

TABLE OF CONTENTS

TABLE OF CONTENTS	1
TABLE OF AUTHORITIES.....	3
POINTS RELIED ON	7
JURISDICTIONAL STATEMENT	9
STATEMENT OF FACTS.....	12
Relator’s child support history	12
Respondent’s Motion to Modify	12
The Affidavit of Doug Nelson.....	13
The Code of State Regulations	14
ARGUMENT.....	15
I. [Respondent’s actions violate Mo. Rev. Stat. § 511.350 & the Missouri Constitution]	15
A. Standard of Review	15
B. Facts	16
C. Legal Analysis.....	17
D. Conclusion	24
II. [The Respondent’s administrative regulations are unconstitutional]	25
A. Standard of Review	25
B. Facts	26
C. Legal Analysis.....	27

CONCLUSION 33
CERTIFICATION UNDER RULES 84.05 & 84.06 34
CERTIFICATE OF SERVICE..... 34

TABLE OF AUTHORITIES

Cases

<i>Board of Educ. Of City of St. Louis v. State</i> , 47 S.W.3d 366 (Mo. 2001).....	31
<i>Bodenhausen v. Missouri Bd. of Registration of Healing Arts</i> , 900 S.W.2d 621, 622 (Mo. 1995).....	31
<i>Chastain v. Chastain</i> , 932 S.W.2d 396 (Mo. 1996)	passim
<i>City of Springfield v. Sprint Spectrum, L.P.</i> , 203 S.W.3d 177 (Mo. 2006).....	27
<i>Civilian Personnel Div. v. Board of Police Com’rs of City of St. Louis</i> , 914 S.W.2d 23 (Mo. Ct. App. 1995).	27
<i>Costello v. Miranda</i> , 137 S.W.3d 498 (Mo. Ct. App. 2004).....	30
<i>Dye v. Division of Child Support Enforcement</i> , 811 S.W.2d 355 (Mo. 1991).....	18
<i>Edwards v. St. Louis County</i> , 429 S.W.2d 718, 722 (Mo. 1968)	21
<i>Harding v. Harding</i> , 826 S.W.2d 404 (Mo. Ct. App. 1992)	30
<i>In re Marriage of Manning</i> , 871 S.W.2d 109 (Mo. Ct. App. 1994).....	30
<i>Johnson v. Labor and Industrial Relationship Comm’n</i> , 591 S.W.2d 241, 244 (Mo. Ct. App. 1979)	32
<i>MacDonald v. Minton</i> , 142 S.W.3d 247 (Mo. Ct. App. 2004).....	31
<i>McCandless-Glimcher v. Glimcher</i> , 73 S.W.3d 68 (Mo. Ct. App. 2002).....	30
<i>Missouri Coalition for Environment v. Joint Committee on Administrative Rules</i> , 948 S.W.2d 125, 133-34 (Mo. 1997).....	27

<i>Missouri Coalition for the Environment v. Joint Committee on Administrative Rules</i> , 948 S.W.2d 125 (Mo. 1997).....	17
<i>Mitchell Engineering Co v. Summit Realty Co, Inc.</i> , 647 S.W.2d 130, 141 (Mo. Ct. App. 1982).....	23
<i>Murray v. Missouri Hwy & Transp. Comm’n</i> , 37 S.W.3d 228, 234 (Mo. 2001).....	18, 28
<i>Pharmflex, Inc. v. Division of Employment Security</i> , 964 S.W.2d 825 (Mo. Ct. App. 1997).....	32
<i>Searcy v. Searcy</i> , 85 S.W.3d 95 (Mo. Ct. App. 2002).....	30
<i>Shiflett v. Shiflett</i> , 954 S.W.2d 489 (Mo. Ct. App. 1997).....	30
<i>State ex rel Mississippi Lime Co. v. Missouri Air Conservation Commission</i> , 159 S.W.3d 376 (Mo. Ct. App. 2005)	25
<i>State ex rel. Eggers v. Enright</i> , 609 S.W.2d 381, 384 (Mo. 1980)	21
<i>State ex rel. Kinder v. McShane</i> , 87 S.W.3d 256 (Mo. 2002).....	15
<i>State ex rel. Lebanon School Dist., R-III v. Winfrey</i> , 183 S.W.3d 232 (Mo. 2006).....	15
<i>State ex rel. Noranda Aluminum, Inc. v. Rains</i> , 706 S.W.2d 861 (Mo. 1986).....	9, 11
<i>State Tax Comm’n v. Admin Hearing Comm’n</i> , 641 S.W.2d 69, 75 (Mo. 1982).....	25
<i>Steeve v. Kansas City Southern Ry, Co.</i> , 175 S.W. 177, 181 (Mo. 1915).....	23
<i>United Pharmacal Co. of Mo., Inc. v. Missouri Bd. of Pharmacy</i> , 208 S.W.3d 907, 909 (Mo. 2006).....	20
<i>Wolff Shoe Co. v. Director of Rev.</i> , 762 S.W.2d 29, 31 (Mo. 1988).....	20

