IN THE SUPREME COURT OF THE STATE OF NEVADA

* * * * *

DANIEL E. FRIEDMAN,

Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE T. ARTHUR RITCHIE, JR., DISTRICT JUDGE,

Respondents,

and

KEVYN Q. FRIEDMAN,

Real Party in Interest.

S.C. NO.
D.C. NO: D-08-396963-D

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION

This *Petition* requests issuance of a writ of mandamus or prohibition pursuant to NRAP 21 and NRS 34.160, directing the district court to deny the pending motion before it for lack of subject matter jurisdiction. At the September 1, 2010, hearing, the district court partially ruled on Kevyn's *Motion*, finding that despite the terms of the UCCJEA, Nevada had jurisdiction over the parties because it ***previously*** had jurisdiction, even though all parties and minor children moved to California over a year ago.

This Court should prohibit the district court from proceeding to the merits of any matters relating to custody of the children, since it has no jurisdiction to do so, and mandate entry of an order so stating.

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POINTS AND AUTHORITIES

I. STATEMENT OF FACTS & PROCEDURE

There are three minor children of the marriage: Zoe Claire Friedman, born August 6, 2004, and twins Jonas Michael and Lucas Matthew Friedman, both born April 12, 2006.[1]

During the divorce proceedings – in June, 2008 – Kevyn and the children moved to Idaho, while Daniel remained in Nevada.[2] Kevyn and Daniel were granted a divorce in Nevada on November 5, 2008.[3]

In the Spring of 2009, Daniel moved to California, and in June, 2009, Kevyn and the children moved from Idaho to California.[4] While there is some uncertainty as to the precise date by which each person completed moving all their things, there is no question that by September, 2009, both parties, their full households, and the children, all were in California.[5] No one involved remained in Nevada.

A year later – on August 12, 2010 – Kevyn filed her *Motion For Confirmation of Custody and Timeshare Pursuant to Decree of Divorce*, in Nevada.[6] A hearing was set for September 8, 2010. Kevyn then sought and obtained *Order Shortening Time*, re-setting the hearing for September 1, 2010.[7]

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[1] DEF0001.

[2] DEF0013.

[3] DEF0018.

[4] DEF0073-DEF0074.

[5] *Id.*

[6] DEF00025.

[7] DEF0105 - DEF0107.

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On August 27, Daniel retained the WILLICK LAW GROUP to oppose Kevyn's *Motion* because Nevada lacked jurisdiction to hear the case. His *Opposition* was e-filed on November 29, 2010.[8]

On August 30, Daniel filed a *Notice of Registration of Out-of-State Custody Order* with the Superior Court of California, County of Los Angeles, Case No. BD531114, to initiate custody litigation in that State; that case is ongoing.

At the September 1 hearing in Nevada, Judge Ritchie ruled that Nevada "continues to have jurisdiction" over the parties because: (1) two years ago (at the time of divorce) Nevada ***had*** jurisdiction over the parties; and (2) a paragraph in the *Decree of Divorce* purports to contradict the UCCJEA by contract, indefinitely maintaining in Nevada jurisdiction over custodial issues, irrespective of who lives where, or for how long.[9]

Judge Ritchie acknowledged on the record that this Court expressly rejected the notion that parties could contract for subject matter jurisdiction in the *Vaile* case.[10] However, the judge further recounted that the *Opinion* in *Vaile* approved use of the "judicial estoppel doctrine." From this, the judge found that – aware of the law or not – Daniel had agreed to keep jurisdiction in Nevada indefinitely, no matter who lived where. Finally, the judge stated that the "crucial distinction" between this case and *Vaile* was that there, Nevada ***never*** had custody jurisdiction, while in this case, Nevada had custody jurisdiction two years ago.[11]

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[8] DEF0096. When we checked our file to submit this Writ Petition, we noticed for the first time that we never received a file-stamped copy back from the Clerk's office. Subsequent investigation revealed that the Clerk's office had rejected our filing but never notified us; their explanation this week was that "When multiple email addresses are entered into the filer's email field, the rejection notice will fail." That is why the file stamp date on the document is so long after the hearing; however, the court and opposing counsel had courtesy copies at the hearing, and the papers were addressed on the merits.

