No. SC83455

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IN THE MISSOURI SUPREME COURT

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STATE OF MISSOURI ex rel. ROBIN HILBURN,

Respondent,

v.

SHERRY STAEDEN (LADLEE),

Respondent,

JEREMIAH W. (JAY) NIXON,
Attorney General,

Intervenor–Appellant.

_____

Appeal from the Circuit Court of Greene County, Missouri,
The Honorable Don E. Burrell, Circuit Judge

_____

INTERVENOR–APPELLANT NIXON'S BRIEF

_____

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JURISDICTIONAL STATEMENT

This is an appeal from a judgment on judicial review under § 454.475.5 RSMo of an order of the Director of the Division of Child Support Enforcement establishing child support under § 454.470.1 RSMo. *See* § 512.020, RSMo 2000. The judgment vacated the Director's order establishing child support and declared § 454.490 RSMo unconstitutional. Therefore, this Court has exclusive appellate jurisdiction under Article V, § 3 of the Missouri Constitution.

STATEMENT OF FACTS

In 1992, the district court of Comanche County, Oklahoma, dissolved the marriage of Sherry Watson and Robert Lee Watson. (L.F. 80.) Though 3 children were born of the marriage, the Oklahoma court did not order either party to pay or not to pay child support. (L.F. 80, 80–81.) The court did restore to Sherry Watson her maiden name of Sherry Gale Staeden. (L.F. 81.)

In 1995, Robin Laurette Alton of Springfield, Missouri, applied to the Division of Child Support Enforcement for child support enforcement services for the 3 Watson children. (L.F. 82–85.) Alton's application listed Sherry Staeden of Lawton, Oklahoma, as the non–custodial parent. (L.F. 82.)

In April 2000, the Director of the Division issued a Notice and Finding of Financial Responsibility and served it on Staeden, now residing in Springfield, and on Robin Laurette Hilburn, formerly known as Robin Laurette Alton. (L.F. 86–88, 89, 90–91.) This notice alleged that the 3 Watson children were in Hilburn's custody and, based on the combined monthly gross incomes of Hilburn ($0.00), who is the person who would be receiving support, and Staeden ($1,263.00), who is the person who would be paying support, Staeden owed a duty of child support in the amount of $343.00 per month beginning on May 15, 2000, and a duty of medical support. (L.F. 86, 92–93.) Both Hilburn and Staeden requested an administrative hearing. (L.F. 96–97, 99–101.)

The September 2000 administrative hearing was conducted by an attorney licensed to practice law in Missouri who was an employee of the Division of Legal Services of the Department of Social Services designated by the Department Director to conduct administrative hearings. (L.F. 60.) The hearing officer received into evidence an Employment Security IMES Information form showing Staeden's average monthly income for 1999 to be $1,263.00 and the Division's Child Support Obligation Worksheet showing the presumed correct child support amount to be $343.00 per month. (L.F. 60, 61, 64–65, 92–93, 95.) Hilburn's attorney asserted that Hilburn is the guardian of the 3 Watson children and their father sends Hilburn $375.00 per

month to support the children. (L.F. 67, 68.) Hilburn testified that the children's father maintains a medical insurance policy available for the children and her husband maintains a medical insurance policy available for all the children living in her home, including the 3 Watson children. (L.F. 70–72.) Staeden did not appear personally and presented no evidence. (L.F. 64.)

On October 26, 2000, the hearing officer issued a Judgment and Order. (L.F. 54–58.) The hearing officer accepted the Division's Child Support Obligation Worksheet and found as fact that Staeden's presumed correct child support amount is $343.00 per month and, after considering all relevant factors, that Staeden's presumed correct child support amount of $343.00 per month is just and appropriate. (L.F. 55, ¶ 4; 56, ¶¶ 8–10.) The hearing officer ordered Staeden to pay child support in the amount of $343.00 per month beginning on May 15, 2000, and to maintain the 3 Watson children as covered dependents on any health insurance policy on a group basis available through her employer. (L.F. 57.)

On November 6, 2000, the Division issued an Income Withholding Order, directing Staeden's employer to pay to the Family Support Payment Center from Staeden's income $343.00 for current child support and $85.75 in arrearage per month or 50% of Staeden's disposable earnings per month, whichever is less, beginning after November 15, 2000. (L.F. 15.)

On November 13, 2000, Staeden filed in the circuit court a Petition for Judicial Review of Administrative Child Support Order [Count I] and for Related Injunctive Relief [Count II] and an Application for Temporary Restraining Order and Preliminary Injunction and Notice. (L.F. 5–17, 18–33.) That day, the circuit court issued a Temporary Restraining Order and Notice of Hearing for Preliminary Injunction, enjoining the Division from enforcing its Income Withholding Order until further order of the court and setting a date for hearing the application for preliminary injunction. (L.F. 34–35.)

