IN THE MISSOURI SUPREME COURT

KELLY J. BLANCHETTE,	)	
	)	
Petitioner/Appellant,	)	Case No. SC95053
	)	
vs.	)	Appeal from Circuit Court of St. Louis County
	)	The Honorable John N. Borbonus, III
STEVEN M. BLANCHETTE,	)	Case No. 13SL-DR05389-01
	)	
Respondent.	)	Transferred from Eastern District

RESPONDENT'S SUBSTITUTE BRIEF

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JURISDICTIONAL STATEMENT

Petitioner-Appellant Kelly J. Blanchette appeals from a circuit court judgment registering foreign judgments and denying her motion to modify those judgments. This appeal involves the interpretation and application of Missouri and West Virginia statutes and case-law, as it relates to the jurisdiction and statutory competence of the Missouri Family Court to register foreign judgments and to modify them. The entry of the circuit court judgment could constitute a final appealable judgment, but only by an "aggrieved party."[1] Supreme Court Rules 74.01 & 81.05.

This appeal does not involve any issue within the exclusive appellate jurisdiction of the Missouri Supreme Court under Article 5, Section 3 of the Missouri Constitution. The Missouri Court of Appeals had *general* appellate jurisdiction of the appeal under Article 5, Section 3 of the Missouri Constitution. The Eastern District had territorial jurisdiction of this appeal under §477.050, RSMo.[2]

The Missouri Court of Appeals for the Eastern District has transferred this appeal to this Court pursuant to Supreme Court Rule 83.02.

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[1] Respondent contends that Appellant is *not* an aggrieved party. *See, Infra*.

[2] Unless noted otherwise, all further statutory citations are to RSMo. Cum. Supp. 2012.

STATEMENT OF FACTS

I. Current Residences of the Parties:

Respondent Steven M. Blanchette (hereinafter referred to as "Father") currently resides in West Virginia and has resided there continuously beginning more than a year prior to filing his petition for divorce in West Virginia, up through the present time. He is employed as a canine officer with the U.S. Central Intelligence Agency. Since February 5, 2005, Appellant Kelly Jean Blanchette (hereinafter referred to as "Mother"), and the two minor children of the parties, Andrew Michael Blanchette (hereinafter, "Andrew") and Hannah Elizabeth Blanchette (hereinafter, "Hannah"), have resided in the state of Missouri. Mother is employed as a school counselor in Missouri. [Respondent's Supp. LF 34].

II. West Virginia Proceedings:

Andrew (the parties' first child) was born on November 5, 2003 in the state of West Virginia. The parties were subsequently married in West Virginia on March 1, 2004. [Respondent's Supp. LF 46].

In February 2005, Father filed his divorce petition in the Family Court of Berkeley County, West Virginia (hereinafter, "the West Virginia Court"). [*Id.*]. At that time, Father, Mother and their minor child Andrew, all resided in West Virginia, and had been residing there for more than one year. [*Id.*]. Mother was pregnant with Hannah at the time Father filed his petition for divorce, but Hannah had not yet been born. Mother was personally served in West Virginia on February 8, 2005, and

was subsequently represented by counsel in the divorce; and she filed her Answer and Counter-Petition in the West Virginia Court on February 14, 2005. [*Id.*].

On February 13, 2005, before final disposition of the divorce, and with the consent of the West Virginia court, Mother moved, with Andrew, to the state of Missouri. [Respondent's Supp. LF 35]. On July 21, 2005, Hannah was born in the state of Missouri. [Respondent's Supp. LF 47].

On January 19, 2006, both parties and their attorneys personally appeared in the West Virginia Court and submitted their testimony in a non-contested matter in which they had reached agreement as to all issues. [Respondent's Supp. LF 46]. In various incarnations, the West Virginia Court rendered its divorce decree, the last and final version of which was entitled "Second Amended Final Divorce Order," signed by the judge on February 16, 2006, and filed-stamped on February 17, 2006 (hereinafter referred to as "the Initial Divorce Decree"). [*Id.*]. In the Initial Divorce Decree, entered as a consent Order based upon Father's petition and Mother's counter-petition, the parties were awarded joint legal custody of *both* children, Mother was awarded primary physical custody of *both* children, and Father was ordered rights of general visitation "at all reasonable times." [*Id.*]. Father was also ordered to pay child support to Mother, and the property and debts of the parties were divided. [*Id.*] The West Virginia Court expressly concluded in the Initial Divorce Decree "[t]hat jurisdiction and venue are proper," as both parties resided in West Virginia for more than a year preceding the filing of the petition [Respondent's Supp.

LF 47]. The West Virginia Court also found "based upon the testimony of the parties that *the custodial allocation set forth in the parties' agreement* would be in the best interests of the parties' infant children and would not cause them any harm." [*Id.,* emphasis supplied]. There is no evidence in the record to suggest that either party or the court considered or contacted St. Louis County as an alternative or preferable forum.

On November 21, 2008, the Initial Divorce Decree was first modified by the West Virginia Court (entitled "Final Custody Order," and hereinafter referred to as "the First West Virginia Modification Order"). In that proceeding, on November 6, 2008, Father appeared in person and with counsel, and Mother appeared by telephone, while her legal counsel appeared in person. In the First West Virginia Modification Order, the West Virginia Court reduced the child support obligation due to Father's travel expenses in visiting the children in Missouri, ordered software for communications between the parties, and specified visitation times and places for Father. [Respondent's Supp. LF 52-55].

