o/a 10-2-89

IN THE SUPREME COURT OF FLORIDA

ATTORNEY GENERAL OF FLORIDA,
ROBERT A. BUTTERWORTFI, 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

REPLY BRIEF OF THE APPELLANT STATE OF FLORIDA

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SUMMARY OF THE ARGUMENT

Appellee misreads the intent and reach of Section 61.14(5), Florida Statutes (1987). The statute creates a "judgment" against those obligors who do not pay within 30 days of their payment date or respond in some manner to the notice of delinquency.

The law does not deny an obligor access to the courts; a right to a response, notice or fair hearing. The law is aimed at creating a judgment, it does not have any effect on enforcements.

As to its prohibitions against modification, it merely restates the case law of this State.

ARGUMENT

PRELIMINARY STATEMENT

Upon a reading of the Answer Brief, it is apparent the Appellee, like the trial and appellate courts, misunderstands the nature and purpose of Section 61.14(5), Florida Statutes. Appellee misconceives this statute as having an effect on the enforcement of child support and alimony arrearages and the equitable defenses available in the enforcement proceedings. This statute has nothing to do with "enforcement" of arrearages. This statute is directed at the creation of a judgment for past due support payments and a statutory codification of the case law concerning the modification of child support arrearages.

The language of Section 61.14(5)(a) that turns, after a chance for the obligor to respond or make payment, an unpaid installment of support into

> 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, (e.s.)

makes it clear that the statute only addresses the creation of a judgment. The statute has no effect on the enforcement process of a child support payment.

I.

SECTION 61.45(5) DOES NOT DENY ACCESS TO THE COURTS

In the initi 1 brief, the State took the position that an obligor has no right to a hearing, and, therefore, no access to the courts, to contest the vesting of the unpaid child support payment; once the support payment was not made it became vested in the child and not modifiable by any court. See, Pottinger v. Pottinger, 133 Fla. 442, 182 So. 762 (1938). However, if there is a "right of access", then Section 61.14(5) meets all constitutional requirements.

Section 61.14(5), Fla. Stat., provides for the ab lity or an obligor to go to a court and contest the delinquent payment before the delinquent payment becomes a judgment by operation of law. In addition, the obligor has the ability to alter or amend the support as to future payments and use any and all equitable defenses in an action seeking to enforce the payment by the obligor of all past due support payments. In no way did the Appellee present any rebuttal that the propositions by the State were not true. Instead, Appellee chose to rebuild the Appellant's position by attempting to apply enforcement cases to a judgment issue. Furthermore the Appellee did not cite to anything in the statute that was a legislative bar to him going to court.

The Appellee begins his argument on pages 8 and 9 of his

answer brief by asserting that 42 U.S.C. §666 makes no reference to a final judgment by a Clerk of Court for which execution may issue nor requires the imposition of a lien upon real property. With all due respect, Appellee is incorrect on both points. First, 42 U.S.C. §666(a)(9)(A) requires a state to have in its law the provision for 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 when an obligor fails to make his court ordered child support payment.

It is clear that Congress contemplated a judgment would be entered in the state and contemplated that the judgment would become a judgment without the need of a judicial act upon the failure of the obligor to pay the support; therefore, the words "by operation of law". In addition, Congress also sought to have the states create the type of judgment that could be enforced.

The Florida Legislature applied the Congressional mandate by requiring that the delinquent child support payment become a

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

Section 61.14(5)(a), Florida Statutes. A comparison of the Florida statute with the federal law reveals an nearly identical rendition. The Florida legislature merely used a few words different as would apply to a more localized application of the law than the federal law would. But the effect is the one intended by Congress; a late payment would become a judgment without need for a judicial procedure and one that could be enforced through the issuance of execution.

Second, 42 U.S.C. §666 does require states to have procedures to apply liens upon real property for overdue support payments. **See**, 42 U.S.C. §666(a)(4).

Appellee then moves on to argue that Section 61.14(5) denies access to the courts by prohibiting a hearing to challenge the vested, past due support payment. To briefly restate, Section 61.45(5)(a) allows the obligor, upon receiving notice, "time for response" to the delinquency notice. Such a response contemplates a right to a judicial hearing. In his case, the Appellee sought and received such a hearing and the delinquency notice has not yet been reduced to a judgment. As to the claim in his response that his child now lives with him, he can, on remand, quash the delinquent payment and modify the requirement of future child support because he has custody of the child. The exclusion of a day in court is only in the mind of the Appellee.

