is a violation of an international treaty which is the supreme law of the United States, on par with the U.S. Constitution. The district court's refusal to permit observation has already caused a formal protest by the Ukrainian government to the U.S. government, risking the district courts of Nevada being branded by the federal government as operating unlawfully. The full consequences are difficult to predict, but could at minimum involve a loss of federal funding to Nevada courts and programs.

III. STATEMENT OF FACTS

Olena is an accomplished professional musician who entered the United States on a O-1 work visa (valid until April of 2021). On April 7, 2020, Olena became

acquainted with Enrique and they began a romantic relationship. In June, Olena moved into Enrique's house as both his girlfriend and tenant; their romantic relationship intensified.[3]

In November 2020, Olena became pregnant with Enrique's child.[4] The conception took place in either California or Nevada as the parties traveled in both states during that time.

Based on the impending birth of their child, Enrique and Olena married on December 26, 2020.[5] Enrique assisted Olena with her green card application by completing an affidavit of support and other standard forms.[6]

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[3] I OK40.

[4] I OK26 indicates the child was expected to be born around July 2021. Nine months before this date is November 2020. The child was actually born on July 28, 2021. See I OK163 and I OK165.

[5] I OK38.

[6] Enrique admits at I OK40 that the parties discussed her petition for permanent residency. However, he fails to state that he retracted the affidavit of support for Olena. *See also* I OK67.

Enrique is a lawyer. Prior to the marriage, he forced Olena to sign a prenuptial agreement, on threat of not supporting her application for a green card, that provided Olena with absolutely no rights to either property or spousal support.[7]

Not long after the marriage and becoming disillusioned with their relationship, Enrique became increasingly verbally abusive. Three weeks after the marriage, in January 2021, Enrique tried to throw Olena out of the marital home and told her the pregnancy was a "mistake," making it clear that he would use any means possible to get rid of Olena and avoid supporting her or "the bastard" in any way. The marriage was irretrievably broken from that point on.

[7] I OK38-40.

To force Olena's hand, in March Enrique rescinded his affidavit of support for Olena's application for permanent residency, requiring Olena to leave the country on April 8 before her visa expired.[8]

On June 11, Enrique had Olena served in Ukraine with his *Complaint for Divorce*[9] and *Summons*.[10] The *Certificate of Service* was completed by a Vitaly Shevel.[11] The *Complaint* alleged that the minor child conceived during their relationship was not his child[12] so he owed no child support, and that the prenuptial

[8] Contrary to Enrique's claims that Olena "surreptitiously" left the country without his knowledge, she stayed in communications with his family and Enrique himself personally drove her to the airport.

[9] I OK1-6.

[10] I OK7.

[11] I OK8-11. While he has alleged that every other legal process in Ukraine is "hopelessly corrupt," Enrique has not complained about the legitimacy of the service of process he initiated.

[12] I OK2.

agreement he forced Olena to sign meant that there was no community property and no spousal support was permitted.

On July 2, Olena – through counsel – filed her *Answer and Counterclaim*.[13] On July 20, Olena filed an *Amended Answer to Complaint*.[14] It stated that "Defendant is without sufficient knowledge to answer to the allegations contained in Paragraph 6 of the Complaint for Divorce; and therefore denies the same."[15] (This is a standard answer in a divorce to a contested matter and denies that an allegation is true.) Olena also acknowledged the prenuptial agreement and admitted to the allegations therein, not knowing that she could have contested it as having being signed under duress.[16]

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[13] I OK12-21.

[14] I OK22-31

[15] I OK23.

[16] *See*, *e.g.*, *Cook v. Cook*, 111 Nev. 822, 898 P.2d 702 (1995); *Williams v. Waldman*, 108 Nev. 466, 836 P.2d 614 (1992) (presumption of fraud when lawyers convince their spouses to enter into marital agreements severely disadvantaging the spouse).

On July 22, Enrique filed his *Reply to Counterclaim for Divorce*[17] which included an Affirmative Defense stating: "Defendant's Counterclaim makes no attempt to state a claim against Plaintiff for the paternity of the child she is carrying *in utero*."[18] Of course she had already *denied* the allegation that the child was *not* Enrique's in her *Answer* and thus had properly pled that the child ***was*** Enrique's.

On July 28, Olena gave birth to a male child named Andrii in Ukraine; the birth certificate has been produced in discovery and filed with the district court.

