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5 Attorney for Respondent

6 BEFORE THE NEVADA COMMISSION ON JUDICIAL DISCIPLINE

7  
8 IN THE MATTER OF THE HONORABLE )  
MELANIE ANDRESS-TOBIASSON, )  
9 Las Vegas Justice Court, Clark County, )  
State of Nevada, )  
10 Respondent.  
11


Case No. 2014-094-P

12 **OPPOSITION TO MOTION REQUESTING THAT THE COMMISSION TAKE**  
13 **JUDICIAL NOTICE AND REQUEST BY RESPONDENT THAT SAID ISSUE BE**  
14 **HELD IN ABEYANCE UNTIL THE TIME OF THE HEARING**

15 COMES NOW the Respondent, MELANIE ANDRESS-TOBIASSON, by and through her  
16 counsel, WILLIAM B. TERRY, ESQ., of the law offices of WILLIAM B. TERRY, CHARTERED and  
17 files the instant opposition to the Special Counsel's request that the Commission take judicial notice  
18 and further Respondent requests that said motion be held in abeyance until such time as the hearing  
19 currently set for February 10, 2017.

20 This Opposition and Request is made and based upon the attached analysis of facts and points  
21 and authorities in support hereof, and any oral arguments as maybe presented at the hearing in this  
22 matter.

23 WILLIAM B. TERRY, CHARTERED

24   
25 WILLIAM B. TERRY, ESQ.  
Nevada Bar No. 001028  
26 WILLIAM B. TERRY, CHARTERED  
530 South Seventh Street  
27 Las Vegas, Nevada 89101  
(702) 385-0799  
28 Attorney for Respondent

1 **MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO THE REQUEST**  
2 **TO TAKE JUDICIAL NOTICE**

3 It is first respectfully submitted that it is unclear exactly what Special Counsel is asking the  
4 Commission to take Judicial Notice of. At page 2, lines 14-18, Special Counsel alleges the following:

5 Respondent Andress-Tobiasson signed, for an attorney she knew, an  
6 adjudicative document in a divorce which had its venue in a Canadian  
7 court. Taking judicial notice of the fact that the Respondent's actions  
8 did not comport with Nevada law on the jurisdiction of the domestic  
9 matters will save time at the hearing, which is scheduled to run only six  
10 (6) hours...

11 For purposes of the instant motion and argument, counsel for the Respondent will assume that  
12 what Special Counsel is asking is that the Commission, prior to hearing, make a finding that Judge  
13 Tobiasson did not have jurisdiction to "participate" in the issue which was presented to her. With this  
14 goes an element of intent or scienter which is submitted Special Counsel has to prove that Judge  
15 Tobiasson knew that she did not have the "power" to issue a finding. The Special Prosecutor may word  
16 this differently by indicating that she knew that she did not have the jurisdiction to issue such a finding.

17 First of all, while the document in question is called an "order" it did not order anything.

18 At the time of the hearing it is expected that the evidence will show that Ms. Bolton married Mr.  
19 Wright in Vancouver, British Columbia on December 17, 2014. At this time, the marriage between two  
20 females was not recognized in the United States and specifically in Nevada. In 2013, the Canadian law  
21 was amended as set forth in the Civil Marriage Act, Part 2, Section 7 and permitted a divorce for non-  
22 residents whose home jurisdictions including states in the United States do not recognize the validity  
23 of Canadian marriages. Section 7 of the Canadian Act provided as follows:

24 **Divorce - non-residential spouses**

25 (1) The court of the province where the marriage was performed may, on  
26 application, grant the spouses a divorce if

27 (a) there has been a breakdown of the marriage as established by the  
28 spouses having lived separate and apart for at least one year before the  
making of the application;

(b) neither spouse resides in Canada at the time the application is  
made; and

(c) each of the spouses is residing – for at least one year immediately  
before the application is made, has resided – in the a state where a  
divorce cannot be granted because that state does not recognize the  
validity of the marriage.

**Application**

(2) The application may be made by both spouses jointly or by one of the

1 spouses with the other spouse's consent or in the absence of that consent  
2 or, in the absence of that consent, on presentation of an order from the  
3 court or a court located in the state where one of the spouses resides that  
4 declares that the other spouse

5 (a) is incapable of making decisions about his or her civil status  
6 because of a mental disability;  
7 (b) is unreasonably withholding consent; or  
8 (c) cannot be found...

9 Of importance is the fact that the above language indicates that it can be on presentation of an  
10 order from the court or a court located in the state where one of the spouses resides. Justice court is in  
11 fact a court.

12 The "order" above-referred to was represented by the Respondent as not being an order because  
13 it ordered nothing. It was, however, a finding of fact. A copy of the "order" is attached hereto and  
14 incorporated by reference herein as Exhibit "A". The "order" was not drafted by Judge Tobiasson but  
15 by Ms. Bolton who submitted it to the court. It was Judge Tobiasson's understanding that no divorce  
16 action was pending in Nevada because Nevada could not grant a divorce based upon same sex marriages  
17 at that point in time. Again, as will be shown at the time of the hearing, Judge Tobiasson researched  
18 the Canadian Law and noted the words "a court" and determined she was merely entering a finding.  
19 The only time that the word "order" or "ordered" appears in the order/finding of fact is where it is  
20 indicates "It is hereby ordered that this court declares that the Respondent is unreasonably holding her  
21 consent with respect to the application the applicant intends to make in the Supreme Court of British  
22 Columbia for divorce under the Civil Marriage Act SC 2005..." Again, this was not an "order" but a  
23 finding of fact. Ultimately the Supreme Court of British Columbia acting on the finding of fact did in  
24 fact grant a divorce under Canadian Law to Bolton and Wright. See Exhibit "B".

