

IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
ex rel. Jed Pittman, etc.,

Appellant,

vs.

JOHN W. STANJESKI,

Appellee.

047
FILED

SID J. WHITE

MAY 9 1980

CLERK, SUPREME COURT

Deputy Clerk

Case No. 73,666

On Appeal from the District
Court of Appeal,
Second District of Florida

APPELLANT, STATE OF FLORIDA'S,
REPLY BRIEF

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ARGUMENT

I.

**SECTION 61.14(5), FLORIDA STATUTES
DOES NOT DENY A DELINQUENT OBLIGOR
ACCESS TO THE COURTS**

The Appellee begins his argument by stating, on page 8 of his answer brief, that 42 U.S.C. §666 makes no reference to a final judgment by a Clerk of Court for which execution may issue nor requires the imposition of a lien upon real property. With all due respect, Appellee is incorrect on both points. First, 42 U.S.C. §666(a)(9)(A) requires 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.

It is clear that Congress contemplated a judgment would be entered in the state and contemplated that the judgment would become a judgment without the need of a judicial act: therefore, the words "by operation of law". In addition, Congress also sought to have the states create the type of judgment that could be enforced. The Florida Legislature applied that mandate by requiring that the delinquent child support payment become a

final judgment by operation of law and shall have the full force, effect, and attributes of a judgment entered by a court in this state for which execution may issue.

Section 61.14(5)(a), Florida Statutes. A comparison of the

Florida statute with the federal law reveals an nearly identical rendition. The Florida legislature merely used a few words different as would apply to a more localized application of the law than the federal law would. But the effect is the one intended by Congress; a late payment would become a judgment without need for a judicial procedure and one that could be enforced through the issuance of execution. Second, 42 U.S.C. §666 does require states to have procedures to apply liens upon real property for overdue support payments. See, 42 U.S.C. §666(a)(4).

The Appellee then argues on page 8 that the entering of the final judgment by the Clerk denies a court the power to set aside, alter, or amend the judgment. Without repeating the lengthy argument presented by the Appellant in Issue I of the Appellant's Initial Brief, p. 11, the case law of the state has already addressed that argument and has held that a court may not set aside, alter or amend a vested, past due support payment. Pottinger v. Pottinger, 133 Fla. 442, 182 So. 762 (1938); Onley v. Onley, 14 F.L.W. 688 (Fla. 2nd DCA, March 14, 1989); Regan v. Thomas, 515 So.2d 505 (Fla. 1st DCA 1987). Again, the courts below confused the difference between the creation of a judgment by Section 61.14(5) (a judgment for which execution may issue) and the actual enforcement of an executed judgment. The former cannot be altered by a court but the latter, under equitable principles, permits the non-enforcement, with the effect of modifying, of the judgment of child support. See, Appellant's Initial Brief, pp. 12-13. Section 61.14(5) will not allow

modification of of a vested judgment but it has no effect upon the equitable defenses in an enforcement procedure.—&/

The remainder of the Appellee's argument under his Point I is a repeat of the points upheld by the courts below. But, as the Appellant has urged in its Initial Brief, the decisions below are incorrect as they have misinterpreted the decisions of this Court and the decisions of the courts of appeal on the two separate and distinct issues of the creation of a judgment after

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The Appellee also states that Section 61.14(5) would have an adverse effect upon Rule 1.540, Florida Rules of Civil Procedure. That issue was raised in the circuit court in D'Agosto v. Wright, 19th Judicial Circuit Court, Case No. 87-495-CA. That court ruled upon it in its Final Summary Judgment. Appellant's Appendix, Appendix C, p.3. The issue was raised in a separation of powers argument as a legislative intrusion on a court's discretion. The circuit court in this case, while adopting most of the 19th Judicial Circuit Court's decision, expressly rejected the separation of powers argument. Appellant's Appendix, Appendix B, p.2. Further, that point was not addressed by the Second District Court of Appeal in its Opinion.