As to the inability to cancel the past due, unpaid installments, the Appellee is correct. A trial court cannot

modify, set aside or alter those past due judgments. Section 61.45(5)(d). But, that is the case law of this State. A court cannot modify a past due support judgment either for child support, Pottinger v. Pottinger, 133 Fla. 442 182 So. 762 (1938); Onley v. Onley, 540 So.2d 880 (Fla. 3rd DCA 1989); Ragan v. Thomas, 515 So.2d 405 (Fla. 1st DCA 1987), accord, Fayson v. Fayson, 482 So.2d 523 (Fla. 5th DCA 1986) (prospective modification only), or for past due alimony payments, Brock v. Hudson, 494 So.2d 285, 286 (Fla. 1st DCA 1986), Jennings v. Jennings, 392 So.2d 352 (Fla. 4th DCA 1981), Coniglio v. Coniglio, 370 So.2d 86 (Fla. 2nd DCA 1979), Brisco v. Brisco, 355 So.2d 506 (Fla. 2nd DCA 1978), Gibson v. Smith, 348 So.2d 681 (Fla. 1st DCA 1977).

It is at this point that confusion sets in. The Appellee, and the two lower courts, then confuse the difference between the creation of a judgment and the enforcement of a judgment. Because the law of this Court prohibits the modification or cancellation of a past due support payment, Appellee then attempts to transpose that case law into a general denial of access to the courts. Furthermore, Appellee attempts to argue that the prohibition against(? could not read word) modification of a past due support payment then will have a negative effect upon his presenting equitable defenses in an enforcement proceeding.

Because a past due support judgment cannot be modified or set aside does not mean it must be enforced. In both past due child support or alimony payments, the courts have the power to deny, on equitable grounds, a judgment reflecting past due payments. As the First District Court of Appeal recently said

> it is well established that, under certain compelling or extraordinary circumstances, the trial court may be justified in refusing to enforce the payment of past due installments. (emphasis added)

Brock v. Hudson, **494** So.2d at **286.** The ability of a court to refuse to enforce a child support or alimony judgment is, like the prohibition against modification of past due support payments, rooted in case law. See Pottinger v. Pottinger, supra; Smithwick v. Smithwick, **343** So.2d **945** (Fla. 3rd DCA **1977).**

The courts below confused this legal distinction; there is a definite difference between the creation of a judgment and the enforcement of a judgment. Courts cannot modify past due support judgments but, for equitable reasons, may refuse to enforce those judgments. Section **16.14(5)** creates a judgment and allows for its enforcement as any other judgment in this state but Section **61.14(5)** does not deal with the enforcement of past due child support payments. As such, Section **16.14(5)** (d) only restates the case law on modification of past due judgments; it does not have any effect on the enforcement of past due judgments or the power of the courts in enforcement actions. For those reasons alone,

Appellee's argument on access to the courts must fail.

The obligor has an appropriate access to the courts. The rights and defenses asserted by the Appellee in an enforcement action still exist, only they exist at the enforcement proceeding, not at the time the obligor fails to make his monthly scheduled court-ordered child support payment. Section 61.14(5) in no way extinguishes these rights. No court has ever ruled an obligor had access to the courts every time he was late on a support payment.

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

II.

THERE IS NO DUE PROCESS VIOLATION PRESENT

A.

NOTICE

The Appellant continues to assert that an obligor is not entitled to any notice of his failure to make his court-ordered child support payments. However, if notice is required after the failure of the obligor to pay, then Section 61.14(5), Florida Statutes meets all notice requirements.

However, the Appellee argues that the statute provides insufficient notice to apprise him of the action. While the form of notice provided in the statute may be insufficient if no action were pending, Appellee sidesteps the fact that the delinquent support payments are part and parcel of an earlier legal action to which he was a party and properly served with personal service.

Appellee cannot argue or deny the fact that he was involved in a dissolution suit in **1976** and ordered to pay **$40.00** twice a month. He apparently received personal service of that suit and knew he had to pay child support to the amount of $80.00 per month each and every month. Appellee apparently knew he was to make his payments through the court depository and should have known to keep his address current with the depository.

As this notice was not notice of a new filing or case, personal service was not necessary. If the Appellee's wife wished to file a petition of some sort with the court in the continuation of the original proceeding, ordinary mail service would have been sufficient. Certified mail, return receipt requested as required in Section 61.14(5)(b)) is reliable and sufficient to apprise the Appellee that he is delinquent (a fact he should already have known) and the consequences of his inaction.

In the case of Quay Development v. Elegante Building Corporation, 392 So.2d 901 (Fla. 1981), 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 his last known address provided by him to the court depository is sufficient in this case.

