IN THE MISSOURI SUPREME COURT

SC95053

KELLY J. BLANCHETTE,

APPELLANT

VS.

STEVEN M. BLANCHETTE,

RESPONDENT.

On Appeal from the Circuit Court of St. Louis County

State of Missouri

The Honorable John N. Borbonus III

Case No.: 13SL-DR05389-01

SUBSTITUTE BRIEF OF APPELLANT KELLY J. BLANCHETTE

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Jurisdictional Statement

This is a family court action for registration of a foreign state's judgment. (LF 8). The trial Court adjudged the registration of a West Virginia Divorce Judgment and two of its Modifications of such judgment. (LF 59). The Eastern District Court of Appeals has transferred this case to the Supreme Court of Missouri pursuant to Rule 83.02 and the Mo. Const. art. V, § 10.

Statement of Facts

The Initial Divorce

On February 8, 2005, Steven Blanchette filed a Petition for Divorce from Kelly Blanchette in Berkeley County, West Virginia (Supp LF 1). Kelly Blanchette and Steven Blanchette were married on March 1, 2004 (Supp LF 2). The grounds for the divorce were Mr. Blanchette's adultery, which was alleged by Ms. Blanchette and admitted by Mr. Blanchette (Supp LF 2). Two children were born to the marriage: Hannah Blanchette, born on July 21, 2005, and Andrew Blanchette, born on November 5, 2003 (Supp LF 2).

The Court found Ms. Blanchette should have primary custodial responsibility of the two children, subject to Mr. Blanchette's right to exercise custodial responsibility when he travels to Missouri at all reasonable times in the St. Louis area (Supp LF 3-4). The Court also ordered that the parties are to exercise joint important life decision making responsibility (Supp LF 4). Among other findings, the Judge ordered Mr. Blanchette to pay $1,500 per month in child support (Supp LF 4). The pregnant mother and child relocated to Missouri during the separation but before the Second Amended Final Divorce Order entered February 17, 2006. (Supp LF 13-14). Ms. Blanchette gave birth to Hanna on July 21, 2005 in St. Louis Missouri, she and her two children have lived in Missouri ever since.

First Modification

Mr. Blanchette moved for a Modification of Custodial Allocation in late 2008 in Berkeley County, West Virginia (Supp LF 13). Ms. Blanchette participated in the proceeding via telephone, while her counsel appeared in person. (Supp LF 13). The Court found exceptional circumstances existed that warranted modification of the custodial allocation. (Supp LF 14). The Court ordered that the children still reside primarily with Ms. Blanchette, except during the times Mr. Blanchette shall have custodial allocation during three separate one-week periods throughout the year. (Supp LF 15). The Court reduced Mr. Blanchette's child support obligation from $1,500 down to $1,350 "to cover the extraordinary travel expenses..." (Supp LF 15).

Second Modification

Mr. Blanchette again petitioned the Berkeley County, West Virginia Court for a Modification of Custodial Allocation and Child Support in late 2013 (Supp LF 20). Mr. Blanchette served Ms. Blanchette, who still resided in St. Louis County, on September 30, 2013 (Supp LF 19-20). Although Ms. Blanchette used her best efforts to find representation on the East Coast in only eight days, she was unable to get an attorney to represent her at the hearing (Supp LF 24). She hired an attorney in West Virginia, but counsel was unable to come to the hearing in such short time (Supp LF 24). Ms. Blanchette's attorney, the undersigned, who was representing her in Missouri had several discussions with Gregory Bailey, Mr. Blanchette's counsel in West Virginia. However, at no point in time did the undersigned accept service on behalf of Ms. Blanchette (Supp LF 25).

The hearing occurred on October 8, 2013, only eight days after Ms. Blanchette was served (Supp LF 19-20). While Mr. Blanchette and his attorneys were present at the hearing, Ms. Blanchette was absent from the proceeding and was not represented in any capacity (Supp LF 20).