Even so, Appellee's reliance upon this Rule is misplaced as it does not have as broad a reach as implied by the Appellee. Rule 1.540 provides relief under a limited set of circumstances. Pompano Atlantic Condominium Associating, Inc. v. Merlino, 415 So.2d 153, 154 (Fla. 4th DCA 1982). ~~See also~~, Fiber Crete Homes, Inc. v. Division of Administration, State of Florida, Department of Transportation, 315 So.2d 492, 493 (Fla. 4th DCA 1975) (and cases cited therein).

Besides clerical errors (Rule 1.540(a)), Rule 1.540 can only be used to alter or amend a judgment where there is mistake, inadvertence, fraud, surprise, excusable neglect, newly discovered evidence, etc. Rule 1.540(b). The rule only "envisions mistakes made in the ordinary course of litigation and does not contemplate judicial error". Pompano, 415 So.2d at 154. See also, Schrank v. State Farm Mutual Automobile Insurance Co., 438 So.2d 410 (Fla. 4th DCA 1983). There exists no provision for relief in absence of mistake, inadvertence, surprise, excusable neglect fraud or the other conditions stated in Rule 1.540a. Owen v. State, 483 So.2d 453 (Fla. 1st DCA 1986); Carolina Casualty Co. v. General Truck Equipment and Trailer Sales, Inc., 407 So.2d 1095 (Fla. 1st DCA 1982).

an obligor fails to make his scheduled payment and the ability to alter or modify such a delinquent, vested payment and the reduction to enforcement of a vested, past due support payment. The obligor has an appropriate access to the courts. The rights and defenses asserted by the Appellee still exist, only they exist at an enforcement proceeding, not at the time the obligor fails to make his monthly scheduled court-ordered child support payment. No court has ever ruled an obligor had access to the courts every time he was late on a support payment.

It is the hope of the Appellant that the Court, in its opinion, fully set out the distinct differences between these two legal events and clarify once and for all how a past due child support payment is to be treated. The Appellant believes that an obligor has received the due process this Court has required in the initial divorce proceeding and Section 61.14(5) does not violate any constitutional or case law of the state.

II.

SECTION 61.14, FLORIDA STATUTES, DOES NOT DENY A DELINQUENT OBLIGOR DUE PROCESS OF LAW

The Appellee's argument on the due process issue misinterprets the amount of due process needed under the circumstance before the Court. Leaving aside the notice requirements actually mandated under Section 61.14(5), let's for the moment assume that Section 61.14(5) did not exist. What would the constitutional due process requirements be when an obligor did not make his monthly, court-ordered child support payments?

The answer to this question comes from the case law of the state prior to the enactment of Section 61.14(5). The answer appears to the Appellant to be clear. The delinquent obligor was not entitled to any due process when he failed to make his court-ordered payment. He had no right to a notice of his delinquency (a violation of a then existing court order), he had no right to a hearing on his delinquency (as to why he was late or the fact that the late payment became vested) nor did he have a right to set aside, alter, amend or modify the vested late payment. Since the delinquent obligor did not possess any due process rights prior to the enactment of Section 61.14(5), he has not been deprived of any due process by its enactment. Rather the delinquent obligor has secured right he did not have before.

However, at the time the obligee attempted to enforce a vested judgment and actually take some property of the obligor away through the use of courts, the obligor did possess all his due process rights prior to an order of enforcement. Section **61.14(5)** did not disturb any right possessed by an obligor at an enforcement proceeding.

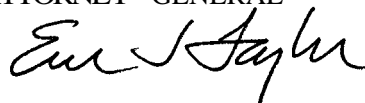
Under the circumstances, Section **61.14(5)** does not violate anyone's due process rights.

CONCLUSION

Therefore, the Appellant again 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** and **MARIE KING**, Assistant State Attorney, Sixth Judicial Circuit, Post Office Box **5028**, Clearwater, Florida **33518**, this 8th day of May, 1989.



ERIC J. TAYLOR/