On August 5, Enrique filed *Plaintiff's Motion for Taking of Specimens for Genetic Identification and Testing in Clark County Pursuant to NRS 126.121(1); to Appoint Guardian Ad Litem for Minor Child; to Bifurcate and Enter Interlocutory Decree of Divorce (All Divorce Terms Resolved Pursuant to Parties' Pleadings), and*

[17] I OK32-35.

[18] I OK33.

to Reserve Jurisdiction to Adjudicate Paternity Claims; and to Compel Defendant's Provision of HIPAA Release.[19] He also filed Exhibits.[20]

Enrique's *Motion* falsely stated that Olena "secretly" left the United States when he knew that he forced her to leave and took her to the airport himself.[21] He then claimed that because she left, her request for his assistance in obtaining a green card was somehow "fraudulent" even though it was he that first offered and then reneged on his offer to support her application, requiring her departure when her visa expired.[22]

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[19] I OK36-53.

[20] I OK54-61.

[21] I OK40.

[22] *Id.*

Enrique also falsely stated that Olena's *Amended Answer or Counterclaim* did not allege that Enrique is the father of the child.[23] This of course is untrue since she denied that Enrique was *not* the father.[24]

Enrique's *Motion* made numerous claims that the government of Ukraine is "corrupt" and thus genetic testing should not be allowed to be done in that country.[25] He provided no support that a genetic test done in Ukraine would be tainted other than to say that the country's government is corrupt. He also provided no support that a positive DNA test could possibly be "faked" in Ukraine or anywhere else in the

[23] I OK41.

[24] I OK23.

[25] I OK44-46

world,[26] although lots of people try to produce false *negatives* in drug and paternity testing.[27]

Lastly, Enrique demanded a HIPAA release so that he could inspect Olena's OB/GYN records. He provided no reason for why Olena's very personal medical records prior to the birth of the child could possibly be probative on the question of his paternity of the child.[28]

On August 26, Enrique filed *Plaintiff's Notice of Defendant's Failure to Oppose Plaintiff's Pending Motion*.[29]

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[26] Enrique's claims have been increasingly outlandish throughout the litigation, all the way to alleging that Ukrainian scientists can somehow create artificial DNA matching his – which technology does not exist. I OK44-46. It is ***impossible***.

[27] It is common knowledge that people try to switch samples, bring in fake urine or other materials, or even send decoys to test centers pretending to be the subject to be tested.

[28] I OK49-50. Apparently, Enrique wanted to see if Olena had ever told her doctor of seeing anyone else during their relationship. She had not, so of course her medical records contain no such information, but it would not have been determinative of Enrique's paternity no matter what was stated in her medical records.

[29] I OK62-64.

Mr. Onello substituted into the case for Mr. Hwang on August 31.

On September 3, Olena – through new counsel – filed an *Opposition* to Enrique's *Motion* and a *Countermotion to Stay Discovery Pending results of Genetic Testing, for Genetic Testing to Occur in Ukraine, on in the Alternative for Genetic Testing to be Coordinated by Testing Centers in United States and Ukraine to Accommodate the Current Circumstances, for Plaintiff to be Ordered to File a Financial Disclosure Form Within [7] Days of Hearing; for Child Support Pending Results of Genetic Testing and for Reimbursement of Medical Expenses Related to Child-Birth, and for Enrique to Pay Costs of Genetic Testing/Attorney Fees Related Solely to the Paternity Action*.[30]

[30] I OK65-74.

The *Opposition* was filed late; when Mr. Onello requested a one week extension of time in which to file, Mr. Lemcke refused.[31]

The *Opposition* correctly asserted that the requested HIPAA release was unnecessary and overly intrusive.[32] It also argued that while Olena could not return to the U.S. for lack of a valid visa, Enrique could easily fly to Ukraine for the DNA test or seek research labs in the United States that have partner labs in Ukraine.[33]

Enrique did not file a *Reply* or an *Opposition* to Olena's *Countermotion*.

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[31] There was no reason to refuse the request as the issue of paternity was not going to be resolved at the next hearing or for at least 90 to 120 days. Enrique acknowledged that timeline. I OK44.

[32] I OK69-70.

[33] I OK71.

On September 7, the District Court held a hearing on the *Motion* and *Opposition*. The resulting *Order* was entered on September 23[34] with *Notice of Entry of Order* filed the same date.[35]

The important findings and orders included a finding that Olena had adequately asserted Enrique's paternity, but contained the language quoted above forbidding collection of samples or DNA testing in Ukraine, and the hand-written interlineation requiring "maternity testing" as well as "paternity testing," to be done only in the United States.[36]

The *Order* also stated, without further findings:

> IT IS HEREBY ORDERED that Enrique's "*Motion for taking of Specimens for Genetic Identification and Testing Pursuant to NRS 126.121(1)" is* <u>*GRANTED.*</u> The specimen collection and testing for genetic

[34] I OK75-84.

