

Family Law Section

NEWSLETTER

Spring 2000

ISSUE HIGHLIGHTS

⌘ Rethinking Missouri's
Administrative Child
Support System

NEWSLETTER COMMITTEE

Susan Jensen
Fall, 1999
Michael C. McIntosh
Winter, 1999-2000
Leigh Joy Carson
Spring, 2000
Allan F. Stewart
Chair

1999-2000 Family Law Section Council Members

Section Chair:
Diane C. Howard
Section Council Members:
Karen A. Plax
Mardi J. Montello
James H. Young
Ann E. Bauer
Mary Lou Martin
John W. Dennis, Jr.
Ronald Baird

EDITOR'S NOTE

Opinions and positions stated in signed material are those of the author and not by fact of publication necessarily those of The Missouri Bar or the Family Law Section Newsletter. Original and fully current sources of authority should be researched.

RETHINKING MISSOURI'S ADMINISTRATIVE CHILD SUPPORT SYSTEM

An Open Letter to the Legislature and to The Missouri Bar

by Alan W. Cohen

Preface

Just ask any lawyer – any lawyer who doesn't work for the Division of Child Support Enforcement. The administrative system of child support in Missouri is a complete disaster. The federal government has decreed through its spending power that the states make every effort to do all child support proceedings administratively. There is no secret that the federal government doesn't want lawyers involved. Lawyers just mess up the works, like asking for fair hearings before fair tribunals, or even handed enforcement of support orders. Oh, that dirty phrase: due process. Oh, that other dirty phrase: access to courts. Oh, that other dirty phrase: best interest of the child.

On March 23, Johnson County Circuit Judge Joseph P. Dandurand both hit the nail on the head and barely scratched the surface. (See MLW April 3, 2000). Judge Dandurand found DCSE's ability to modify court orders the court itself could not modify as being unconstitutional and flailed at DCSE "technicians" as persons all guilty of the unauthorized practice of law. (Unfortunately, DCSE will probably not appeal because, after all, he is just a circuit judge and his findings have little effect outside of his courtroom.)

Judge Dandurand is not alone in the bar (but other circuit judges may look at him as a troublemaker) in his frustrations with the current system. Over the past 12 years, I — and many of you — have been fighting DCSE on behalf of custodial and non-custodial parents alike. Usually, it's some form of demagoguery. Either it's a caseworker

(a/k/a "technician," i.e. some person with barely a college education, 1,000 cases and a near poverty level salary) telling me that she doesn't care what a judge says, she's listening to a higher court. Or it's another caseworker telling a custodial parent that he doesn't believe in criminal non-support so he's not going to refer a case to the prosecuting attorney even though the delinquency is in excess of \$20,000. Mostly, however, it's our legislature and/or Administrative Hearing Commission that has created a system so full of holes you can't even see the substance for the holes.

After 12 years, with a few battles won, and a constant eight million pound gorilla to fight, I have realized that the best way to fix the system is to present a fair replacement. Before I present that, however, here is a brief list of the problems with the existing administrative child support system:

1. Lack of due process in creating child support orders.
 - a. Granting to the director (i.e. case worker) the authority to determine: 1) whether there is a legal basis to enter a support order; 2) whether a case should be filed; 3) whether the caseworker sent the Finding of Financial Responsibility; 4) whether the addresses are correct; 5) whether he or she received a response; 6) whether the response was adequate; and 7) whether the respondent is in "default." And, of course, there is no required paper trail so there is no accountability.
 - b. Impossibility of raising the issue of non-paternity – unless presumed father can

RETHINKING MISSOURI'S ADMINISTRATIVE CHILD SUPPORT SYSTEM

(Continued)

prove lack of access, i.e., in Saudi Arabia. Besides being patently unfair, the statutory scheme granting DCSE this power is unconstitutional as being in violation of the putative father's due process rights, as stated in the attached memorandum of law.

c. Complete lack of ability to do discovery/enforce discovery (where and how could you enforce a subpoena?).

d. Telephone, rather than in person, hearings — even though the statute grants administrative hearings in the most convenient venue to the parties.

