NO. 05-07-01008-CV

IN THE

FIFTH COURT OF APPEALS

AT DALLAS, TEXAS

IN THE INTEREST OF B.N.A.

A CHILD

BRIEF OF APPELLEE, XXX

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ORAL ARGUMENT REQUESTED

IDENTITY OF PARTIES AND COUNSEL

In addition to the parties and counsel identified by the Attorney General in his Brief for Appellant, the following counsel has joined Mr. Praeger in representing the Appellee, XXX:

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STATEMENT OF THE CASE

Appellant, the Attorney General, has appealed two orders of the 301st Judicial District Court of Dallas County, Texas, the Hon. Lynn Cherry presiding, to this Court:

On July 7, 2006, Appellee, XXX, filed a motion to modify his child support obligation. (CR 17). At a pretrial hearing on March 15, 2007, Mr. XXX (via counsel), the obligee (Ms. XXX, proceeding pro se) and the Attorney General's Office (represented by Maurice A. Aguilar) agreed in writing that trial would be held April 23, 2007. (CR 26 & 28). Mr. Aguilar failed to appear for trial.

Based on the evidence presented, the trial court reduced Mr. XXX's child support arrearage to $18,033.88, ordered the Attorney General's Office to disburse child support payments to the Guardian Ad Litem appointed by the trial court, otherwise discharged the Attorney General from the case and enjoined the Attorney General from further participation in the case absent order or request of court.

The trial court signed its Order in Suit to Modify Parent-Child Relationship and Confirmation of Child Support Arrearage on April 24, 2007. (CR 30). On April 25, 2007, the Attorney General's Office filed a Motion for Rehearing or in the Alternative, Motion for New Trial, which the trial court subsequently overruled. Appeal of this Order was timely perfected after the Court granted the Attorney General's Office an extension of time.

After the trial court discharged the Attorney General's Office from this case, and enjoined the Attorney General's Office from taking further action in the case, the

Attorney General issued an administrative writ of withholding to Mr. XXX's employer. (RX 2). Mr. XXX moved the trial court to dissolve the writ by motion filed July 2, 2007. (CR 60). The trial court granted that motion after hearing held July 17, 2007. (CR 65). The Attorney General's Office timely appealed that Order to this Court by Notice of Appeal filed August 6, 2007. (CR 70).

ISSUES PRESENTED

Issue 1 (Appellant's Issue 1): The trial court had jurisdiction to enjoin the OAG from taking further action in this case when the OAG acted outside his statutory authority by attempting to enforce a child support order not governed by Title IV-D of the Social Security Act because the obligee neither received public assistance nor requested the OAG's assistance, and the trial court did not order wage withholding.

Issue 2 (Appellant's Issue 2): The trial court had jurisdiction to order the OAG to remit child support receipts to the Guardian Ad Litem, or even to order child support paid directly from the obligor to the Guardian Ad Litem, when the child support order was not governed by Title IV-D of the Social Security Act because the obligee neither received public assistance nor requested the OAG's assistance, and the trial court did not order wage withholding.

Issue 3 (Appellant's Issue 3): The OAG has failed to preserve error with respect to the trial court's child support payment instructions because the OAG never brought these alleged errors to the attention of the trial court.

Issue 4 (Appellant's Issue 3): The OAG is estopped from claiming that the trial court abused its discretion by ordering the OAG to remit child support payments to the Guardian Ad Litem because, if the trial court did thus abuse its discretion, the OAG led the trial court into error by representing to the trial court that the OAG had no objection to such an order and would comply with it.

Issue 5 (Appellant's Issue 3): The OAG is estopped from challenging the trial court's order that child support payments be remitted to the Guardian Ad Litem because the OAG judicially admitted and in fact affirmatively stated to the trial court that the OAG had no objection to such an order and would comply with it.

Issue 6 (Appellant's Issue 4): The trial court did not abuse its discretion by confirming a child support arrearage because the obligor pled for such relief and the OAG has no interest in any arrearage because the obligee has received no public assistance.

Issue 7 (Appellant's Issue 5): The trial court did not abuse its discretion when confirming the amount of the child support arrearage

because the obligee has not objected to the amount of the confirmed judgment and the OAG has no interest in the amount of the arrearage.

Issue 8 (Appellant's Issues 6 & 7): The trial court's finding that the OAG acted frivolously, unreasonably and without foundation by issuing an administrative writ of withholding supports an award of attorney's fees under Chapter 105 of the Texas Civil Practice and Remedies Code.

STATEMENT OF FACTS

This is a child support modification case in which the child subject of the suit, B.N.A., was 16 years old at the time of trial. B.N.A. was born to XXX on . B.N.A.'s father, XXX, is the Appellee in this case. Because the trial court lowered Mr. XXX's child support obligation but maintained it in an amount greater than that requested by Ms. XXX, Ms. XXX has not appealed the trial court's orders. The Appellant - who failed to appear at trial - is the Office of the Attorney General of Texas (OAG).

Background

Ms. XXX is a . At the time of trial, Ms. XXX had been employed by for seventeen years, or in other words, since before she gave birth to B.N.A. (2 RR 33/2-6). Mr. XXX attended the University of Houston. In 1991, Mr. XXX

(2 RR 11/22 to 12/5; Request to Take Judicial Notice). That same year - on September 21, 1991 - the OAG filed a Petition to Establish the Parent-Child Relationship. Mr. XXX conceded his paternity of B.N.A. and agreed to pay child support of $800 per month, equaling nearly $10,000 per annum. (Supp. RR 12).

Over the years, Mr. XXX paid most of his child support. However,

(2 RR 11/22 to 12/5; Request to Take Judicial Notice). After making a child support payment of $1,800 a few days later, on March 6, 2001, Mr. XXX owed Ms. XXX an additional $2,955.90 in unpaid child support. (PX 3).

Mr. XXX afterward made sporadic but sometimes sizeable payments (as much as $4,800) on his child support obligation. However, he rapidly fell substantially behind.

Mr. XXX invested half a million dollars with the firm but lost it all. (2 RR 29/21 to 31/7). Although Mr. XXX will receive a pension , those payments will not begin until he reaches at least 45 years of age. (2 RR 13/18-21). Mr. XXX was 40 years old at the time of trial. (2 RR 19/20-24).

After

His remuneration was forgiveness of tuition at the school while Mr. XXX worked toward finishing his college degree. In addition, Mr. XXX is self-employed

(2 RR 11/11-19). Mr. XXX receives income for speaking at events and participating in fundraisers. In 2005, Mr. XXX's income equaled $. (PX 1).

The Child Support Modification

Although Mr. XXX and Ms. XXX differed at trial on when their discussions took place, both of them testified that they tried, unsuccessfully, to work out an agreement to lower Mr. XXX's child support after Mr. XXX (2 RR 33/25 to 34/9; 43/5-8). In 2004, Mr. XXX retained an attorney to modify his child support obligation. (2 RR 15/16-25). Although Mr. XXX was under the impression that a suit for modification had been filed, he never received word of any court proceedings. Mr. XXX later talked with "someone with the State of Texas" about his child support. Mr. XXX was told that he had to get rid of his attorney if he was going to talk directly with the State. Mr. XXX was forwarded some papers to send in, but he never heard anything back from the State. (2 RR 17/7 to 18/14). Apparently the OAG did contact Ms. XXX to request her agreement that Mr. XXX's child support be lowered to $200 per month and that Ms. XXX waive all back child support, but Ms. XXX rejected this request. (2 RR 23/15 to 24/1). Eventually, on July 7, 2006, Mr. XXX's attorney filed a motion to modify the amount of child support Mr. XXX was required to pay. (CR 17).