On December 18, 2000, Staeden and the Division stipulated that the circuit court should enter a Stay of Enforcement and any temporary restraining order or injunction should be set aside. (L.F. 40–41.) On that

date, the circuit court entered a Stay Order staying enforcement and setting aside any injunction, thereby rendering Count II of the petition moot. (L.F. 42.)

Count I of Staeden's petition was for judicial review and alleges 14 different reasons the administrative order of child support should be set aside. (L.F. 5–7, ¶ 4.a.–n.) The first among those reasons was that § 454.490 RSMo, providing that upon docketing, an administrative order of child support has the force, effect and attributes of a circuit court order, is unconstitutional because the administrative order is not signed by an Article V judge. (L.F. 5–6, ¶ 4.a.) Staeden did not seek attorneys' fees under Count I, but only under Count II. (L.F. 7, 8.)

Staeden moved for summary judgment, alleging only the following four facts: 1) on October 26, 2000, the Department issued a Judgment and Order ordering her to pay child support and maintain health insurance; 2) on November 6, 2000, the Division Director issued an Income Withholding Order; 3) the Income Withholding Order was directed to Staeden's employer; and 4) the Judgment and Order was not signed by an Article V judge. (L.F. 43.) The Division opposed Staeden's motion on procedural grounds. (L.F. 103–106.) Staeden and the Attorney General, who was permitted to intervene, filed briefs on the constitutional issue only. (L.F. 2, 36–39, 45–47, 107–110.) The Attorney General argued that it was unnecessary to decided the constitutionality of § 454.490 because Staeden's child support obligation was not being enforced through the income withholding order since it was stayed, but could be enforced by means of a judgment on judicial review. (L.F. 107–108.)

On February 27, 2001, the circuit court issued an Order. (L.F. 112–113; A6–A7.) This Order begins by stating:

> It is hereby ordered that the administrative "Judgment and Order" entered on October 26, 2000 and filed with the clerk of the circuit court in this case is hereby set aside as said "Order and Judgment" was not signed

by a judge selected pursuant to the provisions of Article V of the Missouri Constitution.

(L.F. 112; A6.) By way of explanation, this Order states:

> Judgments must be signed by judges selected pursuant to the provisions of Article V of the Missouri Constitution. Slay v. Slay, 965 S.W.2d 845 (Mo. banc 1998); Fowler v. Fowler, 984 S.W.2d 508 (Mo. banc 1999).

(L.F. 113; A7.) By way of further explanation, this Order states:

> Because Section 454.490 RSMo. purports to allow an administrative order signed by a lawyer to be enforced as if it were a judgment signed by a judge, it is unconstitutional under Chastain, Slay, and Fowler.

(L.F. 113: A7.) This Order concludes by stating:

> It is therefore ordered and declared that the administrative "Judgment and Order" entered October 26, 2000 and filed with the clerk of the circuit court is hereby vacated as void *ab initio* and shall have no legal effect. This shall be considered a final judgment for all purposes of appeal.

(L.F. 113; A7.)

On March 8, 2001, Staeden filed a Motion and Application for Award of Attorney Fees seeking attorneys' fees and expenses under § 536.087, RSMo. (L.F. 114–116.) On March 14, following the procedure set out in Local Rule 3.4 Requests for Settings, Staeden's counsel wrote the circuit court asking for a setting on the motion for attorneys' fees. (A8, A9.) On March 16, the Attorney General wrote the circuit court and opposed a setting because he had mailed to the circuit clerk a notice of appeal, and under § 536.087.4 RSMo the court could not rule on a fees motion until the appeal and any proceedings resulting from the appeal were concluded. (A10.)

On March 19, 2001, the Attorney General filed his notice of appeal to this Court. (L.F. 117–122.) On March 22, Staeden's counsel wrote the circuit court and stated that the court's Order may not be a final judgment and that the court could amend its Order under Rule 75.01. (A11.)

The next day, on March 23, 2001, the circuit court issued an Amended Order identical to its February 27 Order but for omitting the February 27 Order's last sentence — "This shall be considered a final judgment for all purposes of appeal." (L.F. 123–124, 122; A12–A13, A7.) The Amended Order was filed with the clerk on March 27. (L.F. 123.)

Also on March 23, the circuit court made a docket entry stating that it enters an amended order deleting the reference to finality for purposes of appeal, all issues in the case have not been resolved, and a challenge to the court's order should be made by writ and not by appeal. (L.F. 3; A14.)

