IN THE MISSOURI SUPREME COURT

STATE OF MISSOURI, ex rel. ROBIN HILBURN,	)	
Relator,	)	
vs.	)	**No. SC83455**
SHERRY STAEDEN (LADLEE),	)	
Respondent,	)	
JEREMIAH W. (JAY) NIXON, Attorney General,	)	
Intervenor-Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF GREENE COUNTY, MISSOURI, HONORABLE DON E. BURRELL, CIRCUIT JUDGE

STATEMENT, BRIEF AND ARGUMENT OF RESPONDENT SHERRY LADLEE

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STATEMENT OF JURISDICTION

This Court lacks jurisdiction and this appeal should be dismissed because the appeal herein is from an order which is not a final judgment for the reasons set forth in Point I of this Brief. Excepting the foregoing, Respondent accepts Appellant's jurisdictional statement.

STATEMENT OF FACTS

Appellant's Statement of Facts does not fairly or concisely state the facts. Hence, Respondent submits her own statement of facts.

Statement of the Case. On October 26, 2000 a purported "**Judgment** and Order" [emphasis added] was entered by a hearing officer/attorney employed by the Department of Social Services purporting to order Respondent to pay child support and maintain health insurance. (LF 54-58). Thereafter pursuant to said purported "**Judgment** and Order", on or about November 6, 2000 the Director of the Division of Child Support Enforcement (DCSE) issued an "Income Withholding Order" directing Respondent's employer to pay to the Family Support Center from Respondent's income accruing child support of $343 per month plus $85.75 per month on alleged "arrearages". (LF 15-18)

Thereafter on November 13, 2000, Respondent filed a 2 Count Petition in the Circuit Court of Greene County. Count I sought judicial review of the administrative child support order based upon **14** grounds, including a complaint that Section 454.490 RSMo. was unconstitutional because the purported "**Judgment** and Order was not signed by a person selected for office in accordance with * * * Article V of the state constitution." Count II sought a temporary restraining order, a preliminary injunction and a permanent injunction against the Director and employees of DCSE because the income withholding order was an attempt to enforce an unconstitutional statute. (LF 5-17)

A TRO and Notice of Hearing for a preliminary injunction were issued by Circuit Judge Miles Sweeney on the same day the petition was filed, enjoining enforcement of DCSE's Income Withholding Order because the so-called "**Judgment** and Order appear to be entered pursuant to a facially and patently unconstitutional statute, to-wit: 454.490 RSMo.". (LF-34). Thereafter on December 18, 2000 pursuant to the Stipulation of Respondent and DCSE (LF 41-42), a "Stay [of Enforcement] Order" was entered by Circuit Judge Don Burrell. (LF-42) In his subsequent Order, Judge Don Burrell interpreted said

Stay Order to be "an order staying enforcement of the 'judgment' until the case could be decided on the merits." (LF 113)

On December 22, 2000 Respondent filed a Motion for Summary Judgment itemizing four undisputed material facts. (LF 43-44) No response pursuant to Rule 74.04(c)(2) was ever filed by DCSE or the Attorney General. Instead DCSE filed an "Objection" claiming that summary judgment was improper under Section 454.475 and under Chapter 536 RSMo. (LF 103-106) Later the Attorney General filed "Suggestions" arguing that Section 454.490 RSMo. was constitutional. (LF 107-110)

Thereafter on February 27, 2001 Circuit Judge Don Burrell filed an **"Order"** holding Section 454.490 unconstitutional and decreed the Judgment and Order of the DCSE hearing officer "void *ab initio* and shall have no legal effect." His **Order** then states, "This shall be considered a final judgment for all purposes of appeal." (LF 112-113)

On March 19, 2001 the Attorney General filed a Notice of Appeal. (LF 117-121)

On March 22, 2001 counsel for Respondent sent the Court a letter citing a recent case regarding finality of judgments for purposes of appeal. (Appellant's A-11) Thereafter on March 27, 2001 Circuit Judge Burrell filed an "Amended Order" which tracked his earlier order but deleted the sentence stating that the judgment was final for purposes of appeal. His docket entry on said date states: "Court enters amended order deleting reference to finality for purposes of appeal as all issues in the case have not been resoled [sic], a challenge to this Court's order should be in the form of a writ and not an appeal." (LF 3, 123-124)

Statement of Facts. Respondent's Motion for Summary Judgment itemized in numbered paragraphs pursuant to Rule 74.04(c)(1) the following material facts:

> 1. A so-called "Judgment and Order" has been entered by the Department purportedly on October 26, 2000 purporting to order Respondent/Plaintiff to pay child support and maintain health insurance. A copy of said Judgment and Order is attached to the Petition as [LF 9-14].

2. Pursuant to said purported "Judgment and Order", on or about November 6, 2000 the Director of the Division of Child Support Enforcement issued an "Income Withholding Order", a copy of which is attached hereto and incorporated herein as [LF 15-17].