Other than file the paternity petition in 1991, the OAG did nothing else in the case (except issue an administrative writ of withholding in 1998) until 2006. On September 18, 2006, after Mr. XXX sought modification of his child support obligation, the OAG issued a child support lien to Scottsdale Insurance Company which was considering a workmen's compensation claim by Mr. XXX. (PX 4). At some point not shown in the record, the OAG also served a child support lien on attorney who was

holding $3,500 in his trust account that represented an insurance payment to Mr. XXX. (2 RR 14/16 to 15/1).

On December 13, 2006, attorney Lawrence J. Praeger substituted in as counsel for Mr. XXX. On February 6, 2007, in an attempt to move this case along, Mr. Praeger filed a Motion for Pre-Trial Conference and Scheduling Order. (2nd Supp. CR). The Motion included a request that the OAG conduct an administrative review of Mr. XXX's child support obligation pursuant to Tex. Fam. Code § 158.506. However, the OAG did not extend the opportunity for such a review to Mr. XXX.

The pretrial conference took place on March 15, 2007. Mr. Praeger appeared for Mr. XXX, Ms. XXX represented herself, and attorney Maurice A. Aguilar appeared for the OAG. At that time, the court set the case for trial on April 23, 2007. (CR 26 & 28). Mr. XXX, Mr. Praeger and Ms. XXX all appeared for trial on April 23, but no one from the OAG attended the trial.

Mr. XXX requested that the trial court set his child support at $419 per month. (2 RR 27/2-6). Ms. XXX had no objection to Mr. XXX's child support being lowered from $800 per month, but she thought the amount should be about $500 per month. (2 RR 34/14-17). After hearing the evidence, the trial court reduced Mr. XXX's child support to $550 per month plus $50 per month toward arrearages which the court found to equal $18,033.88. (CR 30). The trial court ordered child support payments made to the OAG which was, in turn, directed to forward those payments to the Guardian Ad Litem. The total amount to be paid by Mr. XXX equaled $610 per month after including the $10 monthly fee for the Guardian Ad Litem's services. Mr. XXX asked the trial court to

order the $3,500 held by released and applied toward the child support arrearage, which would then equal $14,533.88. (2 RR 62/20-24; 66/12-16). The workmen's compensation settlement, when received, also would be applied to the arrearage. Because Mr. XXX is self-employed, the trial court did not order wage withholding. (CR 35). To allow these events to occur, the trial court dissolved all administrative writs and child support liens prepared by the OAG. For reasons more fully explained during a later hearing, the trial court discharged the OAG from further participation in the case and enjoined the OAG from "taking any additional action in this cause, unless such action is Ordered or requested by the Court." (CR 36).

On April 25, 2007, Mr. Aguilar, realizing that he had missed the trial, filed a Motion for Rehearing or in the Alternative, Motion for New Trial in behalf of the OAG. (CR 54 & 57). However, the only complaint the OAG made in this motion was that the trial court should have found Mr. XXX's child support arrearage to equal $60,971.98 instead of $18,033.88. The motion was set to be heard on July 17, 2007.

The OAG's Violation of the Trial Court's Order

Mr. Praeger duly forwarded a copy of the court's Order and Mr. XXX's first check for $610 to the OAG on May 1, 2007, requesting that the OAG process the payment in accordance with the instructions contained in the Order. (RX 1). The Order included the discharge of the OAG from the case and the injunctions against proceeding without order or request of the court. Nevertheless, on June 26, 2007, the OAG violated the court's Order by sending an administrative writ of withholding to , where Mr. XXX . Mr. Praeger accordingly filed a Motion to Dissolve Administrative Writ of Withholding

and set it for hearing on July 17, 2007, the same day as the OAG's Motion for Rehearing or in the Alternative, Motion for New Trial was to be heard. (CR 60). This Motion to Dissolve Administrative Writ of Withholding, like the Motion for Pre-Trial Conference and Scheduling Order, also included a request for an administrative review.

The Motion Hearings

Mr. Aguilar appeared for the OAG at the hearing on the Motion for Rehearing or in the Alternative, Motion for New Trial on July 17, 2007. Mr. Aguilar did not advance the argument set forth in the motion - that the arrearage of $18,033.88 found by the court was too low. Instead, Mr. Aguilar argued that paying only $50 per month toward the arrearage - which by then equaled $14,383.88 after the $3,500 payment and three monthly payments of $50 - would never retire the arrearage because interest on the arrearage exceeded $50 per month. (3 RR 6/8-16). Mr. Praeger responded that the court had addressed interest at the trial the OAG had missed and that the matter should not be reopened. (3 RR 6/17 to 7/19). The court denied the OAG's Motion for Rehearing or in the Alternative, Motion for New Trial, then took up Mr. XXX's Motion to Dissolve Administrative Writ of Withholding. (3 RR 13/8-10; CR 63).

Mr. Aguilar did not contest that the OAG had received a copy of the court's Order discharging it from the case and enjoining it from further participation in the case absent order or request of the court. Instead, while noting that the June 26 notice and writ were computer-generated, he argued that the OAG had sent the notice and writ because the OAG is Texas' IV-D agency and is charged with collecting child support. Mr. Aguilar claimed: "Our response to that is the attorney general cannot be released from the case

by a judge." (3 RR 18/4-6). But Mr. Aguilar quickly parsed the OAG's position by agreeing with the trial court - in stark contrast to the position taken by the OAG in this appeal - that the trial court had the authority to order child support paid through the OAG and then disbursed to the Guardian Ad Litem.

The record includes the following colloquies:

> THE COURT: And, Mr. Aguilar, are you going to tell me that I cannot order another child support collection agency other than the attorney general? I'm not releasing your agency.
>
> The child disbursement unit, the payments are still going through it. Are you trying to tell me today what I'm not going to do or what I am going to do?
>
> MR. AGUILAR: No, Your Honor.
>
> THE COURT: Well, good.
>
> MR. AGUILAR: If you want the payments to go through the Guardian Ad Litem, that's your prerogative. We're not objecting to that.

(3 RR 18/15 to 19/1).

> THE COURT: And I do appreciate greatly what the attorney general's office does, but let me explain something to you. This court does not have complete confidence that the attorney general's office for the State of Texas does a real good job on a day by day basis of collecting child support which is why with this case because it had a history I went through the Guardian Ad Litem program. And we're going to stay with that program.
>
> MR. AGUILAR: I don't have a problem with that, Your Honor. I'm not saying I have a problem with that.

(3 RR 22/4-14).

> THE COURT: Then on June the 26th of 2007 Deborah L. Miller took it upon herself to send out the order slash notice to withhold income for child support. Now, I'm curious, does that say once it's withheld that it

goes to them, the Guardian Ad Litem program? Or does it just go straight to the AG's office?

MR. AGUILAR: I don't know if it does. If the Guardian Ad Litem was appointed, we would definitely send the payments to the Guardian Ad Litem.