[35] I OK85-97.

[36] I OK77.

identification shall take place in the United States, with the specific situs of that collection and testing within the United States to be determined after further proceedings specified herein. Both paternity testing and maternity testing shall be conducted, which shall require in-person, physical presence of Enrique, Olena, and the subject minor child at the court-ordered testing laboratory that is ultimately ordered.[37]

IT IS FURTHER ORDERED that Olena and the minor child shall be required to travel to the United States, on a schedule and to a situs to be determined after the further proceedings specified herein, to submit to the specimen collection and the testing for genetic identification ordered herein. The collection and testing shall be administered and conducted by a certified U.S. laboratory still to be determined, which collection and testing shall be compliant with generally accepted chain-of-custody protocols.[38]

IT IS FURTHER ORDERED that Olena's "*Countermotion for Genetic Testing to Occur in Ukraine, or in the Alternative for Genetic Testing to be*

[37] I OK92.

[38] I OK92-93.

Coordinated by Testing Centers in United States and Ukraine to Accommodate the Current Circumstances" is <u>*DENIED.*</u>"[39]

The *Order* further required that Olena complete the HIPAA release and granted entry of an *Interlocutory Decree of Divorce*.[40]

On September 29, the Willick Law Group substituted into the case for Mr. Onello. We immediately made a courtesy call to Mr. Lemcke and obtained an indefinite extension of all deadlines for all outstanding discovery, which has never been rescinded.[41]

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[39] I OK94.

[40] I OK94.

[41] Notwithstanding that extension, Enrique has now moved for case-concluding discovery sanction orders – for a finding of non-paternity – notwithstanding this Court's admonition in *Blanco v. Blanco*, 129 Nev. 723, 311 P.3d 1170 (2013) that such orders are prohibited. Enrique has made it ***very*** clear that he intends to avoid ever actually having a DNA test occur, and to find a way to "lawyer" his way to an order of non-paternity.

On September 30, the Court entered the *Interlocutory Decree of Divorce*.[42] *Notice of Entry* was filed on October 1.[43]

On October 4, Olena – through present counsel – filed *Defendant's Motion to Reconsider, Set Aside, Alter or Amend the Order after Motion Hearing.*[44] That timely *Motion* pointed out to the district court that a positive DNA test for paternity can't be faked. Additionally, it detailed the standard procedures utilized by attorneys practicing international family law for accomplishing paternity testing with neither party or the minor child having to travel.[45]

Essentially, that protocol is to allow a representative of each party to be at the accredited lab taking samples of the other party, to verify the identity of the person

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[42] I OK98-105.

[43] I OK106-116.

[44] I OK117-125.

[45] I OK120-121.

appearing and observe the sample (usually a cheek swab) being taken. Two samples are taken; one is retained by the lab, and the other is given to the representative of the other party and immediately put in a sealed delivery envelope to be sent to the other country's lab. Both labs then test all samples and report results, which should match. The process is essentially foolproof so long as adequate security measures to prevent fake negatives are observed; it is ***impossible*** for there to be a "fake positive."

Though we had a verbal indefinite extension to respond to formal discovery, we continued to provide production of documents as they became available. On October 4, a disclosure was made including medical records for Olena and the minor child that advised against any foreign travel. They also included proof that Olena had applied for a new visa to enter the United States, but was ineligible to even schedule a visa interview until July, 2022.

Olena filed her *Financial Disclosure Form* on October 5.[46] Although it is required by NRCP 16.2, Enrique has never filed an FDF and the district court has refused to require him to file one.

On October 7, Olena filed *Defendant's Motion to Set Aside Interlocutory Decree of Divorce*[47] on the basis of this Court's holding in *Gojack*.[48]

On October 26, at the request of the Ukrainian Consulate in San Francisco, Olena filed *Defendant's Ex Parte Motion for Permission from the Court to Grant Ukranian Consulate to Observe at the November 10, 2021, Hearing*.[49]

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[46] I OK126-135.

[47] I OK136-147.

[48] I OK139 citing to *Gojack v. Second Judicial Dist. Court*, 95 Nev. 443, 445-46, 596 P.2d 237, 239 (1979).

[49] I OK148-155.

