O/a 9-11-89

Orig
Consolidated
w/ 73,666

IN THE SUPREME COURT OF FLORIDA

FILED
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MAY 30 1989
CLERK, SUPREME COURT
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Deputy Clerk

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

Appellant,

VS.

Case No. 74,150

JOHN D'AGOSTO,

Appellee.

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

APPELLANT, STATE OF FLORIDA'S,
INITIAL BRIEF

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

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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 emforcement 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. §666 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 thought 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

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[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), . . .

> given, either directly or through the 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 15666 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, John D'Agosto and his wife were divorced in April, 1976. The final decree gave custody of the child to the wife and required the Appellee to make child support payments of $40.00 bi-monthly. At some time in 1984 or 1985, the minor child came to live with the Appellee full time. However, the Appellee failed to file any papers with the trial court modifying the final divorce decree or informing the trial court of the child's new residence away from the mother. Without notification to the court or with permission of the court, the Appellee terminated

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[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 deliquent 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.

his child support payments to his wife even though his final court order directed to make such payments.

On July 10, 1987 the Appellee was supposed to pay into the court depository his required $40 support payment. The Appellee did not make the payment. On August 12, 1987, Freda Wright, Clerk of Indian River County sent a certified letter (R: 11), according to the terms of Section 61.14(5), Florida Statutes (1987), to the Appellee notifying him that he was delinquent in his child support payments and the provisions of Section 61.14 that would be applicable to him if he did not make his payment before August 27, 1987. The letter went to the address possessed by the Clerk which apparently was the Appellee's place of employment. The Appellee was not personally served by the Clerk of Courts as the law did not require him to be so served.

Appellee brought this action on August 21, 1987.

STATEMENT OF THE CASE

On August 14, 1987, the Appellee, John D'Agosto, received a letter from the Honorable Freda Wright, Clerk of Courts, Indian River County, Florida (R: 11). The letter notified the Appellee he was delinquent in his child support payment that had become due on July 10, 1987. The letter also informed the Appellee of the applicable provisions of Section 61.14, Florida Statutes, and the consequences if he did not pay his overdue support payment.

On August 21, 1987, the Appellee filed, with the Circuit Court of the Nineteenth Judicial Circuit, a complaint against Freda Wright (R: 1-12). The Complaint consisted of a Petition for Writ of Prohibition, Petition for Writ of Certiorari, and a Petition for Declaratory Action. Also filed were a Motion to Stay Enactment of Section 61.14, Florida Statutes (R: 16-19) and a Motion to Declare Section 61.14, Florida Statutes, Unconstitutional (R: 13-15). The trial court entered an Order to Show Cause on August 24, 1987 (R: 20).

The essence of the Complaint and the Motions was that Section 61.14 Florida Statutes, violated both the United States and the Florida Constitutions because the Act denied the Appellee due process under the law and abridged his privileges and immunities. It also violated the Florida Constitution by infringing upon the power of the judiciary and denying access to the courts.

Ms. Wright was defended by the County Attorney's Office for Indian River County. The Attorney General was informed of the existence of the suit. However, since the statute was being defended by competent counsel in the form of the Indian River County Attorney's Office, the Attorney General chose not to appear at that time.

Appellee's Complaint was challenged as to its form (R: 21-22). The trial court ordered that the first two counts were to be dismissed and the case resolved on the declaratory judgment count (R: **36-37).** The Court ordered briefing on the constitutionality of the Act and set a hearing for October 12, **1987.**

The Appellee filed a Motion for Summary Judgment (R: 24-**35).** Ms. Wright's counsel filed a memorandum in opposition to the Appellee's Memorandum, including documents concerning the legilative history of both the Federal and State laws (R: **38-95).**

On November **19, 1987,** the trial court issued its Order on the summary judgment (R: **96-100).** The court found Section **61.14,** Florida Statutes, unconstitutional in that the law denied the Appellee due process and access to the courts and the law impinged upon the powers of the judiciary.