THE COURT: Okay. Can you show me where you complied with that portion of the order?

(Off the record on another case)

MR. AGUILAR: It doesn't say here, Your Honor, but we would definitely send it to the Guardian Ad Litem if the Court had designated them as a collector as well. And that's been done in other cases as well as that's not that --

THE COURT: But it doesn't on this.

MR. AGUILAR: It may not say it on there, but we would definitely comply with the Court's order that the Guardian Ad Litem was appointed. We have other cases with the Guardian Ad Litem's office. That's a usual occurrence.

(3 RR 22/19 to 23/16).

The trial court granted the Motion to Dissolve Administrative Writ of Withholding. In addition, after hearing testimony from Mr. Praeger, the trial court awarded Mr. XXX attorney's fees of $1,000 because the OAG's issuance of the administrative writ of withholding constituted an action that was frivolous, unreasonable and without foundation pursuant to Section 105 of the Texas Civil Practice & Remedies Code. Thus, Mr. XXX was entitled to be reimbursed his attorney's fees and expenses. (CR 63).

ISSUES RESTATED

Issue 1 (Appellant's Issue 1): The trial court had jurisdiction to enjoin the OAG from taking further action in this case when the OAG acted outside his statutory authority by attempting to enforce a child support order not governed by Title IV-D of the Social Security Act because the obligee neither received public assistance nor requested the OAG's assistance, and the trial court did not order wage withholding.

Issue 2 (Appellant's Issue 2): The trial court had jurisdiction to order the OAG to remit child support receipts to the Guardian Ad Litem, or even to order child support paid directly from the obligor to the Guardian Ad Litem, when the child support order was not governed by Title IV-D of the Social Security Act because the obligee neither received public assistance nor requested the OAG's assistance, and the trial court did not order wage withholding.

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Issue 4 (Appellant's Issue 3): The OAG is estopped from claiming that the trial court abused its discretion by ordering the OAG to remit child support payments to the Guardian Ad Litem because, if the trial court did thus abuse its discretion, the OAG led the trial court into error by representing to the trial court that the OAG had no objection to such an order and would comply with it.

Issue 5 (Appellant's Issue 3): The OAG is estopped from challenging the trial court's order that child support payments be remitted to the Guardian Ad Litem because the OAG judicially admitted and in fact affirmatively stated to the trial court that the OAG had no objection to such an order and would comply with it.

Issue 6 (Appellant's Issue 4): The trial court did not abuse its discretion by confirming a child support arrearage because the obligor pled for such relief and the OAG has no interest in any arrearage because the obligee has received no public assistance.

Issue 7 (Appellant's Issue 5): The trial court did not abuse its discretion when confirming the amount of the child support arrearage

because the obligee has not objected to the amount of the confirmed judgment and the OAG has no interest in the amount of the arrearage.

Issue 8 (Appellant's Issues 6 & 7): The trial court's finding that the OAG acted frivolously, unreasonably and without foundation by issuing an administrative writ of withholding supports an award of attorney's fees under Chapter 105 of the Texas Civil Practice and Remedies Code.

SUMMARY OF ARGUMENT

The OAG contends that the trial court had no jurisdiction to issue its Orders because those Orders prevent the OAG from performing its duties pursuant to the federal Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), codified in Title IV-D of the Social Security Act. The Court should overrule this contention because this case is not subject to PRWORA. PRWORA controls only child support cases in which an obligee has received public assistance or requested the assistance of the OAG, or in which a court orders income withholding. This case meets none of these requirements.

The Court should not consider the OAG's claim that PRWORA does not permit the OAG to remit child support payments to a Guardian Ad Litem because the OAG did not raise this issue in the trial court. In fact, the OAG represented to the trial court that the OAG had no objection to this payment procedure. If the trial court erred, the OAG led it into error. The OAG judicially admitted that forwarding child support payments to the Guardian Ad Litem is a correct and lawful means to disburse child support payments.

The OAG has no interest in the amount of any child support arrearage because the obligee has not received public assistance from the State of Texas. The amount of the child support arrearage was properly before the trial court. The trial court crafted an agreement of the parties after confirming the child support arrearage.

The trial court did not abuse its discretion by awarding attorney's fees to Appellee because the OAG issued an administrative writ of withholding frivolously, unreasonably and without foundation.

ARGUMENT

Issue 1 (Appellant's Issue 1): The trial court had jurisdiction to enjoin the OAG from taking further action in this case when the OAG acted outside his statutory authority by attempting to enforce a child support order not governed by Title IV-D of the Social Security Act because the obligee neither received public assistance nor requested the OAG's assistance, and the trial court did not order wage withholding.

Issue 2 (Appellant's Issue 2): The trial court had jurisdiction to order the OAG to remit child support receipts to the Guardian Ad Litem, or even to order child support paid directly from the obligor to the Guardian Ad Litem, when the child support order was not governed by Title IV-D of the Social Security Act because the obligee neither received public assistance nor requested the OAG's assistance, and the trial court did not order wage withholding.

In the first two Issues on appeal, the OAG argues that the trial court had no jurisdiction to discharge the OAG from this case or to enjoin the OAG from further participation in it absent order or request of the trial court. Because the response to both Issues turns on a single point - whether this is a Title IV-D case - the two Issues are addressed together.

In its brief, the OAG asserts: "This case is a Title IV-D case." (Brief for Appellant at 1 n.3). The OAG is incorrect: Although this case might have begun as a Title IV-D case, it is one no longer because (1) Ms. XXX received no public assistance from the State of Texas; (2) Ms. XXX did not request the OAG's assistance with respect to Mr. XXX's motion to modify his child support obligation; and (3) the trial court did not order income withholding. Under these circumstances, the trial court had the right to order child support paid by whatever means would best protect the child's interest. The

trial court was not required to order child support paid through the OAG but could have ordered Mr. XXX to pay it to the Guardian Ad Litem directly. Unless the OAG (1) contends that federal law forbids it from forwarding child support to the Guardian Ad Litem in a case to which that federal law does not apply, or (2) does not want to process Mr. XXX's child support payments through its disbursement unit by sending them to the Guardian Ad Litem, the OAG has neither the duty nor the right to enter into this case or to question the trial court's jurisdiction.

The OAG correctly states that a court has no jurisdiction to enjoin the Attorney General from the lawful performance of his duties. However, the OAG concedes that such jurisdiction exists when the Attorney General acts outside the law. Brief for Appellant at 14 n.4, citing *Director of the Dep't of Agric & Env't v. Printing Indus. Ass'n of Texas,* 600 S.W.2d 264, 265-66 (Tex. 1980); *Griffen v. Hawn,* 161 Tex. 422, 341 S.W.2d 151, 152-53 (1960). Because the OAG has acted outside its statutory authority in this case, the trial court had jurisdiction to issue the Orders under review.

PRWORA's Requirements

In 1996, in connection with President Clinton's promise "to end welfare as we know it," Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. 104-193, 110 Stat. 2105 (Aug. 22, 1996). PRWORA substantially expanded Section IV-D of the federal Social Security Act. Among other things, PRWORA required the states to enact uniform interstate laws, provided for state and federal registries of newly hired employees, streamlined procedures to establish paternity and set forth additional penalties for failure to pay court-

ordered child support. Congress directed that most of the expenses incurred by states in collecting child support would be reimbursed. 42 U.S.C. § 655. Congress' intent in passing PRWORA lay in setting forth a framework within which states would be required to seek enforcement of child support obligations so that, to the extent feasible, parents, rather than the public, would be responsible for the costs incurred in supporting their children. This framework included reimbursement to the states of funds expended via programs such as Temporary Assistance for Needy Families (TANF).