Regulations

Mo. Rev. Stat. § 452.340 passim

Mo. Rev. Stat. § 452.370 29

Mo. Rev. Stat. § 452.400 22

Mo. Rev. Stat. § 454.425 28

Mo. Rev. Stat. § 454.496 passim

Mo. Rev. Stat. § 511.350 passim

Mo. Rev. Stat. § 530.010 9

Mo. Rev. Stat. § 536.031 14

9

Rule 88.01 30

12

13 CSR 30-5.010 14, 30, 31

13 CSR 30-5.020 7, 14, 19

13 CSR 30-7 26

13

Fiscal notes for §511.350 22

14

Mo. Const. Art. II § 1 7, 15, 17, 18

Mo. Const. Art. III, § 40 8, 25, 27

Mo. Const. Art. III, §40 27

Mo. Const. Art. IV, § 37..... 27

Mo. Const. Art. V, § 18..... passim

Mo. Const. Art. V, § 4..... 9, 11

Mo. Const. Art. V, §5..... 8, 25

POINTS RELIED ON

I. Relator is entitled to an order prohibiting the Respondent from proceeding with an administrative action to modify a judicial support order entered by the Circuit Court of McDonald County, because the Family Support Division, an administrative agency, may not modify a judgment or decree entered by a court of competent jurisdiction, in that § 511.350 prohibits an administrative agency from amending a prior judgment entered by a court of competent jurisdiction and Art. II § 1 and Art. V, § 18 of the Missouri Constitution require judicial action for the modification of a court order and the Respondent's attempt to proceed administratively violate the above referenced provisions.

Dye v. Division of Child Support Enforcement, 811 S.W.2d 355 (Mo. 1991)

State ex rel. Eggers v. Enright, 609 S.W.2d 381, 384 (Mo. 1980)

Wolff Shoe Co. v. Director of Rev., 762 S.W.2d 29, 31 (Mo. 1988)

Chastain v. Chastain, 932 S.W.2d 396 (Mo. 1996)

Mo. Rev. Stat. § 511.350

Mo. Rev. Stat. § 454.496

Mo. Const. Art. V, §18

Mo. Const. Art. II, § 1

13 CSR 30-5.020

II. Relator is entitled to an order prohibiting the Respondent from proceeding with an attempt to administratively modify a judicial support order in that Respondent agency's regulations: 1) constitute special laws in violation of Art. III, § 40 in that litigants who proceed administratively have different restrictions on what evidence the hearing unit may consider than judicial arena litigants; and 2) the limiting regulations exceed the Respondent's statutory authority in that Respondent is required to calculate child support pursuant to Mo. Rev. Stat. § 452.340 and the agency has imposed limits on those calculations beyond those that exist under § 452.340.

Board of Educ. Of City of St. Louis v. State, 47 S.W.3d 366 (Mo. 2001)

Bodenhausen v. Missouri Bd. of Registration of Healing Arts, 900 S.W.2d 621, 622 (Mo. 1995).

Murray v. Missouri Highway Transp. Com'n, 37 S.W.3d 228 (Mo. 2001)

State Tax Comm'n v. Admin Hearing Comm'n, 641 S.W.2d 69, 75 (Mo. 1982).

Mo. Const. Art. III, § 40

Mo. Rev. Stat. § 452.340

Mo. Const. Art. V, §5

Mo. Rev. Stat. § 452.340

13 CSR 30-50.010

JURISDICTIONAL STATEMENT

Relator has filed this writ of prohibition in the Missouri Supreme Court challenging Missouri Department of Social Services, Family Support Division's authority to modify a judicial support order entered by a court of competent jurisdiction.

This Court is vested with jurisdiction to enter writs of prohibition via Mo. Const. Art. V, § 4. This Court has additional authority to issue a writ of prohibition to “prevent usurpation of judicial power...” Mo. Rev. Stat. § 530.010. While a writ of prohibition remains a discretionary remedy for this court, this Court in *State ex rel. Noranda Aluminum, Inc. v. Rains*, 706 S.W.2d 861 (Mo. 1986) stated:

[W]here there is an issue which might otherwise escape this Court's attention for some time and which in the meantime is being decided by administrative bodies or trial courts whose opinions may by reason of inertia or other cause become precedent [sic]; and, the issue is being decided wrongly and is not a mere misapplication of law; and, where the aggrieved party may suffer considerable hardship and expense as a consequence of such action, we may entertain the writ for purposes of judicial economy under our authority to ‘issue and determine original remedial writs.’

Id. at 862-63.

The more expansive constitutional grant of authority recognized in *Noranda* permits this Honorable Court to review this matter if this Court determines that the

“orderly and economical administration of justice justifies issuance of the writ in such a case.” *Id.* at 863.

As conceded by Respondent in its answer, “[t]here are literally hundreds of support orders in Missouri that are or may shortly be subject to administrative consideration, and then to judicial modification. There is considerable potential for differing actions, or the issuance of conflicting opinions from the circuit courts and districts of the [C]ourt of [A]ppeals.” *Answer to Petition for Writ of Prohibition* at 12. The Respondent further admits there are over 143,000 IV-D cases in Missouri computer databases with a judicial support order that may warrant modification review. *Family Support Division’s Request for an Expedited Briefing and Argument Schedule*, paragraph 3.