On December 18, **1987,** the Attorney General, appearing as permitted by Section **86.091,** Florida Statutes, filed a Notice of Appeal in the circuit court (R: 101-102).

The issues were briefed by the Appellant and Mr. DAgosto. [3] Oral argument was held in West Palm Beach on December 15, 1988. On April 12, 1989, the District Court of Appeal issued its opinion. See, Attorney General of Florida, Robert A. Butterworth v. D'Agosto, 14 F.L.W. 911 (Fla. 4th DCA, April 12, 1989). The District Court affirmed the decision of the trial court on all the points stated by the trial court in its Final Summary Judgment of November 17, 1987 and recited those pertinent parts of the Final Summary Judgment the District Court thought important. The Attorney General filed a notice of appeal with the Fourth District Court of Appeal on May 8, 1989.

After receiving notice from this Court that the case was before it, the Attorney General moved on May 18, 1989 to consolidate this case with State of Florida v. Stanjeski, Case No. 73,666, as both cases dealt with the constitutionality of Section 61.14(5), Florida Statutes (1987).

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[3] On appeal, the Fourth District Court of Appeal realigned the parties and shifted Freda Wright, Clerk of Courts, to an Appellee even though her office initially defended the statute and the Attorney General merely assumed her legal position on appeal.

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?

III.

HAS THE FLORIDA LEGISLATURE, BY ENACTING CERTAIN PROVISIONS OF SECTION 61.14, FLORIDA STATUTES, IMPINGED UPON THE POWER OF THE JUDICIARY AS SET OUT IN ARTICLE V, FLORIDA CONSTITUTION?

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 deliquent obligor is not entitled to access to the courts as no court could modify the past due judgments the 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 deliquent 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.

III.

Section 61.14(5), Florida Statutes (1987), does not impinge upon the powers of the judiciary. Section 61.14(5) addresses child support "judgments" and only prohibits the modification of past due "judgments". The prohibition in Section 61.14 is a mere restatement of the common and case law of Florida. This statute does not attempt to limit the court's discretion or power in an enforcement proceeding.

ARGUMENT

INTRODUCTORY STATEMENT

This case is before this Court upon the decision of the Fourth District Court of Appeal rendered April 12, 1989, holding Section **61.14 (5),** Florida Statutes, unconstitutional.[4]/ The case came before the District Court of Appeal from the final order of the Circuit Court of the Nineteenth Judicial Circuit that found Section **61.14(5),** Florida Statutes **(1987)** unconstitutional. The trial court 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.

3. The act impinges upon the power of the judiciary to amend or alter a prior decision or order of the court.

The District Court of Appeal affirmed the decision of the trial

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[4]/ A similar challenge to the constitutionality of Section **61.14(5)** was made in the Nineteenth Judicial Circuit Court. The statute was held unconstitutional; affirmed on appeal, State of Florida, ex rel. Jed Pittman V. Stanjeski, **14** F.L.W. **164** (Fla. 2nd DCA, January 13, 1989); and is now pending before this Court as Case No. **73,666.**

court. 14 F.L W. 911 (Fla. 4th DCA, April 12, 1989).[5]/

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 commom 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.

5/ Though decided before it, the Fourth District Court of Appeal did not rely upon the Second District Court of Appeal's decision in State of Florida, ex rel. Jed Pittman v. Stanjeski, supra.

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 deliquent payment becoming a "judgment by operation of law" or permit the modification of past due support payments. These decisions are plainly wrong. Historicly, a deliquent obligor was not entitled to any hearing before his deliquent 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 deliquent obligor therefore acquired no "constitutional" right to access of the courts when the Legislature enacted Section 61.14(5) directing that his deliquent 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. s2.01, 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 deliquent obligor has under the law. In particular, the two courts below failed to recognize that in the past a deliquent 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, Ileckes 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]

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[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).