25 By March 17, 2014, Judge Tobiasson after consulting with attorneys for the court rescinded the  
26 court order/finding of fact of February 12, 2014. A copy of this document is attached hereto and  
27 incorporated by reference herein as Exhibit "C". Within the order rescinding, Judge Tobiasson  
28 recognized that "that determination is consistent with the Court's conclusion that the reference to  
"court" in the act must be interpreted to mean "a court of competent jurisdiction."

The position of the Respondent is that this Commission must look at Judge Tobiasson's state  
of mind as it existed when the "order/finding of fact" was signed not in hindsight. Having been advised

1 that there was no divorce pending because there could not be (same sex marriage) the Court at that time  
2 interpreted "a court" as being any court including Justice court. The Respondent was mindful that  
3 Justice courts are courts of limited jurisdiction. See NRS 4.370.

4 NRS 1.4653 sets forth the "Circumstances under which judge may be disciplined or retired..."

5 Subsection 1 provides as follows:

6 1. The Commission may remove a judge, publicly censure a judge or  
7 impose other forms of discipline on a judge if the Commission  
8 determines that the judge

9 (a) has committed willful misconduct;

10 (b) has willfully or persistently failed to perform the duties of office;

11 or

12 (c) is habitually intemperate.

13 The above makes it clear that the Special Prosecutor must show that Judge Tobiasson willfully  
14 and almost with a bad motive violated the Canons of Judicial Ethics. Certainly the Special Prosecutor  
15 is not proceeding under subsection (b) or (c). Subsection 2 of NRS 1.4653 provides as follows:

16 The Commission may publicly censure a judge or impose other forms of  
17 discipline on a judge if the Commission determines that the Judge has  
18 violated one or more of the provisions of the Nevada Code of Judicial  
19 Conduct in a matter that is not knowing or deliberate...

20 It is submitted that this provision does not mean that if a judge makes a mistake that they are  
21 subject to a form of discipline. To the contrary, a further provision of NRS 1.4653 provides as follows:

22 The term does not include claims of error or abuse of discretion of  
23 findings of fact, legal decisions or procedural rulings unless supported  
24 by evidence of abuse of authority, a disregard of fundamental rights, an  
25 intentional disregard of the law, a pattern of legal error or an action taken  
26 for a purpose other than the faithful discharge of judicial duty...

27 This provision stands for the proposition that if a judge makes a mistake they should not be  
28 subject to judicial discipline.

The Special Prosecutor is attempting to "punish" Judge Tobiasson for a singular act not a series  
of acts. After the request was presented to Judge Tobiasson she did not immediately sign it but went  
home and researched the Canadian Law saying "a court" and she ultimately signed the finding. This  
was one act. There is therefore no "pattern of legal error or an action taken for a purpose other than the  
faithful discharge of judicial duty..." The Special Prosecutor then must show an abuse of authority, a  
disregard for fundamental rights or an intentional disregard of the law. It is submitted that there was  
no intentional disregard of the law since what Judge Tobiasson was doing was making a finding of fact.

1 Again, her "order" ordered nothing. The only issue therefore is whether or not there was an abuse of  
2 authority. This goes to the heart of the Special Prosecutor's request to take judicial notice. It is  
3 submitted that there was no abuse of authority based upon Judge Tobiasson's state of mind at the time.

4 It is submitted that NRS 4.370 which provides for jurisdiction of justices of the peace has been  
5 both expanded and limited based upon judicial decisions. In *State of Nevada v. Justice Court and the*  
6 *Honorable William P. Jansen*, 112 Nev. 803, 919 P.2d 401 (1996) the Nevada Supreme Court found  
7 that a justice of the peace exceeded his authority in ordering discovery prior to a preliminary hearing.  
8 This case was a limitation on justice court powers but Judge Jansen was not disciplined before this  
9 Honorable Commission. Other cases have shown that the powers of a justice of the peace have been  
10 expanded by judicial interpretation. In *Grace v. The Eighth Judicial District Court of the State of*  
11 *Nevada and the Honorable Douglas W. Herndon*, the Nevada Supreme Court reversed the finding of  
12 a district court judge who found that justice court did not have the power to consider no less grant a  
13 motion to suppress. Nothing in NRS 4.370 indicates that a justice of the peace has the power to grant  
14 a motion to suppress. Nevertheless, the *en banc* Supreme Court found that a justice of the peace does  
15 in fact have the power to consider and grant or alternatively deny a motion to suppress. Again, Judge  
16 Herndon was not disciplined for his decision.

17 Perhaps an even better case to cite to this Honorable Commission is that of *Saliscooper v. The*  
18 *Eighth Judicial District Court and the Honorable Judge Joseph T. Bonaventure*. This case was unique  
19 in it's facts in that the District Attorney's office had a policy of not offering plea negotiations to female  
20 prostitutes but had no such similar policy in reference to males who were allegedly the buyers of sex.  
21 Motions to dismiss were filed in every justice court in Clark County, Nevada. Ultimately, the justice  
22 court judges made a determination to have one judge conduct a hearing on the issue and then consult  
23 with all the other judges and make a "unified finding". As part of their ruling, the Nevada Supreme  
24 Court found that justice courts do not have jurisdictional authority to sit "en banc" or to make  
25 collaborative findings citing NRS 4.370. Importantly, however, the Supreme Court found that justice  
26 court did have jurisdiction over a criminal defendants allegations that the County District Attorney was  
27 violating equal protection by selecting prosecuting solicitation of prostitution cases based on gender  
28 where the allegations arose in the context of a criminal misdemeanor. In effect the Court granted

1 jurisdiction to justice courts to make such a determination even though this was not specifically set forth  
2 under NRS 4.370. In reaching this result, the Court held that the legislature has “necessarily  
3 empowered” justice courts with the authority to resolve constitutional issues arising in criminal  
4 misdemeanor cases.