Finally on March 23, the Attorney General wrote the circuit court and stated that the February 27 Order was a final judgment and that the court could not rule on the fees motion because an appeal had been filed. (App. A15.)

POINTS RELIED ON

I.

This Court has jurisdiction over this appeal, because the February 27 Order is a final and appealable judgment in that 1) the Order is in writing, signed by a judge, denominated in its body "a judgment for all purposes of appeal," and filed with the circuit clerk, and 2) disposes of all issues in a single claim for judicial review since fees and expenses under § 536.087 RSMo are collateral, that is, accompanying as secondary and subordinate, to judicial review.

Boley v. Knowles, 905 S.W.2d 86 (Mo. banc 1995)

City of St. Louis v. Hughes, 950 S.W.2d 850 (Mo. banc 1997)

Committee for Educ. Equality v. State, 878 S.W.2d 446 (Mo. banc 1994)

§ 536.087, RSMo 2000

II.

The trial court erred in declaring the administrative order establishing child support void and § 454.490 RSMo unconstitutional, because Article V of the Missouri Constitution permits executive officials to perform judicial functions delegated to them by the legislature, including the Director of the Division of Child Support Enforcement to hold hearings, ascertain facts, apply the law to the facts, and issue decisions determining child support, and because § 454.490 does not authorize the Director to render judgments, but to collect child support by the same means used to collect a judgment.

Dye v. Division of Child Support Enforcement,

811 S.W.2d 355 (Mo. banc 1991)

Henry v. Manzella, 356 Mo. 305, 201 S.W.2d 457 (1947)

State ex rel. Keitel v. Harris, 353 Mo. 1043, 186 S.W.2d 31 (1945)

§ 454.490, RSMo 2000

ARGUMENT

I.

This Court has jurisdiction over this appeal, because the February 27 Order is a final and appealable judgment in that 1) the Order is in writing, signed by a judge, denominated in its body "a judgment for all purposes of appeal," and filed with the circuit clerk, and 2) disposes of all issues in a single claim for judicial review since fees and expenses under § 536.087 RSMo are collateral, that is, accompanying as secondary and subordinate, to judicial review.

The February 27 Order is in writing, signed by a judge, denominated a judgment, and filed with the circuit clerk. See Rule 74.01(a); *City of St. Louis v. Hughes*, 950 S.W.2d 850, 853 (Mo. banc 1997). And the Order disposes of all the issues in one claim for relief. *See Boley v. Knowles*, 905 S.W.2d 86, 88 (Mo. banc 1995). Thus it satisfies the requirements for a judgment.

That is true even though it is entitled "Order" rather than "Judgment." In the body of its writing, the circuit court "called" its writing a "judgment." *City of St. Louis v. Huges*, 950 S.W.2d at 853. *See also Skalecki v. Small*, 951 S.W.2d 342, 346 (Mo.App., S.D. 1997) and *Hoy v. Hoy*, 961 S.W.2d 128, 128–29 (Mo.App., S.D. 1998) (both recognizing that the "purpose" of the word "judgment" in a docket entry may be to denominate the entry a judgment). The circuit court said: "This shall be considered a final judgment for all purposes of appeal." (L.F. 113; A7.) This language denominates the Order a judgment.

This language cannot be an attempt to authorize an interlocutory appeal under Rule 74.01(b) on fewer than all the claims for relief presented in this action because this action presents only one claim for relief — a claim for judicial review. This Court has said that "if the order disposed of one claim for relief, the order is a final judgment and this Court has jurisdiction." *Boley v. Knowles*, 905 S.W.2d at 88 (internal quotation marks and footnote omitted). What is meant by one claim for relief is one legal right. *See Boley v. Knowles*, 905 S.W.2d at 88 n. 3; *Committee for Educ. Equality v. State*, 878 S.W.2d 446, 451 (Mo. banc 1994). A

single claim for relief, or one legal right, exists when a single aggregate of operative facts gives rise to a right enforceable by the courts. *See Committee for Educ. Equality*, 878 S.W.2d at 451.

The aggregate of operative facts giving rise to the right of judicial review in this case is 3 children born of the Watson marriage, the Watson dissolution, the absence of any order for their mother to pay child support, the 3 children residing in the custody of their guardian, their mother's $1,263.00 monthly income and her failure to support her children therefrom, and the Division of Child Support Enforcement's establishment of an order for their mother to pay $343.00 per month child support.

Multiple claims for relief exist when proof of different facts and application of distinguishable law is required. *See Committee for Educ. Equality*, 878 S.W.2d at 451. No aggregate of operative facts other than that just described need be or was proven in this case. And no law other than the law of child support need be or was applied in this case.