[9] DEF0073.

[10] *Vaile v. District Court*, 118 Nev. 262, 44 P.3d 506 (2002).

[11] DEF0073.

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Now that Daniel has, for the first time, conferred with counsel who is aware of the jurisdictional limitations set out in the UCCJEA, he seeks a writ of prohibition preventing continuing litigation of custody matters in Nevada, and a writ of mandate from this Court to the district court requiring entry of an order so stating.

II. STATEMENT OF ISSUES PRESENTED AND OF THE RELIEF SOUGHT

If a court makes a finding of fact that the children and the children's parents do not reside in Nevada, and have not lived here for a year, may the court nevertheless choose to entertain motions relating to modification of the custody of those children?

III. LEGAL ANALYSIS

A. Propriety of the Writ

This Court has original jurisdiction over the extraordinary remedies of writs of mandamus, prohibition, and certiorari.[12] The Court has exclusive jurisdiction to issue a writ of mandamus to compel a district court to perform a required act,[13] or to refrain from performing a prohibited act, such as one beyond its subject matter jurisdiction.[14]

Specifically, "A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, NRS 34.160, or to control an arbitrary or capricious exercise of discretion."[15] It is the appropriate remedy to

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[12] Nev. Const. Art. 6 §§ 4, 6.

[13] NRS 34.160.

[14] NRS 34.320; NRS 34.330.

[15] *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981).

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compel performance of a judicial act.[16] Its counterpart, a writ of prohibition, acts to prevent a court from transcending the limitation of its jurisdiction.[17]

Both writs are to be issued when there is no plain, speedy, and adequate remedy in the ordinary course of law.[18]

B. Jurisdiction Under The Uniform Child Custody Jurisdiction and Enforcement Act

1. What is Regulated is Subject Matter Jurisdiction

Like the statute it replaced,[19] the UCCJEA regulates ***subject matter jurisdiction***.[20] "Subject matter jurisdiction" refers to a subject as to which a court either does, or does not, have jurisdiction to hear depending entirely on something external to the case before it. If the external thing is lacking, then there is "a jurisdictional defect of the fundamental type. . . . where there is 'an entire absence of power to hear or determine the case.'"[21]

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[16] *Solis-Ramirez v. Eighth Judicial Dist. Court ex rel. County of Clark*, 112 Nev. 344, 913 P.2d 1293 (1996).

[17] *Goicoechea v. Fourth Judicial Dist. Court ex re. County of Elko*, 96 Nev. 287, 607 P.2d 1140 (1980).

[18] *Hickey v. District Court*, 105 Nev. 729, 782 P.2d 1336 (1989); NRS 34.160; NRS 34.330.

[19] The UCCJA, which was in effect prior to Nevada's adoption of the UCCJEA in 2003.

[20] *Swan v. Swan*, 106 Nev. 464, 796 P.2d 221 (1990).

[21] *State Indus. Ins. System v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984) & *Shisler v. Sanfer Sports Cars, Inc.*, 83 Cal. Rptr. 3d 771, 775 (Ct. App. 2008) (*quoting Abelleira v. District Court of Appeal, Third District*, 109 P.2d 942, 947 (Cal. 1941)).

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2. Modification Jurisdiction Was Lost When the Parties and Children Left the State

Under NRS 125A.315 (based on § 202 of the model Uniform Child Custody Jurisdiction and Enforcement Act [UCCJEA]), Nevada lost modification jurisdiction[22] when all of the parties left the state, on two grounds. While the first is arguably discretionary, the second ground is mandatory:

> NRS 125A.315 EXCLUSIVE, CONTINUING JURISDICTION
>
> 1. Except as otherwise provided in NRS 125A.335, a court of this state which has made a child-custody determination consistent with NRS 125A.305 or NRS 125A.3250 has exclusive, continuing jurisdiction over the determination until:
>
> > (a) A court of this state determines that the child, the child's parents and any person acting as a parent do not have a significant connection with this state and that substantial evidence is no longer available in this state concerning the child's care, protection, training, and personal relationships; ***or***
> >
> > (b) a court of this State or a court of another State determines that the child, ***the child's parents, and any person acting as a parent do not presently reside in this State***.