5 The above are only a few examples of situations where judges were not sanctioned for  
6 “exceeding their authority” or in effect for making wrong decisions and there are cases where powers of  
7 a justice of the peace although not specifically delineated in NRS 4.370 were expanded.

8 The Respondent will now address the specifics of the request by Special Counsel asking that  
9 judicial notice be taken of what appears to be the issue of whether or not Judge Tobiasson had  
10 jurisdiction in the instant case. Importantly, the Special Prosecutor does not cite NRS 47.130 dealing  
11 with “Matters of fact”. They cite NRS 47.140 which deals with judicial notice pertaining to matters of  
12 law. Those include the Constitution, the Constitution of the State and the Nevada Revised Statutes and  
13 “the Constitution statutes or other written law of any other state or territory of the United States, or of  
14 any foreign jurisdiction, as contained in a book or pamphlet published by its authority or approved to  
15 be commonly recognized in its courts...” Under NRS 47.140 the panel, for example, may be asked at  
16 the time of the hearing to take judicial notice of the Canadian Marriage Act as it existed at the time that  
17 the finding of fact or order was provided to Judge Tobiasson. That however is not the issue herein.  
18 Since the Special Prosecutor has cited within their argument NRS 47.130 which deals with matters of  
19 fact, the statute provides in part as follows:

- 20 2. A judicially noticed fact must be
  - 21 (a) generally known within the territorial jurisdiction of the trial court;
  - 22 or
  - 23 (b) capable of accurately and ready determination by resort to sources  
24 whose accuracy cannot reasonably be questioned, so that the fact is not  
25 subject to reasonable dispute.

26 Taking both NRS 47.130 and NRS 47.140 into consideration, it is submitted that the motion of  
27 the Special Prosecutor should be denied. NRS 47.130 contains the mandatory directive that “a  
28 judicially noticed fact must be”. The word “must” means that there can be no other interpretation.

It is also respectfully submitted that the “fact” is subject to reasonable dispute.

Vivian Wright Bolton filed a federal action against Melanie Andress-Tobiasson and others in  
federal court. Ultimately the Federal Court was called upon to either grant or deny a motion for

1 summary judgment brought by counsel for Judge Tobiasson. Ultimately, the Court granted the motion  
2 for summary judgment. A copy of that Order is attached hereto and incorporated by reference herein  
3 as Exhibit "D". As the Commission can tell, the Court may first analyze the facts and these are the  
4 same facts as will be presented to this panel. In the Federal Court's opinion the Court also addressed  
5 Judge Tobiasson's position that she was performing a judicial function through the justice court when  
6 she issued the February order and reviewed the Canadian Act and that the Canadian Act provided her  
7 with a colorable basis for asserting her jurisdiction. The Court also recognized the plaintiff's position  
8 that Judge Tobiasson arguably acted in clear absence of jurisdiction. In coming to it's conclusion to  
9 grant the motion for summary judgment, the Federal Court made several important factual findings.  
10 First, it recognized that although the February order was ex parte and without notice, these facts do not  
11 make the issuance of a court order any less judicial in nature. The Court further found that "nor does  
12 the lack of formality by which Bolton requested the order and by which Judge Andress-Tobiasson  
13 signed it take the issuance of the order outside the parameters of normal judicial function..." (Citations  
14 omitted). The Court also found that even if Tobiasson and Bolton were on "friendly terms" and that  
15 the Judge relied on the facts set forth in Bolton's affidavit that would not change the fundamental  
16 judicial nature of the act of entering a court order. The Federal Court then reviewed the Canadian Act.  
17 In it's decision the Court found that the Canadian Act did not specify which type of court could make  
18 such a finding. At page 6 of the opinion, the Court specifically found:

19                   Therefore, Judge Andress-Tobiasson had a colorable basis to assert  
20                   jurisdiction and issue the February Order and reason to believe that all  
21                   conditions had been met to satisfy subsection 7(1)-(2) of the Canadian  
22                   Act.

23                   The Court further found:

24                   ...Even if Judge Andress-Tobiasson overstepped the bounds of her  
25                   court's jurisdiction and acted in excess of her authority, this is not the  
26                   same as acting in clear absence of all jurisdiction. *See Stumps*, 435 U.S.  
27                   at 356-357...

28                   As a result of it's finding, the Federal Court granted the motion for summary judgment and  
dismissed.

                  It is submitted that the identical issues with the identical parties were present before the Federal  
Court. The same issue, i.e., the power to issue an order or, as the Special Prosecutor, the jurisdiction

1 was considered by the Federal Court and in part relying upon the Canadian Act found that Judge  
2 Tobiasson did in fact have jurisdiction or at least a colorable basis for asserting jurisdiction.

3 Why is not the Federal finding res judicata and collateral estoppel as to the motion submitted  
4 by the Special Prosecutor. It is submitted that it is both, res judicata and collateral estoppel.


5 Under NRS 47.130 the Commission cannot take judicial notice of a fact which is subject to  
6 reasonable dispute. It is submitted that the fact was subject to dispute.

7 **THE COMMISSION SHOULD WITHHOLD RULING ON THIS ISSUE UNTIL THE**  
8 **TIME OF THE HEARING**

9 Under NRS 47.170 "Judicial notice may be taken at any stage of the proceeding prior to  
10 submission to the court or jury..." Judge Tobiasson maintains that NRS 47.170 is permissive and not  
11 mandatory in nature and as such, the question of judicial notice should be withheld until such time as  
12 the hearing if not denied in it's entirety.

