

TABLE OF CONTENTS

TABLE OF CITATIONS	iii-vii
STATEMENT OF THE FACTS	viii-xi
STATEMENT OF THE CASE	xii-xiii
STATEMENT OF THE ISSUES	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT	4
INTRODUCTORY STATEMENT	4
I. SECTION 61.14(5), FLORIDA STATUTES, DOES NOT DENY ACCESS TO THE COURTS	6
II. SECTION 61.14(5), FLORIDA STATUTES DOES NOT DENY DUE PROCESS OF LAW	21
CONCLUSION	30
CERTIFICATE OF SERVICE	31

TABLE OF CITATIONS

	<u>Page (s)</u>
<u>Adams v. Adams</u> , 423 So.2d 596 (Fla. 3d DCA 1982)	10
<u>Armour v. Allen</u> , 377 So.2d 798 (Fla. 1st DCA 1979)	10, 11
<u>Ashe v. Ashe</u> , 509 So.2d 1146 (Fla. 1st DCA 1987)	10, 13
<u>Barry v. Robson</u> , 65 So.2d 739 (Fla. 1953)	12
<u>Berenice v. Scarritt</u> , 76 Mo. 565, 43 Am.Rep. 768 (1882)	9
<u>Bullard v. Bullard</u> , 195 So.2d 876 (Fla. 2nd DCA 1967)	9
<u>Canney v. Board of Instruction of Alachua County</u> , 278 So.2d 260 (Fla. 1973)	22
<u>Fox v. Haislett</u> , 388 So.2d 1261 (Fla. 2nd DCA 1980)	11, 12
<u>Fuentes v. Shevin</u> , 407 U.S. 67 (1972)	21
<u>Florida Public Service Commission v. Triple A. Enterprises, Inc.</u> , 387 So.2d 940 (Fla. 1980)	21
<u>Frazier v. Fraizer</u> , 109 Fla. 164, 147 So. 464 (1933)	9
<u>Fuller v. Fuller</u> , 23 Fla. 236, 2 So. 426 (1887)	9
<u>Gottesman v. Gottesman</u> , 202 So.2d 775 (Fla. 3d DCA 1967)	8
<u>Guzy v. Pavic</u> , 500 So.2d 711 (Fla. 1st DCA 1987)	10, 11
<u>Hadley v. Department of Insurance</u> , 411 So.2d 184 (Fla. 1982)	22

<u>Hart v. Hart</u> , 458 So.2d 815 (Fla. 4th DCA 1984)	22
<u>Heckes v. Heckes</u> , 129 Fla. 653, 176 So. 541 (1937)	9
<u>Hurst v. Hampton</u> , 274 So.2d 891 (Fla. 4th DCA 1973)	12
<u>Kern v. Kern</u> , 360 So.2d 482 (Fla. 4th DCA 1978)	9, 10
<u>Klugar v. White</u> , 281 So.2d 1 (Fla. 1973)	7
<u>Lake v. Lake</u> , 103 So.2d 639 (Fla. 1958)	7
<u>Lang v. Lang</u> , 252 So.2d 809 (Fla. 4th DCA 1971)	11
<u>Mathews v. Eldridge</u> , 424 U.S. 319 (1976)	21, 22, 23
<u>Morrissey v. Brewer</u> , 408 U.S. 471 (1972)	22
<u>Mullane v. Central Hanover Bank & Trust Co.</u> , 339 U.S. 306 (1950)	22, 26
<u>O'Brien v. O'Brien</u> , 424 So.2d 970 (Fla. 3d DCA 1983)	9, 11, 28
<u>Onley v. Onley</u> , 14 FLW 688 (Fla. 3rd DCA, March 14, 1989)	11
<u>Panganiban v. Panganiban</u> , 396 So.2d 1156 (Fla. 2nd DCA 1981)	10, 11
<u>Petrucci v. Petrucci</u> , 252 So.2d 867 (Fla. 3d DCA 1971)	11
<u>Pottinger v. Pottinger</u> , 133 Fla. 442, 182 So.2d 762 (1938)	11, 12, 14
<u>Quay Development, Inc. v. Elegante Building Corporation</u> , 392 So.2d 901 (Fla. 1981)	22, 26
<u>Ragan v. Thomas</u> , 515 So.2d 505 (Fla. 1st DCA 1987)	11
<u>Robbins v. Robbins</u> , 429 So.2d 424 (Fla. 3rd DCA 1983)	23

<u>Ryan v. Ryan</u> , 277 So.2d 266 (Fla. 1973)	21
<u>Shufflebarger v. Shufflebarger</u> , 460 So.2d 982 (Fla. 3rd DCA 1984)	11
<u>Smith v. Department of Insurance</u> , 507 So.2d 1080 (Fla. 1987)	7
<u>Smithwick v. Smithwick</u> , 343 So.2d 945 (Fla. 3rd DCA 1977)	13, 19
<u>State v. Bollinger</u> , 88 FL. 123, 101 So.2d 282 (1924)	9
<u>Tetra v. Tetra</u> , 297 So.2d 642 (Fla. 1st DCA 974)	9
<u>Van Loon v. Van Loon</u> , 132 Fla. 535 182 So. 205 (1938)	10, 14
<u>Warrick v. Hender</u> , 198 So.2d 348 Fla. 4th DCA 1967)	13
<u>Other Authorities</u>	

FEDERAL STATUTES:

42 U.S.C. §666 vi-xii

FEDERAL/PUBLIC LAWS:

Pub.L. 98-378, §3(b), 98 Stat. vi-xii, 16
1306

Pub.L. 99-509 vi-xii, 16

FLORIDA STATUTES :

Section 61.13, Florida Statutes (1937) 10

Section 61.14(5), Florida Statutes (1987) passim

Section 744.301, Florida Statutes (1987) 9

Section 744.361, Florida Statutes (1987) 9

FLORIDA LAWS:

Chapter 86-220, Laws of Florida, viii, 16
Sections 115-154

Chapter 37-95, Laws of Florida, Section 5 x, 16

STATEMENT OF THE FACTS

In the early 1970's Congress began to take further notice of the continuing nearly total lack of enforcement of child support orders throughout the United States. Children, who deserved and needed the money, were not getting much state assistance in obtaining the money from their non custodial parent (mostly fathers). As many of these children were recipients of Aid to Families with Dependent Children (AFDC). Congress, in 1967, had amended the Social Security Act to require state welfare agencies to establish a single governmental agency to identify the paternity of each child and secure support payments from that non supporting man.

