O/a 10-2-89

IN THE SUPREME COURT OF FLORIDI

ATTORNEY GENERAL OF FLORIDA,
ROBERT A. BUTTERWORTH, OR
behalf of the STATE OF FLORIDA,

Appellant,

vs. Case Nor 74,150

JOHN D'AGOSTO,

Appellee.
_____/

On Appeal from the District
Court of Appeal,
Fourth Bistrict of Florida

APPELLEE, JOHN D'AGOSTO'S, ANSWER BRIEF

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PREFACE

The Appellee, JOHN D'AGOSTO, will be referred to as Appellee, D'Agosto, or the father. The Appellant, the ATTORNEY GENERAL OF FLORIDA, ROBERT A. BUTTERWORTH, OR behalf of the STATE OF FLORIDA, will be referred to as Appellant or the State.

The trial Court in this matter was the Honorable L.B. Vocelle, Circuit Court of the Nineteenth Judicial Circuit in and for Indian River County, Florida. The trial Court will be referred to as the trial Court or the Court below. The trial Court will be referred to as the trial Court or the Court below. The Appellate Court in this matter was the Fourth District Court of Appeals in will be referred to as the Appellate Court.

Section 61.14(5), Florida Statutes (1987), will be referred to as the statute or the subject statute,

STATEMENT OF THE CASE

D'Agosto adopts the Statement of the Case submitted by the State with the addition that the trial Court ordered a Summons in Certiorari and entered an Order *to* Show Cause on the date of August 24, 1987, in response to D'Agosto's Petition for Certiorari/Petition for Writ of Prohibition. The trial Court entered Final Summary Judgment in favor of D'Agosto on November 19, 1987.

STATEMENT OF THE FACTS

D'Agosto objects to the Statement of Facts submitted by the State on the basis that various assertions contained therein are made without reference to supporting data or documentation plus certain 'facts' are not part of the record Below. Further, D'Agosto objects to the historical analysis, interpretation and relevance placed on various Federal Statutes by Appellant in this matter. Appellants commentary and editorializing regarding the Federal Legislation is not part of the record and inappropriate in this appeal. D'Agosto objects to the attempt by the State to politicize this matter.

D'Agosto was divorced in April, 1976, wherein the minor child remained with the Wife and child support payments were ordered in the amount of $40.00 bi-monthly. However, the minor child has lived exclusively with D'Agosto for approxiaately three years without any contact or communications from the Wife, during which time the child support payments were suspended by Appellee. D'Agosto did not enter into a Stipulation for Modification of Final Judgment transferring custody nor has he filed a Petition for Modification of the Final Judgment of Dissolution of Marriage. Consequently, the minor child has lived exclusively with D'Agosto for approximately three years without the Court entering a Modification of the Final Judgment reflecting the changed circumstances pertaining to the residency of the minor daughter.

D'Agosto received a copy of the 'Certified Notice of Delinquency' in child support payments from the Clerk's office on or about the dte of August 14, 1987. The certified document was mailed to his place of employment, and he was not personally served with the document by the postman, process server or otherwise. D'Agosto did

receive the Notice from his employer who accepted the document on his behalf. The certified document provided that he would have to pay the sum of $2,993.00 on or before August 27, 1987, otherwise a Final Judgment of Delinquency would be entered against D'Agosto and recorded in the official records of the county and any county where Appellee may own real property in Florida, The date of the certified document was August 12, 1987, thereby providing D'Agosto with 15 days in which to pay the approximate sum of $3,000.00 or else suffer a Final Judgment of Delinquency resulting in a lien against any real property owned by Appellee in the State of Florida. Note that D'Agosto actually received only 13 days from the date of receipt of the Notice to pay said amount.

SUMMARY OF THE ARGUMENT

I,

Section 61.14(5), Florida Statutes (1987), violates the constitutional right of access to the Courts in that the statute deprives the trial Court the power to net aside, alter or modify an order for any payment of money either for the minor children or the support of a party which has accrued prior to the filing of a motion by an obligor. Consequently, an obligor is denied the right to introduce any evidence supporting equitable defenses which pertain to any payment of money which has accrued prior to the filing of a motion by an obligor.

II.

Section 61.14(5), Florida Statutes (1987). violates due process in that the statutory scheme mandates the rendition of a final judgment against an obligor within 30 days from the date of delinquency irrespective of whether or when the obligor receiwes actual notice of said delinquency, The statute is unconstitutional in that it enacts retroactive legislation ordering a fianl judgment and lien against an obligor pertaining to arrearages predating the enactment of the statute. Further, the statute provides no reasonable time period in which an obligor may pay any duly owed arrearages.

III.

Section 61.14(5), Florida Statutes (1987), abrogates the constitutional principle of soparatfon of powers in that the Legislature has delegated to the Clerk of Court certain rights, including rendering Final Judgments, which is a power fundamentally judicial in nature. The statute prshibite the Court from exercising

its judicial discretion in reviewing, possibly altering, setting aside, or modifying a previous order in violation of separation of powers and in contravention of Fla.R.Civ.P. 1.540, entitled 'Relief from Judgment, Decrees or Orders'

ARGUMENT

I. SECTION 61.14(5), FLORIDA STATUTES (1987), DENIES ACCESS TO THE COURTS.

Section 61.14(5), Florida Statutes (1987), is aaconstitutional on various grounds. The statute is set forth below in its entirety so as to allow a thorough analysis of same:

> (a) When support payments are made throught he local depository, an unpaid payment or installment of support which becomes due after July 1, 1987, under any support order and is delinquent shall become, after notice to the obligor and the time for response contained therein as set forth in paragraph (b), 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 nay issue. The judgment shall be evidenced by a certified copy of the support order and a certified statement by the local depository evidencing a delisquency in support payments.
>
> (b) When an obligor is 15 days delinquent in making a payment or installment of support, the local depository shall notify the obligor by certified mail, return receipt requested, of such delinquency and its amount. The notice shall state that failure to pay the amount of the delinquency and all other amounts which thereafter become due together with costs and a fee of $5 shall become a final judgment by operation of law against the obligor beginning 30 days after the date of such delinquency.
>
> (c) As to real property, a lien is created when the notice requirements in paragraph (b) have been fulfilled and a certified copy of the support order, along with a certified stateaeat of the local depositary evidencing a delinquency in support payments is recorded in the official records book of the county where the real property is located. The amount due shall include the delinquency as certified by the recorded statement of the local depository, amounts which thereafter become due prior to satisfaction of the judgment and costs of filing and recording. Upon request of any person, the local depository shall issue, upon payment of a fee of $5, a pay off statement of the total amount due at the time of the request. The statement ray be relied upon by the person for up to 30 days from the time it is issued unless proof of satisfaction of the judgment is provided. When the depository records show that the judgment has been satisfied, the depository shall record a satisfaction upon receipt of the appropriate recording fee. Any person shall be entitled to rely upon the recording of the satisfaction. The local depository shall not be liable as to errors in its record keeping, except when the error is a result of unlawful activity or gross negligence by the clerk or his employees. The local depository, at the direction of the department, or the obligee in a non IV-D case, is authorized to partially release the judgment as to specific real property.
>
> (d) The judgment by operation of law is a fisal judgment as to any unpaid payment or installment of money which has accrued up to the tine either party makes a motion to set aside, alter, or modify

the order. The Court dses not have the power to set aside, alter, or modify such order, or any portion thereof, which provides for any payment of money, either for rinor children or the support of a party, which has accrued prior to the filing of such motion.

The statute specifies that '...any support order which is delinquent shall 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...'. When an obligor is 15 days delinquent in making a payment or installment of support, the local depository (clerk) shall notify the obligor by certified mail indicating that failure to pay the amount of the delinquency and associated costs shall become a final judgment by operation of law befinning 30 days after the date of such delinquency. A lien is imposed on real property when tho notice requirements have been sotisfied and a certified copy of the support order along with a certified statement of the local deposftory (clerk) evidencing the delinquency of the support payaent is recorded in the official records of the county where real property is located.

The statute dictates that a judgment, by operation of law, is a final judgment as to any unpaid payment which has accrued up to the tire either party makes a motion to set aside, after, or modify the order. The statute prohibits the Court from exercising its judicial responsibility in that '...the Court does not have the power to set aside, alter, or modify such order, or any portion thereof, which provides for any payment of money, either for minor children or the support of a party, which has accrued prior to the filing of such motion...'.

The State has attempted to trace the legislative history pertaining to the subject statute by referencing past federal legislation and the most recent federal statute which is alleged to

mandate the statute which is the subject aatter of this appeal, A superficial review of the subject statute in comparison with the federal legislative 'mandate' reveals noticeable differences. Initially, it is noteworthy that the federal legislation makes no reference or 'mandates' any rights with regard to '...support of a party,..', but rather focuses concern solely on the issue of child support. The subject statute expressly prohibits trial Courts froa either setting aside, altering, or modifying a previous order which provides for any payment of motley, either for minor childrcr or the support of a party which has accrued prior to the filing of such motion by either party (emphasis added). Further, 42 U.S.C. S 666 (1986), makes no reference to a readition of final judgment by a Clerk of Court for which execution may issue; nor does the federal law require the imposition of a lien on realty.

As indicated, the State statute contains additional provisions not 'mandated' by federal legislation; consequently, the State's reference to and reliance upon the federal mandate is misplaced as the 'cause' of the promulgation of the subject statute.

D'Agosto questions the constitionality of 42 U.S.C. S *666* **(1986);** however, that matter is not ths issue before this Court,

Section 61.14(5), Florida Statutes (1987), does violate access *to* the Courts as guaranteed in Article 1, Section 21, of the Florida Constitution, entitled 'Access to the Courts'. Subparagraph (d) provides that the judgment by operation of law is a final judgment as to any unpaid payment which is accrued up to the time either party makes a motion to set aside, alter, or modify the order. However, the Court does not have the power to set aside, alter, or modify such order or any portion thereof which provides for any payment of money, either for minor children or for the support of a party vhich has

accrued prior to the filing of such motion, Consequently, even an order which does not pertain to child support but only provides for support of a party, arguably alimony, may not be reviewed by a lower Court under any circumstances because that Court is prohibited fraa exercising its judicial authority contrary to Fla.R.Civ.P. 1.540, entitled 'Relief from Judgment, Decrees or Orders'.

The express language contained in the statute prohibits the Courts from addressing prior orders, and consequently precludes an obligor from introducing any testimony or any evidence of any nature pertaining to reasons why support which has accrued prior to the filing of any motion should be reduced, waived or in any way altered.

The State asserts that the statute relates only to past child support payments (the State ignores the statutory language which relates to support for a party). It further maintains that the statute does not affect the enforcement process thereby entitling an obligor to assert all the defenses available under common law relative to past due child support orders,

The State's position is contrary to the express language contained in the statute. The statute prehibits the Court from altering, setting aside, modifying, or in any way addressing any payment of support either for minor children or the support of a party which has accrued prior to the filing of a motion by an obligor. It is evident that an obligor is denied access to the Court as it relates to his or her right to assert equitable defenses pertaining to the support order. The statute expressly divests the Court of inherent judicial discretion plus seeks to abolish numerous equitable defenses recognized at common law. Accordingly, the statute clearly violates access to the Courts. See Kluger vs. White, 281 So.2nd 1 (Fla. 1973); Smith vs. Department of Insurance, 507 So.2nd 1080 (Fla. 1987).

A legion of Florida case authority recognizes the right to be heard and present evidence along with confrenting witnesses in connection with matters involving child support arrearages. However, the statute contains no provision for reasonable notice nor an opportunity to be heard on the issue of arrearages. See Ryan vs. Ryan, 277 So.2nd 266 (Fla. 1973). Indeed, the legislature recognized the statutory deficiency in amending the subject statute by inserting specific provisioar for a reasonable opportunity *to* be heard in a timely fashion. S 61.14(5)(b) 3. Fla, Stat, (1988).

In Gottesman vs. Cottesmaa, 227 So.2nd *640* (Fla. 3d DCA 1969). the Court entered an Order finding the husband to be in arrears but did not reduce the arrearages to judgment, Further the Court did not authorize execution on past arrearages based on equitable considerations including the husband's financial inability in that matter. In Smithwick vs. Smithwick, 343 So.2nd 945 (Fla. 3d DCA 1977), the Court rejected the husband's position bat did recognize that the enforcement of arrearages is a matter resting in the sound discretion of the Court to be determined on equitable considerations including the financial status of the parties.

In Warrick vs. Hender, 198 So.2nd 348 (Fla. 4th DCA 1967). the Court eliminated arrearages based on an equitable defense asserted by the husband. In Francisco vs. Francisco, 505 So.2nd 348 (Fla. 2nd DCA 1987), the former husband was granted a set off against a judgment fer past child support and mortgage payments. In Ashe vs. Ashe, 509 So.2nd 1146 (Fla. *4th* DCA 1987) the Court recited the general rule that absent compelling circumstances such as waiver, laches, estoppel, or repreheasible conduct on the part of the custodial parent, arrearages will aot be cancelled or retrospectively reduced. However, the Court recognized the judicial relief of cancellation or reduction

of child support arrearages based on equitable principles. See Chappell vs. Chappell, 253 So.2nd 281 (Fla. 4th DCA 1971): Francisco vs. Francisco, supra; Brock vs. Hudson, 494 So.2nd 285 (Fla. 1st DCA 1986); Brown vs. Brown, 108 So.2nd 492 (Fla. 2nd DCA 1959); Smith vs. Department of Insurance, supra: and Gus vs. Pavic, 500 So.2nd 867 (Fla. 3d DCA 1971); Fox vs. Haislett, 388 So.2nd 1261 (Fla. 2nd DCA 1980); O'Brien vs. O'Brien, *424* So.2nd 970 (Fla. 3d DCA 1983).

Other juridictions recognize equitable defenses in arrearage matters, resulting in set-offs, reductions or elimination of accrued support payments. See M. vs. M., 313 S.W.2nd *209* (Mo. App. 1958); Isler vs. Isler, 425 N.E.2nd 667 (Iad, App. 1981); Beverly vs. Beverly, 257 S.E.2nd 682 (NC App. 1979); Nabors vs. Nabors, 354 So.2nd 277 (Ala. App. 1978); Re: Andras, 410 So.2nd 328 (La. App. 1982); Re: Marriage of Wimrer, 349 N.W.2nd 505 (Iowa App, 1984): Strum vs. Strum, 317 N.E.2nd 59 (Ill. App. 1974); McNeal vs. Rsbinson, 628 P.2nd 358 (Okla. 1981); Pence vs. Pence, 268 S.W.2nd 609 (Ark. 1954): and Sears vs. Sears, 462 A.2nd 1099 (Del. Fam. Ct. 1983).

In sum, the statute prohibits the Court from exercising its judicial function in determining whether or not past child support arrearages should be eliminated or reduced. Further, the statute precludes the Court from exercising its judicial discretion in refusing to reduce arrearages to final judgment and/or alternatively from disallowing execution relative to the prior order of atrearages See Gottesman vs. Cottesaan, supra. To that extent, an obligor is expressly denied access to the Court on the issue of whether past due arrearages may be eliminated, reduced or not reduced to final judgment because the Court is prohibited from setting aside, altering or modifying any prior order relating to the payment of money, either for minor children or the support of a party. Further, the Courts have

been deprived of exercising judicial discretion as to whether arrearages should be reduced to judgment and/or whether execution thereon should be granted or witheld.

The statute violates both the letter and spirit of the constitutional right to access to the Courts and contravenes organic law relative to eliminating equitable defenses pertaining to arrearages.

ARGUMENT

II. SECTION 61.14(5), FLORIDA STATUTES (1987), DENIES DUE PROCESS OF LAW.

The statute mandates the rendition of a final judgment and the imposition of a lien on realty swned by an obligor within 30 days from the date of delinquency, irrespective of whether or when the obligor receives notice of said delinquency. The notice requirement is merely by return receipt requested aail which is insufficient process to apprise the obligor of the pendency of the action. See Quay Development, Inc. vs. Elegante Bldg. Corp., 392 So.2nd 901 (Fla. 1981): Hullane vs. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950): Hart vs. Hart, *458* So.2nd 815 (Fla. 4th DCA 1984).

The statute provides that when an sbligor is 15 days delinquent in making a payment, the local depository (clerk) shall notify the obligor by certified mail, return receipt requested, of such delinquency and its amount. The statute does not require that the notice be served on the obligor. A certified letter is delivered to anyone who vill sign for same, thereby resulting in the reality that an obligor may not receive actual notice of the matter. (Note that 'small claims' matters are more reasonably calculated to insure notice of a pending action. Fla.R.Summ.P. 7.070, entitled 'Method of Service of Process', specifically requires that service of process must be effected pursuant to Fla.R.Civ.P. 1.070 or alternatively, that Florida residents may be served by registered rail, return receipt requested, signed by the defendant or someone authorized to receive mail at the residence or the principle place of business of the defendant.)

There may be compliance with the statutory language resulting in a Final Judgment and liea on property without the obligor receiving

actual notice of an action which directly affects his property rights. Once the final judgment of delinquency is entered, the obligor is not able to set aside, alter, or in any way modify same or a part thereof pursuant to the statutory directive. When an obligor is 15 days delinquent in making a payment, the local depository (clerk) shall notify the obligor by certified nail, and upon satisfaction of the notice requireaeats, a final judgment of delinquency will be entered and a lien recorded against realty beginning 30 days after the date of such delinquency. According to the statutory scheme, an obligor has only 15 days from the date of the letter before he or she suffers a final judgment and a lien on realty. Further, the amount of the judgment is not liaited to the 30 day arrearage period bat relates back to all arrearages indicated by the computer printout. In the instant matter, D'Agosto was given 13 actual days notice before a final judgment in the amount in excess of *$3,000.00* would have Been rendered automatically by 'operation of law'.

During the pendency of the abbreviated time span of receiving notice (presuming the obligor does receive same), and the date the final judgment is rendered, the obligor is not given a realistic opportunity to be heard, *to* present or confront witnesses against him or to produce evidence pertaiaing to the matter at hand. Court dockets are such that it is impossible to schedule a hearing in domestic ratters within a 15 day period before the rendition of a final judgment and creation of a lien resulting therefrom. Again, the amended statute has addressed this obvious problem by entitling an obligor to file a notion to contest the pending judgment within a certain time frame and requiring the Court to entertain said motion before the entry of a final judgment. S 61.14(5)(b) 3. Fla. Stat. **(1988).**

D'Agosto urges that the practical effect and operation of the statute renders it unconstitutional in that an obligor will not receive a meaningful hearing and opportunity to be heard before the rendition of a final judgment. In Aldana ~~vs.~~ ~~Holub~~, 381 So.2nd 231 (Fla. 1980), the Court declared the statute unconstitutional in part based on the 'fortuitous circumstance' that the crowded docket prevented a litigant the opportunity to pursue a claim within the statutory period, The Court recognized the practical operation and effect of the statute in declaring same unconstitutional. Also see Sparkman vs. State, 58 So.2nd 431 (Fla. 1952); Ryan's Furniture Exchange vs. McNam, 162 So.2nd 483 (Fla. 1935).

The statute denies both substantive and procedural due process in that an obligor will be deprived of the constitutionally protected property right without having a meaningful opportunity to be heard on the ratter. See Fickle ~~vs.~~ Adkins, 394 So.2nd 461 (Fla. 3d DCA 1981); Quay Development vs. Elegante Bldg. Corp., supra; Pelle vs. Diner's ~~Club~~, 287 So.2nd 737 (Fla. 3rd DCA 1974); Keating vs. State of Florida, 173 So.2nd 673 (Fla. 1965); Canney vs. Board of Instraction ~~of~~ Alachua County, 278 So.2nd 260 (Fla. 1973); Hart vs. Hart, supra; Florida Public Service Commission vs. Triple A. Enterprises, Inc., 387 So.2nd 940 (Fla. 1980); Ryan vs. Ryan, supra.

The statute is unconstitutional in that it enacts retroactive legislation creating a final judgment and lien against an obligor pertaining to arrearages predating the enactment of the estate. As indicated, the statute provides no reasonable time period in which an obligor may pay any duly owed arrearages, assuming same are properly owed, before such time a lien attaches to a reality. See Fickle vs. Adkins, supra; and Art. I, S 9, Florida Constitution.

The statute is also violative of due process because an

obligor is denied the right to assert defenses and present evidence pertaining to errearages as argued in Point I.

III. SECTION 61.14(5), FLORIDA STATUTES (1987), IMPINGES UPON THE POWER OF THE JUDICIARY.

The State urges a convoluted interpretation of the statute in stating that under the statute, an obligor can alter or amend or a final order in the event one of the circumstances comtemplated under Fla.R.Civ.P. 1.540 exists, The State submits '...however, 61.14(5) only prevents alteration of a substantive order that could have been challenged at trial or on appeal by the obligor,..'. The State's strained interpretation of the statute and above referenced assertion is clearly erroneous. Although D'Agosto is familiar with the general rule of law relative to the existing presumption in favor of the validity of a statute, this Court is aware of the converse rule of law which provides that Courts may not vary the intent of the legislature with respect to a meaning of a statute in order to render it constitutional. Nor nay a Court inject curative language into a statute in order to comport with constitutional mandates. See State vs. Keaton, 371 So.2nd 86 (Fla. 1979); Metropolitan Dade County vs. Bridges, 402 So.2nd 411 (Fla. 1981); Brown vs. State, 358 So.2nd 16 (Fla. 1978): Robinson vs. State, 393 So.2nd 1070 (Fla. 1980); State vs. Keaton, supra; and McCall vs. State, 354 So.2nd 869 (Fla. 1978). It is apparent that the State is urging this Court to engage in semantical gymnastics in an atteapt to inject constititutional breath into the infirm statute.

Separation of powers of governmental entities is a fundamental principle historically recognized and guaranteed by the Constitution. See Art. II, S 3, Fla. Const.

The Statute clearly prescribes certain procedures resulting in the rendition of a final judgment. It is axiomatic that the Legislature cannot dictate practice and procedures pertaining to

matters which are fundamentally judicial in nature. See Art. V, S 2, Fla. Const., State ex rel. McMullen et. al. vs. Johnson, City Clerk, 135 So.816 (Fla. 1931); Watson vs. First Florida Leasing, Inc., 14 F.L.W. 1 (Fla. Jan. 6, 1989). Furthermore, the legislature cannot delegate a judicial act to an officer or agency outside the judiciary pertaining to matters which are uniquely within the province of the courts. See Broward County, etc. vs. LaRosa, 505 So.2nd 422 (Fla. 1987). The Legislature has delegated to the Clerk of Court certain procedures resulting in the rendition of a Final Judgment for which execution may issue. It is a violation of the separation of powers if the Legislature either exercises or delegates to ministerial officers the exercise of judicial functions. See Otto vs. Harllee, et. al., 161 So.2nd 402 (Fla. 1935); Canney vs. Board of Instruction of Alachua County, supra.

