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STATUTE NOTE

CONSTITUTIONAL LAW—Due Process—Texas Sequestration Statute Amended to Comply With Due Process Requirements Tex. Laws 1975, ch. 470.

Texas sequestration procedure has been amended to comply with the requirements of recent United States Supreme Court decisions.¹ While the amended statute retains much of the previous law,² there are significant changes in regard to satisfying the Due Process Clause of the fourteenth amendment concerning the rights of creditor and debtor.³

The purpose of a writ of sequestration is to allow a seller to recover property from a defaulting buyer through summary procedure.⁴ Recently such summary proceedings have been attacked as violating due process;⁵ the applicable statutes did not provide for adequate notice and hearing to the party in possession of the property.⁶ Garnishment of wages without notice

1. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600 (1974); *see* *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, — U.S. —, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975) (garnishment); *Fuentes v. Shevin*, 407 U.S. 67 (1972) (replevin); Tex. Laws 1975, ch. 470, § 1, at 1246-48.

2. Tex. Laws 1887, ch. 44, § 1, at 30-31.

3. The statute primarily relates to the issuance and form of writs of sequestration. It requires that before such writ shall be issued the creditor must file suit in court; subsequently he may receive a writ of sequestration from a judge. Tex. Laws 1975, ch. 470, § 1(a), at 1246. This section allows district and county judges and justices of the peace to issue writs of sequestration. The district court has original jurisdiction of all suits for the trial of the right of property levied upon by virtue of any writ of sequestration. TEX. CONST. art. V, § 8. The plaintiff's application for the writ must include specific facts stating the nature of his claim, the amount in controversy, and the facts which justify the issuance of the writ. Tex. Laws 1975, ch. 470, § 2, at 1247.

If the writ is granted, defendant may seek a dissolution of the writ by filing a written motion with the court, and if the writ is dissolved, the defendant may bring a compulsory counterclaim for damages and for wrongful issuance of the writ. *Id.* § 3(a), (c), at 1247. The Act specifically states that a motion to dissolve the writ is in addition to the right of replevin. *Id.* § 3(e), at 1247. For a summary of the common law right of replevin see 3 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 284 (5th ed. 1942). In the case of consumer goods, the Texas Legislature has also included a liquidated damages provision. Tex. Laws 1975, ch. 470, § 3(d), at 1247.

4. *American Mortgage Corp. v. Samuell*, 130 Tex. 107, 111, 108 S.W.2d 193, 196 (1937).

5. *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, — U.S. —, —, 95 S. Ct. 719, 722, 42 L. Ed. 2d 751, 756 (1975); *Fuentes v. Shevin*, 407 U.S. 67, 96 (1972); *Western Coach Corp. v. Shreve*, 475 F.2d 754, 755 (9th Cir. 1973); *Hall v. Garson*, 468 F.2d 845, 847 (5th Cir. 1972); *Douglas Res. & Chem., Inc. v. Solomon*, 388 F. Supp. 433, 437 (E.D. Mich. 1975).

6. Procedural due process requires that parties whose rights are to be affected, be given notice and hearing. *Hovey v. Elliot*, 167 U.S. 409, 414 (1896); *Windsor v. McVeigh*, 93 U.S. 274, 278 (1876); *Baldwin v. Hale*, 68 U.S. 223, 233 (1863).

and hearing was held to be violative of due process in *Sniadach v. Family Finance Corp.*⁷ Subsequently, the landmark decision by the Supreme Court in *Fuentes v. Shevin*⁸ clarified the question in *Sniadach* as to whether due process was applicable to summary procedures other than garnishment of wages. The Court broadened the *Sniadach* decision by holding that due process was applicable to “any significant property interest,”⁹ and that opportunity for a hearing must occur *before* deprivation of such property takes place.¹⁰ In “extraordinary situations,” however, immediate seizure of a property interest, without an opportunity for prior hearing, would be constitutionally permissible.¹¹