Father thereafter sought a second modification in the West Virginia Court and Mother was personally served with process for that second modification in Missouri on September 30, 2013 . [Respondent's Supp. LF 60]. The Return of Service plainly shows that the court appearance date and time was set for October 8, 2013 at 10:00 am. [*Id.*].[3] On October 8, 2013, the West Virginia Court heard testimony from Father.

[3] Mother has not made the actual summons and modification petition a part of the

Mother did not request a continuance or move for participation by telephone. On October 30, 2013, the Court entered a default judgment against Mother. The West Virginia Court, *inter alia,* granted Father additional specified visitation time with both children and further reduced his child support payments. [*See,* "Final Order Regarding Modification of Custodial Allocation and Child Support," hereinafter referred to as "the Second West Virginia Modification Order; Respondent's Supp.LF 56-59]. Mother admittedly filed no post-Judgment motions nor did she appeal the Second West Virginia Modification Order.

III. Missouri Proceedings:

On September 6, 2013, Mother filed her initial "Petition for Registration of Foreign Judgment and Motion to Modify Divorce Judgment" in the Family Court of St. Louis County. Attached and incorporated into the petition was the initial West Virginia Divorce Decree, the First West Virginia Modification Order, and the Second West Virginia Modification Order, not yet authenticated as required by statute. [LF 1, 6, 8-11; Appellant's Supp LF 1-16, 20-23; Respondent's Supp LF 46-59]. On February 11, 2014, the Family Court dismissed petitioner's petition without prejudice and granted her thirty (30) days to re-file *authenticated* copies of the three West Virginia judgments (because they had only been "certified" by the West Virginia clerk and not "authenticated" by the West Virginia judge) [LF 2].

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record in the trial court or a part of the record on appeal.

On March 13, 2014, Mother filed her First Amended Petition curing the prior defect with *authenticated* copies, and leave was granted to file the same on March 24, 2014 [LF 16]. Thereafter, Father responded with a motion to dismiss and the issues in dispute were extensively and exhaustively briefed by the parties with multiple suggestions in support and opposition, some filed prior to, and some filed after, the oral argument of June 19, 2014 (a non-testimonial hearing on the law). [LF 2-3].

After the multiple briefs and oral argument (not on the record), the Court issued its Judgment of August 11, 2014 (the judgment appealed from), registering all three West Virginia judgments (i.e., the original dissolution decree and two subsequent modifications) and dismissing Mother's motion to modify for lack of jurisdiction in that West Virginia retained exclusive continuing jurisdiction. [LF 59-61].

On August 14, 2014, Mother filed Petitioner's Motion for Reconsideration and for Findings of Fact and Conclusions of Law. [LF 62]. On August 25, 2014, Father filed a motion to dismiss Mother's motion for reconsideration. [LF 67]. On October 2, 2014, the trial court issued its order denying Father's motion to dismiss Mother's motion for reconsideration "as the Court has lost jurisdiction as 30 days have past since the judgment and Petitioner's motion for reconsideration is not ruled on for lack of jurisdiction." [LF 69].

Mother then filed her Notice of Appeal on October 19, 2014. [LF 71].

On October 30, 2014, the parties appeared by counsel before the trial court and, after re-arguing Mother's motion for reconsideration, the Court entered its Order, stating: "[t]he Court hears Petitioner's Motion for Reconsideration and denies it on the merits." [LF 70].

POINTS RELIED ON

I. RESPONDENT MOVES FOR DISMISSAL OF THE APPEAL UNDER §512.020 *BECAUSE* APPELLANT IS NOT "AGGRIEVED" BY THE JUDGMENT FROM WHICH SHE APPEALS *IN THAT* APPELLANT SEEKS TO REVERSE THE TRIAL COURT'S GRANTING OF THE VERY RELIEF THAT APPELLANT SOUGHT FROM THE COURT, VIZ., THE REGISTRATION OF THE FOREIGN JUDGMENTS.

– *City of N. Kan. City v. K.C. Beaton Holding Co.*, Western District No. WD76068/WD76110, January 14, 2014

– *Klagge v. Hyundai Motor America*, 148 S.W.3d 857, 859 (Mo.App.E.D. 2004)

– *Manchester Enterprises, Inc. v. Sharma,* 805 S.W.2d 186 (Mo.App. W.D. 1991).

– *Pruellage v. De Seaton Corp.,* 380 S.W.2d 403 (Mo. 1964)

– Section 512.020, RSMo.

II. THE TRIAL COURT DID NOT ERR IN REGISTERING ALL THREE FOREIGN JUDGMENTS *BECAUSE* MOTHER FAILED TO DEMONSTRATE WITH CLEAR AND SATISFACTORY EVIDENCE THAT THE WEST VIRGINIA COURT LACKED SUBJECT MATTER JURISDICTION TO ENTER AN INITIAL CUSTODY ORDER

RELATING TO HANNAH *IN THAT* THE RECORD IS INSUFFICIENTLY DEMONSTRATES THE LACK OF "SIGNIFICANT CONNECTION" OR "DEFAULT" JURISDICTION UNDER THE UCCJEA.

– *Phillips v. Fallen*, 6 S.W.3d 862, 864 (Mo.banc 1999)

– *Gullett v. Gullett,* 992 S.W.2d 866 (Ky.App. 1999)

– *Stewart v. Vulliet*, 888 N.E.2d 761 (Ind. 2008)

– *In re K.R.*, 735 S.E.2d 882, 889 (W.Va., 2012)

– Section 452.310.2 RSMo.