Section 61.14(5)(d), Florida Statutes, provides that a judgment by operation of law is a Final Judgment as to any unpaid payment which ha8 accrued up to the time either party makes a motion to set aside, alter or modify the Order. The statute further dictates that '...the Court does not have the power to set aside, alter or modify such order, or any psrtion thereof, which provides for any payment ef money, either fer minor children or the support of a party, which has accrued prior to the filing of such motion,..'.

The Legislature has established certain practice and procedures pertaining to a uniquely judiciary functien along with prohibiting the Court from exercising its judicial power in reviewing, possibly altering, setting aside or modifying either the previous child support order or the Final Judgment of delinquency entered by the Clerk, As a result, the Legislature has flagrantly abrogated the constitutionally protected principle of Separation of powers, As

announced in Military Park Fire Control District & 4 vs. David DeMarois, Daniel Kraemer, and Military Park Professional Fire Fighters Union, Local 2741, Iaff, 407 So.2nd 1020 (Fla. 4th DCA 1981), powers constitutionally bestowed upon Courts may not be exercised by the Legilature and matters of practice and procedure are solely within the province of the Ceurts. In Military Park Fire Control Tax District No. 4, the Court ruled that a statute which prioritized certain appeals created prscedural rules for Appellate Courts in violation of the separation of powers doctrine. In In the Interest of B., 408 So.2nd 1048 (Fla. 1982), the Court held that the Legislature is not authorized to provide for an interlocutory review but rather the Supreme Court is vested with that sole authority. Aloo see Internal Improvement Fund vs. Bailey, 10 Fla. 238, wherein the Court invalidated a legislative act directing a rehearing. In Watson vs. First Florida Leasing, Inc., supra, this Csurt held that a probate statute which required a claimant to file written notice of an action was procedural in nature thereby violating separation of powers between the judiciary and legislature.

A legion of case law throughout the country support the general proposition that the Legislature map not invade the province of the judiciary in either creating practice and procedures for the Courts or prohibiting the Courts from exercising powers which are uniquely judiciary in nature.

In Ruff vs. Georgia S. & F. Ry. Co., 64 So. 782 (Fla. 1914), the Court stated that the Legislature had no power to dictate procedures pertaining to the granting or denial of a motion for new trial since sane necessarily involves judicial pswer and discretion. In Puckett vs. The Honorable David M. Cook, 586 P.2nd 721 (Okl. 1978), the Supreme Court of Oklahoma determined that a statute which

prohibited separate cases from being consolidated for trial unless all parties agreed constituted an encroachment by the Legislature upon powers unique to the judiciary. Also see City of Carbandale vs. Yehling et al., 451 N.E.2nd 837 (Ill. 1983), wherein the Supreme Court of Illinois held that legislation which dictates procedures for Courts in eminent domain practices would be striken because of the violation of separation of powers.

The Florida Supreme Court has adopted Fla.R.Civ.P. 1.540, entitled 'Relief from Judgment, Decrees or Orders', The Rule of Civil Precedure provides specific circumstances under which relief may be granted from judments, decrees or orders. The Rule contemplates clerical mistakes, inadvertance, excusable neglect, newly discovered evidence, fraud, the judgment or decree is void as various grounds for seeking relief from a judgment, decree or order. The Florida Supreme Court has promulgated and adopted the above referenced Rule to contemplate various circuastances under which relief should be granted from judgments, decrees or orders. The subject statute specifically violates the express previsions contained under Fla.R.Civ.P. 1.540 and prohibits the Court from exercising its discretion and judicial duties contained therein. The amended statute attempts to address this obvious cosstitutional infirmity, S 61.14(5)(a)3. (Fla. Stat. 1988).