Congress further specifically stated that states also must provide child support collection assistance to custodial parents who had not received public benefits when "such assistance is requested." 42 U.S.C. § 651. For that reason, Congress required the states to provide child support services with respect to a child not receiving public benefits "if an individual applies for such services with respect to the child." 42 U.S.C. § 654(4)(A)(ii).[1] The United States Supreme Court has reiterated the plain meaning of this statute: "A State must provide these services free of charge to AFDC recipients and, when requested, for a nominal fee to children and custodial parents who are not receiving AFDC payments." *Blessing v. Arizona Department of Economic Security*, 520 U.S. 329, 334 (1997).

PRWORA also directs states to pass legislation to improve the effectiveness of child support enforcement. 42 U.S.C. § 654(20)(A). A detailed list of state law requirements is set forth in 42 U.S.C. § 666. Further, a state must establish a "state

[1] Section 654(4) is copied, in its entirety, as Appendix A.

disbursement unit" to collect and disburse child support payments. 42 U.S.C. § 654b(a)(1). Child support collection and enforcement within each state are to be administered by a designated Title IV-D agency, which in Texas is the OAG. Tex. Fam. Code § 231.001.

But PRWORA was not designed to cover, and does not cover, all child support establishment, collection and enforcement activities. It applies only to recipients of public assistance, to cases in which a party has requested assistance of the Title IV-D agency, and to cases in which a trial court orders income withholding. Because none of these situations exist with respect to this case, PRWORA does not prohibit payment of child support by Mr. XXX to the Guardian Ad Litem for Ms. XXX either directly or through the OAG.

No Public Assistance

The first of the three situations in which PRWORA requires payment through the state disbursement unit occurs when an obligee, or a child, has received public assistance, as provided by 42 U.S.C. §654(4)(A)(i) (copied in Appendix A). *Blessing v. Arizona Department of Economic Security,* 520 U.S. 329, 334 (1997) (citing statute); *O'Donnell v. Abbott,* 393 F. Supp. 508, 512 (W.D. Tex. 2005), *aff'd mem.* 481 F.3d 280 (5th Cir. 2007) (per curiam) (quoting statute); *State of Kansas v. United States,* 214 F.3d 1196, 1197 (10th Cir.), *cert. denied,* 531 U.S. 1035 (2000).

In 1991, the OAG petitioned the trial court to establish Mr. XXX's paternity of B.N.A. There is no allegation in the Petition to Establish the Parent-Child Relationship (Supp. CR 8) that the State of Texas had extended public assistance either to Ms. XXX or

to B.N.A. In fact, at that time Ms. XXX was (and has remained) a employee. (CR 31; 2 RR 33/2-6). Similarly, there is no evidence that the OAG acted at Ms. XXX's request. The Petition does recite that it is brought by the Attorney General in providing services authorized by what was then Chapter 76 of the Texas Human Resources Code, but it says nothing further about the Attorney General's role in the case. Moreover, a Petition's allegations are not evidence; if there was a prove-up of Mr. XXX's agreement to pay child support, it is not part of the record. Finally, the Order to Establish the Parent-Child Relationship says nothing about whether Ms. XXX or B.N.A. had received public assistance or had requested the OAG to act. (CR 12).

Even if the record established to the contrary - that Ms. XXX or B.N.A. had received public assistance, or Ms. XXX had requested assistance from the OAG in 1991 - the record is bereft of any such evidence as of 2007 when the court tried the modification action. By the time that Mr. XXX petitioned the trial court to modify his child support, he had paid in excess of $43,000 in child support through the OAG and many more thousands prior to that time. The evidence at trial was that the OAG was forwarding Mr. XXX's child support, in full, to Ms. XXX. The state is the assignee of an obligee's right to receive child support when the obligee seeks public assistance. Tex. Fam. Code § 231.104. Had the state been owed anything, the OAG would have been obliged by law to apply Mr. XXX's child support payments to that debt. Tex. Fam. Code § 231.007. Moreover, Ms. XXX testified that she was not eligible for county benefits and that she carried insurance through Dallas County. (2 RR 35/15-23). Thus, the OAG has no right to intervene in this case based upon providing public assistance to Ms. XXX or to B.N.A.

No Request for Assistance

To implement its intent that even families not receiving public assistance be allowed to enlist the aid of their states' Title IV-D agencies, Congress expressly required that each state's Title IV-D agency must provide services for "any other child, if an individual applies for such services with respect to the child." 42 U.S.C. § 654(4)(A)(ii) (copied in Appendix A). *Carter v. Morrow,* 562 F. Supp. 2d 311 (W.D. N.C. 1983) (statute enforced); *see Blessing v. Arizona Department of Economic Security,* 520 U.S. 329, 334 (1997) (citing statute); *O'Donnell v. Abbott,* 393 F. Supp. 508, 512 (W.D. Tex. 2005), *aff'd mem.* 481 F.3d 280 (5th Cir. 2007) (per curiam); *State of Kansas v. United States,* 214 F.3d 1196, 1197 (10th Cir.), *cert. denied,* 531 U.S. 1035 (2000). Texas has complied with this federal requirement by passing Tex. Fam. Code § 231.102, which states: "The Title IV-D agency on application or as otherwise authorized by law may provide services for the benefit of a child without regard to whether the child has received public assistance."

In this case, the trial court had jurisdiction to issue its Orders because there is no evidence in the record that Ms. XXX requested the OAG's assistance when Mr. XXX sought to lower his child support. In fact, the trial court asked Ms. XXX precisely that question:

> THE COURT: Ms. XXX, did you sign a request asking them [OAG] to seek child support or to help you?
>
> MS. XXX: No, I just -- when I went in to check on the child support, check the status on it, they told me that it was in force, that they had --

THE COURT: Did you ever ask them to assist you, fill out any forms?

MS. XXX: No. Didn't have me fill out any forms.

(2 RR 57/13-21). Earlier, Ms. XXX had rejected the OAG's request that she agree to lowering child support to $200 per month and waive Mr. XXX's arrearage. (2 RR 23/15 to 24/1).

No Withholding

Regardless whether an obligee receives public assistance from the state or requests child support services from the Title IV-D agency, a state's plan must require that all child support subject to withholding be paid through the state disbursement unit. This provision is found in 42 U.S.C. § 654b(a), which states that with respect to cases not being enforced by the state, "and in which the income of the noncustodial parent is subject to withholding pursuant to section 666(a)(8)(B) of this title," payments must be made through the state disbursement unit. Section 666(a)(8)(B), which is part of the section setting forth the requirements for a state plan, requires income withholding except, inter alia, when "one of the parties demonstrates, and the court (or administrative process) finds, that there is good cause not to require immediate income withholding." 42 U.S.C. § 666(a)(8)(B)(i)(I).[2] *See Arrington v. Helms,* 438 F.3d 1336 (11th Cir. 2006) ("Accordingly, in child support cases *involving an income withholding order,* non-TANF custodial parents' child support payments must flow through the SDU." *Id.* at 1339 (emphasis added; statute cited). The OAG's five-year Agency Strategic Plan (Jul. 1,

[2] Section 666(a)(8) is copied, in its entirety, as Appendix B.