Fuentes limited the rights of the creditor in recovering his property from a defaulting buyer. Following *Fuentes*, the Supreme Court upheld the constitutionality of the Louisiana replevin procedure in *Mitchell v. W.T. Grant Co.*¹² The majority in *Mitchell* realized that a “balancing of interests” between seller and buyer was needed, and that the Louisiana procedure “reached a constitutional accommodation of the respective interests of buyer and seller,”¹³ whereas *Fuentes* had restricted constitutional protection solely to the debtor; thus, *Mitchell* required that resolution of any due process question must take account of both interests. The *Mitchell* test is still valid, as evidenced by the Supreme Court’s decision in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*,¹⁴ where the Georgia garnishment statute was held to

7. 395 U.S. 337 (1969). The Court indicated that such summary procedures might well meet the requirements of due process in “extraordinary situations,” but the Court was not explicit in describing such situations. *Id.* at 339.

8. 407 U.S. 67 (1972). The Florida and Pennsylvania replevin statutes interpreted by the Court were similar to prior Texas sequestration procedure. *Compare* Fla. Laws 1967, ch. 67-254, § 28 *and* PA. STAT. ANN. tit. 12, §§ 1821-47 (1967) *with* Tex. Laws 1887, ch. 44, § 1, at 30-31.

9. *Fuentes v. Shevin*, 407 U.S. 67, 86 (1972); *accord*, *Bell v. Burson*, 402 U.S. 535, 539 (1971); *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971); *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970).

10. *Fuentes v. Shevin*, 407 U.S. 67 (1972). The Court stated that the hearing required by due process is subject to waiver, and does not affect its basic requirement that it take place before the property is taken. Also the requirement that the creditor post bond before obtaining the writ is hardly a substitute for a prior hearing. *Id.* at 82-83.

11. *Id.* at 90.

12. 416 U.S. 600 (1974). The Court distinguished the Louisiana prejudgment replevin procedure from those discussed in *Fuentes* in three ways: (1) the Louisiana procedure required that the writ would issue only on specific facts verified by petition, (2) only a judge could issue the writ, and (3) Louisiana law provided for an immediate hearing and dissolution of the writ unless plaintiff proved grounds upon which the writ was issued. *Id.* at 618; *see* LA. CODE CIV. PROC. ANN. arts. 281, 282, 3501, 3506 (1961). *See generally* Burke, *United States Supreme Court Upholds Constitutionality of Louisiana Sequestration Statute*, 28 PER. FIN. L.Q. REP. 72 (1974); Hobbs, *Mitchell v. W.T. Grant Co.: The 1974 Revised Edition of Consumer Due Process*, 8 CLEARINGHOUSE REV. 182 (1974); Note, *Constitutional Law—Due Process—Ex Parte Prejudgment Replevin Statute Held Valid*, 6 ST. MARY’S L.J. 742 (1974).

13. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 610 (1974).

14. — U.S. —, 95 S. Ct. 719, 42 L. Ed. 2d 751 (1975).

violate due process. But the thrust of the *North Georgia* decision is that the *Fuentes* test, as well as *Mitchell*, is still applicable in deciding due process questions.¹⁵

Prior Texas sequestration procedure was recently declared unconstitutional as violative of due process by a federal district court in *Garcia v. Krausse*.¹⁶ The court in *Garcia* used the three-point *Mitchell* criteria in abrogating the Texas sequestration statute.¹⁷ First, the Texas procedure did not require that specific facts be alleged to support the issuance of the writ.¹⁸ Second, judges and justices of the peace, as well as clerks of the district and county courts could issue the writ.¹⁹ Third, there was no immediate opportunity in Texas for a dissolution of the writ by a hearing on the merits of the case.²⁰

The new Texas sequestration procedure provided by the amended statute meets the *Mitchell* test as applied in *Garcia*. The statute provides that the application for the issuance of the writ shall set forth specific facts stating the nature of the plaintiff's claim, the amount in controversy, if any, and the facts justifying the issuance.²¹ The *Garcia* court, in interpreting the *Mitchell* decision, stated that the specific facts must be directed at the reason the applicant fears the destruction or removal of the property.²² The Texas statute also provides that the writ may be issued where there is an "immediate danger" that the defendant or party in possession will conceal, waste, or destroy such property.²³