The West Virginia Court ordered for Steven Blanchette to have custody of the children for a six week continuous period during summer break and for the children to have communication with their father through Skype every Sunday at 8:00 p.m. and to fly unaccompanied or have Ms. Blanchette pay half of the accompanied travel expenses (Supp LF 21).

The Current Action

On September 3, 2013, Ms. Blanchette filed her Petition for Registration of Foreign Judgment and Motion to Modify the Divorce Judgment in St. Louis County. (LF 8). Appellant asked the trial court to register the initial divorce decree and first modification, but not the second modification because Ms. Blanchette did not receive proper notice (LF 11). Further, Ms. Blanchette asked the trial court to modify the West Virginia Judgments which she was given due notice and participated in the proceedings (LF 11).[1]

[1] The trial court originally dismissed the petition because the West Virginia Judgments were not authenticated, but Ms. Blanchette refiled her petition with authenticated judgments. (Record)

On August 11, 2014, the Missouri Trial Court, the Honorable John N. Borbonus III, ordered all of the West Virginia Judgments, including the Initial Divorce Judgment and two Modified Judgments, to be registered in Missouri (LF 61). The Trial Court stated it lacked jurisdiction to modify the West Virginia courts pursuant to the UCCJEA, so it declined to modify the foreign judgments (LF 61). Ms. Blanchette filed a Motion for Reconsideration and for Findings of Fact and Conclusions of law on August 14, 2014 (LF 62). After briefing by Mr. and Ms. Blanchette, the Trial Court dismissed Ms. Blanchette's motion because the court lacked jurisdiction "as 30 days have passed since the judgment" (LF 69). However, after both parties asked the Court to revisit Ms. Blanchette's motion for reconsideration, the Court heard the motion and denied it on the merits (LF 70). Ms. Blanchette appeals (LF 71).

The parties briefed and argued the case before the Missouri Court of Appeals Eastern District and were referred to the Supreme Court of Missouri in the Eastern District's Opinion because of the importance and general interest of the issues raised in the case at hand.

Points Relied On

I. The Trial Court Erred in Registering the Initial Custody Determination and the First and Second Modified Custody Judgments from the West Virginia Court as to Hannah Blanchette Because West Virginia Lacked Subject Matter Jurisdiction Under the UCCJEA in that She Was Born and Always Lived in Missouri, Making Her Home State Missouri.

W.V. Code 48-20-201(a)(1)

W.V. Code 48-20-102(b)

In re Unborn Child of Starks, 19 P.3d 342 (Ok. 2001)

Nestle v. Johns, 452 S.W.3d 753 (Mo. App. E.D. 2015)

Payne v. Weker, 917 S.W.3d 201 (Mo. App. W.D. 1996)

Waltenburg v. Waltenburg, 270 S.W.3d 308 (Tex. App. 2008)

II. The Trial Court Erred in Registering the Second Modified Custody Judgment that the West Virginia Court Entered in October of 2013 Because the Judgment Should Not Have Received Full Faith and Credit Under Article IV of the United States Constitution Because Ms. Blanchette Did Not Receive Proper Notice of the Proceedings By Being Served Only Eight Days Prior To The Custody Modification Proceeding.

W.V. S.C. Rule 4(f)

M.O. S.C. Rule 74.05

Jennings v. Klemme, 620 S.W.2d 403 (Mo. App. S.D. 1981)

Ponder v. Aamco Automatic Transmission, Inc., 536 S.W.2d 888 (Mo. App. W.D. 1976)

Standard of Review

The proper standard of review for both issues of this appeal is de novo. A trial court's decision to register a foreign judgment is a legal conclusion that is reviewed de novo. L & L Wholesale, Inc., v. Gibbens, 208 S.W.3d 74, 78-79 (Mo. App. S.D. 2009). Additionally, the question as to whether Missouri has jurisdiction to determine child custody issues in accordance with the UCCJEA is reviewed de novo. Al-Hawarey v. Al-Hawarey, 388 S.W.3d 237, 241 (Mo. App. E.D. 2012). When the standard of review is de novo, the reviewing court gives "no deference to the circuit court's determination of law." Thomas v. Brown & Williamson Tobacco Corp., 207 S.W.3d 76, 111 (Mo. App. W.D. 2006).