However, the states did not use the 1967 amendments to help the deserted children in their jurisdiction to obtain the support they deserved. To remedy this situation, and to lessen the taxpayers load on the AFDC program, Congress enacted Title IV-D of the Social Security Act (P.L. 93-647) which required the states to improve theory programs for establishing and collecting child support payments, while basic responsibility was left with the states, the federal government has a role monitoring the states. If a state did not have a program or not in conformity with the federal law, the state is to suffer a reduction of 5 percent of the federal match funds under the AFDC program.

While the 1975 law made some improvements, there were still some discrepancies and confusion that continued the lack of money

to the children. One of the major points of confusion was the application of the federal law to non-AFDC families and one of the discrepancies was the lack of specificity of the types of procedures the states must use in operating the IV-D program. The result of all this was a wide discrepancy in enforcement state-to-state. So, in order to improve the system, to have uniformity nationwide and to have the law apply to all custodial parents, Congress amended the Social Security Act again in 1984 with P.L. 98-378, codified at 42 U.S.C. §666. In order to receive federal monies under the Social Security Act, the states were required to enact laws requiring the use of the federally stated procedures in their child support enforcement laws. At 42 U.S.C. §666(a), Congress states

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 the section and with regulations of the Secretary, to increase the effectiveness of the program which the State administers under the part

The difference in this bill over the prior congressional action was the firm procedural requirements that Congress now imposed on the states. Imposed were (1) mandatory wage withholding of the non custodial parent (2) liens against real and personal property for overdue child support (3) state income tax refund offset (4) information to credit agencies about overdue support (5) security bond of the non custodial pursuit to

ensure payment (6) expedited judicial process for establishing, obtaining and enforcing child support payments and (7) notification to AFDC recipients of amounts received. 42 U.S.C. §666(a)(1)-(8). To increase state cooperation in solving this problem, Congress increased the Act's sanction requirements and increased federal monitoring. If the state child support enforcement program did not meet federal requirements, the state would lose federal matching funds and face sanctions.

Florida, as required by Pub.L. 98-378, had to enact the laws directed by Congress if it wished to continue receiving federal AFDC funds. During the 1986 legislative session, HB 1313 was introduced to bring Florida law into compliance with federal law. The Bill was enacted (Chapter 86-220, Laws of Florida) and took effect on October 1, 1986.

In 1986, Congress amended 42 U.S.C. 5666 and added an addition set of procedures that the states were required to have in their child support enforcement programs. Like the earlier law, the states had to have these additional federal requirements in their support enforcement programs in compliance with federal

law in order to receive AFDC monies.^{1/} The additional procedures are set out in Section 9103(b) of Pub.L. 99-509, codified at Section (a)(9) of 42 U.S.C. §666. Congress required the states to have in effect

"Procedures which require that any payment or installment of support under any child support order, whether ordered through the State judicial system or through the expedited processes required by paragraph (2), is (on and after the date it is due --

"(A) a judgment by operation of law, with the full force, effect, and attributes of a judgment of the State, including the ability to be enforced,

(B) entitled as a judgment to full faith and credit in such State and in any other State, and

(C) not subject to retroactive modification by such State or by any other State;

except that such procedures may permit modification with respect to any period during which there is pending a petition for modification, but only from the date that notice of such petition has been given, either directly or through the

1/

Paragraph (2) of Section 9103(b) provided:

(2) In the case of a State with respect to which the Secretary of Health and Human Services has determined that State legislation is required in order to conform the State plan approved under part D of title IV of the Social Security Act to the requirements imposed by the amendment made by subsection (a), . . .

appropriate agent, to the obligee or (where the obligee is the petitioner) to the obligor."

Section 9103(b) provided that, except as provided in paragraph (2) of Section 9103(b), the amendment to Section 42 U.S.C. §666(a) was to be effective on the date of enactment, which was October 27, 1986.

The law was clear; in order for a state to have an approved plan and, thus, receive federal monies, the state must have a plan and the plan must meet the requirements of 42 U.S.C. §654. In order to meet the requirements of §654, the states, as stated in subsection (20), must have in effect the procedural laws as set forth in §666 and implement the procedures set out in the state law. If the state does not meet the mandate of §654(20), the state will be out of compliance and will lose its federal monies.

During the 1987 legislative session, the Legislature was presented with and enacted Senate Bill 631, Chapter 87-95, Laws of Florida, which amended Section 61.14, Florida Statutes by adding subsections 5(a)-(d), the provisions of Section 61.14 challenged here. This amendment to Section 61.14 was intended to bring Florida law into compliance with 42 U.S.C. §666(a)(9). The

law took effect on July 1, 1987.^{2/}

The Appellee and Patricia Stanjeski were divorced on January 16, 1981 (R: 12-14, 21). Custody of their child was given to Mrs. Stanjeski and Mr. Stanjeski was to pay \$40.00 per week in child support (R: 12). In December, 1986, Mrs. Stanjeski agreed to allow Mr. Stanjeski physical custody of the child (R: 22). The minor child continued to reside with the Appellee up to the time of the commencement of this action (R: 22). In

2/

During the pendency of this lawsuit, and as a direct result to the two circuit court decisions ruling Section 61.14(5), Florida Statutes (1987), was unconstitutional, the Legislature again amended Section 61.14(5). See, Section 61.14(5), Florida Statutes (1988 Supp.), Chapter 88, Section 1, Laws of Florida. The amendment specifically addressed the hearing question by providing for a hearing before the judgment by operation of law took effect.