One claim for relief exists, even if there may be multiple remedies. *Committee for Educ. Equality*, 878 S.W.2d at 451. The multiple remedies for the right of judicial review are reversal, modification, or reconsideration of the agency's decision or further agency action. *See* § 536.140.5, RSMo 2000. In this case, the remedy was reversal of the agency decision.

That a prevailing party on judicial review may also recoup its fees and expenses incurred in defending agency action does not create an additional claim for relief or an additional issue within a single claim for relief. Section 536.087 fees and expenses are collateral to the judicial review claim, and consequently there is only one claim for relief in this action. Collateral is defined as "accompanying as a secondary fact, activity, or agency but usu. extrinsic to a main consideration: similar but subordinate." *Webster's Third New International Dictionary* at 444 (unabridged 1993).

The General Assembly intended for § 536.087 fees and expenses to be collateral to a claim for judicial review. Requiring a final judgment before an application for fees and expenses may even be filed

indicates a legislative intent that fees and expenses are secondary and subordinate to judicial review. *See* § 536.087.3, RSMo 2000; A3–A4.[1] Requiring an application for fees and expenses to be filed within 30 days of a final judgment indicates a legislative intent that fees and expenses are secondary and subordinate to judicial review. *See* § 536.087.3, RSMo 2000; A3–A4. Permitting an appeal on the merits despite a pending fees application and prohibiting a decision on the application until the merits appeal is completed indicates a legislative intent that fees and expenses are secondary and subordinate. *See* § 536.087. 4, RSMo 2000; A4. Requiring the fees application decision to be in a writing, separate from the merits decision, and to include written findings and conclusions and the reason or basis therefor indicates a legislative intent that fees and expenses are secondary and subordinate. *See* § 536.087.6, RSMo 2000; A4. And permitting the prevailing party or the state, if dissatisfied with the fees decision, to appeal to the appellate court with jurisdiction over the merits appeal indicates a legislative intent that fees and expenses are secondary and subordinate. § 536.087.7, RSMo 2000; A4–A5.

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[1]An application for fees and expenses must show, among other things, how "the position of the state was not substantially justified." *See* § 536.087.3, RSMo 2000; A3–A4. In light of the federal law requiring Missouri to enforce its child support orders without obtaining an order from some court or tribunal other than the one issuing the support order, it is difficult to see how the State's position that § 454.490 RSMo is constitutional was not substantially justified. *See* Argument II herein.

This Court's statement in *Greenbriar Hills Country Club v. Director of Revenue*, No. SC82805, 2001 Mo. Lexis 32, *7 (Mo. banc Mar. 20, 2001) that § 536.087 fees and expenses are "part and parcel of [an] original cause of action" does not mean that fees and expenses are a free–standing claim for relief or one more issue that is part of a single claim for relief. Rather, fees and expenses are part and parcel of an original cause of action in the sense that they accompany, but nevertheless are secondary and subordinate, to the original claim.

As the General Assembly intended for the Missouri judicial system, in the federal judicial system, "an unresolved issue of attorney's fees for the litigation in question does not prevent judgment on the merits from being final." *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 202 (1988). This is so because fees are collateral, accompanying as secondary and subordinate, to the merits. "As a general matter, at least, we think it indisputable that a claim for attorney's fees is not part of the merits of the action to which the fees obtain." *Budinich*, 486 U.S. at 200. A post–judgment motion for attorney's fees in not a motion under Rule 59(e) of the Federal Rules of Civil Procedure for "reconsideration of matters properly encompassed in a decision on the merits." *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 451 (1982). Similarly, the § 536.087 fee hearing "is not to be treated as a hearing on a motion for reconsideration" under Rule 75.01. *Dishman v. Joseph*, 14 S.W.3d 709, 718 (Mo.App., W.D. 2000).

Under the Equal Access to Justice Act (EAJA), a judgment on the merits in the federal courts is final and appealable despite a pending claim for attorney's fees. *See Gonzales v. Rivkind*, 858 F.2d 657, 660 (11th Cir. 1988); *U.S. v. Estridge*, 797 F.2d 1454, 1459 (8th Cir. 1986). The EAJA is the model for § 536.087. *See Dishman v. Joseph*, 14 S.W.3d at 716. Consequently, the federal cases interpreting the EAJA are "helpful." *Hernandez v. State Bd. of Registration for the Healing Arts*, 936 S.W.2d 894, 901 (Mo.App., W.D. 1997).