(Emphasis added).

Subsection (a) applies to this case – since each party left either one or two years ago, and all recent evidence relating to the children's lives for the past couple of years exists in either Idaho or California. But the district court argument on September 1, and this writ, are both focused on the mandatory jurisdictional rule of subsection (b), which is the only portion of the rule further addressed in this submission.

The Official Comment to Section 202 of the UCCJEA (which became NRS 125A.315) provides specific guidance regarding what to do on these facts:

> Continuing jurisdiction is lost when the child, the child's parents, and any person acting as a parent no longer reside in the original decree State. . . .
>
> The phrase "remains the residence of" in the PKPA has been the subject of conflicting case law. It is the intention of this Act that paragraph (a)(2) of this section means that the named persons no longer continue to actually live within the State. Thus, unless a modification proceeding has been commenced, when the child, the parents, and all persons acting as parents

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[22] "Continuing Exclusive Jurisdiction," frequently abbreviated as "CEJ."

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> physically leave the State to live elsewhere, the exclusive, continuing jurisdiction ceases.
>
> If the child, the parents and all persons acting as parents have all left the State which made the custody determination prior to the commencement of the modification proceeding, considerations of waste of resources dictate that a court in State B, as well as a court in State A, can decide that State A has lost exclusive continuing jurisdiction. . . .

The court below found as a matter of fact that everyone relevant left the State at least a year ago. That should have been the end of its inquiry, and the motion to modify custody should have been summarily denied based on that finding of fact. Nevada simply has no continuing subject matter jurisdiction to enter ***any*** orders relating to custody of the children at issue.[23]

3. Jurisdiction is Determined at the Moment of Filing

In Nevada, jurisdiction is tested at the moment that an "action" or "proceeding" (*e.g.*, a motion) is filed.[24] This is noted in the relevant statutes, and appears to be the uniform rule in the United States.[25] We are not aware of any conflicting provision, anywhere.

The rule is made clear by the simple statement in the Official Comments to the UCCJEA: "Jurisdiction attaches at the commencement of a proceeding."[26] In other words, the question of jurisdiction is a "snapshot" taken at the moment of filing the motion – in this case, August 12, 2010 – at which time everyone relevant had lived in California for the preceding year.

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[23] Our courts do not even have "temporary emergency jurisdiction" to enter orders, since the children are not present in the State. *See* NRS 125A.335.

[24] *Messner v. District Court*, 104 Nev. 759, 766 P.2d 1320 (1988) (time for test of personal jurisdiction is that of the filing of the current proceeding before the court).

[25] *See, e.g.*, NRS 130.207, 130.301; *Goddard v. Heintzelman*, 875 A.2d 1119 (Pa. Super. 2005) (an "action" is initiated when a foreign support order is registered, or a motion to modify a prior support order is filed); *Welsher v. Rager*, 491 S.E.2d 661 (N.C. App. 1997) (same); *Child Support Enforcement Division of Alaska v. Brenckle*, 675 N.E.2d 390 (Mass. 1997) (same).

[26] UCCJEA, Official Comment to § 202.

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Because of this, Judge Ritchie's expressed "belief" that this case is somehow distinguishable from *Vaile* because two years ago, Nevada ***used*** to have jurisdiction, is just mistaken. The fact that this (or any other) State had jurisdiction to enter a custody order at some ***prior*** time is simply irrelevant to the question of whether a court can entertain a custody action at the moment that a custody modification proceeding is filed.[27] The test is applicable at the commencement of the custody proceeding, and a court either has continuing, exclusive jurisdiction, or it doesn't.

4. California is the Home State – the Only Place that Can Issue Custody Orders

Once it has been determined that the original State with CEJ lost that jurisdiction – and the court below already declared as true the facts that make that determination mandatory – then the question becomes whether there is a new Home State, which becomes the ***only*** place where further custody litigation should take place.[28]

Since both parties, and the children, were living in California by September, 2009, that State became the children's Home State no later than six months later – March, 2010. The drafters of the UCCJEA were extremely clear about what they termed "Home State Priority":

> **1. Home State priority.** The PKPA prioritizes "home State" jurisdiction by requiring that full faith and credit cannot be given to a child

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[27] Respectfully, I have told this Court three times in the past couple of years that the family court bench and Bar, collectively, just did not seem to grasp this fundamental notion of subject matter jurisdiction, resulting in multiple appeals that should never have been necessary. *See Smith v. Day*, Case No. 46036, unpublished *Order of Reversal and Remand*, filed February 13, 2007; *Criswell v. Criswell*, No. D-07-385805, Nevada Supreme Court No. 51632 (dismissed after appellate settlement conference); *Simon v. McClure*, No. 50740, unpublished *Order of Remand*, December 16, 2009. This case makes a fourth. The district court bench apparently needs to hear from this Court – in a published opinion – that the time for measuring jurisdiction is the moment a motion is filed, applying the relevant statutory test to the facts at that moment. Publishing that simple guidance will save this Court from having to hear more of these cases, and save litigants untold sums in fees they should not have to incur for appeals they should not have to file.

[28] NRS 125A.325.

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> custody determination by a State that exercises initial jurisdiction as a "significant connection State" when there is a "home State." Initial custody determinations based on "significant connections" are not entitled to PKPA enforcement unless there is no home State. The UCCJA, however, specifically authorizes four independent bases of jurisdiction without prioritization. Under the UCCJA, a significant connection custody determination may have to be enforced even if it would be denied enforcement under the PKPA. The UCCJEA prioritizes home state jurisdiction in Section 201.[29]

The UCCJEA has been adopted by both Nevada and California. Since the children live in California, the only proper State for the filing of the custody action on August 12, 2010, was the Home State of the children – California.[30] Under the clear terms of the law, the court below has rendered a ruling which is not entitled to full faith and credit recognition here, or elsewhere.[31]

There is only one remaining matter relied upon by the court below in electing to address the merits of this case – the purported "agreement" to do so indefinitely, irrespective of where anyone might live after entry of the *Decree*.

Counsel for Kevyn drafted, and both parties (and the trial court) signed off on a *Decree of Divorce* which included at page 4, paragraph 4 (lines 15-22), a provision purporting to effectively invalidate the UCCJEA by contract, indefinitely maintaining Nevada jurisdiction over custodial issues irrespective of who lived where, or for how long.

As the preamble to the UCCJEA makes clear, it was precisely to ***prevent*** any such efforts that the newer uniform law was drafted to replace the UCCJA.

As noted above, Judge Ritchie explained why he thought ***this*** contract-for-subject-matter-jurisdiction case was different than the *Vaile* case (i.e., because the court once had

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[29] UCCJEA, Official Comments, Prefatory Note.

[30] NRS 125A.085 "Home state" defined. "Home state" means:

1. The state in which a child lived with a parent or a person acting as a parent for at least 6 consecutive months, including any temporary absence from the state, immediately before the commencement of a child custody proceeding.

[31] This is the same ruling that this Court rendered as to a California order rendered under similarly improper circumstances in *Swan v. Swan*, 106 Nev. 464, 796 P.2d 221 (1990).

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subject matter jurisdiction, and because the parties "explicitly agreed" to "maintain" custody jurisdiction in Nevada).

But as demonstrated above, the fact that Nevada once had custody jurisdiction is entirely meaningless. And as I informed the district court, and suggest this Court state in its order, this case is ***precisely*** the same as *Vaile* on that point. In that case, as in this one, the parties had entered into an agreement purporting to provide for custody jurisdiction in Nevada, but the controlling law – the UCCJEA – simply does not permit it, making the "agreement" void and unenforceable. There just is no meaningful distinction between the facts of this case and those of *Vaile* as to the absence of subject matter jurisdiction over child custody.