e. Improperly sworn testimony, even though the law requires that an oath be taken “before” a judge or hearing officer pursuant to Chapter 492. (Remember the Donahue Show? Is the caller there? Please raise your right hand.)

f. Impossibility of cross-examining witnesses. Can anyone judge a person's credibility over the telephone?

g. Lack of evidentiary rules in presenting documents. The statute requires that the hearing officer accept DCSE's hearing packet into evidence, even though it violates the hearsay rule, the best evidence rule and is not authenticated.

h. Judgments of support and paternity without actual judicial review, although that is required under the Missouri Constitution.

2. Lack of consistency in enforcement of administrative or judicial judgments.

a. Complete discretion to the caseworker to enforce administrative orders.

b. Complete discretion to the caseworker to determine the method of enforcement of administrative or judicial orders.

c. Complete discretion to the caseworker to determine whether the matter should be referred to the prosecuting attorney for enforcement.

d. Lack of anyone else but DCSE from referring a case to the prosecuting attorney for enforcement.

e. Lack of access to the caseworker, or his/her supervisor.

f. Complete lack of quality control at DCSE. Period.

3. Unintended consequences of a single-

issue system, i.e., paternity/support judgments without custody orders.

a. Lack of protection for “custodial” parents. (Query: If the docketing of administrative order of support is a judgment of paternity pursuant to § 454.485 RSMo., then who has custody?)

b. Lack of access or custody rights to “non-custodial” parents. (Query: If the “non-custodial” parent keeps the child from the other parent, can he or she get the order terminated on the grounds that he or she now has custody?)

c. Lack of anyone looking out for the best interest of the child. (See a and b above.)

Secondary preface

In 1991, in a case called *Dye v. Division of Child Support Enforcement*, the Supreme Court of Missouri visited a challenge to Missouri's then existing administrative child support system. In that case, the appellant unsuccessfully challenged as a whole the legislature's delegation of judicial power to an administrative agency. In denying relief, the Supreme Court compared DCSE's delegation of authority to workmen's compensation and stated that the delegation of authority was proper. In dicta, however, literally waving a huge red flag at the family law bar, the Court noted that the appellant failed to challenge the procedures of the system and thus it would not address that issue.

In 1996, the Supreme Court finally heard a challenge to the administrative procedures in *Chastain*. The Supreme Court found that the existing default procedures were unconstitutional as regarding administrative modifications of judicial child support judgments. The Court's rationale was that the Missouri Constitution required actual judicial review of any administrative action prior to an administrative action becoming a judgment of the court.

The only appellate case challenging the procedures of DCSE is a 1997 Western District case called *Minx v. State*. In that case, relying on *Chastain*, the court found that the “docketing” of an administrative order is a pleading, and thus the Missouri Rules of Civil Procedure governed the docketing of an

RETHINKING MISSOURI'S ADMINISTRATIVE CHILD SUPPORT SYSTEM

(Continued)

administrative order. The specific ruling was that an attorney must sign the administrative order when filing it with the court.

The logic of *Chastain* and *Minx* would create a scenario where the director or, more precisely, an attorney for the director, would have to file a "pleading" requesting that a judge honor the administrative order. The "pleading" would have to be served personally on the respondent, and the matter set for hearing for actual judicial review.

In 1999, in *State v. Houston*, the Supreme Court of Missouri placed a roadblock to that challenge. The Court found that this otherwise unconstitutional judgment was valid even though it had the same exact fact pattern as of that in *Chastain*, and even though the "pleading" was not served upon the respondent under *Minx*.

There have been no further successful attacks on administrative procedures.

Conclusion of prefaces

The basic problem here is one of logistics. If an attorney has a problem with the administrative system, the attorney simply files the appropriate pleadings and obtains a superceding judicial order pursuant to § 454.501 RSMo. Like the poor criminal defendants before the Supreme Court discovered the 6th Amendment in *Gideon v. Wainwright*, the affected poor lack the available resources to fight the behemoth. Clients who have money to fight don't deal with the administrative child support system. So, unless an attorney is willing to volunteer his time, he does his client no favor by taking the matter up the ladder. Even then, attorneys usually meet judicial interference because, like the sailor on perpetual shore leave, the judges don't want to voluntarily take on additional duties. (Why should they?)