3. Said Income Withholding Order was directed to Plaintiff's employer (see [LF 15-17] and verified Application for Temporary Restraining Order) [LF 18-33].

4. The above-described "Judgment and Order" was not signed by an Article V judge. (See said Judgment).

No timely response to said numbered paragraphs was ever filed by DCSE or the Attorney General. (LF)

POINTS RELIED ON

POINT I

THE SUPREME COURT LACKS JURISDICTION OVER THIS APPEAL BECAUSE THE APPEALED ORDER IS NOT A FINAL JUDGMENT IN THAT (1) THE APPEALED ORDER DID NOT DISPOSE OF ALL ISSUES BEFORE THE TRIAL COURT; (2) THE APPEALED ORDER DOES NOT EXPRESSLY STATE THAT THERE IS NO JUST

REASON FOR DELAY AS PROVIDED IN RULE 74.01(b) R.C.P.; AND (3) THE "AMENDED ORDER" IS NOT A JUDGMENT UNDER 74.01 R.C.P. AND THE TRIAL COURT HAD AUTHORITY TO AMEND THE APPEALED ORDER UNDER 74.01(b) AND 75.01 R.C.P.

Rule 74.01 R.C.P.

Rule 75.01 R.C.P.

In re Werths, 33 S.W.3d 541 (Mo.banc 2000)

Wall USA, Inc. v. City of Ballwin, _____ S.W.3d ____, slip op. Nos. 78308 and 78309 (Mo.App.E.D. 3/13/2001)

POINT II

THE TRIAL COURT DID NOT ERR IN DECLARING DCSE'S PURPORTED ADMINISTRATIVE "JUDGMENT AND ORDER" HEREIN-BELOW VOID AND §454.490 RSMO. UNCONSTITUTIONAL BECAUSE THE SAID "JUDGMENT AND ORDER" AND THE SAID §454.490 RSMO. VIOLATED ARTICLE V OF THE MISSOURI CONSTITUTION IN THAT SAID "JUDGMENT AND ORDER" WAS NOT EXECUTED BY A PERSON SELECTED FOR OFFICE IN ACCORDANCE WITH AND AUTHORIZED TO EXERCISE JUDICIAL POWER UNDER SAID ARTICLE V AND IN THAT SAID §454.490 RSMO. AUTHORIZED THE USE OF POST-JUDGMENT ENFORCEMENT REMEDIES FOR A "JUDGMENT AND ORDER" WHICH WAS NOT EXECUTED BY A PERSON SELECTED FOR OFFICE IN ACCORDANCE WITH AND AUTHORIZED TO EXERCISE JUDICIAL POWER UNDER SAID ARTICLE V.

Article V, section 1 of the Missouri State Constitution

Slay v. Slay, 965 S.W.2d 845 (Mo.banc 1998)

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

Fowler v. Fowler, 984 S.W.2d 508 (Mo.banc 1999)

Transit Cas. Co. v. Certain Underwriters, 995 S.W.2d 32 (Mo.App. 1999)

Section 454.490 RSMo.

Section 454.475, RSMo. (Supp. 1999)

ARGUMENT

I.

THE SUPREME COURT LACKS JURISDICTION OVER THIS APPEAL BECAUSE THE APPEALED ORDER IS NOT A FINAL JUDGMENT IN THAT (1) THE APPEALED ORDER DID NOT DISPOSE OF ALL ISSUES BEFORE THE TRIAL COURT; (2) THE APPEALED ORDER DOES NOT EXPRESSLY STATE THAT THERE IS NO JUST REASON FOR DELAY AS PROVIDED IN RULE 74.01(b) R.C.P.; AND (3) THE

"AMENDED ORDER" IS NOT A JUDGMENT UNDER 74.01 R.C.P. AND THE TRIAL COURT HAD AUTHORITY TO AMEND THE APPEALED ORDER UNDER 74.01(b) AND 75.01 R.C.P.

Regarding "all issues". "A prerequisite to appellate review is that there be a final judgment." *In re Werths,* 33 S.W.3d 541 (Mo.banc 2000). "If there is no final judgment, this Court lacks jurisdiction and must dismiss the appeal." *Werths, supra.* **"**A judgment is final only if it leaves nothing for future determination." *Werths, supra.* "If an intended judgment does not dispose of all issues * * * or does not form a final disposition of the matter, it is not a final, appealable judgment and [the Supreme Court has] no jurisdiction to entertain an attempted appeal therefrom." *Werths, supra.*

A review of the record in this case reveals that the appealed Order dated February 27, 2001 resolved only one or two of the 14 claims set forth in Respondent's Petition for Judicial Review (set forth at LF 5-7) and neither grants nor denies Respondent's prayer for a

permanent injunction.[1] Such being the case, the appealed Order failed to dispose of all issues, and this Court lacks jurisdiction over this appeal.