Finally, this Court's jurisdiction over this appeal is not defeated by the circuit court's post–notice of appeal, March 23 Amended Order deleting from its February 27 Order the reference to finality for purposes of appeal, nor by its post–notice of appeal, March 23 docket entry stating that all issues in this case have not been resolved and a challenge to the court's order should be made by writ and not by appeal. (L.F. 3, 112–113, 123–124; A6–A7, A12–A13, A14.) "The designation by a trial court that its order is final and appealable is not conclusive." *Gibson v. Brewer*, 952 S.W.2d 239, 244 (Mo. banc 1997). Likewise, the designation by a trial court that its order is not final and appealable should not be conclusive. In both instances, "finality and appealability" should be determined by "the content, substance, and effect of the order." *Id*.

The March 23 Amended Order treats Staeden's application for fees and expenses as a Rule 75.01 motion to reconsider the February 27 Order. No doubt, upon proper motion or even upon its own motion, the circuit court could have reconsidered the February 27 Order under Rule 75.01. Rules 41 through 101 may apply to judicial review of administrative action when they do not conflict with "§§ 536.100 through 536.150 or the statute specifically governing a particular agency." *Minx v. State*, 945 S.W.2d 453, 456 (Mo.App., W.D. 1997) (Rule 55.03 applies to Director's default order modifying child support). Staeden's counsel's March 22 letter invites the circuit court to reconsider its February 27 Order under Rule 75.01. (A4.)

But regardless of whether the circuit court retained jurisdiction to reconsider its order, it had no jurisdiction to treat fees and expenses as its March 23 Amended Order does — either as an additional claim for relief or an additional issue within a single claim for relief. Fees and expenses are collateral, accompanying as secondary and subordinate, to judicial review. Therefore, the March 23 Amended Order is a nullity and does not make the February 26 Order something other than a final and appealable judgment. This Court has jurisdiction over this appeal.

II.

The trial court erred in declaring the administrative order establishing child support void and § 454.490 RSMo unconstitutional, because Article V of the Missouri Constitution permits executive officials to perform judicial functions delegated to them by the legislature, including the Director of the Division of Child Support Enforcement to hold hearings, ascertain facts, apply the law to the facts, and issue decisions determining child support, and because § 454.490 does not authorize the Director to render judgments, but to collect child support by the same means used to collect a judgment.

A. Standard of Review

When "the only reason" a circuit court gives for reversing an administrative agency's decision is that a statute is unconstitutional, this Court reviews only the circuit court's judgment. *Cocktail Fortune, Inc. v. Supervisor of Liquor Control*, 994 S.W.2d 955, 957 (Mo. banc 1999) (only reason for reversal was regulation unconstitutional). This Court exercises its "independent judgment" when reviewing questions of law. *Phillips v. Fallen*, 6 S.W.3d 862, 864 (Mo. banc 1999).

B. Federal Demand for Missouri's Scheme

The trial court's declaration that § 454.490 RSMo is unconstitutional places at risk the millions of dollars of federal funding Missouri receives for its child support enforcement and temporary assistance to needy families programs. *See* H.B. 1111, 90th Gen. Assembly, 2nd Reg. Sess. (enacted 2000); 2000 Mo. Laws 153; 42 U.S.C. § 609(a)(B) (Supp. IV 1998); *State ex rel. Morrow v. Califano*, 445 F.Supp. 532 (E.D.N.C. 1977) (state's federal funding forfeited by state supreme court decision that federally required state certificate of need statute violates state constitution). Missouri's "entire scheme of administrative adjudication" of child support was adopted "at the urging of the federal government." *Dye v. Division of Child Support Enforcement*, 811 S.W.2d 355, 358–59 (Mo. banc 1991)

As part of that scheme, § 454.490 provides that upon filing a child support order with a circuit clerk, "the order shall have all the force, effect, and attributes of a docketed order or decree of the circuit court, including, but not limited to, lien effect and enforceability by supplementary proceedings, contempt of court, execution and garnishment." § 454.490.1, RSMo 2000; A1. By this statute, Missouri complies with the federal law requiring its child support orders to be enforced without obtaining an order from some court or tribunal other than the one issuing the support order.

Congress requires the States accepting certain federal funding to provide services to establish, modify, and enforce child support obligations for children who receive federal assistance and for children who do not receive federal assistance if an individual applies for services for such a child. *See* 42 U.S.C. §§ 654(3) (1994), 654(4)(A) (Supp.IV 1998). Missouri provides support enforcement services through its State plan for child support enforcement administered by the Division of Child Support Enforcement. *See* §§ 454.400, 454.425, RSMo 2000.