13 DATED this 18<sup>th</sup> day of January, 2017.

14 WILLIAM B. TERRY, CHARTERED

15   
16 WILLIAM B. TERRY, ESQ.  
17 Nevada Bar No. 001028  
18 WILLIAM B. TERRY, CHARTERED  
19 530 South Seventh Street  
20 Las Vegas, Nevada 89101  
21 (702) 385-0799  
22 Attorney for Respondent  
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25  
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28



**CERTIFICATE OF SERVICE**

1 I hereby certify that a true and correct copy of the **OPPOSITION TO MOTION**  
2 **REQUESTING THAT THE COMMISSION TAKE JUDICIAL NOTICE AND REQUEST BY**  
3 **RESPONDENT THAT SAID ISSUE BE HELD IN ABEYANCE UNTIL THE TIME OF THE**  
4 **HEARING** has been forwarded to the following party via electronic mail and U.S. mail, postage pre-  
5 paid, on this 18<sup>th</sup> day of January, 2017.  
6

7 Kathleen Paustian, Esq.  
8 3205 Skipworth Drive  
9 Las Vegas, Nevada 89107  
10 Special Counsel to the Nevada  
11 Commission on Judicial Discipline  
12 kathleenpaustian@cox.net

13 Commission on Judicial Discipline  
14 P.O. Box 48  
15 Carson City, Nevada 89702  
16 ncjinfo@judicial.state.nv.us

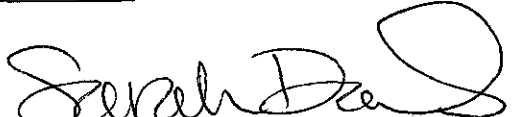
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An employee of William B. Terry, Chtd.

Exhibit “A”

**ORIGINAL**

4

Court File No.: \_\_\_\_\_  
Court Registry: Vancouver

**JUSTICE COURT, LAS VEGAS TOWNSHIP  
CLARK COUNTY, NEVADA**

Between: JENNIFER SUZANNE BOLTON Applicant  
And: VIVIAN WRIGHT Respondent

**ORDER**

A Petition for Divorce having been filed by JENNIFER SUZANNE BOLTON, the Applicant above, and after being fully advised in the premises,

IT IS HEREBY FOUND that Applicant JENNIFER SUZANNE BOLTON is now, and has been, an actual and bona fide resident of the County of Clark, State of Nevada, and has been actually domiciled therein for more than six weeks immediately preceding the commencement of this action and

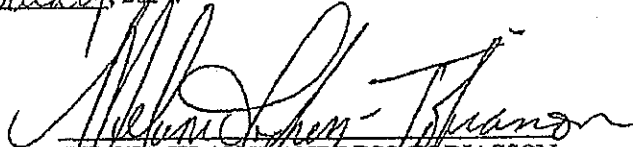
IT IS FURTHER FOUND that the State of Nevada, County of Clark, does not grant legal status to a marriage between persons of the same gender and, therefore, Applicant Jennifer Suzanne Bolton cannot be granted a divorce in the jurisdiction in which she is domiciled.

IT IS FURTHER FOUND that there has been a breakdown of the marriage as established by the spouses having lived separate and apart for at least one year before the making of the application and neither spouse resides in Canada at the time the application is made; and each of the spouses is residing, and for at least one year immediately before the application is made, has

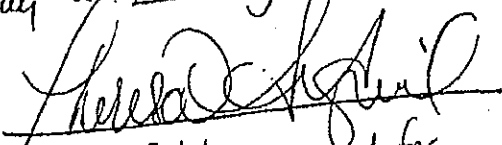
resided, in a state where a divorce cannot be granted because that state does not recognize the validity of the marriage.

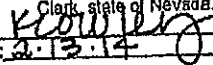
IT IS HEREBY ORDERED that this Court declares that the Respondent is unreasonably withholding her consent with respect to the application the Applicant intends to make in the Supreme Court of British Columbia for a divorce under the *Civil Marriage Act* S.C. 2005, c. 33

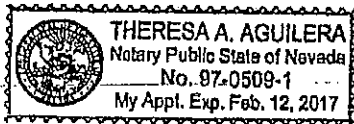
DATED this 17<sup>th</sup> day of February, 2014.

  
JUDGE MELANIE ANDRESS-TOBIASSON  
JUSTICE COURT, LAS VEGAS TOWNSHIP

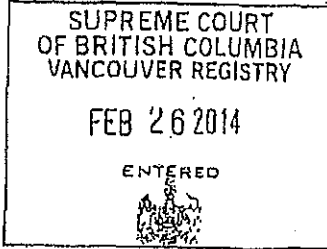
This is Exhibit "B" referred to in the affidavit of Jennifer Suzanne Bolton sworn before me at Las Vegas, Nevada this 13<sup>th</sup> day of February, 2014

  
Notary Public in and for County of Clark and State of Nevada, USA

CERTIFIED COPY  
The document to which this certificate is attached is a full, true and correct copy of the original on file and of record in Justice Court of Las Vegas township, in and for the County of Clark, state of Nevada.  
By:  Deputy  
Date: 2.13.14



**Exhibit “B”**



S=14.1125

Court File No.:  
Court Registry: Vancouver

In the Supreme Court of British Columbia  
In the Matter of the *Civil Marriage Act*

Between: JENNIFER SUZANNE BOLTON Applicant  
And: VIVIAN WRIGHT Respondent

ORDER MADE AFTER APPLICATION

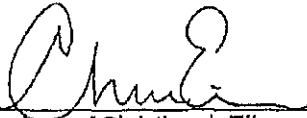
BEFORE A JUDGE OF THE )  
COURT ) 26 FEBRUARY, 2014

ON THE APPLICATION of JENNIFER SUZANNE BOLTON, the Applicant, without a hearing and on reading the materials filed by lawyer Christine J. Eilers on behalf of the Applicant;

THIS COURT ORDERS that:

1. Pursuant to section 7 of the *Civil Marriage Act* (Canada), JENNIFER SUZANNE BOLTON and VIVIAN WRIGHT, who were married at North Vancouver, British Columbia, on the 17<sup>th</sup> day of December, 2004, are divorced from each other, the divorce to take effect on the date of this order.

