SUPREME COURT OF FLORIDA

STATE OF FLORIDA, et al.,

Appellants,

v.

E. D. "BUD" DIXON, Clerk of Court, Polk County, Florida,

Appellee.
_____/

CASE NO. 78,563
DCA NOS. 90-01618
90-01619
CONSOLIDATED
CIRCUIT CASE NO. CGC-88-2410

ON CERTIFICATION OF JUDGMENT REQUIRING IMMEDIATE RESOLUTION FROM THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF THE STATE OF FLORIDA

BRIEF OF AMICUS CURIAE FLORIDA ASSOCIATION OF COURT CLERKS

Respectfully submitted,

FRED W. BAGGETT
ROBERT R. MCDONALD

ROBERTS, BAGGETT, LAFACE & RICHARD
101 E. COLLEGE AVENUE
P. O. DRAWER 1838
TALLAHASSEE, FLORIDA 32302
(904) 222-6891

COUNSEL FOR FLORIDA ASSOCIATION OF COURT CLERKS

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PRELIMINARY STATEMENT

This Amicus Brief is being filed by the Florida Association of Court Clerks in support of the position of Appellee, Honorable E. D. "Bud" Dixon. This brief will address only the substantive issues as to the constitutionality of Section 61.181(5), Florida Statutes (1989), as determined by the lower court, and the proper construction of Section 61.181(5), Florida Statutes (1989).

As used herein, the Appellants, State of Florida and Department of Health and Rehabilitative Services, will be referred to as "State", and the Appellee, Honorable E. D. "Bud" Dixon, will be referred to as "Clerk". The Child Support Depository Account, mandated by Section 61.181, Florida Statutes, is referred to as "CSDA".

Because the issues raised below concern the factual situation of where a payor makes his or her payment into the child support depository by personal check rather than by cash or its equivalent (i.e. certified funds, money orders, etc., the argument herein relates to requiring the Clerk of Court, acting as administrator of the depository, to disburse funds from the depository within four (4) days of receipt of a check to the depository regardless of payment of the check.

STATEMENT OF THE CASE AND OF THE FACTS

Amicus Curiae, the Florida Association of Court Clerks, hereby adopts and incorporates herein the Statement of the Case and of the Facts contained in Dixon's brief filed in this action. Further, however, the Florida Association of Court Clerks notes references are made in various briefs of the collection of an additional $.25 fee when deposits into the CSDA are by personal check. In 1989 the relevant statute was amended deleting this additional fee. Chapter 89-183(3), Laws of Florida.

SUMMARY OF ARGUMENT

Requiring a Clerk of the Court, as administrator of the Child Support Depository, to pay funds from the CSDA to payees prior to the time checks remitted to the CSDA have been paid by the payor's bank constitutes the act of pledging the credit of the State, County or an agency of them. It is irrelevant whether or not the payor's remittance to the depository is ultimately paid by the payor's bank, as a pledge of credit of the account is made any time funds are paid out of an account in anticipation of and prior to the full credit of the deposit into the account. For a pledge of credit to be valid, a determination must be made that the pledge is for a paramount public purpose, which standard is greater than a demonstration of a public interest. The State has not demonstrated that the legislature found it to be a paramount public purpose for the payment of child support payments prior to the full credit of deposits into the depository. Thus, requiring the Clerk to disburse funds from the depository prior to the time the deposit is paid by payor's bank is unconstitutional in contravention of Article VII, Section 10, Florida Constitution.

Section 61.181(5), Florida Statutes (1989), does not require the Clerk to disburse funds from the depository prior to a date four (4) days after the payor's bank has paid the check remitted to the depository. The statutory history and the plain language of Section 61.181(5), Florida Statutes (1989), alone and when construed with other applicable Florida Statutes, does not require disbursement from the depository prior to full credit of the

deposit.

ARGUMENT

I.

REQUIRING THE CLERK TO DISBURSE FUNDS PAID INTO THE CSDA BY PERSONAL CHECK WITHIN FOUR (4) DAYS OF RECEIPT WHEN SUCH DEPOSITS HAVE NOT BEEN PAID BY THE PAYOR'S BANK VIOLATES THE PROHIBITION OF THE PLEDGING OF CREDIT CONTAINED IN ARTICLE VII, SECTION 10 OF THE FLORIDA CONSTITUTION.

A. Section 61.181(5), Florida Statutes (1989), requires the pledging of credit of the state of agency thereof.

Article VII, Section 10, Florida Constitution states

> Neither the state nor any county, school district, municipality, special district, or agency of any of them, shall become a joint owner with, or stockholder of, or give or lend or use its taxing power or credit to aid any corporation, association, partnership or person;...

Section 61.181(5), Florida Statutes (1989), requires the administrator of the Child Support Depository Account to pay child support payments within four working days from payment by the obligor.[1] Requiring the administrator of the CSDA to pay child support payments within this time frame results in the pledging of credit.

