

IN THE CIRCUIT COURT OF APPEALS
SOUTHERN DISTRICT

)	
KENNETH L. KUBLEY,)	
Appellant/Respondent,)	
)	
Vs.)	
)	Appellate Consolidated Nos:
SD24829,)	
)	SD24836 and SD24840
)	
)	
MOLLY M. BROOKS,)	
Respondent/Cross-Appellant,)	ORAL ARGUMENT REQUESTED
)	
and)	
)	
DIRECTOR OF THE DIVISION OF)	
CHILD SUPPORT ENFORCEMENT,)	
DEPARTMENT OF)	
SOCIAL SERVICES,)	
Respondent/Cross-Appellant.)	

Appeal from the
Circuit Court of Phelps County, Missouri
Associate Court
The Honorable Ralph J. Haslag, Judge

APPELLANT-S OPENING BRIEF

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DANIELS LAW OFFICE

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JURISDICTIONAL STATEMENT

This is an appeal from a final judgment and order entered on February 8, 2002, in a Motion to Modify a Decree of Dissolution pursuant to sections 452.040; 454.470 and 454.496 RsMo. (As amended). A notice of appeal was timely filed on March 15, 2002, pursuant to Supreme Court Rule 84.04. None of the issues to be raised on appeal are within the exclusive jurisdiction of the Missouri Supreme Court. Accordingly, this Court has jurisdiction of the appeal pursuant to its general appellate jurisdiction, as more particularly set forth in Article V,

Section 3 of the Missouri Constitution as amended.

STATEMENT OF FACTS

This is an appeal from a Motion to Modify Dissolution of Marriage action. Husband and wife were granted dissolution and granted joint legal custody of the children born of the marriage with husband being designated as a primary custodian and subject to wife's weekday visitation rights, on March 25, 1994. No specific award of child support was made. The Decree was subsequently amended on April 14, 1994, awarding wife a

different set of visitation rights: to wit: weekend visitation instead of weekday visitation. Again, no specific award of child support was granted to husband from wife in the Amended Judgment. (L.F. 1-8). On or about April 1, 1994, husband applied for AFDC relief through the Division of Child Support Enforcement. (L.F. 10). On August 19, 1994, a notice and finding of financial responsibility was filed on wife (L.F. 12).

On October 3, 1994, an administrative default order for child support in the amount of \$381.00 against wife was filed, in Phelps County Circuit Court (L.F. 14). On April 6, 1995, wife signed a contempt order in case number ADAO 656 staying her commitment to jail by agreeing to pay child support in the amount of \$381.00 per month and \$25.00 per month for arrearage (L.F. 18). On September 15, 1995, the Prosecuting Attorney of Phelps County Missouri filed a notice for review in CV393-0624DR (the Circuit Civil Case) on October 5, 1995. (L.F. 101-102). On October 5, 1995, a warrant was issued for wife for failure to appear on the September 15, 1995 notice to appear, referenced above. On October 26, 1995, wife was arrested for failure to appear. On November 1, 1995, the Prosecuting Attorney withdrew the warrant issued October 5, 1995, and wife was freed (L.F.

103). A subsequent Modification of this original Administrative Default Order was filed on December 12, 1996, raising the child support amount from \$381.00 per month to \$598.00 (L.F. 24). On September 29, 1998, a Court of proper jurisdiction entered an order requiring wife to pay \$500.00 per month in child support.

(L.F. 102-103). In its final judgment of February 8, 2002, the Trial Court ruled that the above referenced administrative order was not valid because it was not signed by a Judge. (L.F. 107).

As a consequence of the invalidity of the Administrative Default Order, the Trial Court awarded wife the sum of \$21,649.00 as a judgment against Defendant, Director of Child Support Enforcement, Department of Social Services, State of Missouri and husband. (L.F. 110).

POINTS RELIED ON

THE TRIAL COURT ERRED IN ORDERING THAT HUSBAND BE JOINTLY AND SEVERALLY LIABLE WITH DIVISION OF CHILD SUPPORT ENFORCEMENT ON \$ 21, 649.00 JUDGMENT TO BE PAID TO WIFE FOR MONIES TAKEN UNDER THE COLOR OF A DIVISION OF CHILD SUPPORT ENFORCEMENT ADMINISTRATIVE DEFAULT ORDER WHICH WAS INVALID. THE COURT ERRED IN THAT:

A. THE TRIAL COURT ASSIGNED RESPONSIBILITY FOR THE DIVISION OF CHILD SUPPORT ENFORCEMENT ACTIONS TO HUSBAND WHO HAD NO POWER TO CONTROL OR DIRECT THE ACTIONS OF THE DIVISION OF CHILD SUPPORT ENFORCEMENT (Hereinafter referred to as DCSE) AGAINST WIFE.