THE FOLLOWING PARTIES APPROVE THE FORM OF THIS ORDER:

  
\_\_\_\_\_  
Signature of Christine J. Eilers  
 lawyer for JENNIFER SUZANNE BOLTON

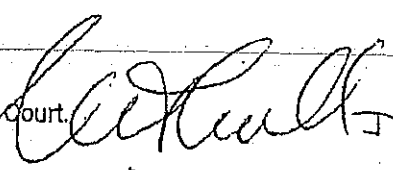
By the Court:   
\_\_\_\_\_  
Registrar



Exhibit “C”

1  
2 **JUSTICE COURT, LAS VEGAS TOWNSHIP**

3 **CLARK COUNTY, NEVADA**

4  
5 IN THE MATTER OF THE CANADIAN  
6 PETITION FOR DIVORCE INVOLVING  
7 JENNIFER SUZANNE BOLTON AND  
8 VIVIAN WRIGHT

**CASE NO.:** N/A  
**DEPARTMENT NO.:** 10

**ORDER RESCINDING**

**FEBRUARY 12, 2014, ORDER**

9  
10 **PROCEDURAL HISTORY**

11 On February 12, 2014, this Court signed an Order which made certain findings under the  
12 Canadian Civil Marriage Act (hereinafter "the Act").

13 After consultation with the Las Vegas Justice Court's Staff Attorney and the Chief Judge,  
14 however, this Court has determined that the February 12, 2014, Order was not properly before  
15 the Court and that such Order must be rescinded. The Court's reasoning appears below.  
16

17  
18 **DISCUSSION**

19 The Act provides, in pertinent part, as follows:

20 7. (1) The court of the province where the marriage was performed may, on application, grant the spouses a divorce if

21 (a) there has been a breakdown of the marriage as established by the  
22 spouses having lived separate and apart for at least one year before the  
23 making of the application;

(b) neither spouse resides in Canada at the time the application is made;  
and

24 (c) each of the spouses is residing - and for at least one year immediately  
25 before the application is made, has resided - in a state where a divorce  
cannot be granted because that state does not recognize the validity of the  
marriage.



1 Application (2) The application may be made by both spouses jointly or by one of the  
2 spouses with the other spouse's consent or, in the absence of that consent, on presentation  
3 of an order from the court or a court located in the state where one of the spouses resides  
4 that declares that the other spouse

- 5 (a) is incapable of making decisions about his or her civil status because of
- 6 a mental disability;
- 7 (b) is unreasonably withholding consent; or
- 8 (c) cannot be found. [*Emphasis added*].

9 This Court originally signed the February 12, 2014, Order because the above language  
10 merely refers to "a court." Now, however, this Court is of the opinion that the Order needed to  
11 come from the Eighth Judicial District (and, more specifically, the Family Division) because of  
12 the difference between a court of "general jurisdiction" and a court of "limited jurisdiction."

13 The Nevada Supreme Court has repeatedly held that "the justice courts are courts of  
14 limited jurisdiction and have only the authority granted by statute." State of Nevada v. Justice  
15 Court, 112 Nev. 803, 805 (1996); see NRS 4.370(1) (stating generally that "justice courts have  
16 jurisdiction of the following civil actions and proceedings and no others except as otherwise  
17 provided by specific statute"). [*Emphasis added*].

18 Conversely, Article 6, Section 6 of the Nevada Constitution classifies District Courts as  
19 general-jurisdiction courts because "[t]he District Courts in the several Judicial Districts of this  
20 State have original jurisdiction in all cases excluded by law from the original jurisdiction of  
21 justices' courts."

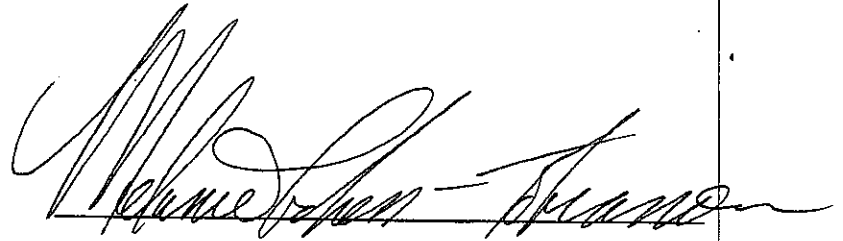
22 This Court does not believe that a law in another country can expand the authority of a  
23 limited-jurisdiction Justice Court in Nevada. Thus, the February 12, 2014, Order should not  
24 have been issued because the applicable Order needed to come from District Court as a court of  
25 general jurisdiction. That determination is consistent with this Court's conclusion that the  
reference to "court" in the Act must be interpreted to mean "a court of competent jurisdiction."

1 Thus, this Court believes that the February 12, 2014, Order was improvidently issued and  
2 that such Order must be rescinded.

3  
4 **ORDER**

5  
6 Pursuant to the statements of fact and the arguments of law submitted, it is hereby  
7 ordered, adjudged, and decreed that this Court's Order dated February 12, 2014, is hereby  
8 rescinded.

9  
10 Dated this 17<sup>th</sup> day of March, 20 14.

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17 **JUDGE MELANIE ANDRESS-TOBIASSON**

**Exhibit “D”**

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UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

\* \* \*

VIVIAN WRIGHT-BOLTON,  
Plaintiff,

v.

MELANIE ANDRESS-TOBIASSON; THE  
ESTATE OF JENNIFER BOLTON; and  
KOCKA & BOLTON, LLC;  
Defendants.