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 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 refered 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 F.L.W. 688 (Fla. 3rd DCA, March 14, 1989); Ragan v. Thomas, 515 So.2d 505 (Fla. 1st DCA 1987); Shufflebarger v. Shufflebarger, 460 So.2d

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[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).

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).

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 interpeted narrowly against the deliquent obligor; the intent being the child needs the money and its denial will be a hardship on the child.

In enforcing a deliquent 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 compe11ing circumstances, such as waiver, laches, estoppel or reprehensible conduct on the part of the custodial parent.

424 So.2d at 971.

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

A deliquent obligor has had in the past no right of access to the courts to have a hearing to contest his deliquent child support payment. This was the state of the law prior to the enactment of Section 61.14(5). As stated above, a deliquent 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 deliquent 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 deliquent support payment was treated as a judgment (just as the deliquent 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 deliquent 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 deliquent support payment, then the enactment of Section 61.14(5) also did not

create a constitutional right to a hearing before the deliquent 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 deliquent obligor has no right to a hearing before his deliquent 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 fed ral 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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[8]/ 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 judical hearing.—9/

9/ 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.

A key factor to remember is what Section 61.14(5) does not 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 count 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. D'Agosto clearly had access to the courts. Subsequent to the August 12, 1987 notice, Mr. D'Agosto 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 circuit court's Final Summary Judgment (R: 96-100), 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 this Court's 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 meaningfull hearing in a failure to pay his court ordered support situation. However, if due process requirements mandate notice and a meaningfull hearing to a deliquent 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 intrest 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 substitue 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 deliquent obligor 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 deliquency.

Using the test of Mathews shows that a deliquent 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 and a lein on the obligor's real and personal property. 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 deliquent. 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 deliquency 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 deliquent with his child support payments that he had a right to notice of the deliquency 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. D'Agosto due process of 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 rned 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. Eleqante 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

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[10] 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 his ex-wife or child against him. Since the enforcement 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 O'Brien v. O'Brien.

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 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 deliquency.

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.

III.

SECTION 61.14(5), FLORIDA STATUTES, DOES NOT IMPINGE ON THE POWER OF THE JUDICIARY

Finally, the trial court ruled that Section 61.14(5), Florida Statutes **(1987)** was unconstitutional in that it represents an improper legislative intrusion on the power of the judiciary in violation Article V of the Florida Constitution. The District Court of Appeal essentially adopted the ruling of the trial court found in the Final Summary Judgment. Therefore, reference will be made to the trial court's final order.

The trial court found two intrusions on the power of the judiciary. First, an interference with Rule 1.540, Florida Rules of Civil Procedure and secondly, in the perceived restriction on the power of a court to modify, alter or amend a past due child support payment. Again, the State submits that the trial court and the District Court of Appeal misunderstand Section 61.14(5) and the case law. Section 61.14(5) does not prohibit something that case law already prohibits nor interferes with the permissible discretion of the trial court.

1. Rule 1.540, Florida Rules of Civil Procedure.

The trial court, in its order, stated that Section 61.14(5) prohibits the courts to utilize the procedures under Rule 1.540, Florida Rules of Civil Procedure, to grant relief from judgments. In its short discussion, the trial court, in the State's reading, appears to give Rule 1.540 broad powers to correct a judgment. However, this is not the case. Rule 1.540 has a narrow application and its purposes can be fulfilled without negating the intent of Section 61.14(5)(d).

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 1.540. 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).

The clear purpose of Section 61.14(5)(d) was to prevent delinquent fathers from attempting to persuade a court to void, on some substantive ground, his past due obligation. The Congress wanted to insure that dead beats would not escape by the cancellation of a delinquent order. On the other hand, Rule 1.540 is clearly aimed at an unjust or unfair judgment being entered against a person for any of the stated reasons in the Rule. The State agrees with this purpose. If one of the limited conditions exist, then the States believes, even under Section 61.14(5), the obligor can alter or amend a final order (i.e., the obligor did not receive notice of the delinquent payment). However, 61.14(5) only prevents alteration of a substantive order that could have been challenged at trial or on appeal by he obligor. Rule 1.540 does not permit the cahnge of any judgment on substantive grounds.