As a condition of having Missouri's child support enforcement plan approved, Congress requires Missouri to have in effect and to implement certain laws and procedures intended to make Missouri's support

enforcement program effective. *See* 42 U.S.C. § 654(20) (1994). To enforce its child support orders, Missouri must have in effect laws and procedures requiring income withholding, such as the withholding order the Division issued in this case. *See* 42 U.S.C. § 666(a)(1)(A) (Supp.IV 1998). And Missouri must have in effect laws and procedures requiring income withholding to be ordered "without the necessity of obtaining an order from any *other* judicial or administrative tribunal." 42 U.S.C. § 666(c)(1)(F) (Supp.IV 1998) (emphasis added). This § 454.490 does. But if § 454.490 is unconstitutional, Missouri does not comply with federal law and risks losing federal funding.

C. Constitutionality of Missouri's Scheme

The statute is constitutional because the Missouri constitution does not erect an impenetrable wall of separation between the departments of government. *See, e.g., Dabin v. Director of Revenue*, 9 S.W.3d 610, 614 (Mo. banc 2000) (Article II permits traffic court commissioners to make findings and recommendations to circuit judges); *Chastain v. Chastain*, 932 S.W.2d 396, 398 (Mo. banc 1996) (Article II permits the Division to assess compliance with circuit court child support orders and to initiate the process resulting in court modification of those orders); *Dye*, 822 S.W.2d at 357–59 (Articles II and V permit the Division to establish child support under § 454.470); *Barber v. Jackson County Ethics Comm'n*, 935 S.W.2d 62, 65 (Mo.App., W.D. 1996) (Article V permits local ethics commission to conduct investigations and issue subpoenas). The delegation of judicial functions — holding hearings, finding facts, applying the law to the facts, and issuing orders based on the law and the facts — to administrative agencies is possible, desirable, and commonplace. *See Dabin*, 9 S.W.3d at 614. Section 454.490 is a permissible delegation of authority.

The General Assembly has authorized the Director of the Division of Child Support Enforcement to issue a notice and finding of financial responsibility to a parent, such as Sherry Staeden, who is responsible for the support of a child on whose behalf the child's custodian is receiving support enforcement services from the Division. *See* § 454.470.1, RSMo 2000; (L.F. 86–88, 90–91). Support enforcement services may be

provided to a custodian, such as Robin Hilburn, who is not receiving public assistance and for children who are not receiving public assistance, foster care benefits, or Medicaid benefits. *See* §§ 454.400.2(14)(a), 454.400.2(14)(b), 454.425, RSMo 2000; (L.F. 82–85).

The General Assembly has also authorized a parent to whom the notice and finding is issued to request in writing, as Sherry Staeden did, a hearing on factual questions raised by the parent's request. *See* §§ 454.470.4, 454.470.7, RSMo 2000; (L.F. 99–101). The hearing provided, such as the one provided in this case, is a contested case hearing before a hearing officer designated by the Department of Social Services and is subject to judicial review. *See* §§ 454.475.1, 454.475.5, RSMo 2000; (L.F. 60–79).

Finally, the General Assembly has authorized that once a child support obligation has been established, the Division can enforce the support obligation, as it attempted to do in this case, by issuing an income withholding order to the obligated parent's employer. *See* § 454.505.1, RSMo 2000; (L.F. 15–17). The withholding order can be stayed, as it was in this case, by a circuit court. *See* § 454.475.1, RSMo 2000; (L.F. 42.)

Consequently, the administrative order establishing child support in this case is constitutional even though it is not signed by an Article V judge and regardless of what it is called. This court has upheld Missouri's "entire scheme of administrative adjudication" of child support from an Article II and an Article V challenge. *Dye*, 811 S.W.2d at 358. And specifically with respect to administrative determination of child support under § 454.470, this Court has said: "The limitation of the authority of the administrative agency, together with the right of judicial review, saves the statute from the separation of powers argument." *Dye*, 811 S.W.2d at 359. The Division's authority to determine child support is subject to the right to obtain "a judicial hearing superseding an administrative hearing." *Dye*, 811 S.W.2d at 359, citing § 454.501, providing that "nothing contained in sections 454.465 to 454.510 shall deprive courts of competent jurisdiction from determining the support duty of a parent against whom an order is entered by the director." § 454.501, RSMo

2000. And the Division's authority to determine child support is subject to the right to judicial review. *See Dye*, 811 S.W.2d at 357, citing § 454.475.5, providing that any parent adversely affected by a decision of the Director may obtain judicial review. *See* § 454.475.5, RSMo 2000.