The intent and effect of the subject statute serves to interfere with and dictate the practice of law for attorneys engaged in domestic relations matters. The statute specifies that the Court does not have the power to set aside, alter or modify either the child support order or presumably the Final Judgment resulting from the Clerk's office pertaining to payment of money either for minor children or for the support of a party which has accrued prior to the filing of such motion. The statute creates consternation for a

practitioner representing a parent who gains physical custody of a minor child without formal modification of the final judgment pertaining to custody. A practitioner must create a record is the forr of having a minor child reside with the non-custodial parent as long as possible before filing a Petition to Modify the Final Judgment as to custody. However, as a result of the statute, a non custodial parent who seeks to establish his or her ability to care for a minor child with hopes of prevailing on a future Petition to Modify faces a final judgment of delinquency and a lien upon his or her realty unless he or she files the appropriate motion and/or petition immediately upon gaining physical custody of minor child. Consequently, the practical effect of the statute dictates the practice of law for a practitioner who faces a dilemma in advising his client as to whether he should suffer a final judgment of delinquency and lien while establishing his ability to care for the minor child.

The statute creates an automatic final judgment and a lien on realty resulting therefrom upon which execution may issue. That statutory scheme further violates the separation of powers provision in that it is contrary to various case law which reserves to the court the decision as to whether or not certain arrearages nay be reduced to final judgment and whether execution ray be witheld relative to that final judgment. The statute creates a final judgment resulting in a lien upon realty thereby automatically entitling an obligee to execute upon same. Consequently, the statute invades a province unique to the judiciary in that the Courts are precluded from entertainfng any type of testimony or any evidence of any nature whatsoever as it relates to equitable defenses, and likewise deprives the Court of making a decision as to whether or not arrearages should even be reduced to judgment, much less allowed to be executed on. Although the State

arges the distinction between the creation of a final judgment as to arrearages and the enforcement of same, the state overlooks the fact that the entry of a final judgment, the execution thereof and the creation of a lien upon realty all represent enforcesent procedures which the Courts have either elected to order or refrain from ordering before the enactment of the statute. See Gottesman vs. Gottesaan, supra, and authority cited below.

As indicated in the previous Points in this Brief, a number of cases specifically Contemplate a reduction or elimination of arrearages based on equitable defenses. Further, proceedings relative to enforcment of child support payments are equitable in nature, and consequently are uniquely within the province of the Courts. See Armour vs. Allen, 377 So.2nd 798 (Fla. 1st DCA 1979); Petrucci vs. Petrncci, 252 So.2nd 867 (Fla. 3d DCA 1971); O'Brien vs. O'Brien, supra; Fox vs. Haislett, supra; Teta vs. Teta, 296 So.2nd 642 (Fla. 1st DCA 1974); Hurst vs. Hampton, 274 So.2nd 891 (Fla. 4th DCA 1973); Warrick vs. Mender, supra; Smithwick vs. Smithwick, supra; Francisco vs. Francisco, supra; Ashe vs. Ashe, supra; Guzy vs. Pavic, supra; Brock vs. Hudsan, supra; Brown vs. Brown, supra; and Chappell vs. Chappell, supra; Hoffman vs. Polep, 14 FLU 848 (Fla. 3d DCA April 4, 1989).

The statutory mandate improperly delegates judicial authority to a ministerial officer and abrogates separation of powers by dictating practice and procedure and divesting the Court of its judicial powers. Consequently, the statute must be declared unconstitutional.

CONCLUSION

The Appellee, John D'Agosto, respectfully requests that this Court affirm the lowers Court's decisfon and the decision of the Fourth District Court of Appeals for all reasons and authority cited herein.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. mail to Joseph R. Boyd, Esquire, 2441 Monticello Drive, Tallahassee, Florida 32303; Chris Walker, Esquire, 1317 Winewood Boulevard, Tallahassee, Florida 32301; Eric J. Taylor, Esquire, Office of the Attorney General, The Capitol, Tallahassee, Florida 32399-1050 and H. James Parker, Esquire, 8204 Massachusetts Avenue, New Port Richey, Florida 34653, this 31 day of July, 1989.

Wayne R. McDonough, Esquire
Florida Bar No: 267570