The State submits that the two legal purposes are not in conflict but can be read consistently with each other. However, if this Court believes some inconsistency may exist, there is no need to totally void subsection (5)(d). Rather, this Court should find it constitutional in all cases except where the

limited circumstances of Rule **1.540** may come into play.[11]

2, Section 61.14(5) does not alter Florida case law

In addition, the trial court and District Court found that Section **61.14(5)** impinged upon the discretionary power of the courts to alter or amend past due child support payments. The courts are in error for two reasons. First, Section **61.14(5)** is a mere restatement of the law and does not prohibit anything the courts, by case law, are already prohibited from doing. Secondly, the trial court, based upon its citations of cases in the final order, has confused modification of a past due judgment with the powers of enforcement of a child support judgment. And, since the District Court adopts the reasoning of the trial court, it too confuses modification and enforcement.

a, Modification of past due child support orders judgments.

It has long been the law of Florida that a court has "no authority to cancel or reduce a past-due installment of child

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[11] Such a ruling would meet the dictates of this Court that a statute must be given a construction that will uphold the law, Miami Dolphins, Ltd. v. Metropolitan Dade County, 402 So.2d **411** (Fla. **1981**), or find a reasonable construction that would render the statute constitutional, Department of Insurance v. Southeast Volusia Hospital District, **438** So.2d **815** (Fla. **1983**).

support. Pottinger v. Pottinger, 133 Fla. 442, 182 So.2d 762 (1938). See also, 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).

Section 61.14(5)(d) is but a restatement of that case law. A trial court cannot modify a past-due child support payment that becomes a judgment under 61.14(5)(d) 30 days after the installment due date if the obligor does not go to court to contest the notice.

Since there is no conflict between case law and Section 61.14(5)(d), Section 61.14(5)(d) does not impinge on any lawfully exercisable discretion of a trial court.

b. Enforcement of a past due child support judgment

While a child support judgment imposes a personal liability and obligation on the obligor in favor of his child, a judgment is nearly 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 enforcement.

This is one of the main misconceptions of the trial court. If confused Section 61.14(5) and its application with judgments with the right, powers, procedures and defenses in enforcing that judgment. All the cases the trial court relied upon for the finding were dealing with enforcement issues not the judgment

itself.[12]/

When a person attempts to "enforce" the past-due installements/judgments on an obligor, the obligor has a right to a hearing and all the equitable defenses the trial court discussed at the "enforcement" proceeding. 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). And, where 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).

Section 61.14(5)(a) is directed to 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 such a "judgment" to the level of all other judgments in the state and allows them to be "enforced"

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[12]/ In particular, the trial court cites for its proposition Gottesman v. Gottesman, 220 So.2d 640 (Fla. 3rd DCA 1969). That case dealt with the enforcement of the past due alimony. However, in its earlier decision, Gottesman v. Gottesman, 202 So.2d 775 (Fla. 3rd DCA 1967), the Third DCA stated that past due alimony installments cannot be modified.

along with the other judgments of the court.

Under the circumstances just stated, Section 61.14(5) does not impinge upon the power of the judiciary. The statute does not interfer with any rights of modification of the judgment and has no application to enforcement actions. Therefore, Section 61.14(5) does not violate Article V of the Florida Constitution.

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 deliquent 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 cop of the foregoing Appellant's Initial Brief has been forwarded by U.S. Mail to **RICHARD SALIBA,** Esquire, and **WAYNE R. McDONOUGH,** Esquire, Post Office Box 1690, Vero Beach, Florida 32961-1690, this 30th day of May, 1989.

ERIC J. TAYLOR/