Case No. 2:14-cv-01612-APG-PAL

**ORDER GRANTING SUMMARY  
JUDGMENT**

(Dkt. #13, #19, #29)

Plaintiff Vivian Wright-Bolton filed suit against defendants Judge Melanie Andress-Tobiasson, the Estate of Jennifer Bolton, and Kocka & Bolton, LLC, asserting a 42 U.S.C. § 1983 claim based on the defendants' alleged violation of her due process rights under the Fourteenth Amendment. She also asserts state law claims for negligence, intentional infliction of emotional distress, and common law conspiracy. Wright-Bolton alleges that her Due Process rights were violated when Judge Andress-Tobiasson signed an order containing findings supporting Jennifer Bolton's application for a Canadian divorce. Judge Andress-Tobiasson moves for summary judgment based on judicial immunity. Wright-Bolton cross-moves for a stay of a decision on the summary judgment motion pursuant to Federal Rule of Civil Procedure 56(d). I grant Judge Andress-Tobiasson's motion for summary judgment on all claims and deny Wright-Bolton's cross-motion for a stay.

**I. BACKGROUND**

Wright-Bolton and Jennifer Bolton were married in Vancouver, Canada. (Dkt. #1 at 3.) They were in a relationship from 2002 to 2011. (*Id.*) After their relationship ended, they were involved in a child custody dispute in Nevada's Eighth Judicial District Family Court. (*Id.*)

In February 2014, Bolton visited Judge Andress-Tobiasson's judicial chambers and requested the judge's assistance in obtaining an order related to Bolton's marriage to Wright-

1 Bolton. (Dkt. #13 at 5.) Bolton had appeared on cases in front of Judge Andress-Tobiasson on  
2 multiple occasions. (Dkt. #1 at 4; Dkt. #13 at 5.) At the time Bolton came to request assistance,  
3 Judge Andress-Tobiasson was aware that Bolton was in a custody dispute with Wright-Bolton  
4 and that Bolton had recently been diagnosed with cancer. (Dkt. #13 at 20.)

5 Judge Andress-Tobiasson states that Bolton presented an affidavit signed by Bolton that  
6 stated that Bolton and Wright-Bolton had been separated for almost three years and that Bolton  
7 was unable to obtain a divorce in Nevada for her marriage in Canada. (*Id.*) Bolton also  
8 represented to Judge Andress-Tobiasson that all Canadian law requirements were met to obtain an  
9 order from a Nevada court that would allow her to finalize the divorce in Canada. (*Id.*) Bolton  
10 allegedly further stated that she had served Wright-Bolton with divorce papers but that Wright-  
11 Bolton was refusing to sign them. According to Judge Andress-Tobiasson, Bolton showed her a  
12 copy of the Canadian Civil Marriage Act (S.C. 2005, c.33) (the "Canadian Act"), which  
13 purportedly would allow her to sign an order supporting Bolton's application for a Canadian  
14 divorce. (Dkt. #13 at 20.)

15 After reviewing Bolton's affidavit and the Canadian Act, Judge Andress-Tobiasson signed  
16 an *ex parte* order on February 12, 2014 finding that (1) Bolton was a resident of Clark County,  
17 Nevada; (2) Clark County did not grant legal status to marriages between same-sex couples; (3)  
18 Bolton and Wright-Bolton had been separated for at least one year and neither spouse resided in  
19 Canada at the time of Bolton's application for divorce; and (4) Wright-Bolton was unreasonably  
20 withholding her consent for divorce (the "February Order"). (*Id.* at 28-29.)

21 In her complaint, Wright-Bolton alleges that prior to entry of the February Order, she was  
22 not given notice of the proposed order and was not given a chance for a hearing, meeting, or  
23 opportunity to be heard about the facts contained in Bolton's affidavit or the couple's underlying  
24 custody dispute in the Eighth Judicial District Court. (Dkt. #1 at 4.) The February Order was  
25 given to the Canadian judge who then issued an order granting Bolton a divorce. (Dkt. #19-5.)

26 After learning of the February Order, Wright-Bolton contacted Las Vegas Justice Court  
27 Chief Judge Karen Bennet-Haron, asking her to investigate the February Order. (Dkt. #19-3 at 3.)  
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1 Judge Andress-Tobiasson subsequently rescinded the February Order based on her discussions  
2 with Judge Bennet-Haron and her own determination that she lacked jurisdiction and therefore the  
3 February Order had been “improvidently issued.” (Dkt. #13 at 38-40.) Soon thereafter, Bolton  
4 passed away.

5 Wright-Bolton’s complaint alleges that Judge Andress-Tobiasson violated her Fourteenth  
6 Amendment Due Process rights by issuing the February Order. She also asserts state law claims  
7 for negligence, intentional infliction of emotional distress, and common law conspiracy. Judge  
8 Andress-Tobiasson moves for summary judgment on all claims against her on the basis of judicial  
9 immunity.

## 10 **II. ANALYSIS**

11 Summary judgment is appropriate if the pleadings, discovery responses, and affidavits  
12 demonstrate “there is no genuine dispute as to any material fact and the movant is entitled to  
13 judgment as a matter of law.” Fed. R. Civ. P. 56(a), (c). A fact is material if it “might affect the  
14 outcome of the suit under the governing law.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248  
15 (1986). An issue is genuine if “the evidence is such that a reasonable jury could return a verdict  
16 for the nonmoving party.” *Id.*

17 The party seeking summary judgment bears the initial burden of informing the court of the  
18 basis for its motion and identifying those portions of the record that demonstrate the absence of a  
19 genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden  
20 then shifts to the non-moving party to set forth specific facts demonstrating there is a genuine  
21 issue of material fact for trial. *Fairbank v. Wunderman Cato Johnson*, 212 F.3d 528, 531 (9th Cir.  
22 2000). I view the evidence and reasonable inferences in the light most favorable to the non-  
23 moving party. *James River Ins. Co. v. Hebert Schenk, P.C.*, 523 F.3d 915, 920 (9th Cir. 2008).