1. Palo v. Stangler, 943 S.W. 2d 683, (Mo. App. E.D. 1997)

ARGUMENT

THE TRIAL COURT ERRED IN ORDERING THAT HUSBAND BE JOINTLY AND SEVERALLY LIABLE WITH DIVISION OF CHILD SUPPORT ENFORCEMENT ON \$ 21, 649.00 JUDGMENT TO BE PAID TO WIFE FOR MONIES TAKEN UNDER THE COLOR OF A DIVISION OF CHILD SUPPORT ENFORCEMENT ADMINISTRATIVE DEFAULT ORDER WHICH WAS INVALID. THE COURT ERRED IN THAT:

A. THE TRIAL COURT ASSIGNED RESPONSIBILITY FOR THE DIVISION OF CHILD SUPPORT ENFORCEMENT ACTIONS TO HUSBAND WHO HAD NO POWER TO CONTROL OR DIRECT THE ACTIONS OF THE DIVISION OF CHILD SUPPORT ENFORCEMENT AGAINST WIFE.

In awarding damages to wife and assigning liability jointly and severally to both husband and DCSE for those damages, the Trial Court cited Palo v Stangler 943 S.W. 2d 683 (Mo.App. E.D.1997) for the proposition that monies wrongfully taken in a support setting, should be returned to the aggrieved party under a contractual theory that calls for the money to be paid back when the equity and conscience demand it. *Id* at 686. However, Palo is distinguishable from the instant case in that the facts

in the instant case do not square with the Trial Court's application of the afore-mentioned legal theory. In Palo, DCSE overreached in taking more child support than it should have by what appeared to be an accounting error. DCSE took \$25,591.00 from plaintiff, when according to its own records it should have only taken \$21,340.00. Therefore, plaintiff, in Palo, in equity and conscience, was entitled to the difference of \$2,755.00. *Id* at 687.

The facts in the instant case are different. Assuming arguendo that DCSE did not obtain a valid, judge-signed order for taking support money from wife and that wife is not estopped from recouping monies taken from that invalid order, by waiver or acquiescence, it is unfair and inequitable to saddle husband with the consequences of DCSE's legal error in failing to obtain a proper Administrative Order against wife for child support.

Husband applied for AFDC, and thereafter all actions regarding support from wife and the taking thereof were directed, controlled, and accomplished by DCSE. Husband was and is not a lawyer and had no way of knowing that the Administrative Default Order promulgated was invalid. DCSE promulgated the order.

DCSE failed to have the order signed by a judge. DCSE's failure to obtain a proper order may, under Palo, make DCSE liable for an overreaching against wife. But under Palo's principals of equity and fairness, liability can hardly be extended to husband for DCSE's mistake. *Id.*

Moreover, a sense of what is fair and equitable in the instant case can be derived from the Trial Court's reasoning about the responsibility of DCSE and husband for wife's tort claims arising from her jailing and treatment at the hands of the Phelps County Prosecuting Attorney. The Trial Court noted in its final judgment that only the Prosecuting Attorney could have initiated the action which led to wife being jailed for failure to abide by the invalid Default Administrative Order, that neither DCSE nor husband could have anticipated the illegal acts, of the Prosecuting Attorney, and that therefore, the law of intervening factors applies to wife's tort claim rendering DCSE and husband blameless for the acts of the Prosecuting Attorney over which neither had any control (L.F.106). That same reasoning and logic seem appropo to determining whether husband should be liable with DCSE when husband had no control

over the acts, by which DCSE took money from wife. Again, all husband did was apply for AFDC. He did not have control over DCSE's action and conduct after his initial application. He had no hand in the manufacture of the faulty Administrative Default Order and could not have anticipated that said order was invalid.

Therefore, coupling the general principals of equity and fairness enumerated in Palo to the Trial Court's reasoning about super intervening factors in wife's tort claim leads to the conclusion that husband should not be jointly and severally liable with DCSE to wife for \$21,649.00 taken under the color of the Original Administrative Default Order over which he had no control. *Id* In sum, applying for AFDC is not enough to make husband a partner in the acts of DCSE for money taken from wife under DCSE's invalid order.

CONCLUSION

Wherefore, husband respectfully requests this Honorable Court correct the Trial Court's judgment as to the joint and several

liability of husband on the Judgment of \$21,649.00 awarded to wife for wrongly taken child support, and enter judgment in favor of wife, if at all, for said amount, against Defendant-Division only.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Supreme Court Rule 8405(g) this certifies

that the floppy disk containing the Appellant-s Opening Brief has been scanned using Norton Anti-Virus Program and found to be AVirus Free@

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Characters	8,525	
Words	1,496	
Sentences	130	
Lines	260	
Paragraphs	64	
Pages		12

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CERTIFICATE OF SERVICE

The undersigned certifies that a complete copy of Appellant's Opening Brief and one floppy disk; was served by mailing a copy thereof, via U.S. Mail to the attorneys of record of each party, at their business addresses on the 29th day of October, 2002.

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