15. *Id.* at —, 95 S. Ct. at 722, 42 L. Ed. 2d 756-57. The Court relied on both *Fuentes* and *Mitchell* in reaching its decision but it was evident from the language of the opinion that *Fuentes* was being resurrected. Justice Stewart noted in a brief concurring opinion: "It is gratifying to note that my report on the demise of *Fuentes v. Shevin* seems to have been greatly exaggerated." *Id.* at —, 95 S. Ct. at 723, 42 L. Ed. 2d at 758.

16. 380 F. Supp. 1254 (S.D. Tex. 1974).

17. *Id.* at 1258-59.

18. *Id.* at 1258. The court admitted that TEX. R. CIV. P. 696 requires that the applicant for the writ must state specific facts as to his interest in the property, and must also include a description of such property. None of those facts, however, needed to include why the applicant feared the destruction or removal of the property. *Id.* at 1258.

19. *Id.* at 1258; Tex. Laws 1887, ch. 44, § 1, at 30-31. While it is true that Louisiana law generally provides that court clerks may issue writs of sequestration this was not the case in *Mitchell* since only the validity of the procedure in Orleans Parish was in issue. That procedure clearly requires judicial authority for issuance of the writ. LA. CODE CIV. PROC. ANN. art. 281 (1961).

20. *Garcia v. Krausse*, 380 F. Supp. 1254, 1259 (S.D. Tex. 1974), where the court also stated that the replevy bond provided by TEX. R. CIV. P. 701 was not comparable to an immediate hearing. See *Fuentes v. Shevin*, 407 U.S. 67, 83 (1972).

21. Tex. Laws 1975, ch. 470, § 2, at 1247.

22. *Garcia v. Krausse*, 380 F. Supp. 1254, 1258 (1974). This is essentially the same language as the Louisiana statute discussed in *Mitchell*. LA. CODE CIV. PROC. ANN. art. 3571 (1961); Tex. Laws 1975, ch. 470, § 1(b), at 1246-47.

23. Tex. Laws 1975, ch. 470, § 1(a), at 1246. As stated in *Mitchell*: "[J]udicial control . . . is one of the measures adopted by the state to minimize the risk that the *ex parte* procedure will lead to a wrongful taking." *Mitchell v. W.T. Grant Co.*, 416

Most important in regard to due process, the statute provides the opportunity for the debtor to have an immediate hearing on the validity of the writ after he has filed a motion to dissolve it.²⁴ The court in *Garcia* found that previous Texas law did not provide for an immediate hearing on the merits of the case.²⁵ While the statute makes no mention of an immediate hearing, it does provide that the hearing shall be held, and the issue determined not later than 10 days after the motion to dissolve is filed.²⁶ Practically speaking, this statute operates in an expedient manner for both creditor and debtor thereby protecting the interests of both parties.

In order to obtain a proper writ of sequestration for his client, the Texas practitioner should be aware of the grounds required for the issuance of such a writ. A person may obtain a writ of sequestration where he sues for, (1) title or possession of real or personal property, (2) any property from which he has been ejected by force or violence, (3) foreclosure of a mortgage, (4) a partition of real property, or (5) title to real property where the defendant is a non-resident.²⁷ If the grounds for the issuance of the writ of sequestration are met, the practitioner should then make application for the writ and post the necessary security bond.²⁸ Caution should be exercised, however, in making the specific factual allegations required for the issuance of the writ, for the creditor must prove such allegations should a hearing ever arise.²⁹

On the other hand, the attorney representing a debtor should be cognizant of certain new procedures to insure proper compliance. Upon being served with the writ, the defendant has several choices. First, he may seek to regain the property via a replevin bond which requires that an "amount not less than double the value of the property to be replevied" must be made payable to the plaintiff.³⁰ Second, the defendant may file a motion to dissolve the writ of sequestration, without filing a replevin bond, whereupon all proceedings under the writ are stayed until a hearing commences.³¹ Third, the defendant may file a motion to dissolve the writ *and* seek the

U.S. 600, 616-17 (1974). The statute also requires that judges of the district and county courts and justices of the peace shall issue writs of sequestration which meet the *Mitchell* requirements. Tex. Laws 1975, ch. 470, § 1(a), at 1246.