However, in a recent letter to the Secretary of the Florida Department of Health and Rehabilitative Services from the Director of the United States Department of Health and Human Services, Office of Child Support Enforcement, the federal agency charged with the monitoring of the states under 42 U.S.C. §666 (filed with the Court as a supplement to the Record), took the position, after a review of Section 61.14(5), Florida Statutes (1987), that the "judgment by operation of law" is to take immediate effect on the date the child support payment is due and not paid. The federal government clearly asserts that 42 U.S.C. §666 does not recognize or permit any delay in attaching the "judgment by operation of law" for the purposes of notifying the obligor, allowing him a time in which to reply or in challenging the delinquent support payment in any manner. They also take the position that there is no right to any hearing over the delinquent payment. The letter informed the State that if Florida did not change its law to meet these objections, the state would lose its federal funding.

December, 1986, the Appellee filed with the circuit court a request to change custody in the child to shared parental custody with primary physical custody in the Appellee (R: 15-17). The petition also sought to eliminate any further child support payment since the child was residing with the Appellee (R: 16).

Apparently, at some point in time, while the child resided with the Appellee in Florida and before any order on the Appellee's petition to the court on the change in custody or support had been issued, the Appellee stopped making his court order child support payment to Mrs. Stanjeski. As a result of that failure to keep current with his child support payment, Jed Pittman, Clerk of the Circuit Court for Pasco County, Florida issued on July 22, 1987, pursuant to the provisions of Section 61.14(5), Florida Statutes (1987), a Notice to Obligor of Delinquency notifying the Appellee of his delinquency and the possibility of a judgment by operation of law if the Appellee failed to pay the delinquent support 30 days from July 3, 1987 (R: 37).

STATEMENT OF THE CASE

On July 23, 1987, the Appellee, John W. Stanjeski received a notice from the Honorable Jed Pittman, Clerk of Courts, Pasco County, Florida (R: 37). The notice was mailed pursuant to the provisions of Section 61.14(5), Florida Statutes (1987). The notice notified the Appellee he was delinquent in his child support payment that had become due on July 3, 1987. The notice also informed the Appellee of the consequences if he did not pay his overdue support payment within 30 days of July 3, 1987.

On August 10, 1987, subsequent to the date the delinquent child support order would become a judgment by operation of law under Section 61.14(5) (a) if not paid or a motion for modification of the child support filed, the Appellee, through counsel, wrote a letter to Mr. Pittman informing him of the factual situation (R: 40).

On October 26, 1987, the Appellee filed, with the Circuit Court of the Sixth Judicial Circuit, a Complaint against Mrs. Stanjeski and Jed Pittman (R: 21-43). The case was assigned the case number of the Appellee's original divorce case number, 80-2023-CA. The Complaint consisted of a Petition for Temporary Injunctive Relief, Declaratory Action and Other Relief. The essence of the Complaint was that Section 61.14(5) Florida Statutes (1987), violated the Florida Constitution because the Act denied the Appellee due process under the law and denied his access to the courts.

Mr. Pittman was defended by the State Attorney's Office for Sixth Judicial Circuit for Pasco County. The Attorney General's Office was informed of the existence of the suit. However, since the statute was being defended by competent counsel in the form of the State Attorney's Office, the Attorney General chose not to appear at that time.

Appellee's Complaint was first challenged in a motion to dismiss (R: 72-75). The trial court denied the motion on December 23, 1987 (R: 86). The Appellee then filed a Motion for Summary Judgment (R: 76-81), attaching to it a copy of the Honorable L. B. Vocelle's Final Summary Judgment in D'Agosto v. Wright, 19th Judicial Circuit, Case No. 87-495-CA as Exhibit "A" (R: 77-81). The State Attorney's Office, on behalf of Mr. Pittman, filed a response to the Appellee's petition for declaratory judgment (R: 87-88) and a memorandum in opposition to the Appellee's motion for summary judgment (R: 91-120) including documents concerning the legislative history of both the Federal and State laws.

On March 2, 1988, the trial court issued its Order on the summary judgment (R: 127-129). The court, adopting much of the final summary judgment in D'Agosto v. Wright, found Section 61.14, Florida Statutes, unconstitutional in that the law denied

the Appellee due process and access to the courts.^{3/}

On March 30, 1988, the Attorney General, appearing as permitted by Section 86.091, Florida Statutes, filed a Notice of Appeal in the circuit court (R: 130-131).

The two issues, due process and access to the court, were briefed by both parties. Oral argument was held in Tampa on December 19, 1988. On January 13, 1989, the District Court of Appeal issued its opinion. See, State of Florida ex rel Pittman v. Stanjeski, 14FLW 194 (Fla. 2nd DCA, January 13, 1989).

The District Court affirmed the summary judgment of the circuit court finding Section 61.14(5), Florida Statutes (1987), unconstitutional. Id., 14 FLW at 196. The District Court, in its decision, clearly stated its reasoning, First it found the law denied access to the court because an obligor is:

prevented from challenging payments which
have occurred prior to the time of the
filing of a motion to set aside, alter,
or modify an existing support order.
(emphasis supplied)

Id., 14 FLW at 195. Thus, it concluded, "works to deny an obligor his day in court to raise" any equitable defenses he may have to the delinquency." (emphasis supplied). Id.

3/

The D'Agosto case is presently pending before the Fourth District Court of Appeal. Butterworth v. D'Agosto, case No. 87-3282. That case was briefed and oral argument was held on December 15, 1988.

Second, the District Court found the provisions of Section 61.14(5) did not provide an obligor with a "legal proceeding in a court of law" to challenge the delinquency notice. Id.

A notice of appeal was filed with the District Court of Appeal on February 2, 1989.⁴/

⁴/

Due to an error on counsel's part, the brief was not filed within the twenty days (20) required under Rule 9.110(j), Florida Rules of Appellate Procedure. Counsel mistakenly believed that he had seventy (70) days, as provided for in Rule 9.110(f). When informed of the mistake, counsel requested and was granted an extension of time in which to file this brief until March 31, 1989.

STATEMENT OF THE ISSUES

I.

**DOES SECTION 61.14(5), FLORIDA STATUTES
(1987) DENY ACCESS TO THE COURTS?**

II.

**DOES SECTION 61.14 FLORIDA STATUTES,
DENY DUE PROCESS OF LAW?**

SUMMARY OF THE ARGUMENT

I.

An obligor is not entitled under the case law of this state to alter or modify a past due, vested child support payment. Consequently, the delinquent obligor is not entitled to access to the courts as no court could modify the past due judgments th obligor wishes to attack.