2004) (Request to Take Judicial Notice) shows that the OAG knows that it may not require child support payments through the OAG when there is no withholding order: "PRWORA mandated that states process all IV-D payments and *all non-IV-D income withholding payments* . . . through a centralized State Disbursement Unit (SDU)." *Id.* at 23 (emphasis added). Texas' statutes comply with these requirements by permitting a trial court, for good cause shown, to forego issuance or delivery of an income withholding order in cases not governed by Title IV-D. Tex. Fam. Code § 158.002.

The trial court determined that Mr. XXX would not be subject to income withholding because he is self- employed: "At the time of the entry of this Order the Court finds that XXX is self employed and not subject to wage withholding." (CR 35). The court continued by stating that at such time as Mr. XXX became employed, then an income withholding order would issue. The OAG has not challenged this finding of the trial court.

Summary

The trial court had jurisdiction to issue its Orders. Mr. XXX and the OAG agree that the OAG may not be enjoined by a trial court when the Attorney General lawfully performs his duties through the OAG but may be enjoined when the Attorney General, through the OAG, acts outside the law. It is not clear that this case ever was a Title IV-D case because Ms. XXX was employed with the State of Texas at the time the OAG filed it and might well have been ineligible for public assistance. Further, nothing in the record shows any request by Ms. XXX that the OAG file the paternity suit. But even if this case began as a Title IV-D case, it is not a Title IV-D case now: Ms. XXX remains

ineligible for public assistance and has received none, she has not requested the OAG to become involved in the case and in fact rejected the OAG's request to become involved, and the trial court expressly declined to order a withholding order to be issued or delivered. The payment of child support in this case is not subject to PRWORA. Thus, the OAG has acted unlawfully by injecting itself into the case.

> **Issue 3 (Appellant's Issue 3): The OAG has failed to preserve error with respect to the trial court's child support payment instructions because the OAG never brought these alleged errors to the attention of the trial court.**

The OAG contends that PRWORA does not allow it to remit Mr. XXX's child support payments to the Guardian Ad Litem because the Guardian Ad Litem is not an "obligee." According to the OAG, if the OAG is required to remit Mr. XXX's child support payments to the Guardian Ad Litem, then Texas would not meet PRWORA's requirements. Presumably, the block grants that Texas receives from the federal government for child support collection would be in jeopardy. However, the OAG raised neither of these issues before the trial court. Alleged errors committed by a trial court are required to be called to the trial court's attention as a prerequisite for raising them upon appeal. *E.g.*, Tex. R. App. P. 33.1. The Court should, therefore, decline to review these issues.

The OAG might attempt to invoke the "fundamental error" doctrine, by which an appellate court reviews an alleged error raised for the first time on appeal

> in those rare instances in which the record shows the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas.

In re: C.O.S., 988 S.W.2d 760, 765 (Tex. 1999) (quoting *Pirtle v. Gregory,* 629 S.W.2d 919, 920 (Tex. 1982)). For a variety of reasons, however, the Court should not allow review of this case under the fundamental error doctrine. These issues would require a full, evidentiary hearing to create an adequate record for review.

Alleged Danger to Federal Funding Speculative

At the outset, the OAG urges the Court to declare void or to reverse the trial court's Order that the OAG send Mr. XXX's child support payments to the Guardian Ad Litem because sending these payments to the Guardian Ad Litem would endanger Texas' federal funding for child support collection. But Texas already has implemented a plan acceptable to the federal government. In fact, last year the OAG's Child Support Division won the Outstanding Program Award from the National Child Support Enforcement Association (NCSEA) (Request to Take Judicial Notice). The NCSEA similarly honored the Attorney General himself in 2005, when General Abbott received NCSEA's State Leader of the Year award. (*Id.*). In short, there is no evidence before the Court that requiring the OAG to forward child support money to the Guardian Ad Litem would call Texas' plan into question.

Interference with Fit Parents' Decisions

As noted above, PRWORA allows parents to bypass the state disbursement unit so long as they have neither received public assistance nor requested the OAG to intervene in their cases, and the child support orders in question do not require income withholding. In short, the OAG appears to take the position that is has the power and the duty to require child support payment through the OAG even when the parents decide otherwise.

Such a position crosses the line into unconstitutionality given the United States Supreme Court's repeated holdings that the state is forbidden from second-guessing the decisions of fit parents with respect to their children. *Troxel v. Granville,* 530 U.S. 57 (2000) (collecting cases). As Mr. Praeger rhetorically asked the trial court, "are we here to expend the state's resources when all of the parties but for government doesn't feel like this is an appropriate remedy even if everyone agrees to it?" (3 RR 11/4-7).

In response to this point, the OAG might well argue that the trial court set Mr. XXX's child support and confirmed his arrearage after an adversary hearing rather than by agreement. But that argument would fail because Ms. XXX did not object to the trial court lowering Mr. XXX's child support. She objected to lowering child support to the extent Mr. XXX requested. The trial court awarded Ms. XXX child support in an amount greater than that requested by Ms. XXX, so Ms. XXX received that which she wanted. Further, Ms. XXX did not object to setting Mr. XXX's child support arrearage at $18,033.88, and she has not appealed this case. A tacit agreement complying with the Constitution's command to respect the decisions of fit parents is before the Court, not a contest with respect to the amount of child support.

The OAG Has No Standing

A third question that remains unexplored, and without evidentiary basis, is the OAG's position that it has standing to question the reduction of Mr. XXX's child support arrearage when PRWORA does not apply to this case. In other words, what facts support the OAG's interest in this case when Ms. XXX is not a recipient of public assistance such that any arrearage collected by the OAG would merely be turned over to Ms. XXX? The

answer to this question might well lie in that part of PRWORA providing for "incentive" payments to states for high rates of collection. 42 U.S.C. § 658a. In other words, the more money the OAG can run through the state disbursement system, the greater an incentive payment the OAG will receive from the federal government. A full evidentiary hearing would have brought out to what extent the OAG attempts to force non-Title IV-D cases with no income withholding - such as this one - through the state disbursement unit.

Lack of Due Process

Finally, and by no means least, should the Court decide to review the OAG's PRWORA positions, Mr. XXX would be deprived of conducting an evidentiary inquiry into the OAG's administrative withholding practices. PRWORA's collection system is based upon the constitutionally suspect foundation that an unpaid child support payment constitutes a final judgment sufficient to support a variety of collection procedures but without any due process at all, other than the belated opportunity to question the proceeding by requesting an administrative review, a review that this case has shown is difficult to obtain. Mr. Praeger raised the question to the trial court, what motivation would the OAG have for risking reduction of child support by participating in a trial when the OAG could simply continue to issue administrative writs based on its own determination of what child support is due? (2 RR 19/13 to 20/14).

Summary

The Court should decline to consider the OAG's third Issue because the OAG did not preserve the error alleged for review. The OAG may not raise issues not previously considered by the trial court for the first time on appeal. There is no fundamental error in this case.