24. Tex. Laws 1975, ch. 470, § 3(b), at 1247.

25. *Garcia v. Krausse*, 380 F. Supp. 1254, 1259 (S.D. Tex. 1974).

26. Tex. Laws 1975, ch. 470, § 3(b), at 1247.

27. Tex. Laws 1975, ch. 470, § 1(b-e), at 1246-47. These grounds for issuance of the writ are essentially the same as those required by prior law with one exception; the remedy for divorce actions has been deleted. The only remedy needed for divorce cases is a writ of injunction which, in effect, would maintain the status quo in the property. *Hearings on H.B. 46 Before the House Judiciary Comm.*, Tex. 64th Legis. Sess. (1975).

28. Tex. Laws 1975, ch. 470, § 3(b), at 1247.

29. TEX. R. CIV. P. 698. The statute also requires that the application for the writ be made under oath. Tex. Laws 1975, ch. 470, § 2, at 1247.

30. TEX. R. CIV. P. 701.

31. Tex. Laws 1975, ch. 470, § 3(a), at 1247.

replevin remedy since the statute specifically provides that a motion to dissolve the writ is in addition to the right of replevin.³² Thus, the defendant must take the initiative before being allowed a hearing. In effect, the motion to dissolve stays all proceedings under the writ but if the defendant does not file a replevin bond, the property remains in the sheriff's possession until the issue of ownership is determined at the hearing.³³ Therefore, the defendant who fails to make the bond is deprived of his property for not more than 10 days until the issue is determined at the hearing.³⁴

If the writ is dissolved at the hearing, the defendant should be aware that an action for damages for wrongful issuance of the writ must be in the form of a compulsory counterclaim,³⁵ and if the defendant has had consumer goods wrongfully taken, the statute contains a liquidated damages provision.³⁶ It is further provided that the writ shall contain the following statement:

YOU HAVE A RIGHT TO REGAIN POSSESSION OF THE PROPERTY BY FILING A 'REPLEVY' BOND. YOU HAVE A RIGHT TO SEEK TO REGAIN POSSESSION OF THE PROPERTY BY FILING WITH THE COURT A MOTION TO DISSOLVE THIS WRIT.³⁷

Although conflict still exists between *Fuentes* and *Mitchell*, the amended statute definitely meets the *Mitchell* requirements of due process.³⁸ Nevertheless, there are problems which the Act leaves unanswered. The *Garcia* decision found that prior Texas sequestration law and the applicable rules of civil procedure were violative of due process under the *Mitchell* test. Although Texas courts are not bound by the federal district court decision in *Garcia*, the question is nevertheless raised as to whether new procedural rules, if any, are needed to harmonize with the statute.

Rules 696 through 716 of the Texas Rules of Civil Procedure deal with sequestration; these should be consulted in conjunction with the statute by Texas practitioners who are involved in sequestration proceedings. Of these

32. Tex. Laws 1975, ch. 470, § 3(e), at 1247.

33. TEX. R. CIV. P. 699.

34. Tex. Laws 1975, ch. 470, § 3(e), at 1247 states that: "A hearing on the motion to dissolve the writ shall be held and the issue determined not later than 10 days after the motion to dissolve is filed . . ." The Louisiana statute upheld in *Mitchell* was not this specific. It merely stated that defendant "may obtain the dissolution of a writ . . . of sequestration." LA. CODE CIV. PROC. ANN. art. 3506 (1961).

35. Tex. Laws 1975, ch. 470, § 3(c), at 1247. The statute also provides that attorneys' fees may also be claimed. *Id.* § 3(d), at 1247.

