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Constitutional Law—Writ of Execution Statutes Held Unconstitutional—Has the Due Process Notice Requirement Left Creditors out in the Cold? Duhon v. Gravett, 302 Ark. 358, 790 S.W.2d 155 (1990).

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CONSTITUTIONAL LAW—WRIT OF EXECUTION STATUTES HELD UNCONSTITUTIONAL—HAS THE DUE PROCESS NOTICE REQUIREMENT LEFT CREDITORS OUT IN THE COLD? *Duhon v. Gravett*, 302 Ark. 358, 790 S.W.2d 155 (1990).*

The right to notice mandated by the due process clause of the fourteenth amendment[1] has prompted courts to look closely at various state statutes that aid creditors in collecting judgments. Courts have declared several of these statutes, including prejudgment and postjudgment garnishment and postjudgment execution statutes, unconstitutional because they do not require notice of possible state and federal exemptions and an opportunity for a hearing to claim the exemptions.[2]

Brigiette Duhon engaged Firestone Tire and Rubber Company to perform repair work on her car. After paying Firestone for the work performed, Duhon stopped payment on her check.[3] On July 5, 1988, Firestone obtained a default judgment against Duhon for nonpayment of her account. On August 5, 1988, Firestone obtained a writ of execution[4] against Duhon and delivered the writ to Pulaski County Sheriff Carroll Gravett. A deputy sheriff went to Duhon's residence on September 19, 1988, to execute upon the writ. The deputy told Duhon that she could pay the judgment and receive her property back before the

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1. U.S. CONST. amend. XIV, § 1 states:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Id.

2. *E.g.*, North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); Fuentes v. Shevin, 407 U.S. 67 (1972); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969); Dionne v. Bouley, 757 F.2d 1344 (1st Cir. 1985); Finberg v. Sullivan, 634 F.2d 50 (3d Cir. 1980); Davis v. Paschall, 640 F. Supp. 198 (E.D. Ark. 1986); Deary v. Guardian Loan Co., 534 F. Supp. 1178 (S.D.N.Y. 1982); Betts v. Tom, 431 F. Supp. 1369 (D. Haw. 1977); McCrory v. Johnson, 296 Ark. 231, 755 S.W.2d 566 (1988).

3. A dispute arose between Duhon and Firestone over whether Firestone had correctly fixed her car. Appendix to Brief for Appellant at 2, Duhon v. Gravett, 302 Ark. 358, 790 S.W.2d 155 (1990) (No. 89-271).

4. 302 Ark. at 358-59, 790 S.W.2d at 155. See ARK. CODE ANN. §§ 16-66-101 to -507 (1987) which provides: "An execution may issue on any final judgment order of a court of record, in personam, for a liquidated sum of money and for interest and costs, or for costs alone."

sale by the sheriff's department.[5]

Duhon paid the outstanding balance due Firestone on September 28, 1988, and received her property from the sheriff's department.[6] On October 12, 1988, Duhon sued Firestone and the sheriff's department for damages and declaratory relief.[7] Duhon alleged that Arkansas' postjudgment execution laws violated the due process clause of the fourteenth amendment[8] by not providing written notice to judgment debtors of federal and state exemptions.[9]

Having settled her claim with Firestone, Duhon amended her complaint to release Firestone as a defendant but maintained her constitutional claim against the sheriff's department.[10] The trial court ruled that Arkansas' writ of execution statutes did not violate due process requirements.[11] Duhon appealed to the Arkansas Supreme Court.[12]

On appeal, the Arkansas Attorney General stated that Duhon rendered her constitutional claim moot because she had received her property after paying the judgment owed to Firestone.[13] The Attorney General argued that Duhon was not harmed, even though she did not

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5. 302 Ark. at 358-59, 790 S.W.2d at 155. See ARK. CODE ANN. § 16-66-501 (1987) which provides:

> The sheriff shall give the purchaser of any real property, sold upon execution, a certificate of sale, in which the property sold shall be described, and the price for which it is sold stated. The certificate shall be evidence of the purchase at the price stated, and the officer shall return a duplicate thereof with the execution. No conveyance shall be made to the purchaser, nor the possession delivered to him, until the time for redeeming has expired. If the property is redeemed by the defendant, as provided in this subchapter, the sale and certificate of purchase shall be null and void.