Leaving aside the notice requirements actually mandated under Section 61.14(5), let's for the moment assume that Section 61.14(5) did not exist. What would the constitutional due process requirements for notice be when an obligor did not make his monthly, court-ordered child support payments?

The answer to this question comes from the case law of the state prior to the enactment of Section 61.14(5). The delinquent obligor was not entitled to any due process when he failed to make his court-ordered payment. He had no right to a notice of his delinquency (a violation of a then existing court order) nor even a hearing. Since the delinquent obligor did not possess any due process rights prior to the enactment of Section 61.14(5), he has not been deprived of any due process by its enactment. Rather the delinquent obligor has secured a new right after the enactment of Section 61.14(5) he did not possess before.

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

B.

FAIR HEARING

Appellee here continues to misread Section 61.14(5) and argues he has no right to a hearing and the judgment will automatically enter on the 30th day after the delinquency. Both arguments are incorrect; the very wording of Section 61.14(5) shows that.

No judgment by operation of law is entered if the obligor files a motion to modify. When such a motion is filed, the court has the power to look at the delinquent payment and modify the support order. During this hearing, the obligor can present all the evidence he wishes as to the delinquent payment.[1] The judgment, by operation of law, takes effect only if the obligor does not respond by filing a motion to modify or payment of the delinquent amount is not received by the clerk of court. The lack of a hearing date or a crowded court calendar will not result in a judgment by operation by law. The obligor will have

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[1] The obligor could not, however, contest those payments that have already become past due. Any defense to not paying them on time could be presented to the court at an enforcement proceeding.

his day in court.[2]/

Again, what was the law of this state prior to the enactment of Section 61.14(5); would a delinquent obligor be entitled to a hearing? Since the case law of this state prohibits a court to modify or set aside a past due payment, it is fair to assume that a delinquent obligor had no right to a hearing as the hearing could accomplish nothing once the support payment became past due and vested.

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[2]/ Appellee also attacks the statute in that it "enacts retroactive legislation . . . pertaining to arrearages predating the enactment of the statute." As has been stated so many times before, past due payments are already considered vested rights and cannot be modified. This law does not create an obligation in the obligor that he did not already have in his divorce order. This law only ensures he does not escape his ordered legal obligation.

Lastly, Appellee complains about the lack of time in which the obligor has in which to pay the past due payments. Such an argument must fall on deaf ears as the obligor knew, all these years, that he had either a duty to pay the ordered amount, or else, on a particular date, seek modification of the support order.

III.

SECTION 61.14 (5) FLORIDA STATUTES DOES NOT IMPINGE UPON THE JUDICIARY

Section 61.14(5), Florida Statutes, does not prevent the courts from doing anything Florida case law already permits. The language, at best, is a codification of the past law. The State requests no curative language as the statute is constitutionally firm.

The Appellee missed the State's point. If one reads Section 61.14(5) to mean a court is prohibited, under the limited provisions of Rule 1.540, Florida Rules of Civil Procedure, from correcting clerical errors, mistakes, fraud, surprise or excusable neglect, then the statute ought to be found by this Court to be constitutional as prohibiting general modification of a child support or alimony judgment (consistent with this Court's past opinions) but not preventing a court from using Rule 1.540 when necessary.

Section 61.14(5) delegates nothing to an officer outside the judiciary. The law only makes a judge's order, the payment of support, a judgment by operation of law 30 days after the obligor violates the judge's support order by the failure of the obligor to comply with his legal duty. This is not a procedural matter, but makes a substantive right in favor of the party owed the support. It is also the mere restatement of the law of this

Court.

Section 61.14(5) takes nothing away from the judiciary, nor binds its hands. It is a reflection of the present law.[3]

CONCLUSION

Appellee's arguments are misdirected. He misreads the intent of Section 61.14(5) and its effect. The statute does not interfere with his access to the courts; his right to due process; nor deprives him of his equitable defenses when an enforcement action arises. Neither does the law interfere with the traditional power of the judiciary.

As the courts below misinterpreted the scope and effect of Section 61.14(5), Florida Statutes (1987), this Court should reverse the decision of the District Court below.

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[3]/ The Appellee complains the law dictates "the practice of law". However, all laws dictate how we, as practitioners, are to practice law. Granted, the law may create work and require parents to keep the court fully informed of their financial status and who has custody of the child but how does this hurt the parents or the child? Since who should have custody of the child is to be determined by what is in the best interest of the child, then the Appellee's fears of creating a record are unfounded.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to **RICHARD SALIBA,** Esquire, and **WAYNE R. McDONOUGH,** Esquire, Post Office Box **1690,** Vero Beach, Florida **32961-1690,** this 16 day of August, **1989.**

ERIC J. TAYLOR
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