Section 61.14(5), Florida Statutes (1987), does not deny access to the courts as the obligor has been permitted by the Legislature the opportunity to respond to the notice of delinquency or file a motion to alter or amend the child support order.

The obligor still retains all his equitable defenses he may have in a proceeding to enforce the payment of a past due support order. Nothing in Section 61.14(5) alters any defense an obligor has in the enforcement process.

II .

An obligor does not have any due process rights in the legal process that turns his willful violation of his legal obligations, established in a properly executed court order, into a judgment. Since upon the failure of the obligor to pay the required support no court can alter or modify the delinquent vested payment, there is no need to notice the obligor of his failure to pay the support or to provide an opportunity to

challenge his failure to pay.

Section 61.14(5), Florida Statutes (1987), does not deny the obligor any due process rights. Through this statute, the obligor is afforded proper notice through certified mail and is afforded a meaningful hearing on the delinquent support payment even though State and Federal Constitutional law does not require such notice or opportunity to be heard. The statute does not prohibit any hearing on the enforcement of a past due amount nor deny the obligor any defenses permitted under law.

ARGUMENT

INTRODUCTORY STATEMENT

This case is before this Court upon the decision of the Second District Court of Appeal rendered January 13, 1989, holding Section 61.14(5), Florida Statutes, unconstitutional.^{5/} The case came before the District Court of Appeal from the final order of the Circuit Court of the Sixth Judicial Circuit that found Section 61.14(5), Florida Statutes (1987) unconstitutional. The trial court, relying on the final summary judgment order of Judge L. B. Vocelle of the Nineteenth Judicial Circuit in D'Agosto v. Wright, 19th Judicial Circuit, Case No. 87-495-CA (R: 77-81) found the statute unconstitutional for the following reasons:

1. The act denies an obligor due process of law in that it does not provide adequate notice to the obligor nor provides for a hearing on the issues raised by the law; and
2. The act denies the obligor access to the courts because the law does not permit the modification of a past due child support order.

The District Court of Appeal affirmed the decision of the trial court. 14 FLW 194 (Fla. 2nd DCA, January 13. 1989).

5/

A similar challenge to Section 61.14(5), Florida Statutes (1987) is pending before the Fourth District Court of Appeal. Butterworth v. D'Agosto, 4th DCA, Case No. 88-3282

Both lower courts misunderstood the legal history of child support payments and the place Section 61.14(5) fits into that story. Section 61.14(5) adds little or anything to the common law or case law of this State. If anything, Section provides greater procedural protections than the past case decisions allowed. The Appellant will show to this Court that courts have long been barred from modifying past due child support judgments and, thus, obligors had no due process rights or rights of access concerning their delinquent payments.

In addition, the two courts failed to see all the procedural protections that do exist in the statute and that these protections fully meet the requirements of both the United States and Florida Constitutions, if, under the circumstances of this case, an obligor is even entitled to such rights.

In short, Section 61.14(5) is but a codification of the common and case law of Florida. The rights of an obligor are not in any way lessened by this statute.

I.

**AN OBLIGOR, DELINQUENT IN HIS
CHILD SUPPORT PAYMENTS, IS NOT
DENIED ACCESS TO THE COURTS**

The main thrust of the opinions of the lower courts is that Section 61.14(5), Florida Statutes (1987), denies an obligor access to the courts if the delinquent obligor is not permitted the ability to appear before a court and have a hearing prior to the delinquent payment becoming a "judgment by operation of law" or permit the modification of past due support payments. These decisions are plainly wrong. Historically, a delinquent obligor was not entitled to any hearing before his delinquent child support payment became "vested" in the payee or the child. The obligor was not entitled to go to a court and get this vested payment modified or negated. A delinquent obligor therefore acquired no "constitutional" right to access of the courts when the Legislature enacted Section 61.14(5) directing that his delinquent support payment become a judgment by operation of law.

However, if a hearing is required to meet due process and an access to the courts, Section 61.14(5), Florida Statutes (1987), permits a hearing and meets all the access and due process hearing tests.

The Courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

Article 1, Section 21, Florida Constitution. The State would submit that the words of the Constitution could not be more precise; their meaning clear. This provision provides that the citizens of this State will have the courts open to them to resolve any conflict between themselves. Put plainly, "every man is entitled to his day in court and to a fair trial." Lake v. Lake, 103 So.2d 639 (Fla. 1958).

Klugar v. White, 281 So.2d 1 (Fla. 1973) is this State's primary case on access to the courts, as so stated recently in Smith v. Department of Insurance, 507 So.2d 1080 (Fla. 1987).

[W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla.Stat. §2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.

Klugar, 281 So.2d at 4, cited in Smith, 507 So.2d at 1088.

In their final decisions, the District Court of Appeal and the trial court ruled that Section 61.14(5), Florida Statutes (1987) (Statute) violated Mr. Stanjeski's access to the courts as guaranteed in Article I, Section 21 of the Florida Constitutional entitled, 'Access to the Courts'. The courts based their rulings on their understanding that the statute did not permit Mr. Stanjeski a day in court to contest the arrearages in his child support payments. However, both the courts misinterpreted the meaning and thrust of child support payments; the ability to modify past due child support payments; and the enforcement of past due amounts and, thus, did not correctly state the rights a delinquent obligor has under the law. In particular, the two courts below failed to recognize that in the past a delinquent obligor did not have a right of access to the court to contest the past due payments. Misunderstanding the historical precedence of child support payments, the courts misapprehended Section 61.14(5) as applied to the question of access to the courts. Therefore, to understand the meaning of Section 61.14(5), one has to first understand the case law history of past due child support payments.

A. GENERAL FLORIDA LAW

1. CHILD SUPPORT PAYMENTS

At common law it was the duty of the father to provide support to his children. This Court has long recognized this

duty, stating in State v. Bollinger, 88 Fla. 123, 101 So. 282 (1924), where it quoted with approval, the wording of Berenice v. Scarritt, 76 Mo. 565, 43 Am.Rep. 768 (1882),

The father owes a duty to nurture, support, educate and protect his child, and the child has the right to call on him for the discharge of this duty.

* * *

These obligations and rights are imposed and conferred by the laws of nature; and public policy, for the good of society, will not permit or allow the father to irrevocably divest himself of or to abandon them at his mere will or pleasure.

See also, Heckes v. Heckes, 129 Fla. 653, 176 So. 541, 543 (1937); Frazier v. Fraizer, 109 Fla. 164, 147 So. 464 (1933); Fuller v. Fuller, 23 Fla. 236, 2 So. 426, 430-433 (1887).^{6/}

The legal basis for child support has also been made statutory. Section 744.301, Florida Statutes (1987) states that both the mother and father are natural guardians of their own and adopted children, during minority. Section 744.361, Florida Statutes (1987) states that it is the duty of the natural guardians to take care of, treat humanely, properly educate, and

^{6/}

However, this is no longer regarded as the exclusive duty of the father; rather the duty is now placed upon both parents to support their children. O'Brien v. O'Brien, 424 So.2d 970 (Fla. 3rd DCA 1983); Kern v. Kern, 360 So.2d 482 (Fla. 4th DCA 1978); Bullard v. Bullard, 195 So.2d 876 (Fla. 2nd DCA 1967).

provide opportunity to learn a trade, occupation, or profession. Additionally, Section 61.13, Florida Statutes (1987) states that in a proceeding for dissolution of marriage, the court may at any time order either or both parents owing a duty of support to a child of the marriage to pay such support. Consequently, obligation to support a child is a dual obligation. Armour v. Allen, 377 So.2d 798, 800 (Fla. 1st DCA 1979); Kern v. Kern, supra.

Once child support is ordered to be paid, Florida courts have consistently held that the custodial parent (generally referred to as the "payee") has a vested property right in any unpaid child support for the benefit of the child. See, Van Loon v. Van Loon, 132 Fla. 535, 182 So, 205 (1938). In Ashe v. Ashe, 509 So.2d 1146, 1148 (Fla. 1st DCA 1987), the court held:

. . . the right to arrearages in child support is a vested right which inures to the benefits of the child.

See also, Guzy v. Pavic, 500 So.2d 711 (Fla. 1st DCA 1987), and Panganiban v. Panganiban, 396 So.2d 1156 (Fla. 2nd DCA 1981).

Not only are child support payments a vested property right, they are a right in which the recipient, payee or child, is constitutionally entitled to. In Adams v. Adams, 423 So.2d 596,

598 (Fla. 3d DCA 1982).7/

2. MODIFICATION OF PAST DUE
CHILD SUPPORT INSTALLMENTS

As a vested property right, a court does not have jurisdiction/power to modify or set aside amounts that are already past due and payable. It has long been the law of Florida, and this Court, that a court has no authority to cancel or reduce a past-due installment of child support. This Court, in Pottinger v. Pottinger, 133 Fla. 442, 182 So. 762 (1938), decided that past due child support installments were vested property of the payee to which the payee could not be divested. Therefore, no court could issue any order that diminished or divested the payee of these support payments. This has been the law in this state ever since. See, Onley v. Onley, 14 FLW 688 (Fla. 3rd DCA, March 14, 1989); Ragan v. Thomas, 515 So.2d 505 (Fla. 1st DCA 1987); Shufflebarger v. Shufflebarger, 460 So.2d 982 (Fla. 3rd DCA 1984); Panganiban v. Panganiban, 396 So.2d 1146 (Fla. 2nd DCA 1981); Fox v. Haislett, 388 So.2d 1261, 1265 (Fla. 2nd DCA 1980); Petrucci v. Petrucci, 252 So.2d 867 (Fla. 3rd DCA 1971).

7/

As it has been established that child support payments constitute a vested right for the benefit of the child, neither the custodial payee parent nor child may waive them. See, Armour v. Allen, 377 So.2d at 799-800; Guzy v. Pavic, supra; O'Brien v. O'Brien, supra; and Lang v. Lang, 252 So.2d 809, 812 (Fla. 4th DCA 1971).

3. ENFORCEMENT OF CHILD SUPPORT JUDGMENTS

The creation of a child support order does not lead to automatic enforcement of the order. Child support orders that have become past due, and where the obligor refuses to voluntarily comply with the order, are to be enforced as any other judgment in this State. While a child support judgment imposes a personal liability and obligation on the obligor in favor of the payee and his child, a judgment is merely the means by which the court renders its decision, Barry v. Robson, 65 So.2d 739 (Fla. 1953). A judgment is necessary for enforcement, but it is not, in and of itself, enforcement,

When a person attempts to "enforce" the past-due installments/judgments on an obligor, the obligor has certain right before being deprived of his or her property, either through judicial order or sale. The obligor has a right of access to the courts and due process rights. These include a right to adequate service of process to notify the obligor of the enforcement proceedings, a right to a hearing to contest the taking of his property and the right to assert all the equitable defenses under law. See Fox v. Haislett, 388 So.2d at 1265; Tetra v. Tetra, 297 So.2d 642 (Fla. 1st DCA 1974); Hurst v. Hampton, 274 So.2d 891 (Fla. 4th DCA 1973). While the ability to quash the past due installments is limited, where the certain extraordinary circumstances exist, the obligor's past-due payments can be canceled. Pottinger, supra; Fox v. Haislett,

supra; Smithwick v. Smithwick, 343 So.2d 945 (Fla. 3rd DCA 1977); Warrick v. Hender, 198 So.2d 348 (Fla. 4th DCA 1967). Accord, Ashe v. Ashe, 509 So.2d 1146 (Fla. 1st DCA 1987). However, the extraordinary circumstances must be present and interpreted narrowly against the delinquent obligor; the intent being the child needs the money and its denial will be a hardship on the child.

In enforcing a delinquent child support judgment, the proper procedural steps must be taken and the courts have discretion to use equitable considerations. Smithwick v. Smithwick, 343 So.2d 945 (Fla. 3rd DCA 1977). The extraordinary facts or circumstances which would allow a court to cancel child support arrearages are set forth in O'Brien v. O'Brien, 424 So.2d 970 (Fla. 3rd DCA 1983). There the court held:

Claims for child support arrearages are generally enforceable, absent extraordinary or compelling circumstances, such as waiver, laches, estoppel or reprehensible conduct on the part of the custodial parent.