Argument

I. The Trial Court Erred in Registering the Initial Custody Determination and the First and Second Modified Custody Judgments from the West Virginia Court as to Hannah Blanchette Because West Virginia Lacked Subject Matter Jurisdiction Under the UCCJEA in that She Was Born and Always Lived in Missouri, Making Her Home State Missouri.

Under the Uniform Child Custody Jurisdiction and Enforcement Act, (UCCJEA) adopted by both Missouri and West Virginia,[2] a state only has jurisdiction to make an initial child-custody determination if one of four paragraphs is met. W.V. Code 48-20-201(a)(1-4).[3] The first and most common method of obtaining jurisdiction is Section 48-20-201(a)(1), stating:

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[2] Missouri adopted the UCCJEA in 2009, and is codified in Sections 452.700 through 452.930. West Virginia adopted the UCCJEA in 2001, and is codified in Sections 48-20-101 through 48-20-404.

[3] Methods 2-4, which are not present in the current matter, are:

> (2) a court of another State does not have jurisdiction under paragraph (1), 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 207 or 208, and

> this State 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 this State but a parent or person acting as a parent continues to live in this state.

W.V. Code 48-20-201(a)(1). The UCCJEA defines commencement as the "filing of the first pleading in a proceeding." W.V. § 48-20-102(e). "Subsection (a) is the exclusive jurisdictional basis for making a child-custody determination by a court of this State." W.V. Code 48-20-201(b). Here, Hannah being born greater than five months after Mr. Blanchette's filing of the original petition prevents West Virginia from having jurisdiction over her.

> (3) all courts have jurisdiction under paragraph (1) or (2) have declined to exercise jurisdiction on the ground that a court of this State is the more appropriate forum to determine the custody of the child under Section 207 or 208; or
>
> (4) no court of any other State would have jurisdiction under the criteria specified in paragraph (1), (2) or (3).

W.V. Code 48-20-201(a)(2-4).

A. West Virginia does not have jurisdiction under the UCCJEA because Hannah was born in Missouri after the filing of the initial divorce petition.

The trial court erred in finding West Virginia had jurisdiction over the initial divorce and subsequent modifications so far as they apply to Hannah.

The plain language of the UCCJEA must be interpreted to give priority to home state jurisdiction and does not attach until a child's birth in the state in which the child was born regardless of pending proceedings in another state. "The primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute." Gash v. Lafayette County, 245 S.W.3d 229, 232 (Mo. banc 2008) (citation omitted) (emphasis added).

There are two provisions of the UCCJEA that make clear it does not apply to unborn children. First, as described earlier, jurisdiction is conferred pursuant to W.V. Code 48-20-201(a)(1) only if:

> this State 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 this State but a parent or person acting as a parent continues to live in this state.

In the case at hand when the petition was filed, it was impossible to determine the child's home state because the child was not born yet and home state jurisdiction could not attach at that time because the court does not have jurisdiction over fetuses. Further the

court and Mr. Blanchette granted Ms. Blanchette's move to Missouri during these proceedings. The issue of when home state attaches is dealt with in a Texas Appellate case which stated, "Home state determination could not be made at the commencement of a child-custody proceeding when the child was not yet born and that the state in which the child was later born would become his home state at the time of his birth." Arnold v. Price, 365 S.W.3d 455, 461 (Tex. App. 2011).

Further, by the definition of "child" under the Act, the second provision makes clear that the UCCJEA cannot apply to unborn children. The UCCJEA defines "child" as "an individual who has not attained 18 years of age." W.V. Code 48-20-102(b). An unborn child is not an individual, as he or she has not gained any years alive. See Waltenburg v. Waltenburg, 270 S.W.3d 308, 316 (Tex. App. 2008) (finding "the plain language of the UCCJEA's definition of a child as 'an individual who has not attained 18 years of age' … does not include an unborn child").