The legislative history of HB 613 (which enacted Mo. Rev. Stat. § 511.350) provides more compelling data as to why this Court should review this matter in this procedural posture as opposed to requiring the Relator to go through the entire administrative process, filing a petition for judicial review, and appeal from there (a lengthy process at best):

In FY 02, DCSE received 15,078 requests for modification from case parties. The division administratively modified 5,670 of those judgments and proceeded judicially in only 114 of those cases.¹

¹ <http://www.moga.state.mo.us/Oversight/OVER03/fishtm/1781-01N.ORG.htm>

Given the breadth of the administrative agency's power and the scope of its efforts to bypass the judicial system, this matter meets the very standards for writ review this Court found compelling in *Noranda, supra*. Relator has clearly demonstrated that this case falls under the rarely used writ exception of *Noranda, supra* and respectfully states that this Court has jurisdiction to issue an original writ of prohibition under Mo. Const. Art. V, § 4.

STATEMENT OF FACTS

Relator's child support history

The facts in this case are relatively simple and unchallenged. The Respondent has admitted the following essential facts in its answer, filed with this Court:

- 1) On July 1, 1997, the Circuit Court of McDonald County, State of Missouri issued its initial child support order in cause number 40V019300101 as part of its judgment of dissolution of marriage, after a full hearing on the merits.
- 2) On September 28, 1998, the Circuit Court modified the custody order and issued a new child support judgment after a full hearing on the merits.
- 3) On March 22, 2004, the Circuit Court modified the child support order after another full hearing on the merits.

Answer to Petition for Writ of Prohibition (paragraphs 1-3).

Respondent's Motion to Modify

The Circuit Court reduced Father's child support obligation to \$591.00 per month on August 13, 1998. (Relator's Ex. 1). Father's support obligation increased to \$633 per month on March 22, 2004. (Relator's Ex. 1).

Now, the Respondent is attempting to reduce, administratively, Father's child support obligation from \$633.00 per month to \$281.00 per month. (Relator's Ex. 1). The Respondent alleges the following grounds:

- 1) a change of 20% or more in the child support amounts, per state guidelines, and

2) the lack of a modification within the previous 36 months. (Ex. 1).

Relator has attached a copy of the final judgment issued between Mother and Father in the appendix to this case and it is clear that the child support was last modified on March 22, 2004 (within the 36 month time frame for review).

Respondent's "Motion for Modification of Child Support Order" (Ex. 1) contains the following important statements and commitments:

- "This Motion describes how the Family Support Division (FSD) **plans to change your child support order.**" (emphasis added)
- "If you do not respond to this Motion within 30 calendar days after the date you receive it, **FSD may enter an order that changes your child support and/or medical support obligation.**" (emphasis added)
- "[O]nly support payments accruing subsequent to service of the motion on all parties to the motion may be modified."
- "The remaining provisions of the existing order remain in full force and effect."
- "The order will change your obligations as described in this Motion."
- "[T]he administrative decision and order may make the effective date of the new child support amount retroactive to the date of service of the Motion."

The Affidavit of Doug Nelson

The Deputy Chief of Staff for the Missouri Attorney General, Doug Nelson, filed an affidavit in the United States District Court for the Western District of Missouri, addressing the legislation at issue in this case. (Ex. 8). The Respondent admits that

HB613 (which included § 511.350), “dramatically” affected the process for “administratively modifying judicial orders, including child support orders.” (Ex. 8). In paragraph 6, the Attorney General’s office admits “This new provision heightened the need in the AGO for trial lawyers to handle a high-volume of modification to support orders because the provision meant that child support orders could no longer be administratively modified.” (Ex. 8).

The Code of State Regulations

Mo. Rev. Stat. § 536.031.5 mandates that “[t]he courts of this state shall take judicial notice, without proof, of the contents of the code of state regulations.” The Department of Social Services has enacted regulations addressing the calculation of child support and the review and modification of child support orders. These regulations are set forth in 13 CSR 30-5.010 and 13 CSR 30-5.020 (Ex. 3). These regulations prohibit the agency from including extraordinary child rearing costs such as college expenses unless already judicially ordered or by consent. 13 CSR 30-5.010(2)(F). The regulations allow the agency to deviate from the established guidelines in only the narrowest of circumstances. 13 CSR 30-5.010(2) (H).

ARGUMENT

I. [Respondent’s actions violate Mo. Rev. Stat. § 511.350 & the Missouri Constitution]

I. Relator is entitled to an order prohibiting the Respondent from proceeding with an administrative action to modify a judicial support order entered by the Circuit Court of McDonald County, because the Family Support Division, an administrative agency, may not modify a judgment or decree entered by a court of competent jurisdiction, in that § 511.350 prohibits an administrative agency from amending a prior judgment entered by a court of competent jurisdiction and Art. II § 1 and Art. V, § 18 of the Missouri Constitution require judicial action for the modification of a court order and the Respondent’s attempt to proceed administratively violate the above referenced provisions.