So, the result is this open plea to the bar and to the legislature to make the necessary changes to the system, but make the system such that it relieves the judiciary of the overwhelming burden of child support cases.

My proposal

Overview

As the Supreme Court correctly stated in

Dye, the workmen's compensation law is a perfect example of appropriate delegation of judicial power to an administrative agency. The administrative child support system should follow that model, with a few modifications. The key to a fair system is access to justice, as well as an opportunity for a full and fair hearing. Further, not only will this proposal comply with federal mandates, it will actually be less expensive than the current system. This will not only eliminate many "technicians," it will consolidate state-created paternity/support actions, removing a vast majority of them from the circuit courts, and making it easier for state attorneys to appear and adjudicate matters. In turn, the circuit courts will have the time to actually review support cases, and spend more time and resources on the custody problems.

1. Process. Each county shall have a court with a certain number of administrative law judges (who are licensed attorneys), depending on the size of the county. In smaller counties, administrative law judges can travel from county to county. Each county shall have no less than one office that will house no less than one clerk. The clerk shall keep files in the same way as the circuit clerk. To save money, as well as to create an aura of authenticity, it would be best if the executive branch rented out space at the local county circuit courthouse.

2. Filing. Any party, pro se or with counsel, or an attorney for the State of Missouri, may file a request to create, modify or enforce an order of support. Regardless of who files, the State of Missouri shall be a party to each and every proceeding. This shall be the sole venue of the State of Missouri for paternity establishment. No other person other than a legal custodian or a parent, or the State of Missouri, may file an action.

3. Jurisdiction/Venue. Personal jurisdiction is the same as the UPA or UIFSA. Subject matter jurisdiction is a custody issue only. Venue, if no Missouri judgment previously exists, may be the county where the child resides, the mother resides or the alleged or adjudicated father resides. A foreign

RETHINKING MISSOURI'S ADMINISTRATIVE CHILD SUPPORT SYSTEM

(Continued)

judgment must be registered in circuit court pursuant to Supreme Court Rules prior to an action being filed.

4. Creation/modification — action filed. Issues involved shall be paternity and current support. Support orders are to be retroactive to date of service, unless the parties agree otherwise. In all actions the state files, all requests for relief shall state the exact amount of support sought and shall have attached thereto a Form 14 calculation sheet. In actions non-state parties file, the parties should include a Form 14, unless the party seeking the support order states under oath that he or she does not know the income of the other party. In those cases, the moving party shall file a Form 14 with their income and special expenses so that the other party may have notice of those expenses, permitting him or her to calculate the support obligation.

5. Special Rules for Modifications. Under no circumstances may an administrative law judge modify an existing court judgment if the original judgment found Form 14 unjust and inappropriate. All said actions should be transferred immediately to the circuit court for adjudication. Further, under no circumstances shall an administrative law judge modify an existing court order if the judge who entered the order could not legally modify it.

6. Enforcement. Any party with a support judgment from that county may file an action for enforcement of that order using any relief presently available under federal law, including, but not limited to, license suspensions, liens, etc. Any such party may also file an action requesting that their case be referred to the local prosecuting attorney for enforcement. The administrative law judge shall have no discretion as to the remedy involved; the decision is based only on whether there lies a legal basis for the enforcement action, and shall enter the remedy sought, or enter an order referring the matter to the prosecuting attorney for adjudication. The prosecuting attorney, in turn, has the discretion to prosecute civilly, criminally or do nothing at all. Further, either party may file an action to determine what, if any, arrearage is owed, for an accounting or restitution.

7. Petition. The state shall create, and the clerk shall have, written forms requesting all relief available, and keep said forms at the

local office. Attorneys may create their own forms if they are consistent with the state created forms.