That the legislature may delegate judicial functions to the executive is not new or unsettled law. In 1940, the U.S. Supreme Court said: "To hold that there was [an unconstitutional delegation] would be to turn back the clock on at least a half century of administrative law." *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 400 (1940), quoted in *Percy Kent Bag Co. v. Missouri Comm'n on Human Rights*, 632 S.W.2d 480, 483–84 (Mo. banc 1982) (rejecting argument that commission's power to issue cease and desist and back pay orders was an unconstitutional delegation under Article II). The cases of *Slay v. Slay*, 965 S.W.2d 845 (Mo banc 1998) and *Fowler v. Fowler*, 984 S.W.2d 508 (Mo. banc 1999) do not indicate otherwise; they merely hold that a family court commissioner's order is not a final and appealable judgment. And though *Slay*'s concurrence and *State ex rel. York v. Daugherty*, 969 S.W.2d 223 (Mo. banc 1998) suggest that a now–repealed statute authorizing family court commissioners to enter judgments may be unconstitutional, § 454.490 does not authorize the Director to enter judgments. The repealed statute permitted findings and recommendations of family court commissioners to "become the judgment of the court when entered by the commissioner." *Slay*, 965 S.W.2d at 846, quoting § 487.030.1, RSMo Cum. Supp. 1997 (repealed). Section 454.490 is very different.

Recognizing a difference between legislative authorization to render a judgment and authorization to collect an obligation by the same means used to collect a judgment, this Court has upheld statutes substantially identical to § 454.490 from an Article V challenge. When an order establishing child support is filed with a circuit clerk, "the order shall have all the force, effect, and attributes of a docketed order or decree of the circuit court, including, but not limited to lien effect and enforceability by supplementary proceedings, contempt of court, execution and garnishment." § 454.490.1, RSMo 2000; A1. Similarly, Division of Employment

Security certificates assessing unpaid unemployment compensation tax, when filed with a circuit clerk, "shall, upon such filing, thereafter be treated in all respects as a final judgment of the circuit court against the employer." § 288.160.6(4), RSMo 2000. And from the time of filing such certificates, the amount of the contributions, interest and penalties specified in them, "shall have the force and effect of a judgment of the circuit court ...." § 288.170.1, RSMo 2000.

This Court upheld § 288.170.1's "force and effect of a judgment" language because it "merely authorizes the commission to enforce the collection of the tax by the same statutory means used to collect a judgment. Such bare authority calls for no exercise of judicial power by the commission." *Henry v. Manzella*, 356 Mo. 305, 201 S.W.2d 457, 460 (1947). *Accord Division of Employment Sec. v. Cusumano*, 809 S.W.2d 113, 115 (Mo.App., E.D. 1991). This Court further reasoned that the commission's certificate derives the qualities of a judgment only for collection purposes and from the court in which it was filed, not from any judicial power of the commission. *See id*.; *State ex rel. Keitel v. Harris*, 353 Mo. 1043, 186 S.W.2d 31, 34 (1945).

Section 454.490 is constitutional, and the Director's order determining child support is valid, because Article V permits executive officials to perform judicial functions delegated to them by the legislature, and because § 454.490 does not authorize rendering a judgment for child support, but collection of child support by the same means used to collect a judgment.

CONCLUSION

For the reasons stated above, the judgment of the trial court should be reversed and judgment entered under Rule 84.14 affirming the Director of the Division of Child Support Enforcement's Judgment and Order and setting aside the December 18, 2000, Stay Order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that 1 copy and 1 computer diskette of the foregoing were served by first–class mail, postage prepaid, this ____ day of June 2001 upon:

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_____
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief includes the information required by Rule 55.03, complies with the limitations of Special Rule No. 1 (b), and contains 5995 words and that the diskettes provided this Court and counsel have been scanned for viruses and are virus–free.

_____
Assistant Attorney General

454.490. Orders entered by director, docketing of, effect. — 1. A true copy of any order entered by the director pursuant to sections 454.460 to 454.997, along with a true copy of the return of service, may be filed with the clerk of the circuit court in the county in which the judgment of dissolution or paternity has been entered, or if no such judgment was entered, in the county where either the parent or the dependent child resides or where the support order was filed. Upon filing, the clerk shall enter the order in the judgment docket. Upon docketing, the order shall have all the force, effect, and attributes of a docketed order or decree of the circuit court, including but not limited to, lien effect and enforceabilty by supplementary proceedings, contempt of court, execution and garnishment. Any administrative order or decision of the division of child support enforcement filed in the office of the circuit clerk of the court shall not be required to be signed by any attorney, as provided by supreme court rule of civil procedures 55.03(a), or required to have any further pleading other than the director's order.

2. In addition to any other provision to enforce an order docketed pursuant to this section or any other support order of the court, the court may, upon petition by the division, require that an obligor who owes past due support to pay support in accordance with a plan approved by the court, or if the obligor is subject to such plan and is not incapacitated, the court may require the obligor to participate in work activities.