Issue 4 (Appellant's Issue 3): The OAG is estopped from claiming that the trial court abused its discretion by ordering the OAG to remit child support payments to the Guardian Ad Litem because, if the trial court did thus abuse its discretion, the OAG led the trial court into error by representing to the trial court that the OAG had no objection to such an order and would comply with it.

Issue 5 (Appellant's Issue 3): The OAG is estopped from challenging the trial court's order that child support payments be remitted to the Guardian Ad Litem because the OAG judicially admitted and in fact affirmatively stated to the trial court that the OAG had no objection to such an order and would comply with it.

The OAG's third Issue claims that if the trial court did have jurisdiction to order the OAG to remit payments to the Guardian Ad Litem rather than directly to the obligee, then the trial court abused its discretion because such an order would prevent the OAG from fulfilling its duties as Texas' state disbursement unit. As noted above, the OAG had neither the duty nor the right to inject itself into resolution of the child support dispute between Mr. XXX and Ms. XXX. Even so, the OAG is estopped from questioning the trial court's exercise of its discretion because if the trial court committed an error, the OAG led the court into error. Further, the OAG judicially admitted that the trial court

had the right to require the OAG to disburse Mr. XXX's child support payments to the Guardian Ad Litem.

In the course of defending against Mr. XXX's Motion to Dissolve Administrative Writ of Withholding, Mr. Aguilar repeatedly represented to the trial court that the OAG had no objection to forwarding Mr. XXX's child support payments to the Guardian Ad Litem for monitoring and disbursement to Ms. XXX:

- "If you want the payments to go through the Guardian Ad Litem, that's your prerogative. We're not objecting to that." (3 RR 18/24 to 19/1).
- "I don't have a problem with that, Your Honor. I'm not saying I have a problem with that." (3 RR 22/12-14).
- "If the Guardian Ad Litem was appointed, we would definitely send the payments to the Guardian Ad Litem." (3 RR 22/25 to 23/2).
- "[W]e would definitely send it to the Guardian Ad Litem if the Court had designated them as a collector as well. And that's been done in other cases as well as that's not that --" (3 RR 23/7-10).
- "[W]e would definitely comply with the Court's order that the Guardian Ad Litem was appointed. We have other cases with the Guardian Ad Litem's office. That's a usual occurrence." (3 RR 23/13-16).

If the Trial Court Erred, the OAG Led the Trial Court Into Error

A well-settled proposition of law is that a party cannot lead a trial court into error and then complain about it later on appeal. *E.g., Nesmith v. Berger*, 64 S.W.3d 110, 119 (Tex. App. - Austin 2001, pet. denied) (citing *Litton Indus. Prods., Inc. v. Gammage*, 668 S.W.2d 319, 321-22 (Tex. 1984)). If the trial court committed error by ordering Mr. XXX's child support payments sent to the OAG and directing the OAG to forward them to the Guardian Ad Litem, the OAG led the trial court into that error by stating that this

was the trial court's prerogative and that the OAG had no objection to that procedure. Mr. Aguilar even said that it is a "usual occurrence" to order child support paid in that fashion, an arrangement that has been followed in other cases. The OAG may not complain about this alleged error on appeal when the OAG led the court into committing the alleged error.

The OAG's Judicial Admissions

Further, Mr. Aguilar's statements constitute judicial admissions that bind the OAG. A judicial admission is a formal waiver of proof that dispenses with the production of evidence on an issue and bars the admitting party from disputing it. *Lee v. Lee*, 43 S.W.3d 636, 641 (Tex. App. - Fort Worth 2001, no pet.). The elements required for a judicial admission are: (1) a statement made during the course of a judicial proceeding; (2) that is contrary to an essential fact or defense asserted by the person making the admission; (3) that is deliberate, clear, and unequivocal; (4) that, if given conclusive effect, would be consistent with public policy; and (5) that is not destructive of the opposing party's theory of recovery. *Laredo Med. Group Corp. v. Mireles*, 155 S.W.3d 417, 429 (Tex. App. - San Antonio 2004, pet. denied).

Statements by counsel made in open court frequently have been held to be judicial admissions. *Sedgwick v. Kirby Lumber Co.,* 130 Tex. 163, 107 S.W.2d 358, 359-60 (1937) (counsel's statement disclaiming fraud on part of opposing counsel binding and defeated bill of review); *Peck v. Peck,* 172 S.W.3d 26, 30 (Tex. App. - Dallas 2005, pet. denied) (counsel's opening statement that disability policy was community property constituted a judicial admission despite client's disagreement); *Lee v. Lee,* 43 S.W.3d

636, 642 (Tex. App. - Fort Worth 2001, no pet.) (counsel's in-court approval of inventory constituted judicial admission of characterization of property listed therein); *Sepulveda v. Krishnan,* 839 S.W.2d 132, 135 (Tex. App. - Corpus Christi 1992) (statements in court by attorney could be judicial admissions), *aff'd,* 916 S.W.2d 478 (Tex. 1995); *Carroll Instrument Co. v. B.W.B. Controls, Inc.,* 677 S.W.2d 654, 659 (Tex. App. - Houston [1st Dist.] 1984, no writ) (attorney's statement during argument to court binding on client).

Mr. Aguilar's repeated statements to the trial court meet the requirements for a judicial admission. They were made during the course of a judicial proceeding; they are contrary to the position that the OAG now takes on this issue; they could not have been more deliberate, clear or unequivocal; they are consistent with public policy in that PRWORA does not require child support payments to be made through the state disbursement unit when there is no withholding order; and they do not destroy Mr. XXX's request to modify his child support, relief that the trial court granted him.

Issue 6 (Appellant's Issue 4): The trial court did not abuse its discretion by confirming a child support arrearage because the obligor pled for such relief and the OAG has no interest in any arrearage because the obligee has received no public assistance.

The OAG next complains that Mr. XXX's motion to modify (CR 17) did not request a monetary judgment. To the contrary, Mr. XXX specifically recited the language (see page 3, para. 5) concerning child support, the monthly amount, and a request for payment on "judgment obligation." This is a request for a reduction to judgment. Assuming that these pleadings are inadequate (which Mr. XXX does not concede), Mr. XXX asserts that these issues were tried by consent. A party who allows

an issue to be tried by consent and does not challenge the lack of pleadings cannot assert a lack of pleadings for the first time on appeal. *Roark v. Stalworth Oil & Gas, Inc.,* 813 S.W.2d 492 (Tex. 1991). For the OAG, in effect, to specially except to Mr. XXX's pleadings after trial of a year-old case when the OAG previously appeared at a pretrial conference on the case smacks of gamesmanship.

The OAG in its Motion for Rehearing or in the Alternative, Motion for New Trial (CR 54 & 57) claims (para. 4) that the judgment that Mr. XXX owes is "a gross difference from the arrearage alleged by the Attorney General in the amount of $60,971.98." The OAG did not complain in its Motion for Rehearing or in the Alternative, Motion for New Trial, that the trial court erred by confirming an arrearage but only how the arrearage was addressed. The Motion for Rehearing or in the Alternative, Motion for New Trial, is the OAG's first pleading in this modification proceeding. The only remedies that the OAG has sought were all administrative.

The above argument assumes that the OAG had any interest in the case in the first place, given that Ms. XXX was not the recipient of public assistance. In short, the amount of arrearage that Mr. XXX is required to pay Ms. XXX does not concern the OAG. For brevity, Mr. XXX incorporates herein the arguments made under Issues 1 through 3 above.