Indeed, other courts have also found the UCCJEA does not apply to unborn children. In Arkansas Department of Human Services v. Cox, the Court concluded the UCCJEA did not apply to unborn children. 349 Ark. 205, 214 (Ark. 2002); see also Anselmo v. Anselmo, 2001 WL 358851 (Conn. Super.Ct. Mar. 28, 2001) (mem. op., not designated for publication) ("the definition section of the [UCCJEA] apparently limits the application of the law to situations following the birth of the child"). Finally, after examining the plain definitions of child under the UCCJEA, the Supreme Court of Oklahoma similarly found the Act does not apply to unborn children. In re Unborn Child of Starks, 19 P.3d 342, 347 (Ok. 2001).

Here, Hannah being born in Missouri after the commencement of the initial divorce proceeding precludes West Virginia's jurisdiction. Mr. Blanchette commenced the divorce proceeding by filing a petition for divorce on February 8, 2005. (Supp LF 1). Hannah was born on July 21, 2005. (Supp LF 2). As she was born after the commencement of the proceeding, West Virginia lacked and continues to lack jurisdiction over Hannah under the UCCJEA.

It should also be noted that although Ms. Blanchette participated in the original divorce proceeding in West Virginia, and a subsequent modification proceeding in 2008, Subject Matter Jurisdiction under the UCCJEA cannot be waived. As the West Virginia Supreme Court succinctly stated, "[s]ubject matter jurisdiction under the Uniform Child Custody Jurisdiction and Enforcement Act, West Virginia Code § 48-20-101, *et seq.*, cannot be conferred by consent, waiver, or estoppel." Rosen v. Rosen, 222 W.Va. 402, 404 (2008). Thus, despite Ms. Blanchette's participation the previous proceedings in West Virginia, the foreign court still lacks jurisdiction over Hannah because home state jurisdiction cannot be waived.

In addition, the West Virginia Supreme Court stated, "Where a foreign court lacks jurisdiction under the UCCJEA, the full faith and credit doctrine will not be applied." *Id*. at 408. Missouri likewise points out "When a judgment has been rendered without jurisdiction or authority, the judgment must be reversed regardless of the manner it is brought to the court's attention." Ruestman v. Ruestman, 111 S.W.3d 464, 477 (Mo. App. S.D. 2003). Not only is the judgment void, collateral attacks are permitted at any time. Typically, collateral attacks on final judgments are also impermissible, however the

rule prohibiting such collateral attacks does not apply when the original judgment is void. Nestle v. Johns, 452 S.W. 3d 753 (Mo. App. E.D. 2015). A judgment that is void is not entitled to any respect and may be impeached at any time in any proceeding in where enforcement is being sought or its validity is questioned. Id. at 757.

Even if West Virginia had jurisdiction over the divorce it could not have exclusive continuing jurisdiction over custody of a child whose home state is Missouri. The Missouri Court could retain jurisdiction over the child without involving the entire divorce. "One state may have jurisdiction over custody even if the divorce is decided by another state's courts." In re Dean, 393 S.W.3d 741, 747 (Tex. 2012). Missouri retains jurisdiction over custody until a finding by the Missouri Court that it is an inconvenient forum, discussing the statutorily required relevant factors. The failure to detail these findings of statutorily required factors is reversible error and does not allow the parties to know upon what information the Court relied and making it impossible for an appellate court to review these factors. Jett v. Jett, 2015 WL 3534148 (Mo. App. S.D. June 5, 2015).

Therefore, since the UCCJEA does not apply to unborn children, the West Virginia Court lacked jurisdiction over Hannah because she was born in Missouri after the commencement of the initial divorce proceeding. Further, the statutorily required findings of the relevant factors were not made by the Missouri Court to decline jurisdiction and therefore the West Virginia custody judgment must be void and may be collaterally attacked and a new order should be issued by the Missouri Court particularly if it is in the best interest of the minor children.

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.