36. *Id.* § 3(d), at 1247.

37. *Id.* § 4, at 1248.

38. The statute does not pass the *Fuentes* pre-seizure hearing requirement, although an argument could be made that the statute should be measured under the "extraordinary situations" of *Sniadach* and *Fuentes*. See *Southwestern Warehouse Corp. v. Wee Tote, Inc.*, 504 S.W.2d 592, 594 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ). In any case, *Mitchell* would surely be the judicial guideline for the statute since it is almost identical to the Louisiana procedure dealt with in *Mitchell*.

20 rules only one conflicts with the statute, and another, while clearly congruent with the Act is mentioned for the reason that it was specifically challenged in the *Garcia* decision. The Supreme Court of Texas should amend rule 696 for contextual reasons since it requires the individual seeking issuance of the writ to state one or more of the causes named in the prior statute.³⁹ The article number and date of the new statute must be substituted in this clause to bring it up to date with the new law. Rule 701 provides that the defendant may replevy the property in question by posting a bond not less than double the value of the property.⁴⁰ The plaintiff in *Garcia* claimed that such a scheme created two classes of persons: those persons who are financially capable of posting bond so that they might retain possession of their property, and those who are not financially capable of posting a bond in amount double the value of the property sequestered.⁴¹ Thus, the plaintiff contended the rule violated equal protection. However, the court in *Garcia* did not deal with this equal protection issue since the previous Texas law and the applicable rules of civil procedure were held unconstitutional on due process grounds. Although *Garcia* was the first case in which rule 701 was argued to be violative of equal protection, one Texas case has upheld rule 701 on other grounds.⁴² While *Mitchell* does not deal with equal protection *per se*, there is language in that case which would also counter any future equal protection arguments.⁴³ The Court said that the buyer could regain his property by presenting a bond to protect the seller, but that the buyer, unlike the seller, was not required to make the seller whole, if his possession before the hearing was wrongful.⁴⁴ The Court's insistence on the rights of both parties would seem to negate any claim that rule 701 violated equal protection.

Rule 696 is the only rule that is inconsistent with the amended statute. The remaining rules, including rule 701, do not conflict with the language of the statute nor do they contain any unconstitutional procedures. It is doubtful that the Texas Supreme Court will have to promulgate new rules of procedure regarding sequestration, with the exception of rule 696.

The purpose of the statute is simply an attempt to keep the remedy of sequestration within Texas law. The legislature was faced with severe

39. TEX. R. CIV. P. 696(d) provides in part: "It shall set forth one or more of the causes named in art. 6840 . . . 1925"

40. TEX. R. CIV. P. 701.

41. *Garcia v. Krausse*, 380 F. Supp. 1254, 1255 (S.D. Tex. 1974).

42. *International Harvester Credit Corp. v. Rhoades*, 363 S.W.2d 397, 400 (Tex. Civ. App.—Austin 1962, no writ). The court in upholding the double-bond requirement of rule 701, simply stated that the rule was an "adequate remedy at law." *Id.* at 400.

43. This issue was not raised in *Mitchell* probably for the reason that the Louisiana replevin bond was less of an economic burden on the debtor. There, the debtor's bond necessary to repossess the property needed only to exceed by one-fourth, the value of the property. LA. CODE CIV. PROC. ANN. art. 3508 (1961).

44. *Mitchell v. W.T. Grant Co.*, 416 U.S. 600, 618 (1974).

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drafting problems due to the questionable state of the *Fuentes* and *Mitchell* decisions. It is clear that *Fuentes* is still viable in Texas since the “extraordinary situations” test was used in declaring the Texas garnishment statute unconstitutional.⁴⁵ The statute’s similarity to the Louisiana procedure that was held to be constitutional in *Mitchell* leaves little room for doubt that Texas sequestration law is constitutional insofar as it meets present constitutional requirements for due process of law.

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45. *Southwestern Warehouse Corp. v. Wee Tote, Inc.*, 504 S.W.2d 592, 594 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ).