IN THE SUPREME COURT OF THE STATE OF NEVADA

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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: 57245
D.C. NO: D-08-396963-D

REPLY TO

"RESPONDENT'S RESPONSE TO APPELLANT'S PETITION FOR WRIT OF MANDAMUS OR PROHIBITION"

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. Any agreement between the parties that jurisdiction is retained in Nevada no matter where the children live is in direct conflict with statute, and void.

I. Reply

The *Response* opens (at 2) with the incorrect factual statement that "no other state court has taken jurisdiction." The California Superior Court has done so, denying Kevyn's

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motion to quash proceedings there a few weeks ago.[1] Responding to pleas from her lawyers, the judge there has suspended proceedings as a matter of comity and respect for this Court, based on their representation in open court there that this Court would rule on the pending writ petition "by the end of January."

Obviously, there is no way Kevyn's California lawyers could have known any such thing, but the point made here is the disingenuous suggestion in the filings here that the California judge's pause in proceedings out of respect for this Court to finish its proceedings was a "refusal" by that court to take jurisdiction. The California court is merely waiting for this Court to issue the requested writ before concluding custody proceedings there.

It is also only for that reason that the California judge has not already initiated a UCCJEA conference with Judge Ritchie. Presuming this Court does ***not*** complete this case in the next several days, as Kevyn's attorneys promised the California judge, he soon will do so in order to continue the California case, as that State has exclusive jurisdiction to do so.

A. Kevyn's "Facts" Statement is a List of Irrelevancies

Neither the terms of a decree that violates statute (pages 2-5) nor the parties choosing to attempt to (unsuccessfully) mediate in any particular place (pages 5-6) has anything to do with the legal issue. Any attmpted retention of jurisdiction over child custody, once both parties and children have left Nevada, is simply void, as detailed in the writ petition.

B. No "Other Remedies" Are Relevant in Any Way

Kevyn states (at 7) that at the time of the September 1 hearing in Nevada, there was "only one court that had jurisdiction to hear a child custody matter, the Nevada court."[2] The only way Nevada could have ***regained*** modification jurisdiction was if Kevyn and the

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[1] Superior Court of California, County of Los Angeles, Case No. BD531114.

[2] NRS 125A.315.

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children moved ***back*** to Nevada before anyone filed a child custody motion anywhere. As explained in our CLE materials:[3]

> What happens to CEJ when parties move out and back depends on whether and when an action is filed, and who it is that is doing the moving. If all parties leave, but the custodial parent and child return to Nevada (after however long an absence) before some other State makes the requisite finding (that all persons had left) and assumes jurisdiction, then Nevada remains the only place where a modification motion could be filed.
>
> But when all relevant persons have left, and the ***non***-custodial parent returns here, there is no such effect. Or, as NCCUSL put it: "Exclusive, continuing jurisdiction is not reestablished if, after the child, the parents, and all persons acting as parents leave the State, the non-custodial parent returns." So if all parties leave, and the non-custodial parent later returns, the child's new Home State (or if there is none, a significant-connection State) assumes jurisdiction to make custody orders.

In this case, all sides agree that Daniel, Kevyn, and the children all moved from Nevada years ago, and no one ever moved back here.[4] Filing papers in a place where there is no jurisdiction is irrelevant to questions of child custody jurisdiction.[5]

As noted above, Daniel has asked the California court to initiate a UCCJEA conference with Judge Ritchie, and it was only the request by Kevyn's lawyers to pause before doing so that prevented it from already happening – they are in no position to go before ***this*** Court and claim that the delay they requested there has any other meaning than deference to this Court's proceedings.

Kevyn acknowledges that a UCCJEA conference is mandatory, but fails to note that once informed of a "simultaneous proceeding," as it has been, the Nevada Court is ***also*** required to contact the other State to determine proper jurisdiction in accordance with the provision of the act.[6]

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[3] *The Basics of Family Law Jurisdiction*, 22 Nev. Fam. L. Rep., Fall, 2009, at 11; materials, "The Basics of Family Law Jurisdiction" (Clark County Bar Association, 2009).

[4] In the context of the UCCJEA, "returned" means relocated with the intent to remain.

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

[6] *See* NRS 125A.355(2); NRS 125A.485. Kevyn quietly acknowledges this on page 7 of her *Response*, at footnote 25.

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Since the Nevada District Court improperly proceeded to rule on jurisdiction after notice of a simultaneous proceeding and did not stay the action as required by NRS 125A.355, Daniel had little choice but to seek a Writ of Mandamus in this Court to compel compliance with the UCCJEA. In short, there were and are no relevant "other remedies." Kevyn is trying to place both courts against one another.

C. Jurisdiction under the Uniform Child Custody Jurisdiction Enforcement Act

Kevyn's analysis of jurisdiction (at 8-9) is not helpful; it merely reiterates Judge Ritchie's "finding" that *Vaile* is distinguishable, without providing any kind of authority or cogent argument how or why that could be so. Kevyn does not even ***try*** to address NRS 125A.315 or §202 of the Model UCCJEA, since doing so would be fatal to her arguments.

Neither the statute itself nor its comments can be ignored out of existence, and they state with great clarity that in this situation, Nevada simply has no subject matter jurisdiction, as detailed in the writ petition.

D. Jurisdiction Was Lost When Everyone Left

It does not matter that the parties signed an "agreement" that Nevada would forever have jurisdiction over the custody matter. Official Comment Two to Section 201 of the UCCJEA is clear on this point as well:

> It should also be noted that since jurisdiction to make a child custody determination is subject matter jurisdiction, ***an agreement of the parties to confer jurisdiction on a court that would not otherwise have jurisdiction under this Act is ineffective.***

[Emphasis Added].

Nevada once ***did*** have jurisdiction over the parties – until both the parties and the children moved out of the State of Nevada. All parties have moved to California and have resided there for more than a year. There is an open case in California. These facts have been found to be true. Therefore, Nevada lost Continuing Exclusive Jurisdiction ("CEJ") when all parties left the State, and proceedings should be held in California.

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As an aside, Kevyn's tortured reading of NRS 125A.315 (at 9-10) makes no sense. The word "or" means one or the other, and no Clintonian parsing can create any other meaning. That "a" is discretionary and "b" is mandatory is beside the point; if ***either*** "a" ***or*** "b" is made out, the statute is satisfied – the only way Kevyn's reading would make any sense is if the word connecting the two subdivisions was "and." It isn't. "Significant connections" are irrelevant if there is a Home State, as there is (California) in this case.

She ***is*** correct (at 11) in stating that California – the Home State – could choose to ***decline*** jurisdiction. But that admits the very premise of this writ proceeding – any such question is exclusively for the ***California*** court to make – and it already denied her motion to quash, brought there making that request.

Kevyn's citation to a pre-UCCJEA case (also at 11), however, is entirely irrelevant here, because the entire ***purpose*** of the UCCJEA was to eliminate the ambiguities and discretionary calls that the superseded UCCJA called on courts to make.[7] We note the absence of any relevant legal authority for Kevyn's position anywhere in the *Response*, which pretty much speaks for itself.

E. There Can Be No "Estoppel" of a Jurisdictional Statute

Kevyn's claim, in a nutshell, is that no one is able to actually apply the controlling statute because her lawyers conned his into signing off on a void provision (without disclosing the statute they were violating, if they themselves knew it). That position is nonsense; it would make ***any*** unlawful agreement nonetheless binding, which obviously is not the case.[8]

Along the way, Kevyn makes the ***outrageous*** claim (at 12-13) that Daniel "was aware of the facts." The relevant ***fact*** here is that the law prohibited any agreement to retain

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[7] UCCJEA, Official Comments, Prefatory Note; *see also* split decision in *Swan v. Swan*, 106 Nev. 464, 796 P.2d 221 (1990) (decided under earlier, now superseded UCCJA).

[8] *See, e.g., Fernandez v. Fernandez*, 126 Nev. ___, ___ P.3d ___ (Adv. Opn. No. 3, Feb. 4, 2010), or for that matter, *Vaile* itself.

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jurisdiction in Nevada once everyone left. There is zero evidence in the record that Daniel was ever told any such thing, by anyone, until he hired this law firm. There is equally zero evidence that Kevyn's lawyers knew – or did not know – that the provision they wrote was contrary to law. But certainly, if they ***did*** know it, they never told either Daniel or the district court. And such full disclosure would be the absolute minimum required to even bring up the concept of "equitable estoppel."

As noted in the original writ petition, the UCCJEA's purpose was to prevent any such thing from ever happening. It has been the law of Nevada since 2003, and if "subject matter jurisdiction" is going to have any meaning, then it must remain an objective fact that either does or does not exist, and not something that can spring in or out of existence by the happenstance of whether parties to agreements do or do not actually read the law.

Notwithstanding the lengthy argument by Kevyn, the "agreement" between the parties purporting to forever keep jurisdiction in Nevada was a dead letter the moment it was signed. The UCCJEA, to have any meaning, must be followed, in this case by stating that only California has any jurisdiction to hear a custody modification motion.

II. 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,

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directing that Nevada does not have subject matter jurisdiction over the custody issues, as required under the UCCJEA. The Writ of Mandamus/Prohibition must be issued to stop the district court from entering further unlawful orders.

DATED this 25th day of January, 2011.

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DECLARATION OF ATTORNEY

1. I, Marshal S. Willick, Esq., declare that I am competent to testify to the facts contained in the proceeding filing.

2. I am an attorney duly licensed to practice law in the State of Nevada; I am employed by the WILLICK LAW GROUP; and I am one of the attorneys representing the Petitioner, Daniel E. Friedman.

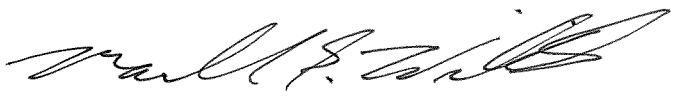
3. I have read the preceding filing, and I have personal knowledge of the facts contained therein, unless stated otherwise. Further, the factual averments contained therein are true and correct to the best of my knowledge, except those matters based on information and belief, and as to those matters,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

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

4. Daniel resides outside of the State of Nevada, and under NRS 15.010, I sign this affidavit on his behalf.

I declare under penalty of perjury under the laws of the State of Nevada (NRS 53.045 and 28 U.S.C. § 1746), that the foregoing is true and correct.

EXECUTED this 25th day of January, 2011.



MARSHAL S. WILLICK, ESQ.

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CERTIFICATE OF SERVICE

I hereby certify that I am an employee of the WILLICK LAW GROUP, and on the 25th day of January, 2011, service of a copy of the foregoing was sent via first class mail, postage prepaid and addressed as follows:

Hon. T. Arthur Ritchie, Jr.
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