On October 27, Olena filed *Supplemental Exhibits* to motion to reconsider[50] including proof that an expedited visa for Olena or the child would only be considered for "true emergencies";[51] proof of birth of the minor child Andrii to Olena;[52] and a copy of Olena's passport.[53]

On October 27, Enrique opposed Olena's request for the Ukraine Consulate to observe court hearings[54] and filed an Exhibit Appendix,[55] arguing that the case was sealed under NRS 126.211 and NRS 125.080,[56] but not suggesting the existence of

[50] I OK156-170.

[51] I OK160.

[52] I OK163 and 165.

[53] I OK166.

[54] I OK171-176.

[55] I OK177-182.

[56] I OK172.

any authority allowing a district court to override a treaty of the United States or frustrate the Supremacy Clause of the United States Constitution.

The same day, Enrique opposed the *Motion to Reconsider* and a *Countermotion for an Order to Show Cause why Defendant Should Not be Held in Contempt of the Order After Motion Hearing; and for Attorney's Fees*,[57] along with more exhibits.[58]

That *Opposition* attacked Olena's request for rehearing claiming that it would be "an extraordinary remedy."[59] It went on to say that Enrique's "concerns" about collecting specimens in Ukraine should control.[60] As of this filing, Enrique has produced nothing that says DNA collection in Ukraine would be different than DNA collection anywhere else in the world or that it is possible for a positive DNA test for

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[57] I OK183-213.

[58] I OK214-221.

[59] I OK189.

[60] I OK192.

paternity to be faked by anyone. Apparently attempting to sound "scary," he even misrepresented Olena's father's occupation as a "fetal cell biologist" whereas he is actually just a medical doctor.[61]

The *Opposition* went on to attack Olena's doctor's notes/opinions about why she and the infant should not internationally travel during a pandemic.[62] Ironically, while Enrique produced no evidence that DNA testing could be unreliable, he argued against the *actual* medical evidence that Olena can't travel at this time.[63]

Enrique's *Countermotion* asked the district court to issue an order to show cause relating to his request for Olena's Ob/Gyn records.[64] That request was submitted in violation of EDCR 5.510 which requires that a separate ex parte

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[61] The intention was pretty clearly made to sway the district court into believing the impossibility of someone faking a positive DNA test.

[62] I OK197.

[63] *Id.*

[64] I OK201.

application along with a detailed affidavit be filed. There was no separate application. He also requested attorney's fees but still failed to file an FDF as required by EDCR 5.507.[65]

On October 28, Olena filed her *Reply* relating to the Ukraine Consulate's requested observation.[66] It provided the controlling federal law and explains that the district court is *required* under the controlling treaty and the Supremacy Clause of the United States Constitution to allow the representative from a foreign consulate to observe the hearings pertaining to one of its citizens.[67]

On November 2, despite the procedural irregularities in the request, the district court issued an *Order to Show Cause* why Olena should not be held in contempt.[68]

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[65] He has never filed an FDF, apparently to avoid confirming in writing the enormous disparity between his wealth and Olena's subsistence-level income in Ukraine.

[66] I OK222-228.

[67] I OK225.

[68] I OK229-233.

The Court issued an *Amended Order to Show Cause*[69] the same day, which was *Noticed* the same day.[70] All of this was done in violation of the local rules which make the procedures for requesting and filing such an order non-discretionary.[71]

On November 3, Olena filed her *Reply* to Enrique's *Opposition* and her *Opposition* to his *Countermotion for an Order to Show Cause,*[72] detailing the procedures for DNA sample taking and testing used by Fellows of the International Academy of Family Lawyers, of which the undersigned is a member.[73]

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[69] I OK234-237.

[70] I OK239-246.

[71] See EDCR 5.510(b) The party seeking the OSC ***shall*** submit an ex parte application for issuance of the OSC to the court, accompanied by a copy of the filed motion for OSC and a copy of the proposed OSC. *Tarango v. SIIS*, 117 Nev. 444, 451 n.20, 25 P.3d 175, 180 n.20 (2001) ("'[I]n statutes, 'may' is permissive and 'shall' is mandatory unless the statute demands a different construction to carry out the clear intent of the legislature.'")

[72] I OK247-254.

[73] I OK249-250. The IAFL is "a worldwide association of practicing lawyers who are recognized by their peers as the most experienced and skilled family law specialists in their respective countries." The IAFL was formed in 1986 to improve the practice of law and administration of justice in the area of divorce and family law throughout the world. *See* https://www.iafl.com/about/.