The record in this matter contains uncontroverted evidence that it is not possible for the administrator of the CSDA to confirm within four days of receipt of a personal check remitted to the CSDA whether or not the personal check has been and/or will be paid by the payor's bank. Because the ultimate question raised herein concerns the payment of funds prior to the payor's checks

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[1] Amicus Florida Association of Court Clerks argues in Part II hereof that the child support payments need not be made until deposits are credited to the CSDA.

"clearing", regardless of whether or not the payor's checks are paid on the first presentment to the payor's bank, subsequently, or at all, the applicable issue concerns that time frame after which the CSDA makes a disbursement from an individual account prior to the full payment of money into the account by the payor's bank, or before the deposit to the account has been credited to the account. While one may consider this to be a concern of form over substance (i.e. what does it matter if a $200 support payment is "covered" for a few days by the depository), when one looks at the entire picture it becomes apparent this question has major impact. In a four month period the Lee County depository was tendered personal checks totalling $466,208 (H224), with three checks totaling $6,763.07 returned for insufficient funds. Hillsborough County CSDA had 93 checks, totaling $19,509.59, returned for insufficient funds during the period October 1988 through January, 1989 (H235). The testimony at trial clearly shows substantial sums of money are disbursed by the CSDAs prior to full payment by payor's bank of deposits into the CSDA.

The State, in its initial brief, asserts that requiring the Clerk, acting as administrator of the CSDA, to pay funds out of the CSDA within four (4) days of receipt of a payor's personal check (and prior to the payor's bank paying the personal check) does not constitute the pledging of credit. As support for its position, the State cites Nohrr v. Brevard County Educational Facilities Authority, 247 So.2d 304 (Fla. 1971). However, Nohrr clearly illustrates that the activities which the State alleges is

required by the applicable statute does in fact constitute the pledging of credit.

Although the Nohrr court decided a question concerning a revenue bond (a type of credit specifically authorized by Article VII, Section 10, Florida Constitution), it defined public credit by stating "in order to have a gift, loan or use of public credit, the public must be either directly or contingently liable to pay something to somebody." Nohrr at 309. Additionally, the State refers to this Court the opinion of the Florida Supreme Court in State v. Housing Finance Authority of Polk County, 376 So.2d 1158 (Fla. 1979), as further support for its position that there has been no public credit. Housing Finance Authority of Polk County is a case that dealt again with a revenue bond. In determining there was no pledge of public credit in the circumstances before it, the Supreme Court stated "where there is no direct or indirect undertaking by the public body to pay the obligation from public funds, and no public property is placed in jeopardy by a default of the third party, there is no lending of public credit." Id. at 1160.

The State erroneously asserts that Dixon has not shown that he, his office or Polk County is either directly or contingently liable for worthless checks on the grounds Section 61.181(5) provides that Dixon cannot be personally liable for a check dishonored by a bank. The State's argument is misplaced Section 61.181(5) provides the Clerk will not be personally liable under Section 28.243, Florida Statutes, which states "A check received by

the office of a clerk of a court *** and which is returned by the bank on which the check is drawn shall be the personal liability of the clerk ***", and is not relevant to the issue at bar. If the CSDA makes a disbursement to a payee, that payee has certain rights to the full payment thereof whether or not the remittance into the CSDA on the account from which the funds are disbursed are paid. The CSDA is in fact obligated to pay the checks it delivers to payees. Although the administrator is not liable under Section 28.243, Florida Statutes, Section 61.181 does not exempt the administrator, nor does the State indicate, the administrator is exempt from Section 68.065, Florida Statutes (civil actions). The fact that there may exist a positive balance in the CSDA does not cure the constitutional infirmities. Such positive balances in the county CSDA are in fact private funds, being funds to be paid to child support recipients, as the CSDA is akin to a trust account.

It would be improper for the administrator to pay from private funds the "float" on the CSDA checks and even more improper for the private funds to pay the checks deposited into the CSDA which are uncollected. Private funds cannot be used for the benefit of public good without just compensation to the private individual. See, e.g., Webbs Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 153, 101 S.Ct. 446, 66 L.Ed.2d 358 (1980).

The case at bar fits within the criteria of Nohrr and Housing Finance Authority of Polk County, as there is a contingent liability to make payment on checks, a direct or indirect undertaking by the public body, and the obligation would be paid

from public funds. Additionally, public property (public funds) is placed in jeopardy by a default of a third party. If the payor's bank fails to make payment on the payor's personal check, it is necessary that public funds be used to cover the shortfall in the CSDA.