424 So.2d at 971.

**B. A DELIQUENT OBLIGOR HAS NO RIGHT
TO ACCESS TO THE COURTS TO CHALLENGE
THE PAST DUE VESTED CHILD SUPPORT PAYMENT.**

A delinquent obligor has had in the past no right of access to the courts to have a hearing to contest his delinquent child support payment. This was the state of the law prior to the enactment of Section 61.14(5). As stated above, a delinquent child support payment became vested the moment it was due and not paid. That position is grounded in this Court's decisions in Pottinger and Van Loon. This Court, nor any court in Florida, has recognized a right in the obligor in any of these earlier cases to a hearing prior to the delinquent child support payment becoming vested in the payee. The law has been clear; if no payment was presented by the court ordered due date, the amount became vested and non-modifiable.

However, this does not mean that the obligor was denied an access to the courts of the State in violation of the Florida Constitution. Prior to a divorce, due process under both state and federal law, require a hearing in which the rights of the divorcing parties are decided. The marital rights are established, obligations settled and the property divided. The hearing at which a circuit court, having jurisdiction over the obligor under Chapter 61, ordered the obligor to pay an amount certain on a specific date each and every month until the child reached majority was sufficient to meet the access and due process rights of the obligor. The obligor was notified of the

divorce proceedings had his day in court and he knew he had to comply with the order of the court.

If he failed to make his payments, the law recognized the obligor was in violation of the support order and the payment became vested in the payee or child. The vested delinquent support payment was treated as a judgment (just as the delinquent payment under Section 61.14(5) becomes a "judgment by operation of law"). That "judgment" was enforced as other judgments, using procedures and recognizing rights permitted under enforcement law, against the delinquent obligor.

Under past case law a hearing was useless. Since the case law of this state forbids the modification of vested, past due child support installments, what value would a hearing have been? No hearing was anticipated because no modification was possible. Apparently, no court found any conflict between the Florida Constitution's access to the courts and the strict rule prohibiting modification of vested support payments.

The enactment of Section 61.14(5) did not alter the past common or case law of this State. It merely put into statutory context the past case law of this Court finding that past due support payment became vested and non-modifiable. If the common or case law did not recognize a state constitutional right to a hearing prior to a past due child support payment becoming vested, and with it the inability to modify the delinquent support payment, then the enactment of Section 61.14(5) also did not

create a constitutional right to a hearing before the delinquent payment becomes a "judgment by operation of law." What ever access to the courts an obligor may have under Section 61.14(5) is at the pleasure of the Legislature; they were not required to give it. As a violator of an order, a delinquent obligor has no right to a hearing before his delinquent payment becomes a "judgment by operation of law."

**C. IF ACCESS TO THE COURTS IS REQUIRED,
SECTION 61.14(5) PERMITS A ACCESS ON
THE ISSUES THAT CAN BE RAISED.**

Even if a hearing is required to meet the state and federal constitutional access to courts and due process requirements, Section 61.14(5) does not deny access to the courts.

**1. CHILD SUPPORT ENFORCEMENT UNDER FLORIDA LAW:
SECTION 61.14, FLORIDA STATUTES**

In response to Congress' mandate in Pub.L. 98-378, the Florida Legislature enacted laws intending to bring Florida laws into compliance with the federal mandate. See, Chapter 86-220, Laws of Florida, Sections 115-154. Later, after the amendment of 42 U.S.C. §666(a) by Pub.L. 99-509, the Legislature amended Section 61.14 by adding subsection (5). Chapter 87-95, Laws of Florida, Section 5. What then does Section 61.14(5) do, or, as important, does not do?

For the first time in statutory form, a past due/delinquent child support can become a "final judgment by operation of

law". Subsection (5)(a). This is an important point to remember; if the statutory conditions are met, the past due payment becomes a "judgment". While the judgment "shall have the full force, effect, and attributes of a judgment entered by a court", subsection (5)(a), the statute gives the judgment no automatic enforcement power. The judgment is to be enforced as any other judgment issued by the court through execution. Id.

Under what conditions will the recent delinquent child support payment become a "judgment by operation of law"? The recent past due amount becomes a judgment only

(1) after notice is provided to the obligor of the past due amount according to the provisions in the statute,

(2) after time for a response from the obligor has expired, and

(3) after the obligor does not make his payment or does not respond to the delinquency notice within 30 days of the date of delinquency.

Section 61.14(5) (a) and (b).8/

Notice must be sent to the obligor after the obligor is 15 days delinquent. The notice must be made by certified mail, return receipt requested. Section 61.14(5) (b). The obligor can

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Leaving all the procedural aspects aside, the Legislature merely restates the case law in directing that an unpaid support payment becomes vested (a judgment) in the payee.

respond before the **30** day period has expired by any means available under the law including a motion to set aside, alter, or modify the child support order. The obligor is free to set any type of hearing he deems appropriate during this time frame.

A past due/delinquent child support payment will not become a judgment if

(1) no notice is sent by certified mail, return receipt requested, to the obligor;

(2) time is not given for the obligor to respond to the notice; or

(3) subsequent to receiving notice, the obligor files a motion to set aside, alter, or modify the child support order.

Thus, a past due child support payment only becomes a judgment, capable of being enforced, if all the procedural prerequisites are met and the obligor does not pay the past due amount or attempts to respond to the notice. The trial court is only prohibited from modifying a past due support payment/judgment where the obligor has failed to pay the amount due or waived his right to respond to the notice and seek a judicial hearing.^{9/}

A key factor to remember is what Section 61.14(5) does not

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However, Section 61.14(5) has no effect upon child support payments that were not paid in the past. These past due payments are already vested and non-modifiable.

do, Section 61.14(5) does not

(1) prevent an obligor from going to court to attempt to modify or alter any future child support payments or to contest the most-recent past due support payment: or

(2) affect the enforcement process, and all the defenses the obligor may assert to past due child support orders when he is properly served with notice that a court now wants to take property away from the obligor for the benefit of the child.

That being the case, under Section 61.14(5) Mr. Stanjeski clearly has access to the courts. Subsequent to the July 22, 1987 notice, Mr. Stanjeski could have gone to court to

(A) contest the past due payment of July 3, 1987 in a motion to alter or amend, since that past due amount had not yet become a judgment by operation of law since that would only occur, had he done nothing, on August 2, 1987; or

(B) at any time move to alter or amend any future payment that he was to make under his child support order.

The lower courts confused the creation of a judgment based upon the failure to pay the required child support payment with the enforcement by the vested payee of a previously created child support judgment. Much of the argument and the cases cited in the D'Agosto order, upon which the circuit court relied, and the Smithwick case, relied upon by the District Court, dealt with enforcement issues. The decisions below did not address the

extensive case law concerning the creation and modification of support orders, only enforcement. And that is the fatal flaw of the lower decisions. Section 61.14(5) only prohibits (as Florida case law also prohibits) the alteration of a past due child support judgment. Section 61.14(5) does not prohibit nor effect the common law equitable defenses available when a judgment is attempted to be enforced,

Section 61.14(5) (a) is directed to the creation of a "judgment" that

shall have the full force, effect, and attributes of a judgment entered by a court in this state for which execution may issue. (e.s.)

The statute, by its own words is not directed at enforcement procedures, it only elevates a past due support payment to a "judgment", on equal plane as all other judgments in the state, and allows these child support judgments to be "enforced" along with the other judgments of the court.

As this Court has prohibited the modification of past due support installments, Section 61.14(5) (d) is but a restatement of that case law. The obligor is not denied access to the courts as he could not under prior case law request a court to modify what he has not paid. Section 61.14(5) does not prevent anything that case law did not already prevent.

II.

A DELIQUENT OBLIGOR IS NOT DENIED DUE PROCESS OF LAW

It is the position of the State that an obligor is not "constitutionally" entitled to any due process to inform him when he has violated his support order or to offer the obligor a meaningful hearing in a failure to pay his court ordered support situation. However, if due process requirements mandate notice and a meaningful hearing to a delinquent obligor, then Section 61.14(5), Florida Statutes, provide sufficient due process for the obligor.

As the United States Supreme Court held in Fuentes v. Shevin, 407 U.S. 67 (1972), the central meaning of procedural due process is that parties, whose rights are to be affected, is entitled to be heard. This includes the right to proper notice and the opportunity to be heard at a meaningful time and in a reasonable manner. Id. This Court has also recognized the right to reasonable notice and an opportunity to be heard. See, Florida Public Service Commission v. Triple A. Enterprises, Inc., 387 So.2d 940 (Fla. 1980); Ryan v. Ryan, 277 So.2d 266 (Fla. 1973). But at what point does this due process attach? It is clear that a due process is required "before an individual is finally deprived of a property interest." Mathews v. Eldridge, 424 U.S. 319, 333 (1976). Of course, the character and extent of the due process protections varies with the interest and nature of

the proceedings involved. Morrissey v. Brewer, 408 U.S. 471,481 (1972); Hadley v. Department of Administration, 411 So.2d 184 (Fla. 1982).

The notice required to satisfy due process is that notice which is reasonably calculated to apprise all interested parties of the pending action. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950); Quay Development, Inc. v. Elegante Building Corporation, 392 So.2d 901 (Fla. 1981). When a hearing is necessary, the hearing must be meaningful and fair. Canney v. Board of Instruction of Alachua County, 278 So.2d 260 (Fla. 1973); Hart v. Hart, 458 So.2d 815 (Fla. 4th DCA 1984).

The need for a hearing and what type of hearing varies with the circumstances. In Mathews v. Eldridge, *supra*, the Supreme Court decided that four factors had to be addressed in determining whether due process was met in a particular situation. The factors are:

1. the private interest that will be affected by the governmental action;
2. the risk of an erroneous deprivation through the use of the present procedures;
3. the governmental interest and any burden of additional or substitute procedures; and
4. the fairness and reliability of the present procedural safeguards.

Id., at 335 and 343. Under these circumstances present in the type of case before the Court, is a delinquent entitled to any

specific due process?

**A. AN OBLIGOR IS NOT ENTITLED TO ANY
DUE PROCESS WHEN HIS SUPPORT PAYMENT
BECOMES DELIQUENT.**

Due process is necessary where the rights of parties, property or otherwise, are determined. In the situation where the obligor defaults on his obligation to pay his court ordered child support, no rights of the obligor are established or altered. All that occurs, under the common and case law as well as under Section 61.14(5), is that it is established that the obligor did not meet his legal obligation and the obligor forfeites any opportunity he had to contest the support payment then due. Consequently, the circumstances do not dictate a need for due process protections at the point of delinquency.

Using the test of Mathews shows that a delinquent obligor is not entitled to notice or a hearing. First, no individual interest is being affected at the time a child support payment becomes vested. All interests concerning the obligor's rights and obligations were established at the earlier divorce proceedings. His duty to pay was established in the court's final order. Second, there is no risk of any deprivation of any property of the obligor as no property is taken at such a point in time. All that is done is the creation of a vested judgment. At the time property is taken, at an enforcement proceeding, the obligor has a right to full notice and a hearing in which he can raise all defenses in protection of his

property. Third, the governmental interest in the protection of children by the automatic creation of the judgment at the point of non-payment outweighs the need for additional or substitute procedural requirements. Since the obligor will have his day in court at an enforcement proceeding, there is no need for any hearing at the time the support payment becomes delinquent. Finally, the present procedures of automatic vesting are fair and reliable. A court order already exists which directs the obligor to pay the set amount of support on a particular date. The delinquency is a result of the obligor's failure to comply with the court's order. The memorializing of the past due payment is fair and reliable.

In fact, it would be an absurd result that a party violating a court order had a right to due process notice at the time of the violation and a right to a hearing on the violation especially when no property is being taken from him nor any new right or obligation established. **As** stated above, the law from this Court has been that when a child support payment is not made the amount becomes vested in the payee or child. During the entire time prior to the enactment of Section 61.14(5) no court has ever come close to holding that when the obligor becomes delinquent with his child support payments that he had a right to notice of the delinquency before the amount became vested in the payee. The same is true for hearings. Since a child support payment could not be modified or destroyed by a court once it was

past due and vested, it would be ridiculous to assert that an obligor had a right to a meaningful hearing when no hearing could alter the fact.