On November 10, Olena filed a *Supplemental Exhibit* consisting of the formal letter from the Ukrainian Consulate requesting Consular Access to observe the proceedings relating to its citizen and invoking the Vienna Convention.[74]

The same day, the Court held a hearing on all pending issues. An *Order From the November 10, 2021, Hearing* was entered on November 30.[75] The Court reiterated its minute order that the Ukrainian Consulate representative would not be allowed to observe hearings.[76] A record was made that Olena objected to that order in light of the Supremacy Clause of the United States Constitution.[77]

The district court – without reference to any credible evidence of any kind – agreed with Enrique's unsupported argument that a DNA test done in Ukraine would

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[74] I OK255-259.

[75] I OK282-286.

[76] I OK284.

[77] I OK283.

be "subject to unreliability" and was somehow subject to "human error or intentional misconduct."[78] The Court also wrongly claimed that it had the jurisdiction to order Olena to "come back to the U.S. if she wants to prove that [Enrique] is the father of the child."[79] The district court did not address the fact that it lacks jurisdiction to allow Olena to enter the country in violation of federal visa law, current COVID restrictions in both countries, or U.S. immigration laws.[80]

[78] I OK297. There are accredited DNA testing labs in both the United States and Ukraine certified to perform such testing. *See* NRS 126.131(1)(c)(2).

[79] *Id.*

[80] In prior federal cases involving international kidnap situations, federal judges have made findings that only a federal judge has any authority to order relaxations or exceptions to border and federal immigration requirements.

IV. STANDARD OF REVIEW AND SUMMARY OF THE ARGUMENT

A writ of mandamus may be granted "to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion."[81] Errors of law are reviewed *de novo*,[82] as are questions of constitutional or statutory construction; this Court need not defer to the trial court's reading of a statute, but instead considers the question *de novo*.[83] This Court has held that its review of a district court's interpretation of a statute or court rule is *de novo*.[84]

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[81] *See Clark Cty. Dist. Attorney. v. Eighth Judicial Dist. Court*, 123 Nev. 337, 342, 167 P.3d 922, 925 (2007).

[82] *Moseley v. Dist. Ct.*, 124 Nev. 654, 188 P.3d 1136 (2008); *Settelmeyer & Sons v. Smith & Harmer*, 124 Nev. 1206, 197 P.3d 1051 (2008).

[83] *See Irving v. Irving*, 122 Nev. 494, 134 P.3d 718 (2006); *Carson City District Attorney v. Ryder*, 116 Nev. 502, 998 P.2d 1186 (2000); *State, Dep't Taxation v. McKesson Corp.*, 111 Nev. 810, 896 P.2d 1145 (1995); *Tighe v. Las Vegas Metro. Police Dep't*, 110 Nev. 632, 877 P.2d 1032 (1994).

[84] *Marquis & Aurbach v. Eighth Judicial District Court*, 122 Nev. 1147, 146 P. 3d 1130 (2006).

In this case, the district court held that Olena and the minor child must return to the United States to have specimens for DNA testing taken. This is not a requirement under the law, is contrary to both legal restrictions and medical advice, and effectively prevents required DNA testing from occurring at all. The district court ignored the presumptions of paternity which apply to Americans[85] and violated the treaty of the United States with Ukraine by not allowing a representative from the Ukrainian Consulate to attend and observe hearings where both opposing counsel and the district court have denigrated the foreign national *and* her country of origin.

These orders were erroneous for several reasons. First, there is no way in which to fake a positive DNA test for paternity. Second, there is a presumption of

[85] Enrique has relentlessly pushed the narrative that Olena is some sort of foreign-born gold-digging whore, although she never sought or received anything of any kind from him, there is no doubt in her mind as to his paternity of their child, and she simply wants the father of their child to take responsibility for that child. The district court's words and actions have unfortunately reflected the attitude that Olena and her child are not due the same protections afforded to American litigants, which has been exacerbated by the district court's denigration of a foreign country and her dismissal of the concerns and formal requests of that country's government.

paternity that is being ignored, while DNA testing is effectively being prevented and the child at issue is deprived of all support from his wealthy father. Third, the district court was required to allow a foreign consulate to have a representative in attendance under the Supremacy Clause of the United States Constitution.

Those decisions should be reversed, and the district court should be ordered to invoke the presumption of paternity and actually allow the DNA testing to occur. All future hearings in this matter should be open to a representative from the Ukrainian government to observe.

V. ARGUMENT

A. THE DNA TESTING SHOULD BE REQUIRED TO BE ACTUALLY DONE IMMEDIATELY

Olena has made it ***extremely*** clear that she has no doubt of any kind as to Enrique's paternity of their child.