– Section 452.730 RSMo.

– Section 452.735 RSMo.

– Section 452.740 RSMo.

– Section 452.765 RSMo.

– Section 487.010 RSMo.

– W. Va.Code §48–20–102

– W. Va.Code §48–20–201

– W. Va.Code §48–20–204

– W. Va.Code §48–20–207

– W. Va.Code §48–20–208

– W. Va.Code §51-2A

III. THE TRIAL COURT DID NOT ERR IN REGISTERING ALL THREE FOREIGN JUDGMENTS *BECAUSE,* EVEN IF THE WEST VIRGINIA COURT LACKED SUBJECT MATTER JURISDICTION TO ENTER A CUSTODY ORDER RELATING TO ONE CHILD OF THE MARRIAGE, THE REGISTERED JUDGMENTS WOULD NOT BE INVALIDATED IN THEIR ENTIRETY *IN THAT* THE WEST VIRGINIA COURT DID HAVE SUBJECT MATTER JURISDICTION TO ENTER ORDERS RELATING TO THE OTHER CHILD, FOR CHILD SUPPORT, AND FOR THE DIVISION OF THE PROPERTY AND DEBT OF THE PARTIES.

– *Treme v. St. Louis County,* 609 S.W.2d 706, 710 (Mo.App.E.D.1980)

– *Kennedy v. Boden*, 231 S.W.2d 862, 865-866 (Mo.App. W.D. 1950)

– *Poole v. Poole*, 287 S.W.2d 372, 374 (Mo.App. E.D.1946)

IV. THE TRIAL COURT DID NOT ERR IN REGISTERING THE SECOND WEST VIRGINIA MODIFICATION ORDER OF OCTOBER 2013 *BECAUSE* THE WEST VIRGINIA COURT DID HAVE PERSONAL JURISDICTION OVER MOTHER *IN THAT* MOTHER RECEIVED ADEQUATE AND REASONABLE NOTICE OF THE DATE OF THE HEARING.

– *Pruellage v. De Seaton Corp.,* 380 S.W.2d 403 (Mo. 1964)

– *Schwermer v. Schwermer*, 350 S.W.3d 460 (Mo.App.W.D. 2011)

– *Brittany S. v. Amos F.,* 753 S.E.2d 745 (W.Va.2012)

– Supreme Court Rule 55.25

– Section 452.747.2, RSMo.

– W.Va. Code §48-9-401

– W.Va. Code §48-20-108

– W.Va. Code §48-11-105

– West Virginia Civil Procedure Rule 3

– West Virginia Civil Procedure Rule 4

– West Virginia Civil Procedure Rule 6

– West Virginia Civil Procedure Rule 12

– West Virginia Rules of Practice and Procedure for Family Court, Rule 9

– West Virginia Rules of Practice and Procedure for Family Court, Rule 18

– West Virginia Rules of Practice and Procedure for Family Court, Rule 21

– West Virginia Rules of Practice and Procedure for Family Court, Rule 50

ARGUMENT

I. RESPONDENT MOVES FOR DISMISSAL OF THE APPEAL UNDER §512.020 *BECAUSE* APPELLANT IS NOT "AGGRIEVED" BY THE JUDGMENT FROM WHICH SHE APPEALS *IN THAT* APPELLANT SEEKS TO REVERSE THE TRIAL COURT'S GRANTING OF THE VERY RELIEF THAT APPELLANT SOUGHT FROM THE COURT, VIZ., THE REGISTRATION OF THE FOREIGN JUDGMENTS.

The right of appeal is statutory and it is fundamental that in order to appeal a party must be aggrieved by the judgment from which he appeals. Section 512.020. *See, City of N. Kan. City v. K.C. Beaton Holding Co.*, Western District No. WD76068/WD76110, January 14, 2014; and *Klagge v. Hyundai Motor America*, 148 S.W.3d 857, 859 (Mo.App.E.D. 2004), *citing, Manchester Enterprises, Inc. v. Sharma,* 805 S.W.2d 186 (Mo.App. W.D. 1991).

Mother is admittedly aggrieved by the trial court's refusal to entertain her motion to modify the West Virginia judgments. Moreover, the court of appeals erroneously found that "[i]nsofar as the trial court did not grant all the relief sought, . . ., [Mother] is sufficiently aggrieved to bring this appeal" [Eastern District Opinion, page 4]. Yet, Mother has *not* appealed from that portion of the trial court's judgment [*See,* Notice of Appeal on October 19, 2014, LF 71], and, in her Points Relied On, does not complain of any error in the trial court's refusal to entertain Mother's motion

to modify on the grounds that West Virginia had continuing exclusive jurisdiction.[4] Issues not set out in the points relied on may not be raised in the appeal. *Pruellage v. De Seaton Corp.,* 380 S.W.2d 403, 405[3] (Mo. 1964)*; In re Marriage of Ulmanis*, 23 S.W.3d 814 (Mo.App.S.D. 2000); *Yates v. State*, 158 S.W.3d 798 (Mo.App.E.D.2005). Instead they are considered to have been abandoned. *Pruellage, supra; Kerr Const. Paving Co., Inc. v. Khazin*, 961 S.W.2d 75 (Mo.App.W.D.1997). Further, new or different issues may not be raised for the first time in a reply brief. *Coyne v. Coyne,* 17 S.W.3d 904 (Mo.App. E.D.2000).

The only portion of the trial court's judgment that Mother seeks to reverse in this honorable Court is the trial court's ruling in *registering* the three West Virginia judgments. Mother attached and incorporated into her first amended petition authenticated copies of *all* three West Virginia judgments. The trial court did no more than register the three foreign judgments that Mother voluntarily placed before it.

Mother points out that she began attacking the validity of all three West Virginia judgments immediately after seeking to register them. Nevertheless, although Mother obtained a ruling that she considers detrimental to her, she obtained the judgment she asked for, and she is thus not "aggrieved" by the judgment so as to entitle her to appeal. *Klagge, supra,* 148 S.W.3d at 859. Accordingly, her appeal should be dismissed.

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[4] See footnote 8, *infra.*

II. THE TRIAL COURT DID NOT ERR IN REGISTERING ALL THREE FOREIGN JUDGMENTS *BECAUSE* MOTHER FAILED TO DEMONSTRATE WITH CLEAR AND SATISFACTORY EVIDENCE THAT THE WEST VIRGINIA COURT LACKED SUBJECT MATTER JURISDICTION TO ENTER AN INITIAL CUSTODY ORDER RELATING TO HANNAH *IN THAT* THE RECORD INSUFFICIENTLY DEMONSTRATES THE LACK OF "SIGNIFICANT CONNECTION" OR "DEFAULT" JURISDICTION UNDER THE UCCJEA.

"A foreign judgment, regular on its face, ... is entitled to a strong presumption that the foreign court had jurisdiction both over the parties *and the subject matter* and the court followed its laws and entered a valid judgment." *Phillips v. Fallen*, 6 S.W.3d 862, 864 (Mo.banc 1999). "The burden to overcome the presumption of validity and jurisdiction must be met with 'the clearest and most satisfactory evidence,' and this burden lies with the party asserting the invalidity of the foreign judgment." *Id.*

Mother argues that because Hannah never resided in West Virginia, the West Virginia Court could not have had subject matter jurisdiction under the Uniform Enforcement of Foreign Judgment Law (hereinafter "UCCJEA") to render any orders regarding Hannah's custody in any of the three judgments Mother petitioned for

registration.[5] Yet, Mother has not met her burden of establishing that the West Virginia Court lacked subject matter jurisdiction to enter an initial custody award in its Initial Divorce Decree.

The West Virginia version of the UCCJEA provides:

> **Except as otherwise provided in section 20–204 [§48–20–204, Temporary Emergency Jurisdiction], a court of this State has jurisdiction to make an initial child custody determination only if:**
>
> **(1) [West Virginia] is the home state of the child on the date of the commencement of the proceeding, or was the home state of the child within six months before the commencement of the proceeding, and the child is absent from [West Virginia] but a parent or person acting as a parent continues to live in [West Virginia];**

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[5] Ordinarily, Missouri law does not recognize limitations on the jurisdictional competence of the courts to hear cases. *J.C.W. ex rel. Webb v. Wyciskalla,* 275 S.W.3d 249, 254 (Mo.banc 2009). When a statute speaks in jurisdictional terms, it is properly read as merely setting limits on remedies or elements of claims that courts may grant. *Id.* at 255. It is clear, however, that the West Virginia UCCJEA uses the term "subject matter jurisdiction," and that West Virginia *does* recognize limitations on the jurisdictional competence of their courts to hear cases. *In re K.R.*, 229 W.Va. 733, 735 S.E.2d 882 (W.Va., 2012).

(2) A court of another state does not have jurisdiction under subdivision (1) of this subsection, or a court of the home state of the child has declined to exercise jurisdiction on the ground that this State is the more appropriate forum under section 20–207 [§48–20–207] or 20–208 [§ 48–20–208], and:

(A) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with [West Virginia] other than mere physical presence; and

(B) Substantial evidence is available in [West Virginia] concerning the child's care, protection, training and personal relationships;

(3) All courts having jurisdiction under subdivision (1) or (2) of this subdivision have declined to exercise jurisdiction on the ground that a court of [West Virginia] is the more appropriate forum to determine the custody of the child under section 20–207 [§ 48–20–207] or 20–208 [§ 48–20–208]; or

(4) No court of any other state would have jurisdiction under the criteria specified in subdivision (1), (2) or (3) of this subsection.

W. Va.Code §48–20–201(a). A child's home state is defined as follows:

"Home state" means the state in which a child lived with a parent or a person acting as a parent for at least six consecutive months *immediately before the commencement of a child custody proceeding*. In the case of a child less than six months of age, the term means the state in which the

> **child lived from birth with any of the persons mentioned. A period of temporary absence of any of the mentioned persons is part of the period.**

W.Va.Code §48-20-102(g) [emphasis supplied].

Except for the exercise of "temporary emergency" jurisdiction as provided in Section 204 of the UCCJEA, to exercise jurisdiction to determine child custody, a court of West Virginia must satisfy one of the four bases of jurisdiction set forth in Section 201(a). These four bases have been aptly summarized as 1) "home state" jurisdiction; 2) "significant connection" jurisdiction; 3) "jurisdiction because of declination of jurisdiction"; and 4) "default" jurisdiction. *In re K.R.*, 735 S.E.2d 882, 889 (W.Va., 2012). These jurisdictional bases do not operate alternatively to each other, but rather, in order of priority—reaching the next basis of jurisdiction only if the preceding basis does not resolve the jurisdictional issue. *Id.*

Pursuant to West Virginia Code § 48–20–102(g) (2001), *"*to establish home state jurisdiction as a result of living with a parent, the operative period of time which must first be analyzed is the six-month period *immediately before* the commencement of a child custody proceeding.*"* *In re K.R., supra,* 735 S.E.2d at 890 [emphasis supplied]. Because Hannah was still unborn, Father therefore agrees that West Virginia could not have had "home state" jurisdiction over Hannah *at the commencement* of the divorce proceeding. Yet, at the time the initial West Virginia divorce petition was filed, neither Missouri nor any other state had "home state" jurisdiction for the same reason (Hannah had not yet been born). Consequently, no

court had "home state" jurisdiction when the divorce was filed in West Virginia. All the cases interpreting the application of the UCCJEA (and the UCCJA) would agree with this conclusion. "Home state" jurisdiction cannot attach to unborn children. *See,* cases cited by Mother.