**B. IF DUE PROCESS IS REQUIRED,
SECTION 61.14 (5) PROVIDES
SUFFICIENT PROCEDURAL DUE PROCESS**

Both the trial court and District Court found that Section 61.14(5), Florida Statutes, denied Mr. Stanjeski due process of the law because he would not have an opportunity to be heard on the delinquent child support payment. As in the "access to the courts" section, supra, the courts misconstrued the child support payment process and where Section 61.14(5) fits into the scheme. Furthermore, the courts read certain prohibitions into the statute that do not exist. If due process is required in the situation of an obligor violating the court's child support order, then Section 61.14(5) provides sufficient due process.

Section 61.14(5) provides both reasonable notice and a meaningful opportunity to be heard.

1. Notice

The provisions of Section 61.14(5) do not become operative until a child support payment becomes delinquent. Then, the past due amount does not become a "final judgment by operation of law" until after notice to the obligor. Section 61.14(5)(a). Section 61.14(5)(b) requires that notice be given to the obligor after the child support payment is "15 days delinquent". And, the

local depository is required to send the notice to the obligor

by certified mail return receipt
requested.

Section 61.14(5) (b). Finally, subsection (5) (b) requires certain information be given to the obligor in the notice.

The State submits that the information provided and the method of sending notice to the obligor is reasonable and, as required by Mullane and Quay, reasonably calculated to reach the obligor and notify him of the pending action. The obligor is warned in the notice of the pending action and the consequences if he does not act (either through payment or motion). Furthermore, "certified mail, return receipt requested" is clearly calculated to achieve service on the obligor. Because the Postal Service puts high priority on such mail, it is calculated to be received by the obligor shortly after the mailing of the notice. These procedures negate the trial court's fears that the notice will not be received within the proper time or that there will not be ample time to respond.

In the case of Quay Development v. Elegante Building Corporation, supra, this Court was faced with the question whether notice by publication of a sheriffs' sale alone was sufficient notice in a sale of property. While this Court stated that publication alone violated due process, the Court said

notice by mail would not cause
significant delay or burden on the

state in executing on the property.

* * * * *

The constitutional infirmity could have been remedied by the simple mailing of a letter.

Id. at 903-904. If "simple mailing" is sufficient notice to someone whose land is to be sold, then certified, return receipt requested to the obligor at the last known address provided by him to the court depository is sufficient in a case such as this where none of the obligor's property or rights are at stake.

What was missed by the courts below were the proceedings that took place long before Section 61.14(5) could come into effect providing the Appellee with sufficient due process. Before Section 61.14 (5) would even be applicable, the Appellee had to have had a support order entered against him. For that order to be legal, the Appellee had to have been personally noticed of the pending request for a support order (probably contained in a divorce action); have an opportunity to respond to the request; and have a meaningful hearing in which to contest the support request. When the Appellee received his final order, the order clearly stated that the Appellee was required to make a specific payment on a specific date each month in support of his child. Thus, the Appellee knew he had a legal obligation and when it must be fulfilled. If he failed to meet his court ordered obligation he knew it and mailing a notice of the consequences of the failure to comply with the order was

sufficient to meet due process.^{10/}

2. Meaningful Hearing

Contrary to the courts' decisions, Section **61.14(5)** does provide for a meaningful response to the notice and an opportunity to be heard. It's the two courts below that read the existence of no hearing into the statute; not the words of the statute itself. For some reason, the two courts made great significance out of the fact that the Legislature did not specifically state that the obligor had a right to a hearing. What was not addressed was the fact that the statute does not forbid a hearing.

The very purpose of the due process right to be heard is to hear and argue any response made by a defendant. Does **61.14(5)** specifically or by implication anticipate an opportunity to be heard. Yes! It states not once, but twice that the obligor can respond to the notice of delinquency. In subsection (5)(a), the Legislature made it crystal clear that the delinquency would not become a judgment until after the obligor is given notice and "time for response". In addition, under subsection (5)(d), a

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Appellant concedes that the notice provisions of Section **61.14(5)** would not be sufficient to inform the obligor of an enforcement proceeding brought by his ex-wife or child against him. Since that proceeding could result in the transfer of title to property through judicial order or sale, the obligor would have the right to personal service and a hearing personally before a judge to present all the defenses that were set out in Q'Brien v. Q'Brien.

delinquent payment does not become a judgment if a motion to alter or amend is pending. Surely the Legislature did not mean that the obligor had a right to file a response but no right for the response to be considered. Furthermore, the statute does not prohibit a hearing. As, under the Rules of Civil Procedure, a party can request a hearing, an obligor can request a hearing right after receiving notice of the delinquency.

Therefore, subsequent to the notice, the obligor can file his response and/or a motion to alter or amend and a full and fair hearing on those pleadings will be held. There is nothing in 61.14(5) that prohibits any hearing on these pleadings. The courts' discussion on these points is without foundation.

Because of these rights to notice, to response and to a hearing, Section 61.14(5) does not deprive an obligor of any property in violation of due process either in notice or hearing.

CONCLUSION

Because of the nature of the proceedings involved here, the mere creation of a judgment because of the willful failure of an obligor to obey a previously filed court order, no due process right to notice or hearing or a right of access to the courts is necessary for the obligor. At those times when an obligor's rights or property are subject to the power of the court, the obligor is fully provided due process and access to the courts.

If, however, due process and a right of access to the courts are applicable to the delinquent obligor, then Section 61.14(5), Florida Statutes (1987) provides sufficient due process and access to the courts for the obligors of this state.

Therefore, the Appellant submits that Section 61.14(5), Florida Statutes, is constitutional and this Court should reverse the decisions of the district and trial courts below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to H. JAMES PARKER, Esquire, 8204 Massachusetts Avenue, New Port Richey, Florida 34653; MARIE KING, Assistant State Attorney, Sixth Judicial Circuit, Post Office Box 5028, Clearwater, Florida 33518, this 31ST day of March, 1989.



ERIC J. TAYLOR