Missouri has a significant interest in the health, safety and welfare of children residing within its boundaries. The state uses its resources to ensure that these minor children become useful members of society and do not become a burden upon the system squandering precious resources. Missouri's interest is particularly strong when it is the home state of a child, where she was born, has always lived, attends school and is treated by local doctors. "Jurisdiction exists [in this context] only if it is in the child's interest, not merely the interest or convenience of the feuding parties, to determine custody in a particular state. Payne v. Weker, 917 S.W.2d 201, 204 (Mo. App. W.D. 1996) (quoting Timmings v. Timmings, 628 S.W.2d 724, 726-27 (Mo App. E.D. 1992)).

The statutory structure of the UCCJEA prioritizes the four ways in which a court may obtain jurisdiction placing home state as the first and primary factor. The UCCJEA differs from its predecessor the UCCJA because of this prioritization. The UCCJEA is designed to make jurisdiction more straight forward by prioritizing to the home state jurisdiction. Powell v. Stover, 165 S.W.3d 322, 326 (Tex. 2005). Previously under the UCCJA a court would balance and weigh factors under the four paragraphs to come to a conclusion as to who should have jurisdiction. However, this created situations where multiple states had or could claim they had concurrent jurisdiction by balancing and weighing the factors differently. With the UCCJEA, the legislature sought to avoid jurisdictional competition and conflict that results when courts in different states

determine jurisdiction based on subjective factors. Id. The UCCJEA seeks to do away with this inconsistency in jurisdictional disputes by placing them in order of importance making home state number one.

This prioritization and top ranking of home state is indicative of the legislator's intent to make this the most important determining factor in jurisdiction over custody and if a home state can be found it must be used. If the child did not exist as a person at the time of the filing of the action jurisdiction cannot attach at that time, home state can only be determined once the child is born and that is the earliest time in which jurisdiction can attach. Jurisdiction attaches at birth and gives the state the child is born in the right to protect the child through granting of jurisdiction over custody and support.

Either Missouri or West Virginia may decline to exercise jurisdiction to make a child custody determination, if the court determines that is an inconvenient forum under the circumstances, and that a court of another state is a more appropriate forum. R.S.Mo § 452.770 and W.V. Code 48-20-207. However, before determining whether this court or West Virginia is an inconvenient forum, either court shall consider whether it is appropriate that a court of another state exercise jurisdiction and in order to do so, the court shall allow the parties to submit information and shall consider all relevant factors. R.S.Mo § 452.770.2 and W.V. Code 48-20-207(b). The most relevant factors that both courts assume under are the following:

(1) Whether domestic violence has occurred and is likely to continue in the future and which state could best protect the parties and the child;

(2) The length of time the child has resided out of state;

(3) The distance between the court of this state and the court of the state that would assume jurisdiction;

(4) The relative financial circumstances of the parties;

(5) Any agreement of the parties as to which state should assume jurisdiction;

(7) The ability of the court of each state to decide the issue expeditiously and the procedures necessary to present evidence; and

(8) The familiarity of the court of each state with the facts and issues of the pending litigation.

R.S.Mo § 452.770.2 and W.V. Code 48-20-207(b).

However, under the UCCJEA, a court may decline its jurisdiction only after the court considers certain factors. Watson v. Watson, 272 Neb. 647 (Neb. 2006) (concluded that the UCCJEA required a court to allow the parties to submit information and to consider all relevant factors before determining whether it is an inconvenient forum). Declining jurisdiction is different than denying jurisdiction exists. Denying that jurisdiction exists means that the Court never had jurisdiction to begin with. Here Missouri clearly has jurisdiction as Hannah's home state and therefore must consider the relevant factors.

The relevant factors to be considered not only include those in the statute, but also who has a significant interest in the child's health, safety and welfare. As the West Virginia Supreme Court has pointed out previously under the UCCJA, similar to the UCCJEA in that the best interest of the child must be served by the Act which "is premised on the theory that the best interest of a child is served by limiting jurisdiction to

modify a child custody decree to the court which has the maximum amount of evidence regarding the child's present and future welfare." State ex rel. Conforti v. Wilson, 203 W. Va. 21 (W.Va. 1998).