Legally, Olena is not permitted to return to the United States under federal immigration law; she can't even get an interview for a new visa until next summer; it could be one or more years before she is actually able to return to the United States, if ever. In the meantime, she is raising the parties' child alone without any support of any kind from the child's father – exactly as Enrique threatened.

Nevada's parentage laws apply to "all persons, no matter when born."[86] No exception is set out for those born in a foreign country or to a foreign national. The

[86] NRS 126.011.

liberty interest of a parent in the care, custody, and management of the parent's child is a fundamental right.[87] That includes the right to promptly ascertain parentage and obtain an order of support.

Olena left the country in April, 2021, very pregnant, and gave birth on July 28. Maternity is proven by the birth certificate already on file.[88] The district court's hand-written interlineation of refusal to "believe" a birth certificate because it was issued in a foreign country – until Olena returns to the United States and is DNA tested with the child – is contrary to statute. It is also offensive to common decency, and common sense.[89]

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[87] NRS 126.036(1).

[88] NRS 126.041(1)(a).

[89] The DNA testing we are trying to have actually done will resolve without doubt the maternity and paternity of the child in question.

This Court has held that a party has a right to have DNA testing ***actually done*** upon application.[90] The only practical way to get DNA testing actually accomplished anytime soon is to have the samples collected – with whatever security measures, including live video, are deemed appropriate – and then tested at labs in both places, as detailed above. It is simple, safe, secure, and could be accomplished in a matter of weeks; there is simply no legitimate objection to collection of DNA samples where the parties actually live.

It is true that under NRS 126.161, a court can apply "restrictions and directions," but the district court may not make the testing *impossible* to achieve. The protocol set out above has every safeguard for ensuring legitimacy, but as noted if anyone reasonably requests yet further testing, the district court may also "order that

[90] *Avila v. Martinez*, No. 77242, Order of Reversal and Remand (Unpublished Disposition, Jan. 23, 2020).

independent tests for determining paternity be performed by other experts or qualified laboratories."[91]

If anyone really ***did*** have any remaining doubts after that testing, provisional orders could be made with a provision for ***re***-testing at some later date when the parties can internationally travel. There is no actual reason for such an order, but the point is that this child should not be indefinitely or permanently denied an order verifying Enrique's paternity and all support.

[91] NRS 126.121(3).

B. THE PRESUMPTION OF PATERNITY SHOULD BE APPLIED UNTIL AND UNLESS REBUTTED

Under NRS 126.051, Enrique is the presumed father of Andrii since he and Olena were married and because they cohabited before and after conception of the child.

The district court has refused to apply the presumption, apparently because Olena is a "foreigner," but under Nevada law the presumption of Enrique's paternity may ***only*** be rebutted by "clear and convincing evidence,"[92] which evidence does not exist (and which Enrique and the district court are actively blocking from actually being produced).

Under Nevada law, child support should have been ordered paid months ago.[93] The procedural gimmicks being employed of supposedly requiring genetic testing,

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[92] NRS 126.051(3); *see Love v. Love*, 115 Nev. 572, 959 P.2d 523 (1998).

[93] NRS 126.143.

while actually preventing it from being accomplished, should be seen for what they are. The district court should be compelled to immediately require Enrique to file a Financial Disclosure Form as required by court rules[94] and award child support accordingly, back to the birth of the child.[95]

C. THE OBSERVATION OF PROCEEDINGS BY A FOREIGN CONSULATE IS REQUIRED UNDER THE VIENNA CONVENTION AND FEDERAL LAW

The original motion filed by Enrique requested both a sealed file and an advance order closing all hearings. The sealed file statute (NRS 125.110) is irrelevant to the motion relating to observation of the hearing.[96]

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[94] NRCP 16.1; EDCR 5.507.

[95] *See* NRS 125B.030.

[96] *See Johanson v. Eighth Judicial Dist. Court of Nev.*, 124 Nev. 245, 182 P.3d 94 (2008).

NRS 125.080 has been on the books since 1865. The statute only permits closed hearings in divorce trials.

Starting in the 1980s, local rules for the Eighth Judicial District Court (Clark County) were passed and approved by the Nevada Supreme Court governing procedure in "all domestic relations matters commenced under the provisions of Title 11 of NRS" except paternity and reciprocal support cases (which had their own specialized rules) – in other words, in essentially all family court cases.

By 1995, the Clark County local rules included EDCR 5.02, stating that ***all*** family court hearings would be "private" upon the request of either party, but allowing the court to override such a request. This was always interpreted to mean the hearings could be closed.