The State erroneously asserts that the fees collected by the administrator of the CSDA pursuant to Section 61.181(2), Florida Statutes, creates the "safety net" necessary to cover personal checks which are not ultimately paid by a payor's bank. The State misconstrues the purpose and use of Section 61.181(2). The fee received for receiving, disbursing or handling alimony or child support payments are fees to reimburse the Clerk's office for its administrative expenses in operating the depository. In no way does it contemplate that these fees are to be used to cover personal checks which will not be paid by the payor's bank. In fact, pursuant to Section 61.181(2), the fee collected "shall be a flat fee based, to the extent practicable, upon estimated reasonable costs of operation." It is thus clear that the flat fee amount is to reimburse the Clerk for operational costs and not as a contingency fund for worthless checks. The cost anticipated would include, for example, bank fees for operating the account, charges for printing checks, and salaries for the personnel necessary to adequately staff the CSDA.

B. The Pledge of the Public Credit pursuant to Section 61.181(5), Florida Statutes (1989), does not serve a paramount public purpose.

When it is determined that the State, County or an agency

thereof has pledged credit to support a private entity or person, there must be demonstration that the public credit is for a paramount public purpose. Although there are a number of cases stating that the public interest served can be incidental, the standard under which this issue is determined is a paramount public purpose test. In O'Neill v. Burns, 198 So.2d 1 (Fla. 1967), the Florida Supreme Court reaffirmed the standard to be used in approving the enunciation of the law by the lower court, writing:

> He corrected states: "It is only when there is some clearly identified and concrete public purpose as the primary objective and a reasonable expectation that such purpose will be substantially and effectively accomplished, that the State or its subdivision may disburse, loan or pledge public funds or property to a non-governmental entity such as a non-profit corporation."

O'Neill at 4 (emphasis added). The O'Neill court determined that the pledge of state monies to a not-for-profit private entity for the construction of its headquarters in Florida was improper as a "public purpose of primary, as distinguished from incidental, benefit to the public has not been shown it the case before [the court]." Id. (emphasis added). The standard was again reaffirmed in Linscott v. Orange County Industrial Development Authority, 443 So.2d 97 (Fla. 1983), (a case concerning a revenue bond, in which cases the standard to be met is lower) wherein the Court stated at page 101:

> With the adoption of the Constitution of 1968, the "Paramount public purpose" test developed by case law

> under the Constitution of 1885[2] lost much of its viability. The test is still applicable when a pledge of public credit is involved, ***" (emphasis in original).

Even assuming that the case law does not require the statute to specifically recite a paramount public purpose, there has been no demonstration of a paramount public purpose served by Section 61.181(5), Florida Statutes (1989). The primary beneficiaries of the statute are the individual payees and not the public, notwithstanding the argument of the State that the public is the primary beneficiary because requiring the recipients of the payments to receive payments prior to the time frame in which the payor's personal check is paid by the payor's bank will keep the recipients off State supported welfare, etc. At most, any public purpose served in expediting the payment of child support would be effective only for the first payment to the recipient, because as a practical matter the delay in receipt of payment by the recipient would only occur with the first payment made by a personal check. An illustration as follows demonstrates this one time minimal "lag" time. Assume a payment is made by personal check deposited on the first day of the month, and such payment is not made by the payor's bank until six days later, the seventh (7th) day of the month, and the administrator of the CSDA makes payment to the recipient within four (4) days thereafter, or the eleventh (11th) day of the month. For the next payment, assuming the payor makes a payment by

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[2] The applicable provision of Article IX, Section 10 of the 1885 Florida Constitution states "the credit of the State shall not be pledged or loaned to any individual, company, corporation or association; ***"

personal check on the first day of the month, the recipient would receive the support payments from CSDA again on the eleventh (11th) day of the month or thirty (30) days after the disbursement of the preceding month's payment. Therefore, any delay in payment is only a one time delay. Preventing this one time delay of a few days in payment to a private individual, when weighed against the amount of personal checks processed through the CSDAs for which public credit would be given, certainly is not a matter of paramount and primary public purpose.

The State argues in its brief that the lower court improperly disregarded the deference to which the Legislature's determination of public purpose is entitled. However, the only so called determination of public purpose recited by the State is contained in a staff analysis. If the Legislature in fact declared a paramount public purpose to be met by the statute, it should have recited such determination in the Acts creating the subject statute and/or in the statute itself, as it routinely does, eg., Section 39.001, 39.002 (Juveniles), 39.10 (Foster Care), 61.1304 (Uniform Child Custody Jurisdiction Act) and 88.012 (Uniform Reciprocal Enforcement of Support), Florida Statutes. However, there has been no such legislative determination in Section 61.181(5), Florida Statutes (1989), or Laws of Florida enacting or amending the statute.

Therefore, Section 61.181(5), Florida Statues (1989), if it requires the Clerk as administrator of the CSDA to disburse funds from the CSDA prior to the time a payor's personal check to the

CSDA is paid by the payor's bank, requires the pledge of the public credit of a State agency, which pledging of credit does not serve a paramount primary public purpose, but serves only a private interest, and it therefore unconstitutional under the dictates of Article VII, Section 10, Florida Constitution.