Missouri and West Virginia use the same approach to jurisdiction placing the child in the state where the maximum amount of evidence is available. "The interest of the child is served when the forum has optimum access to relevant evidence about the child and family. There must be maximum rather than minimum contact with the state." In re Marriage of Dooley, 15 S.W.3d 747 (Mo. App. S.D. 2000) (quoting State ex rel. Laws v. Higgins, 734 S.W.3d 274, 278 (Mo. App. S.D. 1987)). An example, Missouri courts use is Payne v. Weker. In Payne v. Weker, the parties' original divorce proceeding had taken place in Missouri. 917 S.W.3d 201 (Mo. App. W.D. 1996). Soon thereafter, Mother and child moved to Maryland when child was three years old. Id. The father filed a motion to modify custody, and the trial court dismissed the motion finding that it was in the best interest of the child for Maryland to assume jurisdiction. Id. at 203. The court upheld the trial court's finding stating that the child's greater contacts were with Maryland in that she attended school there, had established relationships, was involved in activities, and her medical records were located there. Id. at 204-205.

Here the children have lived in Missouri for more than eight years. One child has lived in the state since the age of two and the other child was born within the state and has never lived elsewhere. The children attend school, tutoring, activities, and doctor's appointments exclusively in Missouri where they reside. Clearly the maximum amount of evidence is in Missouri. Missouri is the most convenient forum despite the fact that each

state may claim home state for one child. As such Missouri has the strongest interest in the custody and support of these children. If the Court in West Virginia and Missouri genuinely examine the statutorily relevant factors they must conclude West Virginia is an inconvenient forum and Missouri is the most convenient forum. If one state must relinquish jurisdiction as they both have home state of a child it should be the state which has the least information and hence the lesser interest in the care and custody of these children.

While it is preferable to have one judge oversee all custody matters from beginning to end so that they are familiar with the case and the family, providing a more informed decision on custody and support this is not absolute. Often times a case is transferred when judges retire or are reassigned or the parties move and actions are moved to new more convenient forums. What is paramount is the best interest of the child and this should not be lost by ignoring all the statutorily required factors but must be the goal of these factors honestly and fairly evaluated coming to a meaningful conclusion that supports the health safety and welfare of these minor children who are residing in Missouri.

II. The Trial Court Erred in Registering the Second Modified Custody Judgment that the West Virginia Court Entered in October of 2013 Because the Judgment Should Not Have Received Full Faith and Credit Under Article IV of the United States Constitution Because Ms. Blanchette Did Not Receive Proper Notice of the Proceedings By Being Served Only Eight Days Prior To The Custody Modification Proceeding.

Under Article IV, Section 1 of the United States Constitution, Missouri Courts may "give full faith and credit to the judgments of sister states unless it can be shown that there was (1) lack of jurisdiction over the subject matter, (2) a failure to give due notice, or (3) fraud in the concoction of the judgment." Jennings v. Klemme, 620 S.W.2d 403, 406 (Mo. App. S.D. 1981) (citation omitted) (emphasis added). The trial court erred in registering the Second Modification because (1) Ms. Blanchette being notified of the hearing only eight days prior to the hearing deprives her of due notice, and (2) any information provided to Ms. Blanchette's Missouri attorney regarding the West Virginia proceeding lacked the necessary notice pursuant to the state statutes.

A. Ms. Blanchette being served only eight days prior to the proceeding is not sufficient notice under either Missouri or West Virginia Law, so it does not constitute Due Notice under the UCCJEA.

The UCCJEA demands that persons living outside of the forum state can be given notice in two ways: (1) in a manner prescribed by the law of this State for service of process or (2) by the law of the State in which the service is made." W.V. Code 48-20-

108. "Notice must be given in a manner reasonably calculated to give actual notice but may be by publication if other means are not effective." Id.