The West Virginia UCCJEA leaves a bit of legal lacuna as to custody cases filed before the birth of the child. As Mother argues in her brief, some states have indeed held that the subject matter jurisdictional requirement is not met if the child is unborn when the initial custody proceeding is filed and when the child is thereafter born in another state because it is only when the child is born that a home state can be determined. *Ex., Waltenburg v. Waltenburg*, 270 S.W.3d 308, 316 (Tex. App. 2008); and other cases cited by Mother in her Brief.[6] Such a rule is overbroad and unjustified, however, where the foreign court may have acquired subject matter jurisdiction under the "default" jurisdiction provision as set forth in Section 201(a)(4). Accordingly, other states have observed that the facial terms of the UCCJEA, as well as its predecessor, the Uniform Child Custody Jurisdiction Act, only provides that

[6] It should noted that *In re Unborn Child of Starks*, 18 P.3d. 342, 347 (Ok. 2001), cited by Mother for the proposition that the UCCJEA may not be applied to vest jurisdiction to any court while the child remains unborn, was not decided under the UCCJEA. Instead the Oklahoma court held that their *Children's Code* had no application to unborn children.

"home state" jurisdiction cannot attach to an unborn child. Nevertheless, these states have simultaneously found that the other provisions for establishing initial custody jurisdiction — "significant connection" jurisdiction; jurisdiction because of "declination of jurisdiction"; and "default" jurisdiction — *may* be applied to vest jurisdiction over unborn children. *See, Gullett v. Gullett,* 992 S.W.2d 866 (Ky.App. 1999); *Stewart v. Vulliet*, 888 N.E.2d 761 (Ind. 2008). Under this more thorough analysis of all four bases of initial custody jurisdiction, Mother fails in her heavy burden of establishing that West Virginia was without subject matter jurisdiction to establish initial custody of Hannah, as there exist jurisdictional nexi under the UCCJEA other than that of "home state" jurisdiction.

In accord with this more extensive analysis, the court of appeals pointed out in the case *sub judice* that the lack of home state jurisdiction does not compel the legal conclusion that West Virginia lacked subject matter jurisdiction over the judgments registered here. First, the court of appeals properly concluded that, because the West Virginia court clearly had subject matter jurisdiction over the parties' marriage itself, their West Virginia property, and their son, Andrew, bifurcation of proceedings must be avoided and the "one-family, one court" unified family court system adopted in both states should also be respected.

> **Though neither party suggests that the UCCJEA confers jurisdiction over fetuses (*citations*), logically any dissolution action involving minor children must necessarily determine custody of *all* children of the**

marriage, including those born after the initial filing [fn. 3: In West Virginia, see *Mitchell v. Mitchell*, where the appellate court instructed the trial court on remand to determine custody and support of a child with whom mother was pregnant during the pendency of the dissolution and when judgment was entered. 205 W.Va. 203, 211 at FN 8, 517 S.E.2d 300, 308 at FN 8 (W.Va.1999). Similarly, in Missouri, a petition must name each child of the marriage and must state whether the wife is then pregnant (§452.310.2), and the resultant decree must resolve the issue of custody in order to be deemed a final judgment (*In re Marriage of Coulter*, 759 S.W.2d, 642, 645 (Mo.App.E.D.)]. Respecting this imperative, even accepting that the present proceedings didn't "commence" as to Daughter until her birth five months after that initial filing, we nonetheless cannot construe the home state provisions of the UCCJEA to prescribe an impractical result of bifurcation or transfer of the case midway through the litigation [fn 4: Such a result also offends the "one family, one court" rationale behind the unified family court system adopted in both West Virginia and Missouri. W.Va. §51-2A; §487.010 RSMo.]. The UCCJEA is intended to *avoid* jurisdictional competition and conflict. *Al-Hawarey v. Al-Hawarey*, 388 S.W.3d 237, 245 (Mo.App.E.D.2012) (emphasis added). Consistent with this intent, our statutory construction should be

> **reasonable and logical and should avoid unreasonable or absurd results.** ***Cooling v. State Department of Social Services, Family Support Division,*** **446 S.W.3d 283, 288 (Mo.App.E.D.2014). The rational alternative, then, is that the home-state basis for jurisdiction under the UCCJEA is simply inapplicable to Daughter given the chronology of this case, and we must examine the other possibilities.**

Court of Appeals Opinion, pages 7-8 (emphasis supplied).