A. Standard of Review

“Prohibition is a discretionary writ that lies only to prevent ‘an abuse of judicial discretion, to avoid irreparable harm to a party, or to prevent exercise of extrajurisdictional power.’” *State ex rel. Kinder v. McShane*, 87 S.W.3d 256 (Mo. 2002).

“The writ is available to avoid useless lawsuits and to afford relief at the earliest possible moment in the litigation or where to do otherwise would deprive a party of an absolute defense.” *State ex rel. Lebanon School Dist., R-III v. Winfrey*, 183 S.W.3d 232 (Mo. 2006).

B. Facts

It is undisputed that Relator has been the custodial parent entitled to receive child support pursuant to a judicial judgment entered in the Circuit Court of McDonald County, Missouri. (Petition and Answer). The Respondent now seeks to administratively modify this judicial order, pursuant to Mo. Rev. Stat. § 454.496. (Ex. 1).²

Respondent served Relator with a modification motion containing the following statements that imply that the Respondent is the final decision-maker for modifying child support orders, absent a request for an administrative hearing:

- “This Motion describes how the Family Support Division (FSD) **plans to change your child support order.**” (emphasis added)
- “If you do not respond to this Motion within 30 calendar days after the date you receive it, **FSD may enter an order that changes your child support and/or medical support obligation.**” (emphasis added)
- “[O]nly support payments accruing subsequent to service of the motion on all parties to the motion may be modified.”
- “The remaining provisions of the existing order remain in full force and effect.”
- “The order will change your obligations as described in this Motion.”
- “[T]he administrative decision and order may make the effective date of the new child support amount retroactive to the date of service of the Motion.”

² In addition, it has not been 36 months since the last judicial modification of support was entered,

C. Legal Analysis

This Court last visited the interplay of Mo. Rev. Stat. § 454.496 and Missouri’s Constitution in *Chastain v. Chastain*, 932 S.W.2d 396 (Mo. 1996). However, in light of recent statutory amendments and the Code of State Regulations, as well as subsequent case law addressing judicial powers, Relator requests this Court to revisit *Chastain*, *supra*.

1. Separation of powers under Article II, Section 1

Any constitutional analysis of Respondent’s administrative power to modify a judicial order must begin with the separation of powers concept. Art. II, § 1 of the Missouri Constitution clearly defines Missouri’s three branches of government. The Constitution created the legislative, executive, and judicial branches of our government. In *Missouri Coalition for the Environment v. Joint Committee on Administrative Rules*, 948 S.W.2d 125 (Mo. 1997), this Court ruled that the Joint Committee on Administrative Rules’ power to suspend and disapprove of state agency rules unconstitutionally interfered with the executive branch in violation of Art. II § 1. *Id.* “This Court has consistently held that the doctrine of separation of powers, as set forth in Missouri’s constitution, is ‘vital to our form of government.’” *Id.* at 132 (internal citations omitted).

This Court went on to state that the branches of government “ought to be kept as separate from and independent from, each other as the nature of free government will admit...” *Id.* at 132-33. This Court recently addressed whether a statute that requires the Highway Commission to submit to arbitration violated Art. II, §1. In *Murray*, this Court stated, “A statute that purports to give an administrative agency purely judicial

power – the power of judicial review – violates the principle of separation of powers and is unconstitutional.” *Murray v. Missouri Hwy & Transp. Comm’n*, 37 S.W.3d 228, 234 (Mo. 2001).

In *Dye v. Division of Child Support Enforcement*, 811 S.W.2d 355 (Mo. 1991), this Court briefly addressed the Art. II, § 1 challenges to Chapter 454 hearings. This Court found that the limitation of authority of the administrative agency, together with the right of judicial review, saves the statute from such a challenge. However, the motions that the agency served on all parties do not refer to the judicial component of the proceedings. Failure to request a hearing will result in the entry of a default support order. There is no reference to judicial review in the motion.

In this case, Mo. Rev. Stat. § 454.496 is being interpreted by Respondent in a manner inconsistent with Article II, § 1 limits. This Court in *Chastain, supra*, made certain assumptions about how the Respondent proceeds with an administrative motion that are no longer accurate. The agency’s internal regulations empower the agency to modify child support orders. For example, the motion states the “Family Support Division” may modify the order, not that the Family Support Division may decide to ask a judge to modify his or her previous order.

Respondent continues to serve motions on unsuspecting parents that clearly state that agency has more power than it does. Respondent’s role as part of the executive branch is clearly crossing the line into the judicial area with administrative motions to modify judicial support orders.

2. Application of Article V, § 18

Article V, §18 of the Missouri Constitution clearly defines the judicial branch of Missouri's government. In *Chastain*, this Court stated, "The authority that the constitution places exclusively in the judicial department has at least two components – judicial review and the power of courts to decide issues and pronounce and enforce judgments." *Id.* at 399.