Issue 7 (Appellant's Issue 5): The trial court did not abuse its discretion when confirming the amount of the child support arrearage because the obligee has not objected to the amount of the confirmed judgment and the OAG has no interest in the amount of the arrearage.

The OAG next contends that the trial court erred in calculating the amount of arrearage confirmed because, according to Tex. Fam. Code § 157.262(a), "in a contempt proceeding or in rendering a money judgment, the court may not reduce or modify the amount of child support arrearages." The OAG argues that a trial court acts as a "mere scrivener" in "mechanically" calculating arrearages. Brief for Appellant at 30. In support of this statement, the OAG cites, among other authorities, Chief Justice Phillips' dissenting opinion in *Williams v. Patton,* 821 S.W.2d 141, 153 (Tex. 1991). In that dissent, Chief Justice Phillips argued that private parties should have the right to compromise and settle child support arrearages. The majority, however, held that a child support arrearage may not be compromised and settled unless and until it is reduced to judgment.

The OAG ignores the fact that, in essence, the trial court's confirmation of Mr. XXX's child support arrearages occurred prior to settlement of them. In attendance at trial were Mr. XXX, represented by Mr. Praeger, and Ms. XXX, the obligee. The trial court went to great lengths to attempt to establish a confirmed arrearage and a payment plan that would be acceptable to Ms. XXX and that Mr. XXX could perform:

> We need to look at a realistic number that [Mr. XXX] can pay so Ms. XXX here is getting money for child support and money for medical child support on a daily basis and he's not stuck with something -- a number so far out there that, Mr. XXX, one day you say, forget it.

> "I'm moving to California. I'm changing my name to Tom Smith, and nobody's ever going to see me again. I've had it." I don't want that to happen. I want reality to set in that you've got a beautiful 16-year-old daughter who can't depend on you and a mother who is working as hard as she can to be both mother and father and not getting her child support.
>
> I don't want that to happen, and that's what's happening.

(2 RR 52/11-24) (quotations added). During the course of calculating child support, the trial court repeatedly checked with Ms. XXX to determine whether she understood and had any objection to the numbers the trial court proposed, both on current support and on the amount and payment schedule for arrearages. (2 RR 57/22 to 58/1; 59/2-4; 64/6-8; 65/6-13; 66/12-18). Ms. XXX responded that she understood, she expressed no objection, and she has not appealed any issue in this case.

As sometimes happens in family court, a contested hearing segued into a settlement conference. Although the OAG's precise calculations of Mr. XXX's child support arrearage have varied slightly ($60,971.98 in the Motion for Rehearing or in the Alternative, Motion for New Trial (CR 54 & 57) as compared with $59,918.32 shown on Mr. XXX's payment record at trial (PX 3)), it was clear to everyone present in court that day that the amount of child support arrearage equaled about $60,000. Rather than undertake the "judicially imposed make-work for the bench and bar" Chief Justice Phillips predicted would result from forcing the parties to try their cases before settling them, the trial court undertook - with the parties' consent - to craft a workable solution. The trial court's resolution of this case complies with the rule in *Williams v. Patton,* 821

S.W.2d 141 (Tex. 1991), because the trial court essentially confirmed the child support arrearage before working with the parties to resolve the case.

The OAG asks this Court to reverse the child support arrearage of $18,033.88 and then to render judgment for a child support arrearage of $59,918.32 as of March 1, 2007. Brief for Appellant at 33. Given that Ms. XXX and Mr. XXX, with the aid of the trial court, previously reached an agreement on what the arrearage should be, the OAG's proposed disposition of the case would burden the parties concerned just as Chief Justice Phillips feared.

As with the argument under Issue 6 above, the above argument assumes that the OAG had any interest in the case in the first place, given that Ms. XXX was not the recipient of public assistance. In short, the amount of arrearage that Mr. XXX is required to pay Ms. XXX does not concern the OAG. For brevity, Mr. XXX incorporates herein the arguments made under Issues 1 through 3 above.

Issue 8 (Appellant's Issues 6 & 7): The trial court's finding that the OAG acted frivolously, unreasonably and without foundation by issuing an administrative writ of withholding supports an award of attorney's fees under Chapter 105 of the Texas Civil Practice and Remedies Code.

Section 105.002 of the Texas Civil Practice & Remedies Code permits a court to award attorney's fees against a state agency when that agency asserts a claim that is "frivolous, unreasonable, or without foundation." A "claim" within the meaning of this statute includes the issuance of administrative child support notices and writs. *Attorney Gen. v. Cartwright,* 874 S.W.2d 210 (Tex. App. - Houston [14th Dist.] 1994, writ denied). Although the OAG attacks the trial court's award of attorney's fees in two Issues, the

Texas Supreme Court has directed that "the totality of the tendered evidence" be reviewed to ascertain whether the state has failed "to demonstrate any arguable basis for the . . . claim." *Brainard v. State,* 12 S.W.3d 6, 30 (Tex. 1999), *overruled in part on other grounds by Martin v. Amerman,* 133 S.W.3d 262 (Tex. 2004) (quoting *Attorney Gen. v. Johnson,* 791 S.W.2d 200, 202 (Tex. App. - Fort Worth 1990, writ denied)); *Black v. Dallas County Child Welfare Unit,* 835 S.W.2d 626 (Tex. 1992). Therefore, Mr. XXX responds in a single Issue. The trial court's Order is subject to abuse-of-discretion review. *Brainard, supra.*

In 2006, Mr. XXX moved the trial court to modify his child support. While the case was pending, the OAG, which had not taken any action in this case since 1998, began issuing administrative child support writs. On February 6, 2007, Mr. XXX filed a Motion for Pre-Trial Conference and Scheduling Order in which he requested administrative review with respect to the withholding writ. (2nd Supp. CR). The OAG neither responded to the motion nor granted Mr. XXX an administrative review. The OAG has not addressed this failure to act in its Brief for Appellant.

At the pretrial conference of March 15, 2007, trial was set for April 23, 2007. Mr. Aguilar appeared for the pretrial conference but did not appear for trial. After hearing the evidence, the trial court concluded that the OAG had done a poor job of monitoring Mr. XXX's child support payments such that a large arrearage existed. The trial court appointed its Guardian Ad Litem to monitor the case so that this situation would not reoccur. Although the trial court was not required to do so, it ordered that Mr. XXX pay child support to the OAG, which then was directed to forward Mr. XXX's child support

payments to the Guardian Ad Litem for disbursement to Ms. XXX. Because Ms. XXX has not received state assistance and did not request the OAG to become involved in the case, and the court did not order income withholding, the trial court could have ordered Mr. XXX to make child support payments directly to the Guardian Ad Litem, bypassing the OAG altogether. Following trial, Mr. Praeger sent a copy of the court's Order to the OAG, which received that Order on May 6, 2007. (CR 1).