Where no other state has home state jurisdiction at the commencement of the proceedings, West Virginia Code §48–20–201(a)(2) could have conferred jurisdiction of Hannah by the West Virginia Court, if:

> **(A) The child and the child's parents, or the child and at least one parent or a person acting as a parent, have a significant connection with [West Virginia] other than mere physical presence; and**
>
> **(B) Substantial evidence is available in [West Virginia] concerning the child's care, protection, training and personal relationships.**

W. Va.Code § 48–20–201(a)(2). Because Hannah *had* been conceived, but was not yet born at the time of the commencement of the proceeding, it is not at all clear or obvious how the West Virginia courts would have interpreted its jurisdiction over Hannah under the "significant connection" test of Section 201(a)(2), if the court had been called upon to litigate that specific issue. Father can find no relevant precedent under West Virginia caselaw, so that this would therefore be a matter of first

impression in West Virginia. However, there was indeed a significant connection between Hannah and *both* parents at the time the divorce proceeding was filed (she was conceived in West Virginia and was living there *in utero*); and of course, substantial evidence was available at that time in West Virginia concerning her future care, protection, training and personal relationships. Regardless of the relative merit of this argument, however, Mother has wholly failed to establish that *Missouri* would have had any significant connections at the time the divorce was filed (when both parties were still residents of West Virginia). There is no evidence of record whatsoever to support such a finding.

Both the second and third bases for UCCJEA jurisdiction provide that West Virginia could have also acquired jurisdiction over Hannah if Missouri would have *declined* jurisdiction on the ground that West Virginia was the more appropriate forum.[7] It is undisputed, however, that Missouri did not decline to exercise jurisdiction at the time the divorce proceeding was filed in West Virginia, as Mother never asked either court to consider the matter (until 2013) or to confer with the other as contemplated under the UCCJEA's cooperation provisions. §452.730 & .735; W.Va. §48-20-110. And, as the court of appeals pointed out in the case *sub judice*, "[e]ven if Mother had raised the issue immediately after Hannah's birth, the St. Louis County court would have properly declined jurisdiction in that the parties'

[7] A child's physical presence is neither necessary nor sufficient to make a child custody determination. W.Va. §48-20-201(c); §452.740.3.

dissolution was already pending in West Virginia. §452.765; *Mitchell,* 517 S.E.2d at 308, FN 8." Court of Appeals Opinion, page 8. Accordingly, the court of appeals properly found that "[u]nder either scenario the second and third options fail to confer Missouri's authority or defeat West Virginia's jurisdiction over the initial custody determination as to Daughter within the parties' pending dissolution proceedings in Berkeley County. Thus by process of elimination, Daughter necessarily falls into the fourth category: no other state satisfied the criteria for jurisdiction under the preceding alternatives." *Id.* [emphasis supplied]; *see also, Gullett, supra*.

Mother has simply not satisfied her burden to convict the trial court of error and hold, as a matter of law, that the West Virginia Court did not have subject matter jurisdiction to determine custody of both children in its Initial Divorce Decree (and subsequently). At most, she has established that West Virginia was not the home state of the child at the commencement of the custody proceedings there. But she has failed to establish that West Virginia lacked subject matter jurisdiction under all provisions of the UCCJEA, including W. Va.Code §48–20–201(a)(2)(3) or (4).[8]

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[8] For the first time on appeal, Mother inserts a heading into the *argument* portion of her substitute brief (under her *first* point relied on), entitled: "B. The Trial Court Erred in Denying Kelly Blanchette's Motion to Modify the West Virginia Judgment's as They Did Possess Jurisdiction and Authority to Do So" [Appellant's Substitute Brief, p. 17]. This "heading" is for the first time included on appeal despite the fact that Mother's Notice of Appeal does not raise the trial court's dismissal of Mother's motion to modify as a ruling being appealed. Equally if

III. THE TRIAL COURT DID NOT ERR IN REGISTERING ALL THREE FOREIGN JUDGMENTS *BECAUSE,* EVEN IF THE WEST VIRGINIA COURT LACKED SUBJECT MATTER JURISDICTION TO ENTER A CUSTODY ORDER RELATING TO ONE CHILD OF THE MARRIAGE, THE REGISTERED JUDGMENTS WOULD NOT BE INVALIDATED IN THEIR ENTIRETY *IN THAT* THE WEST VIRGINIA COURT DID HAVE SUBJECT MATTER JURISDICTION TO ENTER ORDERS RELATING TO THE OTHER CHILD, FOR CHILD SUPPORT, AND FOR THE DIVISION OF THE PROPERTY AND DEBT OF THE PARTIES.

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not more importantly, Mother's Points Relied On themselves do not assign error to the trial court's dismissal of Mother's motion to modify. Issues not set out in the points relied on may not be raised in the appeal. *See, Pruellage v. De Seaton Corp., In re Marriage of Ulmanis*, and *Yates v. State*, *supra.* Instead they are considered to have been abandoned. *Pruellage* and *Kerr Const. Paving Co., Inc. v. Khazin*, *supra*. Moreover, despite the wording of heading "B," the actual argument contained thereunder does not logically or intelligibly even relate to the dismissal of Mother's motion to modify. Mother appears to argue here that West Virginia could have or should have *declined* its continuing exclusive jurisdiction and allowed Missouri to proceed to modify its judgments. However, that is an argument that should have been, or should be, made in West Virginia. It was not made there and West Virginia has been afforded no such opportunity to make any such determination, to-date.

