No. SC84354

IN THE MISSOURI SUPREME COURT

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

Dissolution Proceeding

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.)

Administrative Proceeding

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.[1] (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.)

[1]Hilburn, Staeden's sister, was appointed guardian by the probate commissioner of the Circuit Court of Greene County. *See State ex rel. Ladlee v. Aiken*, 46 S.W.3d 676, 677 (Mo.App., S.D. 2001).

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 Director 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.)

Judicial Review

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. (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 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 as a judgment after judicial review. (L.F. 107–108.)

After entry of non–final orders and dismissal of an appeal therefrom, *see State ex rel. Hilburn v. Staeden*, 62 S.W.3d 58 (Mo. banc 2001), on January 10, 2002, the circuit court entered judgment. (L.F. 112–115.) The judgment 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." (L.F. 114.) The judgment also sets aside, vacates as void *ab initio*, reverses, and holds for naught the Judgment and Order of October 26, 2000, because it "was not signed by a judge selected pursuant to the provisions of Article V of the Missouri Constitution." (L.F. 114.) And the judgment enjoins the Division's Director from enforcing the Income Withholding Order of November 6, 2000. (L.F. 114–115.)

After receiving permission from this Court to file a late notice of appeal, on April 15, 2002, the Attorney General filed his notice of appeal to this Court. (L.F. 118, 124.)

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Background

This is an appeal from judicial review of an order of the Director of the Division of Child Support Enforcement establishing child support. The circuit court vacated the child support order and declared § 454.490 RSMo unconstitutional because it purports to allow an administrative order signed by a lawyer to be enforced as if it were signed by a judge. The statute gives an order establishing child support, when filed with a circuit clerk, the force, effect, and attributes of a judgment of the circuit court, including enforceablility by supplementary proceedings. The circuit court also enjoined the Director from enforcing an income withholding order he had issued to collect the child support.

Summary of the Argument

Section 454.490 RSMo is constitutional because it merely authorizes collection of child support obligations by the same statutory means used to collect judgments. The statute does not authorize the Director to render judgments or transform his orders establishing child support into judgments. Using this reasoning, this Court has upheld similar statutes giving Division of Employment Security certificates assessing unpaid unemployment compensation tax, when filed with a circuit clerk, the force and effect of judgments. Such bare authority, this Court has said, is not the exercise of judicial power.

Section 454.490 is constitutional also because the legislature has authorized the Director to hold hearings, find facts, apply the law to the facts, and issue orders establishing child support. To enforce his child support orders, the legislature has authorized the Director to issue income withholding orders. And the legislature has subjected the Director's authority to the dual safeguards of an independent, superseding judicial determination of child support and of judicial review. Using this reasoning, this Court has previously upheld the administrative adjudication of child support in Missouri from an Article V challenge.

For these reasons, this Court should uphold § 454.490 from constitutional attack. Otherwise, Missouri risks losing federal funding for its temporary assistance to needy families and child support enforcement programs. Through § 454.490, Missouri complies with the federal law that the States' administrative child support orders be enforceable without first obtaining an order of some court or tribunal other than the one issuing the support order.

POINT RELIED ON

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

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 is 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 administrative adjudication of child support

States choosing to accept federal funding for temporary assistance to needy families and for child support enforcement must have and comply with a federally approved State plan for a child support enforcement program.[2] A child support enforcement program establishes, modifies, and enforces — by both judicial and administrative process — 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(4)(A), 654(20), 666(a)(2). Missouri's child support enforcement program is administered by the Division of

[2]Title IV–A of the Social Security Act, 42 U.S.C. § 601–619, requires States accepting federal funds for temporary assistance to need families to operate a child support enforcement program under an approved State plan. *See* 42 U.S.C. §§ 602(a)(2), 603(a)(1)(A). Title IV–D of the Social Security Act, 42 U.S.C. §§ 651–669b, requires the States accepting federal funds for child support enforcement to have an approved State plan for child support enforcement. *See* 42 U.S.C. §§ 654, 655(a)(1)(A). For a general discussion of the Social Security Act's child support provisions, see *Blessing v. Freestone*, 520 U.S. 329, 333–35 (1997), *Kansas v. U.S.*, 214 F.3d 1196, 197–98 (10th Cir. 2000), and *In re Lappe*, 176 Ill.2d 414, 680 N.E.2d 380, 385–86 (1997).

Child Support Enforcement of the Department of Social Services. *See* §§ 454.400, 454.425, RSMo 2000. 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 a condition of Missouri's receiving federal funding, Congress requires Missouri to have in effect and to implement certain laws and procedures intended to make Missouri's child support enforcement program effective. *See* 42 U.S.C. § 654(20). To enforce its child support orders, Missouri must have in effect laws and procedures requiring income withholding, such as the withholding order the Director issued in this case. *See* 42 U.S.C. §§ 666(a)(1)(A), (b)(1). 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) (emphasis added).

By § 454.490 RSMo, Missouri complies with the federal law requiring its administrative child support orders to be enforced without obtaining an order from some court or tribunal other than the one issuing the support order. Section 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.

Consequently, the trial court's declaration that § 454.490 is unconstitutional places at risk the millions of dollars of federal funding Missouri receives for its needy families and child support enforcement programs. *See, e.g.*, H.B. 11, 91st Gen. Assembly, 1st Reg. Sess., §§ 11.060, 11.075, 11.080, 11.085, 11.090, 11.145, 11.150 (enacted 2001); 2001 Mo. Laws 150, 151, 154, 155; 42 U.S.C. § 609(a)(8)(A), (B); 42 U.S.C. § 655(a)(1)(A); *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).

C. Constitutionality of Missouri's scheme for administrative adjudication

Section 454.490 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 Director 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 COMPLIANCE

I hereby certify that this brief includes the information required by Rule 55.03, complies with the limitations contained in Rule 84.06(b), and contains 3681 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.

4. 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)