II.

SECTION 61.181(5), FLORIDA STATUTES (1989) DOES NOT REQUIRE THE CLERK, AS ADMINISTRATOR OF THE CSDA, TO DISBURSE FUNDS FROM THE CSDA PRIOR TO PAYMENT BY THE PAYOR'S BANK OF A PERSONAL CHECK DEPOSIT TO THE CSDA.

Amicus Florida Association of Court Clerks adopts and agrees with the argument of Amicus Green concerning the construction of Section 61.181(5), Florida Statutes (1989). One need only to look at the history of Section 61.181(5) to conclude the disbursements from the CSDA need not be made until four (4) days after the payor's check has "cleared." In 1986, Section 61.181, Florida Statutes, was substantially reworded by Chapter 86-220 (126), Laws of Florida. As enacted in said Chapter, Section 61.181(5) provided in part "The proceeds of the check need not be disbursed prior to payment of the check." (emphasis added). By Chapter 88-176(24), Laws of Florida, the applicable language was amended to read "[p]ayment shall be made by the depository to the obligee within two (2) working days after the depository receives the obligor's remittance." (emphasis added). Thus, under the 1988 statute there was a statutory mandate to pay to the payee within two (2) days of tender to the depository by payor. However, the legislature in 1989 again revised the statute to read "upon payment by cash, cashiers check or money order, the depository shall disburse the

proceeds to the obligee within two (2) working days. Payments drawn by check on the account of a payor or obligor shall be disbursed within four (4) working days." Chapter 89-183(3), Laws of Florida. Thus the legislature deleted the requirement of paying child support payments within a certain time from deposit, but a payment on a check is made at such time as the payor's bank has either paid the item in cash, settled the item without reserving a right to revoke the settlement, completed the process of posting the item to the account of drawer, or made a provisional settlement without timely revocation. §647.213, Florida Statutes. Payment to the CSDA does not occur when a payor remits a check to the CSDA, but only after the payor's bank has taken one of the statutorily referenced steps for final payment. A logical construction of the statute, therefore, would require disbursements within four (4) working days of full and final payment to the depository. A payment to the depository is separate and distinct from making a tender to or remittance to the depository, and the true reading and construction of the statute is "Disbursements from the depository drawn by check on the account of a payor or obligor shall be disbursed to payee or obligee within four (4) working days of final payment to the depository of payor's check." Therefore, if the Clerk of the Court is required to disburse funds within four (4) days after payment, disbursement need not be made until four (4) days after the payor's bank has made final payment pursuant to Section 674.213, Florida Statutes.

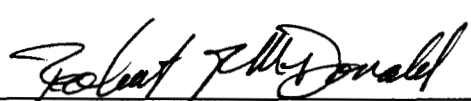
CONCLUSION

Section 61.181(5), Florida Statutes (1989), if construed as to require the administrator of the Child Support Depository Account to disburse funds to a payee prior to the time the personal check of a payor to the CSDA is paid by the payor's bank, mandates the unlawful pledge of public credit to serve primarily a private interest and not a paramount public interest. Public funds must be pledged to cover the payments made out of the CSDA before deposits are fully paid. Any public purpose is incidental and not paramount. Section 61.181(5), Florida Statutes (1989), does not require the Clerk, as administrator of the CSDA, to disburse funds from the CSDA prior to final payment by a payor's bank of a personal check made by a payor to the CSDA. The 1988 statute did require disbursement prior to final payment, but the amendment to the statute by Chapter 89-183, Laws of Florida, corrected this defect and the statute now requires disbursements from the CSDA only after final payment by a payor's bank of a personal check remitted to the CSDA.

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by Hand Delivery this 25th day of September, 1991, to Joseph Lewis, Jr., Assistant Attorney General, Department of Legal Affairs, The Capitol - Suite 1501, Tallahassee, Florida 32399-1050, to Joseph R. Boyd and William H. Branch, Boyd & Branch, 1407 Piedmont Drive East, Tallahassee, Florida 32317, Chriss Walker, Department of Health and Rehabilitative Services, 1317 Winewood Boulevard, Tallahassee, Florida 32301, and by U.S. Mail to Victor J. Troiano, Troiano & Roberts, P. O. Drawer 829, 317 S. Tennessee Avenue, Lakeland, Florida 33802 and Steven Carta, P. O. Box 1686, Fort Myers, Florida 33902.

FRED W. BAGGETT
ROBERT R. MCDONALD
ROBERTS, BAGGETT, LAFACE & RICHARD
101 East College Avenue
Post Office Drawer 1838
Tallahassee, Florida 32302
(904) 222-6891

By: 

ROBERT R. MCDONALD
Florida Bar No. 0370614

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