Assuming, *arguendo*, that Mother could and did meet her heavy burden in establishing that West Virginia lacked subject matter jurisdiction to determine the custodial arrangements of Hannah, that would not *ipso facto* lead to the conclusion that the trial court erred in registering the three judgments. Out of caution, Father also suggests that it is well established that where a portion of a judgment is void, the remainder remains valid if the void portion is separable. *Treme v. St. Louis County,* 609 S.W.2d 706, 710 (Mo.App.E.D.1980), *citing*, *Kennedy v. Boden*, 231 S.W.2d 862, 865-866 (Mo.App. W.D. 1950) and *Poole v. Poole*, 287 S.W.2d 372, 374 (Mo.App. E.D.1946). Unless the void section is so contradictory with the remainder of the judgment as to render the entire judgment nugatory, the void section is entirely severable. *Treme, supra,* 609 S.W.2d at 710.

The registered judgments did not deal with the custody of Hannah alone. All three contained custody provisions regarding Andrew. All three contained child support provisions regarding both children. And the Initial Divorce Decree contained provisions regarding the division of property and debt.

The United States Constitution does not permit one state to refuse providing full faith and credit to a multi-faceted judgment simply because one portion of that judgment is subject to collateral attack on jurisdictional grounds. Judgments are registered for a variety of reasons including *enforcement* of such judgments in the registering state. Consequently, if this Court should hold that Mother has sustained her burden in establishing that the custody provisions relating to Hannah are void

(which Father disputes), such holding should not render *all* valid portions of the judgment void (relating to custody of Andrew, support and property). Instead, the void portion(s) of the registered judgment should simply be held unenforceable by Missouri courts in a subsequent enforcement proceeding.

This Court should not convict the trial court of error in granting *Mother's* petition for registration. At most, the custody provisions relating to Hannah may not be subject to enforcement in Missouri, should Mother subsequently succeed in proving that West Virginia lacked subject matter jurisdiction under the UCCJEA to adjudicate that one issue. *Treme, Kennedy,* and *Poole*, *supra.*

IV. THE TRIAL COURT DID NOT ERR IN REGISTERING THE SECOND WEST VIRGINIA MODIFICATION ORDER OF OCTOBER 2013 *BECAUSE* THE WEST VIRGINIA COURT DID HAVE PERSONAL JURISDICTION OVER MOTHER *IN THAT* MOTHER RECEIVED ADEQUATE AND REASONABLE NOTICE OF THE DATE OF THE HEARING.

It cannot be gainsaid that in a motion to modify custody, visitation and/or child support, like in every other adjudication, due process requires that a hearing on such a motion must be preceded by reasonable notice to the party whose rights are sought to be affected. *State ex rel. Hawks v. Lazaro,* 157 W.Va. 417, 440 (W.Va.1974); *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S.306, 314 (1950).

However, in the case at bar, Mother admits that she was personally served with process in Missouri on September 30, 2013, notifying her of the upcoming hearing on the motion to modify set for October 8, 2013. The return of service displays the hearing date and time upon the face of it. [Respondent's Supp. LF 60]. Unfortunately, Mother did not include the actual summons in the record on appeal, so there is no way to confirm or dispute whether the summons also displayed the hearing date. Nevertheless, Mother does not argue that she lacked notice of the hearing date, only that nine days was insufficient as a matter of law.[9]

Mother correctly points out that the West Virginia version of the UCCJEA provides that persons living outside the forum state can be given notice in a manner prescribed by the laws of West Virginia *or* by the law of the state in which the service is made. W.Va. Code 48-20-108. But then Mother wrongly argues, however, that under West Virginia Civil Procedure Rule 4(f), and under Missouri Supreme Court Rule 55.25, thirty days notice was required. Both rules are inapposite.

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[9] Issues not set out in the points relied on may not be raised in the appeal. *Pruellage v. De Seaton Corp., In re Marriage of Ulmanis*, & *Yates v. State*, *supra*. Instead they are considered to have been abandoned. *Pruellage & Kerr Const. Paving Co., Inc. v. Khazin*, *supra*. New or different issues may not be raised for the first time in a reply brief. *Coyne v. Coyne, supra*.

West Virginia Civil Procedure Rule 4(f) does provide a minimum notice period of thirty days for personal service outside the state for *initial proceedings* commenced by "filing a complaint with the court." *See,* West Virginia Civil Procedure Rule 3 [Appendix A-11]. However, modifications filed under W.Va. Code §48-11-105 are not "initial proceedings" filed by complaint, but instead are continuing proceedings filed by "motion." For motions, notices of hearing must be served "at least 9 days before the time set for hearing, if served by mail," or "at least 7 days before the time set for hearing, if served by hand delivery...." *See,* W.Va. Civil Procedure Rule 6(d) [Appendix A-17]. Responses to such motions shall be served "at least 4 days before the time set for hearing, if served by mail," or "at least 2 days before the time set for hearing, if served by hand delivery. . .." *Id.* Under these rules, Mother did receive timely notice of the October 8, 2013 hearing date. She then failed to timely respond and/or to appear.

On the other hand, Missouri Supreme Court Rule 55.25 is a *pleading* rule providing that all answers to *petitions* be filed within thirty (30) days. However, answers to *motions to modify* are not required under Missouri law and default judgments cannot therefore be rendered as a result of the failure to file a responsive pleading to a motion to modify. *Schwermer v. Schwermer*, 350 S.W.3d 460 (Mo.App.W.D. 2011). Rule 55.25 is also inapposite to Mother's point relied on.