The findings included within the trial court's Order Dissolving Administrative Writ of Withholding relate subsequent events:

> 3. The [modification] Order further enjoined the Attorney General from further activities on this case.
>
> . . . .
>
> 5. On or about July 1, 2007 XXX through counsel received a letter from the Attorney General's office dated June 26, 2007 stating that XXX'S employer had been sent an Order/Notice to Withhold Income for Child Support (Administrative Writ of Withholding).
>
> 6. On July 2, 2007 XXX filed a Motion to Dissolve Administrative Writ of Withholding which contained a request for Administrative Review as allowed by Section 158.506 of the Texas Family Code.
>
> 7. The Attorney General's office did not schedule an administrative hearing.
>
> . . . .
>
> 9. The Attorney General's action in issuing an administrative writ was in direct violation of this Court's injunction.
>
> 10. The Attorney General's actions were frivolous, unreasonable and without foundation pursuant to Section 105 of the Texas Civil Practice and Remedies Code.

(CR 63).

The Brief for Appellant raises several arguments by which the OAG urges the Court to reverse the award of attorney's fees. One of the arguments is that the trial court had no jurisdiction to enjoin the OAG from further participation in the case. Mr. XXX has addressed this contention in his Issues 1 through 3 which, for the sake of brevity, are incorporated in this Issue.

The Brief for Appellant continues with these arguments:

- The OAG asserts issuing a writ of withholding in violation of an injunction constitutes an action, not a claim, such that Tex. Civ. Prac. & Rem. Code § 105.002 does not apply. The OAG does not cite *Attorney Gen. v. Cartwright,* 874 S.W.2d 210 (Tex. App. - Houston [14th Dist.] 1994, writ denied), in which the Fourteenth Court of Appeals upheld an award of attorney's fees against the OAG because the OAG made a frivolous claim when it issued a notice of withholding. Further, the OAG's issuance of a writ of withholding was frivolous regardless whether issuance of the writ violated the trial court's injunction.
- The OAG claims: "The trial court also found that the OAG's failure to conduct an administrative review of the Writ of Withholding was frivolous, unreasonable, and without foundation." Brief for Appellant at 38. This statement misrepresents the trial court's ruling, set forth in para. 9 of the Order above: "The Attorney General's action in issuing an administrative writ was in direct violation of this Court's injunction." However, it certainly is possible that the OAG's failure to accord Mr. XXX an

administrative review contributed to the totality of the evidence supporting the trial court's award of attorney's fees.

- The OAG claims that in his Motion to Dissolve Administrative Writ of Withholding (CR 60), Mr. XXX requested that the trial court, rather than the OAG, conduct an administrative review. At the motion hearing Mr. Praeger noted that this sentence contained a typographical error. As did Mr. XXX's prior Motion for Pre-Trial Conference and Scheduling Order, this pleading should have requested the OAG to conduct an administrative review. (3 RR 28/20 to 29/6). The OAG's disingenuous position appears to be that it did not understand this request to be one for administrative review.

- The OAG does not mention Mr. Praeger's undisputed testimony that he tried - a third time - right before court to attempt to obtain an administrative review:

> MR. PRAEGER: I would testify just one further thing. When I saw Mr. Aguilar in court this morning I said, what's the deal with this administrative writ? I said, are y'all going to withdraw it? No, we'll just let the Court decide.
>
> That's exactly what happened. So the point of it is, Judge, they weren't going to lift this writ unless we came down here. And I think my client ought to be compensated for it. It's just that simple.

(3 RR 30/1-9).

- The OAG claims that Mr. XXX made no request for administrative review when in fact Mr. XXX made three such requests: First, in the Motion for

Pre-Trial Conference and Scheduling Order; second, in the Motion to Dissolve Administrative Writ of Withholding (which included the typographical error); and third, verbally, immediately before the hearing on the Motion to Dissolve Administrative Writ of Withholding.

- The OAG further claims that, because it did not extend Mr. XXX an administrative review, Mr. XXX failed to exhaust his administrative remedies such that the trial court lacked subject-matter jurisdiction. Brief for Appellant at 40.
- Finally, the OAG claims that the trial court lacked power to dissolve this unlawful administrative writ because the only grounds for dissolution are that the wrong obligor is named or that the arrearages are incorrect. Brief for Appellant at 37.

Overall, the OAG's position is that regardless whether a case is subject to PRWORA, whether a court has ordered income withholding, or whether a court has enjoined the OAG from continuing to attempt child support collection against an obligor, the OAG is entitled to disregard the law and the court's orders. This view persists in the OAG's Brief for Appellant which, among other things, argues that the trial court erred by ordering child support payments made to the Guardian Ad Litem via the OAG even though Mr. Aguilar repeatedly assured the trial court that the OAG had no objection to that arrangement. Under the totality of the evidence, the OAG has failed to demonstrate any arguable basis for its issuance of an administrative writ of withholding. The trial

court cannot be said to have abused its discretion by awarding Mr. XXX his attorney's fees incurred in having that writ dissolved.

Prayer for Relief

WHEREFORE, PREMISES CONSIDERED, XXX prays that the Court affirm the judgment of the trial court. Mr. XXX prays for general relief.

Respectfully submitted,

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Certificate of Service

I certify that I have served a true and correct copy of the above and foregoing document on the following persons:

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by certified mail, return receipt requested, on this _____ day of May, 2008.

_____

Jimmy L. Verner, Jr.

Appendix A

42 U.S.C. § 654(4)

A State plan for child and spousal support must--

. . . .

(4) provide that the State will—

(A) provide services relating to the establishment of paternity or the establishment, modification, or enforcement of child support obligations, as appropriate, under the plan with respect to—

(i) each child for whom

(I) assistance is provided under the State program funded under part A of this subchapter,

(II) benefits or services for foster care maintenance are provided under the State program funded under part E of this subchapter,

(III) medical assistance is provided under the State plan approved under subchapter XIX of this chapter, or

(IV) cooperation is required pursuant to section 2015 (l)(1) of title 7, unless, in accordance with paragraph (29), good cause or other exceptions exist;

(ii) any other child, if an individual applies for such services with respect to the child; and

(B) enforce any support obligation established with respect to—

(i) a child with respect to whom the State provides services under the plan; or

(ii) the custodial parent of such a child;

Appendix B

42 U.S.C. § 666(a)(8)

(a) Types of procedures required

In order to satisfy section 654 (20)(A) of this title, each State must have in effect laws requiring the use of the following procedures, consistent with this section and with regulations of the Secretary, to increase the effectiveness of the program which the State administers under this part:

. . . .

(8)

(A) Procedures under which all child support orders not described in subparagraph (B) will include provision for withholding from income, in order to assure that withholding as a means of collecting child support is available if arrearages occur without the necessity of filing application for services under this part.

(B) Procedures under which all child support orders which are initially issued in the State on or after January 1, 1994, and are not being enforced under this part will include the following requirements:

(i) The income of a noncustodial parent shall be subject to withholding, regardless of whether support payments by such parent are in arrears, on the effective date of the order; except that such income shall not be subject to withholding under this clause in any case where

(I) one of the parties demonstrates, and the court (or administrative process) finds, that there is good cause not to require immediate income withholding, or

(II) a written agreement is reached between both parties which provides for an alternative arrangement.

(ii) The requirements of subsection (b)(1) of this section (which shall apply in the case of each noncustodial parent against whom a support order is or has been issued or modified in the State, without regard to whether the order is being enforced under the State plan).

(iii) The requirements of paragraphs (2), (5), (6), (7), (8), (9), and (10) of subsection (b) of this section, where applicable.

(iv) Withholding from income of amounts payable as support must be carried out in full compliance with all procedural due process requirements of the State.