The West Virginia Supreme Court, the forum state in the 2013 divorce modification proceeding, has stated "[n]otice contemplates meaningful notice which affords an opportunity to prepare a defense and to be heard upon the merits." State ex rel. Hawks v. Lazaro, 157 W.Va. 417, 440 (W.Va. 1974); Mullane v. Central Hannover Bank & Trust Co., 339 U.S. 306, 314 (1950) ("[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections"). No opportunity to prepare a defense is afforded with eight days' notice from service to default hearing in a state half a continent away. Under West Virginia Law, a person living out of state may be personally served pursuant to Rule 4(f). In those cases, the summons "shall notify the defendant that the defendant must appear and defend within 30 days after service, otherwise judgment by default will be rendered against the defendant at any time thereafter." W.V. S.C. Rule 4(f). This action to modify required service such as an original proceeding would and required a response such as an original proceeding would, to serve someone and then to hold a hearing before their time to respond has expired cannot be seen as an opportunity to defend.

Ms. Blanchette was personally served on September 30, 2013 in St. Louis County, for the hearing that occurred on October 8th, 2014 in West Virginia. (Supp LF 19-20). Ms. Blanchette was given only eight days and falls well short of the thirty days required

by West Virginia Rules. W.V. S.C. Rule 4(f). No statute in either state that Ms. Blanchette is aware of allows a party to default another party before they have had a meaningful opportunity to respond and defend and particularly disfavors default judgments as they do not represent the interest of all the parties. Here the children were given no representation in the modifications in which their rights were affected.

However, Ms. Blanchette still could have been properly served if Mr. Blanchette complied with Missouri Law, or the law of the state was service was made. According to Missouri Supreme Court Rule 55.25, "[a] defendant shall file an answer within thirty days after the service of the summons and petition…" If the "party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules … a judgment may be entered against the defaulting party." MO S.C. Rule 74.05. Again, the eight days given to Ms. Blanchette to defend herself falls well below the thirty days that is required in Missouri and notice of hearing cannot terminate a party's time to respond or defend.

Indeed, this case demonstrates why the thirty days required in Missouri and West Virginia to defend a civil action is essential for an out-of-state litigant such as Ms. Blanchette. Ms. Blanchette, who lived in Missouri, had only just over a week to find and pay an attorney to defend her in West Virginia, approximately 600 miles away. Ms. Blanchette found an attorney, made a payment, but the attorney was still unable to make it in time to the October 8th hearing. (Supp LF 24). Further upon her demand to have the West Virginia judgment set aside she was notified it would not be possible. The eight days simply was not enough time for Ms. Blanchette to mount a defense in a state half a

continent away which lowered her child support payment by $403. Instead of being given "an opportunity to prepare and be heard on the merits," Ms. Blanchette was given an insufficient amount of time to properly defend herself, amounting to a violation of her Right to Due Process of Law. State ex rel. Hawks, 157 W.Va. at 440. Therefore, as Ms. Blanchette was not granted due notice pursuant to the UCCJEA, the trial court erred in registering the second modified judgment because it violated the Full Faith and Credit Clause of the United States Constitution.

It is important to note that the shortest deadline to respond to a pleading Ms. Blanchette is aware of is 20 days unless shortened by the Court, Ms. Blanchette was not even afforded this amount of time to hire an attorney let alone respond. In the initial custody matter she was given due notice and was able to retain an attorney in time, in the first modification again she was given due notice and was able to hire an attorney in time, here she was not given meaningful and due notice and could not hire an attorney in time. Meaningful and due notice would enable her to retain an attorney which is her right as a matter of law and a court cannot force her to proceed on her own behalf without giving her time to retain counsel. She cannot be forced to act on her own behalf with the court which may potentially prejudice her without the right to retain the counsel of an attorney.

B. Mr. Blanchette's West Virginia attorney discussing the Matter with Ms. Blanchette's Missouri attorney does not constitute notice that satisfies the Due Process Clause of the Fourteenth Amendment.

As described earlier, according to the UCCJEA, notice can be given pursuant to the manner prescribed by the law of this State for service of process or by the law of the state in which the service is made. W.V. Code 48-20-108(a).