When this Court last reviewed Mo. Rev. Stat. § 454.496, it did so in isolation. However, when §454.496 is reviewed *in pari materia* with the current Code of State Regulations and §511.350, the analysis of whether the Respondent's interpretation and application of § 454.496 violates Missouri's Constitution changes.

This Court held, in *Chastain*, that Mo. Rev. Stat. § 454.496 does not permit the Division to "review the trial court's order." *Id.* However, 13 CSR 30-5.020(2)(A) "Any child support obligation being enforced by the division **shall be reviewed by the division at its own request...**" (emphasis added). The next paragraph states "**The division shall review** the following cases, at its own request, no less frequently than once every thirty-six (36) months from the date the order was established, last reviewed, or modified." 13 CSR 30-5.020(2)(B) (emphasis added). Thus, despite this Court's warning in *Chastain*, the Family Support Division continues to operate in violation of Article V Section 18.

A review of the very statements made by the Respondent in its Motion to Modify reveal an agency which walks and talks like a judicial entity. The Respondent does not refer to any judicial oversight in the motion served on Relator. (Ex. 1). In fact, the order

states specifically that if the responding party fails to timely request a hearing, then the agency may enter an order modifying the underlying order. The agency, through its own forms, acts as if they are the final arbiter of the child support issues, in violation of *Chastain* warnings and Art. V, § 18.

3. The Respondent's actions violate § 511.350

Notwithstanding Article V, §18, the Respondent's actions are in violation of Mo. Rev. Stat. § 511.350 as well in two very distinct ways: First, the Respondent's very act of filing a motion to modify a prior order (the title itself is telling of its intent) is an attempt by Respondent to modify a judicial order. Second, if the Respondent obtains a ruling from its administrative hearing officer enabling it to modify the order, then Respondent's very action of filing the order (also known as "docketing an order") with the Circuit Clerk constitutes the agency's action of attempting to modify a judicial order. Even the filing of the motion in the Circuit Court violates Mo. Rev. Stat. § 511.350.

The intention of the legislature enacting Mo. Rev. Stat. §511.350 are clear: stop the administrative agencies from acting like judicial entities. "[T]he plain and unambiguous language of a statute cannot be made ambiguous by administrative interpretation and thereby given a meaning which is different from that expressed in a statute's clear and unambiguous language." *Wolff Shoe Co. v. Director of Rev.*, 762 S.W.2d 29, 31 (Mo. 1988). "The goal of statutory analysis is to ascertain the intent of the legislature, as express in the words of the statute." *United Pharmacal Co. of Mo., Inc. v. Missouri Bd. of Pharmacy*, 208 S.W.3d 907, 909 (Mo. 2006). In this case, the plain words of Mo. Rev. Stat. § 511.350, coupled with the available legislative history from the

fiscal notes, are clear. The legislature intended to reign in the Respondent's administrative modification activities.

The other constitutional issue raised in this matter is the inherent conflict between Mo. Rev. Stat. § 454.496 and § 511.350. Mo. Rev. Stat. § 454.496 empowers the Division to proceed administratively, and conduct a contested hearing, on child support modifications. In this case, there existed § 454.496, prior to the enactment of §511.350.

There are many rules of statutory construction, however “[i]n all these diverse and sometimes conflicting rules the ultimate guide is the intent of the legislature; the other rules of construction may be considered merely as aids in reaching that result; and the purpose and object of the legislation should not be lost sight of.” *Edwards v. St. Louis County*, 429 S.W.2d 718, 722 (Mo. 1968). Only if legislative intent is unclear will this Court proceed with trying to harmonize the two statutes by determining which statute is “special” and which is a “general” statute. A special statute is not repealed by a statute “general in its terms and application, **unless the intention of the Legislature to repeal or alter the special law is manifest...**” *State ex rel. Eggers v. Enright*, 609 S.W.2d 381, 384 (Mo. 1980) (emphasis added). In cases of ambiguous intent, this Court will continue all attempts to reconcile the two statutes into a harmonious relationship. *Id.*

Given the fiscal notes for § 511.350 and the newspaper article the Respondent has filed with this Court in support of its motion for expedited review, it is clear that the Byrd amendment that included Mo. Rev. Stat. § 511.350 was intended to limit Respondent's administrative activities. The article sets forth in detail the origins of the additional language to Mo. Rev. Stat. § 511.350, which includes the story of how the sponsoring

legislator had been the recipient of an administrative modification of his judicial order and the legislator felt that the Respondent had overstepped its bounds. Thus was born the new language of Mo. Rev. Stat. § 511.350. The fiscal notes for §511.350 (Exhibit 6), indicate that the legislature considered the information and testimony of officials from the Department of Social Services – Division of Child Support Enforcement, who “assume this bill, if enacted, would prevent DCSE from performing modification of child support orders via administrative process.” The Division went on to complain: “If this legislation passes, all modifications would need to be obtained judicially.” *Id.*

Only if this Court cannot determine the legislative intent of Mo. Rev. Stat. § 511.350 should this court attempt to reconcile the two statutes. In this case, finding a harmonious relationship between the two statutes is difficult at best, after taking into account the legislative history of Mo. Rev. Stat. § 511.350, as well as the affidavit of the Attorney General. The Respondent is specifically authorized to file a motion to modify child support in the judicial arena under Mo. Rev. Stat. § 452.400(13), however even that action may be affected by Mo. Rev. Stat. § 511.350. The only way to reconcile the two statutes would be for the division to be able to enter an administrative modification on an order it deems to be entered by a court of incompetent jurisdiction since § 511.350 excludes such orders from its ban. Clearly, Ms. Hansen’s child support order does not fit that exception.