Regarding Rule 74.01(b). Rule 74.01(b) R.C.P. allows the trial court to "enter a judgment as to one or more but fewer than all of the claims [but] only upon an express determination that there is no just reason for delay. In the absence of such determination, any order or other form of decision, however designated, that adjudicates fewer than all the claims * * * shall not terminate the action as to any of the claims". The trial court's 2/27/01 Order, while disposing of less than all of the claims, did not contain any

[1]Note that Paragraph 11 of the trial court's said order interprets the "Stay Order" merely as "an order staying enforcement of the 'judgment' until the case could be decided on the merits". [LF 122]

"express determination that there was "no just reason for delay". Hence, said Order despite its express statement that it was to be "considered a final judgment for all purposes of appeal", was not. *Wall USA, Inc. v. City of Ballwin,* _____ S.W.3d ____, slip op. Nos. 78308 and 78309 (Mo.App.E.D. 3/13/2001).

Regarding the Amended Order. Under Rule 74.01(b) when "any order or form of decision" does not dispose of all claims, it is "subject to revision at any time before the entry of judgment adjudicating all the claims". Further under Rule 75.01 the trial court retains control over all of its judgments during the 30 day period after entry. Hence, assuming, *arguendo,* that the Order of 2/27/01 was an appealable "Judgment" as contended by Appellant, the trial court still had the authority to amend it when it did so, on March 23, 2001. As a result, this Court lacks jurisdiction over this appeal, because the trial court was entitled to revise/amend its order so as to render it "non-final".

II.

THE TRIAL COURT DID NOT ERR IN DECLARING DCSE'S PURPORTED ADMINISTRATIVE "JUDGMENT AND ORDER" HEREIN-BELOW VOID AND §454.490 RSMO. UNCONSTITUTIONAL BECAUSE THE SAID "JUDGMENT AND ORDER" AND THE SAID §454.490 RSMO. VIOLATED ARTICLE V OF THE MISSOURI CONSTITUTION IN THAT SAID "JUDGMENT AND ORDER" WAS NOT EXECUTED BY A PERSON SELECTED FOR OFFICE IN ACCORDANCE WITH AND AUTHORIZED TO EXERCISE JUDICIAL POWER UNDER SAID ARTICLE V AND IN THAT SAID §454.490 RSMO. AUTHORIZED THE USE OF POST-JUDGMENT ENFORCEMENT REMEDIES FOR A "JUDGMENT AND ORDER" WHICH WAS NOT EXECUTED BY A PERSON SELECTED FOR OFFICE IN ACCORDANCE WITH AND AUTHORIZED TO EXERCISE JUDICIAL POWER UNDER SAID ARTICLE V.

Regarding the "Judgment and Order." "Article V, section 1 of the state constitution vests the judicial power of this state in * * * courts * * * composed of judges." *Slay v. Slay,* 965 S.W.2d 845 (Mo.banc 1998). To constitute a "judgment", a purported judgment must be signed by "a person selected for office in accordance with and authorized to exercise judicial power by article V of the state constitution". *Slay, supra.* A purported judgment which is not signed by a judge is a nullity. *Slay, supra,* (Holstein, et al. concurring.), *Fowler v. Fowler,* 984 S.W.2d 508 (Mo.banc 1999). The foregoing rules are not limited to purported judgments entered by family court commissioners. See *e.g., Transit Cas. Co. v. Certain Underwriters,* 995 S.W.2d 32 (Mo.App. 1999) which voids a ruling by a court-appointed master. See also, *Chastain v. Chastain,* 932 S.W.2d 396 (Mo.banc 1996) which holds administrative child support modifications are unconstitutional when entered without explicit judicial approval.

In the instant case the purported "Judgment and Order" was not entered by a judge but instead was signed by a "Hearing Officer who is a licensed Missouri attorney employed by the State of Missouri, Department of Social Services, Division of Legal Services, and properly designated by the Director of the Department of Social Services to conduct child support administrative hearings **and render written judgments**. Section 454.475, RSMo. (Supp. 1999)." (See the "Judgment and Order" at LF 12-13, emphasis added) Under the foregoing authorities, said purported "Judgment and Order" is null and void and the trial court's holding below so declaring, must be affirmed.

Regarding §454.490. "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.**" *Chastain v. Chastain,* 932 S.W.2d 396 (Mo.banc 1996--emphasis added). Section 454.490 RSMo. provides that "[u]pon docketing, the [administrative child support] 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." Said statute in effect therefore, authorizes the entering of an enforceable child support judgment by an administrative hearings officer instead of an article V judge. Further, said statute awards DCSE the power to enforce said purported judgment, giving it a power granted by the constitution exclusively to the judicial branch. Said statute is therefore unconstitutional under *Slay, supra* and *Chastain, supra*. As a result, the decision of the trial court below so holding, must be affirmed.

CONCLUSION

For the foregoing reasons, either the appeal must be dismissed or the holding of the trial court affirmed.

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 prepared, this ____ day of July, 2001 upon:

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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 _____ words and that the diskettes provided this Court and counsel have been scanned for viruses and are virus free.

_____