### 24 **A. Judge Andress-Tobiasson’s Judicial Immunity Defense**

25 Judge Andress-Tobiasson moves for summary judgment arguing that absolute judicial  
26 immunity requires that I dismiss all of the claims against her. She argues that she was performing  
27 a judicial function when she issued the February Order and that the text of the Canadian Act  
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1 provided a colorable basis for her assertion of jurisdiction. Wright Bolton responds that the  
2 February Order (1) was not a judicial act as it exceeded the scope of the Justice Court's limited  
3 jurisdiction, (2) was not entered in a case that was pending before Judge Andress-Tobiasson, and  
4 (3) did not arise out of a confrontation with the judge in her official capacity. Further, Wright-  
5 Bolton contends that Judge Andress-Tobiasson's later rescission of the February Order based on  
6 lack of jurisdiction, as well as statements made by the presiding judge in the custody litigation,  
7 prove that Judge Andress-Tobiasson acted in the clear absence of all jurisdiction, and therefore  
8 judicial immunity does not apply.

9 A claim under 42 U.S.C. § 1983 may be maintained against a government official in her  
10 individual capacity who, under color of law, deprives an individual of constitutional rights.  
11 However, certain categories of government officials are protected from such claims by absolute  
12 immunity. See *Forrester v. White*, 484 U.S. 219, 225-226 (1988). To determine whether absolute  
13 immunity applies, the inquiry focuses on the nature and function of the act, not the specific action  
14 taken. See *Stump v. Sparkman*, 435 U.S. 349, 362 (1978). Absolute immunity applies to judges  
15 performing "judicial acts." *Id.* at 359. Only actions taken "in clear absence of all jurisdiction"  
16 will not be protected by absolute immunity. *Id.* at 356-57. Judicial immunity is immunity from  
17 suit, not just immunity from a later assessment of damages. *Mirales v. Waco*, 502 U.S. 9, 11  
18 (1991). Therefore, if judicial immunity attaches to the actions of a judicial officer, the suit must  
19 be dismissed.

20 I analyze four factors to determine whether an act is judicial in nature: whether (1) the  
21 precise act is a normal judicial function, (2) the events occurred in the judge's chambers, (3) the  
22 controversy centered around a case then pending before the judge, and (4) the events at issue  
23 arose directly and immediately out of a confrontation with the judge in his or her official capacity.  
24 See *New Alaska Dev. Corp. v. Guetschow*, 869 F.2d 1298, 1302 (9th Cir. 1989); see also *Meek v.*  
25 *County of Riverside*, 183 F.2d 962, 967 (9th Cir. 1999). If the act is judicial in nature, absolute  
26 immunity attaches even if the act is done maliciously or in bad faith, involves grave procedural  
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1 errors, or exceeds the judge's jurisdiction. *See Stump*, 435 U.S. at 359; *Mirales*, 502 U.S. at 11;  
2 *Pierson v. Ray*, 386 U.S. 547, 554 (1967).

3 The issuance of court orders is a quintessential judicial function. *See Stump*, 435 U.S. at  
4 362 (finding that a judge's issuance of an order was a judicial act and "the type of act normally  
5 performed only by judges"). Although the February Order was *ex parte* and without notice to  
6 Wright-Bolton, these facts do not make the issuance of a court order any less judicial in nature.  
7 Nor does the lack of formality by which Bolton requested the order, and by which Judge Address-  
8 Tobiasson signed it, take the issuance of the order outside the parameters of a normal judicial  
9 function. *See Forrester*, 484 U.S. at 227 ("the informal and *ex parte* nature of a proceeding has  
10 not been thought to imply that an act otherwise within a judge's lawful jurisdiction was deprived  
11 of its judicial character").

12 Although the February Order was not issued in a case directly in front of Judge Address-  
13 Tobiasson, it was done in her chambers and Bolton went to her in her judicial capacity. Indeed,  
14 Bolton specifically sought out Judge Address-Tobiasson because she needed a court order from a  
15 Nevada judge that she could submit to the Canadian court to obtain a divorce. Even assuming  
16 that Judge Address-Tobiasson and Bolton were on friendly terms, that the judge relied on the  
17 facts in Bolton's affidavit without verifying their accuracy, and that Bolton's recent cancer  
18 diagnosis influenced the judge's decision, that would not change the fundamental judicial nature  
19 of the act of entering a court order. Allegations of bad faith or corrupt motive on the judge's part  
20 do not make the judge's actions any less judicial in nature. *See Forrester*, 484 U.S. at 227-28; *see*  
21 *also Mireles*, 502 U.S. at 11 ("judicial immunity is not overcome by allegations of bad faith or  
22 malice, the existence of which ordinarily cannot be resolved without engaging in discovery and  
23 eventual trial"). Unless Judge Address-Tobiasson acted in clear absence of jurisdiction, no issues  
24 of material fact remain and her issuance of the February Order was a judicial act protected by  
25 absolute judicial immunity.

26 The Canadian Act which Judge Address-Tobiasson relied on in issuing the February  
27 Order states that for non-resident spouses:

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1 7. (1) The court of the province where the marriage was performed may, on  
2 application, grant the spouses a divorce if

3 (a) there has been a breakdown of the marriage as established by the  
4 spouses having lived separate and apart for at least one year before the  
5 making of the application;

6 (b) neither spouse resides in Canada at the time the application is made;  
7 and

8 (c) each of the spouses is residing—and for at least one year immediately  
9 before the application is made, has resided—in a state where a divorce  
10 cannot be granted because that state does not recognize the validity of the  
11 marriage.