4. The Attorney General affidavit

The affidavit of Assistant Attorney General Doug Nelson (Exhibit 8) is also consistent with the Division’s statements about the effect of § 511.350. The Respondent

argues in its Suggestions in Opposition that such an affidavit is not binding on the Division in this action. Statements made by its counsel, however, bind a client. *See Steeve v. Kansas City Southern Ry, Co.*, 175 S.W. 177, 181 (Mo. 1915) (“[W]e find it held almost, if not quite universally, that the judicial admissions of an attorney are absolutely conclusion about his client until made matters for the determination of the trials of fact...”).

In a civil employment discrimination case pending in the Western District Court between a former attorney for the Respondent and the Attorney General of Missouri (Respondent’s counsel), the Deputy Chief of Staff filed an affidavit in support of the State’s summary judgment motion. In defending the agency’s employment decisions regarding a disabled attorney, Respondent’s counsel stated the effect of Mo. Rev. Stat. §511.350 has been to effectively eliminate administrative modifications and that the agency will now be required to proceed through judicial modification processes in order to modify judicial orders. (Ex. 8).

The Western District addressed the use of statements in briefs on prior appeals as admissions against interests in *Mitchell Engineering Co v. Summit Realty Co, Inc.*, 647 S.W.2d 130, 141 (Mo. Ct. App. 1982). That Court reiterated long-standing legal principles that statements in abandoned pleadings can be admissible, as well as stipulations, affidavits and petitions in prior lawsuits under the concept of an “admission against interest.” *Id.* The Attorney General, which is counsel for the Respondent, came to the same conclusion as Relator regarding the applicability of §511.350 to §454.496

and the Respondent should be bound by the statements of its counsel, made under oath pursuant to a motion for summary judgment, filed in the Western District action.

D. Conclusion

After reviewing the legislative history of Mo Rev. Stat. § 511.350 as well as the constitutional limitations of Art. V, § 18 and Art II, § 1, it is clear that the Respondent's continued attempt to administratively modify a judicial order is not only unconstitutional but a violation of Missouri's statutory limitations.

II. [The Respondent’s administrative regulations are unconstitutional]

II. Relator is entitled to an order prohibiting the Respondent from proceeding with an attempt to administratively modify a judicial support order in that Respondent agency’s regulations: 1) constitute special laws in violation of Art. III, § 40 in that litigants who proceed administratively have different restrictions on what evidence the hearing unit may consider than judicial arena litigants; and 2) the limiting regulations exceed the Respondent’s statutory authority in that Respondent is required to calculate child support pursuant to Mo. Rev. Stat. § 452.340 and the agency has imposed limits on those calculations beyond those that exist under § 452.340.

A. Standard of Review

The Relator adopts the standard of review for this writ of prohibition as set forth in Point I of this brief. The judiciary has the right to declare void the rules and regulations of an administrative body. *State Tax Comm’n v. Admin Hearing Comm’n*, 641 S.W.2d 69, 75 (Mo. 1982). Mo. Const. Art. V, §5 gives this Court authority to “establish rules relating to practice, procedure and pleadings for . . . administrative tribunals.” *See State ex rel Mississippi Lime Co. v. Missouri Air Conservation Commission*, 159 S.W.3d 376 (Mo. Ct. App. 2005) (holding that circuit courts cannot hear writs against administrative agencies since they lack superintending authority over administrative tribunals).

B. Facts

13 CSR 30-50.010 limits Respondent's powers in calculating child support, despite being directed to fully comply with Mo. Rev. Stat. § 452.340. *See also* 13 CSR 30-7 (addressing procedures for an administrative hearing). Under the regulations, the hearing officer (in contrast to a judicial entity determining child support amounts):

- Should generally include in income overtime and secondary employment as income
- May determine income information by relying on data from the Department of Labor and Industrial Relations, local unions, or local employers
- May not impute income to a person with no work history with a child under the age of 6 years
- May impute income to a parent with no work history with a child between 6 and 12 years of age at 20 hours per week at federal minimum wage.
- May only include extraordinary medical or child-rearing costs if ordered by a court or if there is a written agreement between the parties
- May only deviate downward on the overnight visitation credit
- May only find the Form 14 unjust and inappropriate under 6 limited circumstances and may only deviate up to 25%

Relator has been challenging the administrative procedures in this matter in that she has significant college tuition costs which the hearing officer is prohibited from considering but which a judicial entity would be permitted to consider in calculating

Father's child support obligations. In addition, Father has access to significant family funds, apart from his disability benefits, which the Respondent cannot consider.

C. Legal Analysis

1. The Department of Social Services and Rulemaking

Mo. Const. Art. IV § 37 established the Department of Social Services. The agency's promulgation of rules is part of its executive function. *Missouri Coalition for Environment v. Joint Committee on Administrative Rules*, 948 S.W.2d 125, 133-34 (Mo. 1997)

2. Violation of special law provisions of Article III, Section 40.

Mo. Const. Art. III, § 40 further prohibits the enactment of special laws which affect the rules of evidence or proceedings in tribunals. The Eastern District has assumed, without deciding, that although the State Constitution prohibits the general assembly from enacting such special "laws", administrative regulations have the force and effect of "laws" for purposes of this constitutional prohibition, and therefore administrative regulations are limited by the provisions in Mo. Const. Article III, §40. *Civilian Personnel Div. v. Board of Police Com'rs of City of St. Louis*, 914 S.W.2d 23 (Mo. Ct. App. 1995).

a. Special laws

A special law is a law when it applies to a fixed subclass and such a law is invalid unless substantial justification exists for using a special rather than a general law. *City of Springfield v. Sprint Spectrum, L.P.*, 203 S.W.3d 177 (Mo. 2006). If the law does not

include all similarly situated persons, then the law is a “special law.” *Murray v. Missouri Highway Transp. Com’n*, 37 S.W.3d 228 (Mo. 2001).

b. Section 454.425 creates a subclass

Chapter 454 addresses the state’s ability to enforce child support laws, through the Division of Child Support Enforcement (now the Family Support Division). Mo. Rev. Stat. § 454.425 requires the division of child support enforcement to render child support services to persons, regardless of whether the applicant has received public assistance. Mo. Rev. Stat. § 454.496 applies to cases in which support enforcement services are being provided pursuant to Mo. Rev. Stat. § 454.425. In such cases, the obligated parent, the obligee or the division of child support enforcement may file a motion to modify an existing child support order.. Mo. Rev. Stat. § 454.496.1.

c. The agency is legislatively bound to set child support amounts pursuant to Section 452.340 but its administrative regulations do not follow this mandate

Mo. Rev. Stat. §§ 454.496.6 and sub 7 require that the administrative order comply with section 452.340 and applicable Supreme Court rules. In response to this power, the agency has entered limitations on what the hearing officers may or may not consider in calculating child support obligations. These evidentiary limitations on what its administrative hearing unit, which is supposed to be a distinct entity from the Respondent, may do, create a special law for those who are eligible for services under Mo. Rev. Stat. § 454.425. In this case, Father will receive certain assumptions and protections that would not exist for him in the judicial arena.

d. Section 452.340 is much more expansive and equitable than the Respondent's administrative regulations

In this case, Respondent has involuntarily forced Relator into a class of persons subject to a possible modification of her child support award. People in similar circumstances have available the full penumbra of remedies under Mo. Rev. Stat. § 452.340. Judicial modification of child support awards are governed by § 452.370.1. Mo. Rev. Stat. § 452.370.1 requires a showing of “changed circumstances so substantial and continuing as to make the terms unreasonable.” *Id.*

A judicial entity calculating child support amounts is required to consider the financial resources of both parties, including the extent that a new spouse or significant other as well as the earning capacity of a party who is unemployed should share expenses. *Id.* There is a *prima facie* showing of a change in circumstances if the child support is different by 20% or more IF the presumed child support guidelines formed the basis of the original order. *Id.*

Specifically, persons served with a motion to modify child support in a judicial arena are able to request the following (unlike those in the administrative arena):

- 1) Ask the Court to enter a finding that the presumed amount of child support is unjust or inappropriate considering all relevant factors, including the factors listed in §452.340.1.
- 2) Ask the Court to award child support based on the child's actual monthly expenses if the actual expenses are less than the presumed amount of child support. *Costello*

v. Miranda, 137 S.W.3d 498 (Mo. Ct. App. 2004). *See also Harding v. Harding*, 826 S.W.2d 404 (Mo. Ct. App. 1992)

- 3) Ask for a deviation from the Form 14 amount if visitation is more than 109 overnights per year (the regulation limits the credit to 10% for overnights between 91-145 overnights). *McCandless-Glimcher v. Glimcher*, 73 S.W.3d 68 (Mo. Ct. App. 2002).
- 4) Consider the contribution of a cohabitant to a party's income in order to determine if a deviation from the Form 14 is unjust or inappropriate. *Searcy v. Searcy*, 85 S.W.3d 95 (Mo. Ct. App. 2002).
- 5) Consider the statutory factors for calculation of child support, which are independent of the Rule 88.01 factors. § 452.340. Even though Rule 88.01(a) requires the administrative agency to consider all relevant factors, many of those factors are limited under 13 CSR 30-5.010.
- 6) Ask for contribution for college expenses. Under § 452.340.5 college expenses can be included in line 6e of the Form 14 as an extraordinary expenses of the court can find the Form 14 unjust and inappropriate because the college expenses were not included. *See Shiflett v. Shiflett*, 954 S.W.2d 489 (Mo. Ct. App. 1997)
- 7) Ask for contribution for private school expenses. *See In re Marriage of Manning*, 871 S.W.2d 109 (Mo. Ct. App. 1994).(holding that when children were in private school for nine years the trial court should have included the tuition cost in its child support calculations).