3. In addition to any other provision to enforce an order docketed pursuant to this section or any other support order of the court, division or other IV-D agency, the director may order that an obligor who owes past due support to pay support in accordance with a plan approved by the director, or if the obligor is subject to such plan and is not incapacitated, the director may order the obligor to participate in work activities. The order of the director shall be filed with a court pursuant to subsection 1 of this section and shall be enforceable as an order of the court.

1. As used in this section, **"work activities"** include:

    1. Unsubsidized employment;
    2. Subsidized private sector employment;
    3. Subsidized public sector employment;
    4. Work experience (including work associated with the refurbishing of publicly assisted housing) if sufficient private sector employment is not available;
    5. On-the-job training;
    6. Job search and readiness assistance;
    7. Community services programs;
    8. Vocational educational training, not to exceed twelve months for any individual;
    9. Job skills training directly related to employment;
    10. Education directly related to employment for an individual who has not received a high school diploma or its equivalent;

11. Satisfactory attendance at a secondary school or course of study leading to a certificate of general equivalence for an individual who has not completed secondary school or received such a certificate; or
12. The provision of child care services to an individual who is participating in a community service program.

(L. 1982 S,B, 468 § 19, A.L. 1997 S.B. 361, A.L. 1998 S.B. 910)

536.087. Reasonable fees and expenses awarded prevailing party in civil action or agency proceeding – application, content, filed with court or agency where party appeared – appeal by state, effect – power of court or agency to reduce requested amount or deny, when – form of award – judicial review, when. –

1. A party who prevails in an agency proceeding or civil action arising therefrom, brought by or against the state, shall be awarded those reasonable fees and expenses incurred by that party in the civil action or agency proceeding, unless the court or agency finds that the position of the state was substantially justified or that special circumstances make an award unjust.

2. In awarding reasonable fees and expenses under this section to a party who prevails in any action for judicial review of an agency proceeding, the court shall include in that award reasonable fees and expenses incurred during such agency proceeding unless the court finds that during such agency proceeding the position of the state was substantially justified, or that special circumstances make an award unjust.

3. A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in an agency proceeding or final judgment in a civil action, submit to the court, agency or commission which rendered the final disposition or judgment an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses are computed. The party shall also allege that the position of the state was not substantially justified. The fact that the state has lost the agency proceeding or civil action creates no legal presumption that its position was not substantially justified. Whether or not the position of the state was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by an agency upon which a civil action is based) which is made in the agency proceeding or civil action for which fees and other expenses are sought, and on the basis of the record of any hearing the court or agency deems appropriate to determine whether an award of reasonable fees and expenses should be made, provided that any such hearing shall be limited to consideration of matters which affected the agency's decision leading to the position at issue in the fee application.

4. A prevailing party in an agency proceeding shall submit an application for fees and expenses to the administrative body before which the party prevailed. A prevailing party in a civil action on appeal from an agency proceeding shall submit an application for fees and expenses to the court. The filing of an application shall not stay the time for appealing the merits of a case. When the state appeals the underlying merits of an adversary

proceeding, no decision on the application for fees and other expenses in connection with that adversary proceeding shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

5. The court or agency may either reduce the amount to be awarded or deny any award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

6. The decision of a court or an agency on the application for reasonable fees and expenses shall be in writing, separate from the judgment or order of the court or the administrative decision which determined the prevailing party, and shall include written findings and conclusions and the reason or basis therefor. The decision of a court or an agency on the application for fees and other expenses shall be final, subject respectively to appeal or judicial review.

7. If a party or the state is dissatisfied with a determination of fees and other expenses made in an agency proceeding, that party or the state may within thirty days after the determination is made, seek judicial review of that determination from the court having jurisdiction to review the merits of the underlying decision of the agency adversary proceeding. If a party or the state is dissatisfied with a determination of fees and other expenses made in a civil action arising from an agency proceeding, that party or the state may, within the time permitted by law, appeal that order or judgment to the appellate court having jurisdiction to review the merits of that order or judgment. The reviewing or appellate court's determination on any judicial review or appeal heard under this subsection shall be based solely on the record made before the agency or court below. The court may modify, reverse or reverse and remand the determination of fees and other expenses if the court finds that the award or failure to make an award of fees and other expenses, or the calculation of the amount of the award, was arbitrary and capricious, was unreasonable, was unsupported by competent and substantial evidence, or was made contrary to law or in excess of the court's or agency's jurisdiction. Awards made pursuant to this act✸ shall be payable from amounts appropriated therefor. The state agency against which the award was made shall request an appropriation to pay the award.

(L. 1989 H.B. 143 § 5)

✸ "This act" (H.B. 143, 1989) contains numerous sections. consult Disposition of sections table for definitive listing.