8. Service. Personal service shall be pursuant to the Supreme Court Rules.

9. Default. Along with a summons, the party served will receive a document to file to request a hearing. Attorneys may file answers. If a party fails to file a written response within 30 days, the administrative law judge may enter an order granting a default in inquiry. The administrative law judge must hear evidence on the record prior to entering a default judgment. Failure to hold a testimonial hearing shall be grounds to set aside the judgment.

10. Rules of Court. Supreme Court Rules 42 through 67 shall apply.

11. Discovery. All discovery shall be pursuant to Supreme Court Rules.

12. Special Paternity Issues. Regardless of a legal presumption of paternity, any party may request that the administrative law judge – and the administrative judge shall have the authority to require – that a party submit to genetic testing for paternity. If either party refuses, or deliberately fails to appear, the administrative law judge may, upon his own motion, or upon the motion of the other party, transfer the matter to circuit court to be heard as a contested paternity case.

13. Pre-trial conferences. If paternity is no longer an issue, the administrative law judge should schedule and hold a pre-trial conference in an attempt to settle the issue of support. All parties are required to submit Form 14s, W2s and two years of tax returns at the pre-trial conference. Prior to the setting of any hearing, or upon settlement, the parties are to execute an entry of appearance that waives service of process as to the filing of the administrative law judge's decision with the circuit court, and provide addresses for mailing of the decision. Each party has a duty to update this information. As with the family court commissioner, if the parties consent to a final order adjudicating all issues, the parties may waive the rehearing.

14. Hearing. Except as stated below, the hearing shall be formal, incorporating all of the rules of evidence. Nevertheless, at the pre-trial conference, the non-moving party may elect either formal or informal testi-

RETHINKING MISSOURI'S ADMINISTRATIVE CHILD SUPPORT SYSTEM

(Continued)

mony. The informal testimony would involve the administrative law judge questioning the parties, and a relaxed rule for admission of documents.

15. Decision. All decisions of the administrative law judge shall be final after 30 days. At that time, the judge shall transfer the action to the circuit court. Within 40 days of the decision, any party may file: 1) a request for rehearing on the issue of support; and/or 2) a request for transfer on the issues of physical and legal custody. If the parties consent to an order of support and paternity, either party may request, and the administrative law judge shall, transfer the matter to the circuit court for a hearing on the issue of custody.

16. Judicial Review. Upon the transfer to the circuit court, a court shall immediately

schedule a hearing to be held within 30 days to provide actual judicial review of the administrative law judge's decision, and to provide notice of the hearing in writing to the parties. In essence, this will be treated as a paternity docket.

17. Guardian ad litem appointment. Unless there exists a judgment setting forth the custody of any child or children involved, the court shall, upon the filing of any action by the administrative law judge, enter an order adding the minor child as a party to the proceeding. Upon said order, the court shall enter an order appointing a guardian ad litem for the minor child or children involved for determining the best interest of the child as to physical and legal custody.

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR DECLARATORY JUDGMENT

Here, for your free use, is a Memorandum of Law, filed in support of having the principal statutes DCSE uses to create a support order to be declared unconstitutional. I will be glad to take any comments or answer any questions. Please e-mail me at alanwcohen@aol.com.

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR DECLARATORY JUDGMENT

I. FACTS

Respondents XX, a female child, and XY, a male child, were born to Respondent YY (hereinafter "Mother"), on (date), respectively. Prior to the filing of this action, Respondent State of Missouri, Division of Child Support Enforcement (hereinafter "DCSE") initiated an administrative action seeking child support from Petitioner for the benefit of said minor children. Petitioner, Mother, and the minor children are all residents of (your) County, Missouri.

Relying on its interpretation of Section 454.485 RSMo., DCSE served Petitioner with a "Findings of Financial Responsibility" under MACCS/IV-D No. (), claiming that Petitioner is the presumed father of the minor children pursuant to Section 210.822.1(4) RSMo. Petitioner denied paternity, and requested a hear-

ing. That action is currently pending. Hearing is scheduled for (date).