8) Ask for extraordinary medical expenses to be included in the chart based on the needs of a child. *MacDonald v. Minton*, 142 S.W.3d 247 (Mo. Ct. App. 2004).

3. 13 CSR 30-5.010 exceeds statutory authority.

“Administrative agencies – legislative creations – possess only those powers expressly conferred or necessarily implied by statute.” *Bodenhausen v. Missouri Bd. of Registration of Healing Arts*, 900 S.W.2d 621, 622 (Mo. 1995). “The scope of power and duties for public agencies is narrowly limited to those essential to accomplish the principal purpose for which the agency was created.” *Board of Educ. Of City of St. Louis v. State*, 47 S.W.3d 366 (Mo. 2001). Respondent enforces and establishes support orders as permitted under Chapter 454. In this case, the Respondent has been legislatively authorized, prior to Mo. Rev. Stat. § 511.350, to calculate child support pursuant to Mo. Rev. Stat. § 452.340.

In *Board of Education*, this Court held that a school board election statute was unconstitutionally void for vagueness. In addressing the shortcomings of the legislative statutes, as well as conflicting statutes, this Court noted that it was not up to the judicial branch to engage in “judicial legislation” by supplying omissions and remedying legislative defects, under our system of “tripartite government.” *Id.* at 371. If this Court is not in a position to fill in gaps in legislation, the Respondent division is certainly equally ill-equipped to remedy any legislative short-comings by enacting limiting rules for the calculation of support obligations.

Rather than relying on the plethora of cases interpreting § 452.340, the administrative regulations set up their own rules limiting the hearing officer’s broad discretion in

calculating child support amounts based on the family's circumstances. The regulation limitations are inconsistent with the multitude of cases which have interpreted § 452.340. The agency's creation of its own interpretation of a statute and court rules and its limitations on relevant evidence exceeds its statutory authority.

In *Pharmflex, Inc. v. Division of Employment Security*, 964 S.W.2d 825 (Mo. Ct. App. 1997), the Western District held the Division of Employment Security exceeded its authority when it promulgated regulations that defined "good cause" for an extension of at 15-day period of filing an appeal of a Division decision. This regulation was more restrictive than the legislature intended, and thus the regulation was invalid. Regulations that attempt to expand or modify statutes are invalid, on the grounds of being beyond the scope of authority. *Id.* at 829. The Eastern District has held that regulations may not conflict with a statute and if a regulation does conflict with the statute, the regulation must fail. *Johnson v. Labor and Industrial Relationship Comm'n*, 591 S.W.2d 241, 244 (Mo. Ct. App. 1979).

In this case, the enabling statute for modification hearings states that child support obligations are to be calculated pursuant to Mo. Rev. Stat. § 452.340. Any restriction on that calculation authority and the evidence and factors the agency may consider in making such calculation, is unconstitutional. If the legislature intended to place any limits on such evidence, it would have done so.

CONCLUSION

In light of the foregoing, the Relator prays that this Court grant a permanent writ of prohibition that prohibits the Respondent from taking any further action in this case and declaring Mo. Rev. Stat. § 454.496 unconstitutional, as applied, or as repealed in light of Mo. Rev. Stat. § 511.350. Alternative, the Relator prays that this Court enter an order declaring the administrative child support regulations unconstitutional as both a “special law”, which treats the Relator differently than a Respondent in a judicial modification action, or as unconstitutional as exceeding the scope and authority of the administrative agency.

CERTIFICATION UNDER RULES 84.05 & 84.06

Comes now Benicia Baker-Livorsi, attorney for Relator, and states to the Court the following:

1. This brief uses at least 13 point Times New Roman font using Microsoft Word. The brief contains 6814 words, as reported by Word and therefore complies with the limitations of Rule 84.06(b).
2. A copy of the brief on CD-ROM is filed with the hardcopies of this brief as required under Rule 84.06(g). All electronic copies of this brief have been scanned for viruses and are virus-free.

CERTIFICATE OF SERVICE

Counsel states that the undersigned has mailed to Greg A. Perry, Assistant Attorney General for the State of Missouri, a copy of the brief in this matter along with a CD-ROM of this brief and emailed a copy of this brief to Mr. Perry at his email address: hcs@ago.mo.gov on the 13th day of February, 2007.

BY: The Family Law Group, LLC

Benicia Baker-Livorsi #45077

Livorsi@lawyer.com

Daniel P. Card, II #24272

dcard@lawyer.com

Attorneys for Petitioner

#6 Westbury Dr.

St. Charles, MO 63301

636-947-8181

636-940-2888 Facsimile