The court of appeals here points out that although §452.747.2 does provide respondents with 30 days after the date of service to file an answer, "West Virginia's

enactment of the UCCJEA does not contain this procedural clarification." Court of Appeals Opinion, page 10. The court of appeals thereafter sets forth its own research on this issue of West Virginia law, to-wit:

> **West Virginia divorce actions are commenced by the filing of a petition. Family Court Rule 9(a). Those involving children must be accompanied by a child support enforcement form. *Id.* The summons must be served on the respondent within 20 days of the filing of the petition. Family Court Rule 9(b). The respondent has 20 days to file an answer. Family Court Rule 9(c) and Civil Rule 12. Respondents served outside the state have 30 days to appear and defend or be deemed in default. Civil Rule 4(f). Motion hearings require seven days' notice by personal service or nine days' notice by mail. Civil Rule 6(d). Various versions of West Virginia's modification statute (previously §48-2-15 and now §48-9-401) have required that custody modification be requested by motion or petition. See *Brittany S. v. Amos F.*, 753 S.E.2d 745 at FN 12 (W.Va.2012) (noting historical evolution of the statute's pleading requirement). Family Court Rule 50 currently requires a petition, and Family Court Rule 21(a) requires a hearing to be held within 45 days of the filing. But nothing in the foregoing identifies the applicable service rule or prescribes a specific timeframe for modifications. Even the state judiciary's *pro se* court forms**

> **fail to illuminate the matter: although the initial divorce answer instructions alert respondents to the 20-day deadline, the modification packet contains no answer form and identifies no notice period or deadline for a responsive pleading, stating only that the petition must be served on the opposing party before the hearing can be scheduled. Absent clear authority on the question of whether and which of the foregoing service rules apply to custody modifications in West Virginia, we cannot confidently conclude that Kelly's notice was non-compliant and will not, in this collateral attack, second-guess the Berkeley County court in that regard.**

Court of Appeals Opinion, p. 10, FN 6. Accordingly, the court of appeals concludes that:

> **West Virginia precedent instructs us simply to follow the fundamental principle that due process requires reasonable notice and the opportunity to be heard. *Brittany S. v. Amos F.*, 753 S.E.2d 745, 750 (W.Va.2012). For that inquiry, notice required by due process is fact-specific and will vary with the circumstances and conditions presented. *State v. Elliott*, 225 S.W.3d 423, 424 (Mo. 2007)."**

Court of Appeals Opinion, page 10.

Given that Mother *and* her attorney, Mr. Singer, had actual notice of the hearing date (by virtue of personal service and communications between the parties'

respective counsel) *and* that neither party sought or moved to continue or to postpone that known date, it is difficult to appreciate why the nine days notice admittedly provided was constitutionally infirm. Nine days is not insufficient time within which to request a continuance, even if done *pro se* by Mother. It should also be noted that West Virginia law further provides that its courts "may conduct any hearing, including an evidentiary hearing, telephonically or by videoconference . . .." Family Court Rule 18. The West Virginia Court duly noted at the October 8, 2013 hearing that "Ms. Blanchette had received actual notice of the hearing but failed to attend in person or via telephone." [*See,* Respondent's Supp.LF 1, Affidavit of Gregory A. Bailey, Esq.]. Further, in Appellant's Brief, Mother admits that her counsel, Mr. SInger, spoke to Father's counsel about the pending motions to modify in *both* states as early as September 16, 2013 [*See,* Appellant's Substitute Brief, page 26]. Again, the court of appeals' Opinion is both accurate and instructive.

> **Here, for the broader context, we recall that Kelly was no stranger to the forum. She was a West Virginia resident when the divorce action commenced, she appeared in person and by counsel at the original hearing, and she appeared telephonically and by counsel in the first modification. Although Kelly claims that she was unable to obtain local counsel on eight days' notice before the second modification hearing, she had ample opportunity within that time to arrange to participate in the hearing telephonically or in the very least to request a continuance. She**

> **did neither and simply elected not to appear at all. Additionally, Kelly could have moved to set aside the court's resultant order or she could have appealed it in West Virginia, but she didn't. Given these particular facts, we find that Kelly received reasonable notice and an opportunity to be heard sufficient to satisfy due process as required under West Virginia case law governing custody modifications. The trial court did not err in recognizing and registering the second modification.**

Court of Appeals Opinion, page 11.

Lastly, in her Substitute Brief, Mother for the first time attacks the Second Modification Judgment on the grounds that the West Virginia court failed to make certain findings (regarding the pending Missouri case and what is in the best interests of the children), and failed to appoint a GAL. As before, Mother failed to raise these alleged errors in her points relied on. Issues not set out in the points relied on may not be raised in the appeal. *See, Pruellage v. De Seaton Corp., In re Marriage of Ulmanis*, and *Yates v. State*, *supra.* Instead they are considered to have been abandoned. *Pruellage* and *Kerr Const. Paving Co., Inc. v. Khazin*, *supra*. Moreover, Mother also did not raise such issues in the trial court *or* in the court of appeals. Mother certainly cannot raise them for the first time in her Substitute Brief to this Court.

CONCLUSION

For all of the foregoing reasons, this appeal should be dismissed, or in the alternative, the judgement of the trial court should be affirmed.

Respectfully submitted,

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APPELLANT'S CERTIFICATIONS

Comes now the undersigned attorney for Appellant and hereby certifies:

(1) This brief complies with the provisions of Rule 55.03.

(2) This brief complies with the limitations contained in Rule 84.06(b).

(3) This brief, excluding the cover, this certificate, signature blocks, and appendix — contains 7,948 words.

(3) This brief is proportionately spaced (and not monospaced).

(4) This brief was prepared by WordPerfect X5 word processing.

(5) This brief has been served upon all opposing counsel via electronic service on *casenet* and by first-class U.S. Mail, postage prepaid, this 22nd day of July 2015, to:

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