NRS 125.080 was last updated in 2007; the amendment expanded the list of persons who could presumptively remain in a closed hearing at a divorce trial beyond

court personnel, the parties, their counsel, and witnesses, to also include parents, guardians, and siblings of parties. The statute states that it applies to only "the trial and issue or issues of fact joined therein." In other words, the statute itself is irrelevant to motion hearings, and confers no right of closure.

The closed hearing local rule in Clark County was deleted from the rules in 2016, based on an apparent error by the rule revision committee of that time. Some judges took the rule deletion to be a "change in policy" and stopped closing hearings except in the final trial of divorce cases, looking strictly at the language of NRS 125.080.

The next rule revision committee noted the problem and attempted to restore the prior local rule as it had been in place previously, but when Phase One of the rule revisions went to the Supreme Court for approval in 2019, this Court altered the language to insert the words "pursuant to NRS 125.080" in the title of the rule (then

EDCR 5.210), and changed the reference from "all actions filed under Title 11" to "in an action for divorce" in the rule text, although the restored rule still referred to "hearings or trial."

The effect of those changes was to expand the ability in Clark County to request closed hearings from just trials to also include pre-trial hearings, but adding subsection (d), under which:

> If the court determines that the interests of justice or the best interest of a child would be served, the court may permit a person to remain, observe, and hear relevant portions of proceedings notwithstanding the demand of a party that the proceeding be private.

It is obvious that both the "interests of justice" and the best interest of the infant are served by allowing his government to be assured that he is being treated fairly by the family court of Nevada.

Further changes to the local rule have been proposed by the 2019-2021 rule revision committee, but as of this writing are still pending review and approval by this Court.

In short, even if the federal law set out below was not controlling (and it is), the district court was required to override Enrique's desire for secrecy on the basis of public policy, international comity, and the interests of justice; as Supreme Court Justice William O. Douglas once remarked about secrecy in general, "Sunlight is the best disinfectant."

Beyond public policy and common sense, under the Supremacy Clause of the United States Constitution,[97] the treaties entered into by the United States are on par with the Constitution itself and supersede ***any*** other law or ruling of any federal or state government.

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[97] Article VI, Paragraph 2 of the U.S. Constitution.

Article 5 of the Vienna Convention on Consular Relations,[98] dated April 24, 1963, effective March 19, 1967, and ratified by the United States on December 24, 1969, provides in part that it is the purpose of the Convention and the duty of a court to permit consular access to monitor court proceedings so as to:

> (h) safeguard[], within the limits imposed by the laws and regulations of the receiving State, the interests of minors and other persons lacking full capacity who are nationals of the sending State, particularly where any guardianship or trusteeship is required with respect to such persons;

As Enrique admitted in the proceedings below, what remains in the case are questions of paternity and child support involving a mother and an infant who are both Ukrainian citizens – and the government of that country has expressed an

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[98] Vienna Convention on Consular Relations, Apr. 24, 1963, 21 U.S.T. 77, 596 U.N.T.S. 261 (entered into force Mar. 19, 1967) (entered into force for the United States Dec. 24, 1969). *See* United States Dept. of State, Consular Notification and Access; Instructions for Federal, State, and Local Law Enforcement and Other Officials Regarding Foreign Nationals in the United States and the Rights of Consular Officials to Assist Them (U.S. Dept. of State, Office of Legal Adviser and Bureau of Consular Affairs, 5th ed. Sept. 2018).

interest in being sure that its citizens are being fairly treated by the courts of this country. Refusing to allow consular access violates the Convention, which is the supreme law of the land. Enrique's desire to keep secret his shameful treatment of his wife and child are not permitted by the controlling law, but have been completely indulged by the district court despite that controlling law.

As noted, we have been informed that the Ukrainian government has already lodged a formal protest with the United States Department of State as to its denial of access to observe the court proceedings regarding two of its nationals. We do not know what the impact of that protest will be, or what the federal government might do to the courts of Nevada in response,[99] but there is no reason whatsoever to create

[99] There is some history of the federal government restricting Title IV(d) funding to states which refuse to abide by federal law relating to matters relating to children in their family courts.

an international incident over the request by Ukraine to observe the operation of our family court.

It is bad enough that the district court has permitted, and engaged in, denigration of a foreign national and her child in our family court. Doing so in secret is a disgrace.

D. REMAND TO A DIFFERENT DEPARTMENT SHOULD BE CONSIDERED

The district court judge has repeatedly denigrated an entire foreign country, and entered orders holding both Olena and her child to a different standard than applied to Americans, for being citizens of that country. In defiance of an international treaty requiring it, the district court has refused to permit that foreign government to observe how its citizens are being treated by our courts.

The rulings and commentary recounted above present, at minimum, an appearance of impropriety.

Where the litigation history merited it, this Court has remanded cases with direction that they be heard by a different judge so as to avoid any appearance of impropriety.[100] It is respectfully suggested that this is such a case, and upon remand should be assigned to a different department of the family court.

VI. CONCLUSION

Secure and certain DNA testing, in accordance with the standard protocol developed and followed by IAFL Fellows world-wide, should be ordered to proceed immediately, with strict security measures to ensure that Enrique does not attempt to fool the test by any evasion or deception. A "false positive" is impossible.

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[100] *See, e.g.*, *Fisher v. Fisher*, 99 Nev. 762, 670 P.2d 572 (1983); *Willmes v. Reno Mun. Court*, 118 Nev. 831, 59 P.3d 1197 (2002).

In the meantime, the district court should be required to comply with Nevada law by honoring the statutory presumption of paternity, and ordering Enrique to submit a Financial Disclosure Form and award support accordingly.

The district court should permit observation of its proceedings by the Consul of the Ukrainian government immediately, and for all future proceedings in the case.

In light of the xenophobia and overt discrimination pervading the existing file, it may be appropriate to remand to a different department of the family court.

DATED this 29th day of December, 2021

Respectfully Submitted By:
WILLICK LAW GROUP

/s/ Marshal S. Willick, Esq.
MARSHAL S. WILLICK, ESQ.
Nevada Bar No. 2515
3591 E. Bonanza Road Suite 200
Las Vegas, NV 89110-2101
Attorneys for Appellant

CERTIFICATE OF COMPLIANCE

1. I hereby certify that this brief complies with the formatting requirements of NRAP 27(d), the typeface requirements of NRAP 32(a)(5) and type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Corel WordPerfect 16 in 14 point Times New Roman type style.

2. I further certify that this brief complies with the page or type-volume limitations of NRAP 21(d) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points or more and contains 6,789 words.

3. Finally, I hereby certify that I have read this Petition For Writ of Mandamus or Prohibition, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose.

4. I have read the preceding filing, and I have personal knowledge of the facts contained therein, unless stated otherwise. Further, the factual averments contained therein are true and correct to the best of my knowledge, except those matters based on information and belief, and as to those matters, I believe them to be true.

5. The factual averments contained in the preceding filing are incorporated herein as if set forth in full.

6. I further certify that this brief complies with all Nevada Rules of Appellate Procedure. I understand that I may be subject to sanctions in the event that the

accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 29th day of December, 2021.

WILLICK LAW GROUP

/s/ Marshal S. Willick, Esq.
MARSHAL S. WILLICK, ESQ.
Nevada Bar No. 2515
3591 E. Bonanza Road Suite 200
Las Vegas, NV 89110
Attorneys for Petitioner

VERIFICATION

STATE OF NEVADA)

)

COUNTY OF CLARK)

Marshal S. Willick, Esq., being first duly sworn, deposes and says that:

I am an attorney duly licensed to practice law in the State of Nevada. I am an attorney at the Willick Law Group, and I am the attorney representing Petitioner Olena Karpenko. I have read the preceding filing, and it is true to the best of my knowledge, except those matters based on information and belief, and as to those

matters, I believe them to be true. The Petitioner resides outside the County, and under NRS 15.010, I sign this Verification on her behalf.

MARSHAL S. WILLICK, ESQ.

SIGNED AND SWORN to before me
this 29th day of December, 2021.

NOTARY PUBLIC in and for said
County and State

JUSTIN KYLE JOHNSON
NOTARY PUBLIC
STATE OF NEVADA
Appt. No. 21-9363-01
My Appt. Expires January 7, 2025

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of Willick Law Group and that on 29th day of December, 2021, I served a true and correct copy of the Petitioner's *Petition for Writ of Mandamus or Prohibition* by electronically with the Clerk of the Nevada Supreme Court, to the following:

Paul A. Lemcke, Esq.
Pecos Law Group
8925 South Pecos Road, Suite 14A
Henderson, Nevada 89074
paul@pecoslawgroup.com
Attorney for Respondent/Plaintiff

District Court Judge, Dawn Throne
Eighth Judicial District Court
Family Courts & Services Center
601 North Pecos Road,
Las Vegas, Nevada 89101

/s/ Victoria Javiel
Employee of WILLICK LAW GROUP

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