Petitioner filed the immediate action first to deny paternity and to ask the court to restrain the Director of DCSE from proceeding. Petitioner filed an amended Petition also seeking that this court declare that Sections 454.485 and 454.490 as unconstitutional as a violation of Petitioner's Due Process Rights under the Missouri and United States Constitutions.

II. ARGUMENT

A. Statutory Authority for Declaratory Judgment Action

Petitioner brings this action pursuant to the Declaratory Judgment Act (Sections 527.010 et. seq.), and pursuant to Section 536.050 RSMo. Under the former provision, the court has authority to enter a declaratory judgment finding that a statute is unconstitutional. Under the latter provision, the courts of this state are granted the authority to extend declaratory judgments affecting administrative agencies even while there is an administrative action pending. Section 536.050 specifically finds that a party bringing an action under this section does not have to exhaust his administrative remedies under any one of three situations, the first of which does not necessarily apply. Under subsection (2), the court may

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR DECLARATORY JUDGMENT

(Continued)

adjudicate the issue if the issue is the constitutionality of a statute or other question of law. That is precisely the situation here. Further, subsection (3) permits relief if the Petitioner would otherwise suffer irreparable harm if unable to secure judicial consideration of his claim. Again, here, Petitioner would suffer irreparable harm to his property (by way of attorney fees and support) and to his liberty interest (his reputation and his possible incarceration) if this court does not act on his claim.

Therefore, this court has authority to render a judgment declaring Sections 454.485 and 454.490 unconstitutional.

B. Statutory History and Application of the Facts.

Article I, Section 10 of the Missouri Constitution, as well the 14th Amendment to the United States Constitution, states that "No person shall be deprived of life, liberty or property without due process of law." *Id* at 229. Article 5, Section 5 of the Missouri Constitution further states that the Supreme Court may establish rules relating to courts and administrative tribunals, but those procedures "shall not change substantive rights."

As originally intended, Section 454.485.1 RSMo. (1982) provided that that DCSE could obtain from a putative father and mother of a minor child born out of wedlock a "consent order," being an administrative order agreeing to paternity and the amount of support. Section 454.490 then provided that the docketing of that order with the circuit court would be a judgment of paternity. Section 454.485.2 (1982) then provided that the docketing of the order would establish paternity for all legal purposes. Under this scheme, the director had no discretion, but instead acted as a conduit so that two parents could enter an agreement as to paternity and child support. There was but one limitation. Section 454.485.3 (1982) provided that in no case could the director or the hearing officer enter an order or finding of non-paternity as to any person who was presumed to be the father under Missouri law. At that time, the only legal presumption was created when a child was born during lawful wedlock.

In 1987, the legislature passed the Uniform Parentage Act, Sections 210.817 *et. seq.* Sec-

tion 210.822 RSMo. provided a new legal definition of Section presumption of paternity. Further, it provided for a cause of action for determining paternity and non-paternity. It provided the procedures for genetic testing, and set forth procedures for the court to utilize in determining the validity of genetic testing in Section 210.834 RSMo. Specifically, it provided the procedures for one to challenge the validity of genetic testing. Therefore, if this were a case presented under the UPA, Petitioner would have the opportunity to challenge the genetic testing results that the state presents. Further, and perhaps most important, he would have the opportunity to have his own test performed, as Section 210.834.1,2 RSMo. dictates that the court "shall" order genetic testing when a party requests it, even supplemental tests as long as the request is "reasonable."

Therefore, prior to the 1993 and 1994 amendments, there were two remedies for DCSE in establishing paternity. If a man and mother of a child cooperated with DCSE, they could enter a consent order that DCSE could docket with the court, and that would be a judgment of paternity. If DCSE was unable to bring an action, DCSE could refer cases to the prosecuting attorney, who is authorized under Section 454.120 RSMo. to file on behalf of DCSE under 210.826.2 RSMo.

In 1993 and 1994, however, the legislature made several amendments to Section 454.485, expanding the power of DCSE to enter original support orders against any person presumed to be the natural father of a child as defined in Section 210.822 of the UPA. In making this amendment, the legislature did not amend Sections 454.485.2, 454.485.3 (now 454.485.4) or Section 454.490.

Therefore, instead of the consent orders, DCSE could now enter support orders even where paternity was contested, as long as the alleged father was a presumed father. Moreover, the statute plainly stated that DCSE could not enter an order of non-paternity where there was a presumed father. Further, since the docketing of a support order was a judgment of paternity, DCSE could now create judgments of paternity while denying the presumed father a hearing on the issue of paternity. *See Wadley v. State*, 895 S.W.2d 176 (Mo. App. 1995). In

MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR DECLARATORY JUDGMENT

(Continued)

1997, the legislature made some attempt at remedying the situation, granting to DCSE the “power” to order genetic testing if the presumed father “sets forth facts establishing a reasonable probability that there was no sexual contact between the parties.” In essence, this amendment granted to DCSE the discretion to request additional testing when it felt that there was no remote chance the presumed father was the natural father of the child. It does not, as under the UPA, grant the presumed father the right to a blood test, or other genetic test, at his request. The legislature, instead, has reached back in time and, for administrative actions only, re-adopted Lord Mansfield’s Rule (also known as the Four Seas Rule). Under this rule, a third party could produce evidence that the husband was impotent, or had no access to the wife during the period of conception, by showing that he was beyond the four seas of England during the relevant period of conception. *Drake v. Milton Hospital Association*, 178 S.W. 462 (Mo. 1915). As of 1915, Missouri had long adopted this lack of access rule. *Id.* Therefore, this amendment does not exorcise the denial of due process that this statute requires if DCSE acts upon it. Rather, it creates additional problems under the 14th Amendment Equal Protection Clause, because it creates two separate burdens to obtain tests of genetic markers.

In 1994, the legislature amended Section 210.822 to include what is now 210.822.1(4). That subsection states that there is a presumption of paternity created if an expert concludes that an alleged parent is not excluded and that the probability of paternity is 98 percent or higher, given a prior probability of .05, i.e., 1 in 20. Beginning in 1995, DCSE began entering support orders against non-presumed fathers if DCSE felt that it had in its possession a blood test result from a person it determined was an “expert” — something that clearly was the province of the court. *State ex. rel. K.R. by May v. Brashear*, 841 S.W.2d 754,756 (E.D. 1992). In 1997, the legislature again invaded the province of the court by creating Section 210.834.7 RSMo. and therein defining who is an expert in court proceedings under 210.817 to 210.852. While this amendment on its face does not apply to actions under Chapter 454, it is important for this court to remember that the

rules on experts are set forth in the Supreme Court Rule 60.01, and that rule is not subservient to the statute. *State ex. rel. Newton v. Conklin*, 767 S.W.2d 112 (Mo. App. 1989).

Most important, as in the case of those legally presumed to be the father of a child under Section 210.822.1(1)(2)(3), a person who DCSE believes is the presumed father of a child pursuant to Section 210.822.1(4) also has no method of disputing paternity. In the case at bar, DCSE has simply relied on the test results that are positive of whom it feels is an “expert.” Thus, DCSE, unless this court determines that the statutes in question are unconstitutional, will presently enter an order of support against Petitioner, and the docketing of that support order will become a judgment of paternity as to both children. Petitioner will be denied a hearing on the issue of paternity, and a judgment will forever scar him.

C. Due Process Analysis

Due Process requires, at a minimum, that, absent an overriding state interest, individuals forced to utilize the judicial process to resolve their disputes must be given a meaning opportunity to be heard, i.e., an opportunity granted at a meaningful time and in a meaningful manner. *Boddie v. Connecticut*, 91 S.Ct. 780, 786 (1971). It is at the root of due process that a person not be deprived of a significant property or liberty interest — except for “extraordinary situations where some governmental interest is at stake that justifies postponing the hearing until after the event.” *Id.* To determine whether there is a due process violation, the court should apply the balancing test set forth in *Mathews v. Eldridge*, 424 U.S. 319, 332, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976). *See also State ex. rel. Williams v. Marsh*, 626 S.W.2d at 229.