12 (2) **The application may be made** by both spouses jointly or by one of the  
13 spouses with the other spouse's consent or, in the absence of that consent, **on**  
14 **presentation of an order from the court or a court located in the state where**  
15 **one of the spouses resides** that declares that the other spouse

16 (a) is incapable of making decisions about his or her civil status because of  
17 a mental disability;

18 (b) is unreasonably withholding consent; or

19 (c) cannot be found.

20 S.C. 2005, c.33, 7(1)-(2) (emphasis added). The Canadian Act does not specify which  
21 type of court can make such a finding, rather it states that the order can be issued by any  
22 court located in the state where the applicant spouse resides. Judge Andress-Tobiasson  
23 is a Las Vegas Justice Court judge within Clark County, Nevada. Based on Bolton's  
24 affidavit and statements, Judge Andress-Tobiasson had reason to believe that Bolton was  
25 a resident of Clark County, had been living apart from Wright-Bolton for at least a year,  
26 and that Wright-Bolton was refusing to grant a divorce. Further, at the time she issued  
27 the February Order, Nevada did not recognize the validity of same-sex marriages.  
28 Therefore, Judge Andress-Tobiasson had a colorable basis to assert jurisdiction and issue  
the February Order and reason to believe that all conditions had been met to satisfy  
subsection 7(1)-(2) of the Canadian Act.

23 Wright-Bolton argues that Judge Andress-Tobiasson's order rescinding the  
24 February Order on the basis of lack of subject-matter jurisdiction shows she acted in the  
25 absence of all jurisdiction. Additionally, she points to statements by the presiding judge  
26 in the couple's custody dispute, who stated that there were procedural issues with the  
27 February Order and that Judge Andress-Tobiasson lacked jurisdiction.  
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1 I disagree. Even if Judge Andress-Tobiasson overstepped the bounds of her  
2 court's jurisdiction and acted in excess of her authority, that is not the same as acting in  
3 clear absence of all jurisdiction. *See Stumps*, 435 U.S. at 356-357 ("A judge will not be  
4 deprived of immunity because the action he took was in error, was done maliciously, or  
5 was in excess of his authority; rather, he will be subject to liability only when he has  
6 acted in the clear absence of all jurisdiction.") (citations omitted). Because Judge  
7 Andress-Tobiasson had a colorable basis to assert jurisdiction as specified under the  
8 Canadian Act, she is entitled to absolute judicial immunity with respect to Wright-  
9 Bolton's § 1983 claim.

10 The Nevada Supreme Court also grants absolute judicial immunity to judges  
11 performing judicial acts. *See State v. Second Judicial Dist. Court ex rel. Cnty. of*  
12 *Washoe*, 55 P.3d 420, 424 (Nev. 2002) (recognizing that judges are afforded absolute  
13 immunity in connection with their judicial functions). Thus, Judge Andress-Tobiasson is  
14 also immune from Wright-Bolton's state law claims. Accordingly, no genuine dispute  
15 of material fact exists and Judge Andress-Tobiasson is entitled to summary judgment.

16 **B. Wright-Bolton's Cross-Motion for Stay Pursuant to Rule 56(d)**

17 Federal Rule of Civil Procedure 56(d) states that:

18 If a nonmovant shows by affidavit or declaration that, for specified reasons, it  
19 cannot present facts essential to justify its opposition, the court may:

- 19 (1) defer considering the motion or deny it;
- 20 (2) allow time to obtain affidavits or declarations or to take discovery; or
- 21 (3) issue any other appropriate order.

22 Fed. R. Civ. P. 56(d). The party seeking the continuance must show that it lacks the facts

~~essential to resist the summary judgment motion. *See McCormick v. Fund Am. Companies, Inc.*,~~

23 26 F.3d 869, 885 (9th Cir. 1994). Wright-Bolton offers no fact, either in her opposition to the  
24 summary judgment motion or in the accompanying attorney declaration, which could be found  
25 during discovery that would overcome Judge Andress-Tobiasson's right to judicial immunity.  
26 Instead, Wright-Bolton argues that the defendants would not be burdened by a delay in  
27 consideration of their motion for summary judgment until after some discovery has occurred and  
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1 that it would be inefficient to consider this motion prior to Wright-Bolton having the opportunity  
2 to conduct discovery. But this is not the standard under Rule 56(d), which requires Wright-  
3 Bolton to show what specific, essential facts she lacks in order to resist summary judgment. *State*  
4 *of Cal., on Behalf of California Dep't of Toxic Substances Control v. Campbell*, 138 F.3d 772,  
5 779 (9th Cir. 1998). Wright-Bolton offers no reason why further discovery would deprive Judge  
6 Andress-Tobiasson of absolute judicial immunity, nor can I think of one. Therefore, I deny  
7 Wright-Bolton's motion for a stay under Rule 56(d).

8 **III. CONCLUSION**

9 IT IS THEREFORE ORDERED that defendant Judge Melanie Andress-Tobiasson's  
10 motion for summary judgment on all claims (**Dkt. #13**) is **GRANTED**.

11 IT IS FURTHER ORDERED that plaintiff Vivian Wright-Bolton's motion for stay of  
12 decision pursuant to Federal Rule of Civil Procedure 56(d) (**Dkt. #19**) is **DENIED**.

13 IT IS FURTHER ORDERED that defendant Judge Melanie Andress-Tobiasson's motion  
14 to strike Wright-Bolton's designation of an expert witness (**Dkt. #29**) is **DENIED as moot**.

15 DATED this 23<sup>rd</sup> day of September, 2015.

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17 ANDREW P. GORDON  
18 UNITED STATES DISTRICT JUDGE  
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