Multiple recent decisions of this Court have made clear, over and over again, that statutes and rules are to be construed to say what they mean, that "creative" lawyering seeking exemptions from statutes for individual litigants is simply prohibited, and that the orders purporting to do so are void to the extent they attempt it.[32]

It is for that reason that parties cannot make child support non-modifiable despite statutes saying it may be modified (*Fernandez*). They cannot define custody in a way at variance with Nevada law that binds reviewing courts (*Rivero II*). And they surely cannot create subject matter jurisdiction where it does not exist. The provision of the *Decree* purporting to "maintain" subject matter jurisdiction in Nevada, when it is clearly lacking as a matter of statute, is a nullity. Parties simply cannot contract to subject matter jurisdiction.[33]

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[32] *See Rivero v. Rivero*, 125 Nev. ___, 216 P.3d 213 (Adv. Opn. No. 34, Aug. 27, 2009) (statutory definitions of custody apply no matter what parties have attempted to agree to); *Fernandez v. Fernandez*, 126 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 3, Feb. 4, 2010) (child support may not be made "unmodifiable" by stipulation and order that "neither party would seek modification of child support").

[33] *Vaile v. District Court*, 118 Nev. 262, 44 P.3d 506 (2002).

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IV. CONCLUSION

The district court's ruling that it would entertain a custody motion even though both parties and the children have lived in California for a year is indefensible as a matter of law. The lower court lacks subject matter jurisdiction to hear any such motion, or enter any custodial orders. Wherefore, Daniel requests that a *Writ of Mandamus or Prohibition* issue, directing that the motion be denied as outside the subject matter jurisdiction of the court, as required under the UCCJEA.

DATED this 30th day of November, 2010.

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AFFIDAVIT OF ATTORNEY

STATE OF NEVADA)
)
COUNTY OF CLARK)

MARSHAL S. WILLICK, ESQ., being first duly sworn, deposes and says:

1. I am an attorney licensed to practice law in the State of Nevada, and the United States District Court, State of Nevada, I am employed by the WILLICK LAW GROUP and am one of the Nevada attorneys for Mr. Daniel E. Friedman, the Petitioner in this action.

2. This verification is being made on behalf of Petitioner under NRS 15.010, because he is absent from the State of Nevada, County of Clark.

3. I have read the above *Petition for Writ of Mandamus or Prohibition* and know the contents thereof as true, except as to the matters that are stated therein on my information and belief, and as to those matters, I believe them to be true.

DATED this 30th day of November, 2010.

MARSHAL S. WILLICK, ESQ.

SIGNED and **SWORN** to before me
this 30 day of November, 2010.

NOTARY PUBLIC in and for said
County and State

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
MARY STEELE
Appt. No. 00-63861-1

NOTARY PUBLIC
STATE OF NEVADA
County of Clark
MARY STEELE
Appt. No. 00-63861-1
My Appt. Expires Jan. 6, 2013

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CERTIFICATE OF COMPLIANCE

1. I am an attorney duly licensed to practice law in the State of Nevada.

2. There is no plain, speedy, and adequate remedy in the ordinary course of law available to the Petitioner.

3. I hereby certify that I have read the preceding *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 further certify that this *Writ* complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e) which requires every assertion in the *Writ* regarding matters in the record to be supported by appropriate references to the record in the Appendix. I understand that I may be subject to sanctions in the event that the accompanying *Writ* is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 30th day of November, 2010.

MARSHAL S. WILLICK, ESQ.
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3591 E. Bonanza Road, Suite 200
Las Vegas, Nevada 89110-2101
Attorneys for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the WILLICK LAW GROUP, and on the 1st day of December, 2010, service of a copy of the foregoing was sent via first class mail, postage prepaid and addressed as follows:

Hon. T. Arthur Ritchie, Jr.
Family Court, Dept. H
200 Lewis Avenue
Las Vegas, Nevada 89155

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