In examining the interests in the case at bar, Petitioner, and any person similarly situated, clearly has a property interest in the money taken from him. *State ex. rel. Williams v. Marsh*, 626 S.W.2d at 230. Moreover, Petitioner, and those similarly situated would have a property interest in having to pay money to an attorney to defend the agency action.

Further, under Section 454.475.6 RSMo., upon request, prior to an administrative hearing before a hearing office, DCSE shall enter a support order “if . . . clear and convincing

evidence establishes a presumption of paternity." Further, said temporary order shall be effective upon filing with the clerk, and is "not subject to a hearing," and may be stayed by a court only upon a finding that the award fails to comply with Rule 88.01. Therefore, absent a finding of this court that the aforesaid statutes are unconstitutional, DCSE could, if the mother requests, enter a support order without the benefit of a hearing on support, much less the validity of the genetic testing, and the only court review is whether the amount was correctly determined pursuant to Rule 88.01.

As well, Petitioner, and those similarly situated, would also have a liberty interest in his reputation, as well as his physical liberty, in that failure to comply with such an administrative order could result in his incarceration for criminal nonsupport pursuant to Section 568.040 RSMo (1993). As stated in *State ex. rel. State v. Campbell*, the Eastern District issued a writ against the trial judge from his granting of a genetic test to a defendant in a criminal non-support case where there was a prior judgment of paternity, or otherwise "legitimized by process." 936 S.W.2d 585 (1996). Since DCSE's docketing of a support order pursuant to 454.485.3 RSMo. is "legitimized by process" under the statute, Petitioner would therefore, upon the docketing of the DCSE support order, be immediately subject to criminal liability.

The state interest in denying these basic due process rights to the putative father is non-existent. The legislature has enacted the Uniform Parentage Act providing the procedures necessary to adjudicate paternity, not limited to the right to challenge blood test results. *Piel v. Piel*, 918 S.W.2d 373 (Mo. E.D. 1993), *Michigan Social Services ex. rel. D.H. v. K.S.*, 875 S.W.2d 597, 599 (Mo. E.D. 1994), *State ex. rel. K.R. by May v. Brashear*, 841 S.W.2d at 756. Therefore, there is no necessity for such an administrative process when there is a far better one in the judiciary.

Next, consider a situation where the putative father is an identical twin, whose DNA results would also be identical. If DCSE's interpretation is correct, it could enter an order against either twin without a hearing on the issue of paternity, and

begin taking money from him. Further, consider a situation where the mother of a child has serendipitously discovered that the semen donor of her child done through a licensed physician is an extremely wealthy individual. That mother could allege him to be the natural father of the child and request that DCSE begin an administrative proceeding. Unlike the UPA, where a donor receives legal protection under 210.824, DCSE could require genetic testing, and then on the basis of the genetic test, find that man to be the natural father of that child was a presumed father under 210.822.1(4), and enter an order of support. The resulting docketing of the order would create a judgment of paternity against a man who would ordinarily be protected under the UPA.

Therefore, applying *Boddie v. Connecticut*, *Mathews v. Eldridge* and *State ex. rel. Williams v. Marsh*, it is clear that, assuming the unnecessary state interest, it cannot be outweighed by the interests of the individual to his property and liberty interests and the complete denial to the putative father of his right to a hearing of the issue of paternity. Therefore, Sections 454.485 and 454.490 RSMo. are unconstitutional pursuant to the Missouri and United States Constitutions.

CONCLUSION

Since the statutory scheme set forth in Sections 454.485 and 454.490 do not meet constitutional muster under due process analysis, this court should enter a judgment declaring that said statutes are unconstitutional, therein suspending any administrative action in this matter.

Respectfully submitted,
Alan W. Cohen #34974
Attorney for Petitioner
16 N. Central Ave.
Suite 203
Clayton, Missouri 63105
(314) 863-8800
Fax 721-2602

Family Law Section Newsletter

The Missouri Bar

P.O. Box 119

Jefferson City, Missouri 65102-0119

Nonprofit Org. U.S. POSTAGE PAID Jefferson City, MO Permit No. 312