Both Missouri and West Virginia require the notice to be given pursuant to statute, and any service other is inconsequential. In Ponder v. Aamco Automatic Transmission, Inc., the plaintiff Ponder attempted to serve the Defendant, Aamco Transmissions, Inc. by serving a Manager of Aamco Transmission Corporation, which was based in Pennsylvania. 536 S.W.2d 888, 889-90 (Mo. App. W.D. 1976). In Ponder, Aamco may have had actual notice because "the attorney for the [plaintiff] notified the Pennsylvania counsel of the corporate defendant that [plaintiff] had been served with process as manager of Aamco." Id. at 892-93 Despite the fact the counsel of the corporate defendant may have had actual notice, the court reiterated that "[a]ctual notice given in any manner other than as prescribed by the service statute is not sufficient." *Id.* (emphasis added); See also State ex. Rel. Northwest Arkansas Produce Co., Inc. v. Gaertner, 573 S.W.2d 391, 396 (Mo. App. E.D. 1978).

Similarly, West Virginia does not permit any notice other than what is specified in its Rules of Civil Procedure. Types of service permitted in West Virginia are detailed in their Rules of Civil Procedure 4-6. While there are several different ways to serve someone, merely notifying a known associate is not one of them.

Here, Gregory Bailey notifying Ms. Blanchette's attorney is not sufficient notice under Missouri or West Virginia Law. On September 16, 2013, the undersigned and Mr. Bailey spoke about Ms. Blanchette's action in St. Louis County Court. (Supp LF 25).

However, anything the undersigned may have been aware of does not constitute sufficient notice because it did not comply with either the Missouri or West Virginia notice statutes.

Thus, the Trial Court erred in registering the Second Modification because it should not have received Full Faith and Credit because Ms. Blanchette was not given Due Notice of the West Virginia proceeding. The West Virginia Court in its ruling lacks many necessary findings required to be made for any modification proceeding. It does not note any pending proceedings involving the minor child in another state despite their knowledge of the same despite Mr. Blanchette's and his West Virginia counsel's knowledge of the same nor does it make any findings of facts and conclusions of law regarding the changes to the Order being in best interest of the minor children. The West Virginia Court did not consider that the children were interested parties whose rights should have been protected even if mother had not appeared. This could have been done through appointment of a guardian ad litem to protect the interest of the children but the children's interest were not considered in the second West Virginia modification only the interests of Mr. Blanchette. Finally, a lack of subject matter jurisdiction as discussed above would also make the 2nd modified West Virginia Judgment void and therefore not given full faith and credit.

Conclusion

The Trial Court erred in registering all three West Virginia divorce judgments because West Virginia never had jurisdiction over Hannah. The UCCJEA jurisdiction only applies to children who are born and not unborn children. Once born jurisdiction

can attach pursuant to the UCCJEA and also the definition of home state. Thus, the Trial Court's judgment as to Hannah should be reversed and it should find Missouri has jurisdiction to determine her custody matters or in the alternative to modify the West Virginia Order as it applies to her and if it declines jurisdiction must make statutorily required findings in order to decline jurisdiction.

Further, the Trial Court erred in registering the second modified judgment because Ms. Blanchette did not receive proper notice, constituting a violation of her Fourteenth Amendment Right to Due Process. The Trial Court should not have given the foreign judgment Full Faith and Credit because she was not given due notice which prevented her from being able to retain counsel half a continent away and the judgment lacked subject matter jurisdiction. Finally, the Trial Court erred in not modifying the West Virginia judgment as it has jurisdiction over Missouri children. The Trial Court's judgment should be reversed and be ordered to withdraw the second modification registration and make appropriate modifications regarding custody and support of Missouri Children.

Respectfully Submitted,

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Certificate of Compliance

Appellant states and certifies to this Court that her brief complies with Special Rule 360, Rule 55.03 and Rule 84.06(b) and 84.06(c). Appellant's Substitute brief does not exceed 31,000 words or 2,200 lines of text if the brief uses a monospaced face pursuant to Rule 84.06(b).

Appellant's Substitute brief includes 6378 words and 603 lines, which are both below the allotted limit, all words contained in the brief except the cover, certificate of service, certificate required by Rule 84.06(c), signature block and appendix are counted toward the word and line limitations.

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