6. Brief for Appellant at 5, Duhon v. Gravett, 302 Ark. 358, 790 S.W.2d 155 (1990) (No. 89-271).

7. *Id.* at 6.

8. 302 Ark. at 358-59, 790 S.W.2d at 155.

9. *Id. See also* ARK. CODE ANN. §§ 16-66-205 to -220 (1987). Arkansas provides that certain property is exempt from seizure based on the provisions of the Arkansas Constitution, article 9. Article 9 provides that single individuals can exempt from execution personal property not exceeding $200 in value. The exemption increases to $500 for married couples or heads of households. These exemptions allow a judgment debtor to select what personal property is exempt from execution, such as clothes, furniture, and other personal belongings. However, the value of any property in excess of the above limits is not exempt from levy.

With regard to garnishment of wages, federal law generally exempts 75% of a debtor's weekly take home pay from garnishment. 15 U.S.C. § 1673 (1982).

10. Brief for Appellant at 6, Duhon v. Gravett, 302 Ark. 358, 790 S.W.2d 155 (1990) (No. 89-271).

11. 302 Ark. at 359, 790 S.W.2d at 155.

12. Duhon v. Gravett, 302 Ark. 358, 790 S.W.2d 155 (1990).

13. *Id.* at 358, 790 S.W.2d at 156.

receive written notice prior to the seizure of her property.[14] The court noted that the issue was moot but elected to hear the case anyway because the issue was of public interest and a decision on the constitutionality of the statutes could prevent similar lawsuits in the future.[15] The Arkansas Supreme Court held Arkansas' writ of execution laws unconstitutional because the statutes do not provide for written notice to debtors that certain federal and state exemptions are available. *Duhon v. Gravett*, 302 Ark. 358, 790 S.W.2d 155 (1990).

A fundamental right provided by the fourteenth amendment[16] is the guarantee of due process whenever the federal or state government's power is used to deprive an individual of life, liberty, or property.[17] Due process requires the use of fair procedures before any deprivation can occur.[18] The fair procedures required depend upon the type of deprivation that occurs.[19]

In *Endicott Johnson Corp. v. Encyclopedia Press, Inc.*[20] the United States Supreme Court initially decided that a judgment debtor was not entitled to notice before his wages could be garnished.[21] The Court reasoned that once a debtor had an opportunity to be heard and judgment is rendered against him, the judgment debtor takes notice that a judgment creditor will use whatever means available in collecting the judgment.[22]

Forty-five years after *Endicott*, the Court had occasion to rethink the due process requirements for wage garnishment in *Sniadach v. Family Finance Corp.*[23] The Court examined Wisconsin's prejudgment garnishment procedures and held that notice and an opportunity to be heard must be provided before garnishing a debtor's wages.[24] The Court noted that wages are a distinct property item in our modern economic system and that fair procedures under the feudal regime are not

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14. *Id.*

15. *Id.* at 360, 790 S.W.2d at 156.

16. U.S. CONST. amend. XIV, § 1. See *supra* note 1 and accompanying text.

17. J. NOWAK, R. ROTUNDA, & J. YOUNG, CONSTITUTIONAL LAW 527 (2d ed. 1983).

18. *Id.*

19. *Id.*

20. 266 U.S. 285 (1924).

21. *Id.*

22. *Id.* at 288. For a discussion of this case, see Dunham, *Postjudgment Seizures: Does Due Process Require Notice and Hearing?*, 21 S.D.L. REV. 78, 79 (1976).

23. 395 U.S. 337 (1969).

24. *Id.* at 340, 342. The Court observed that the garnishing of wages before a judgment was rendered could impose a serious hardship on the debtor and his family. *Id.* at 340.

always fair in our modern society.[25]

Following the reasoning in *Sniadach*, the United States Supreme Court extended the notice and hearing requirements to consumer goods in *Fuentes v. Shevin*.[26] The Court held that Florida's prejudgment seizure statutes[27] provided for a deprivation of property, even though only temporary.[28] The Court went on to say that the deprivation of consumer goods in *Fuentes* was no different than the deprivation of wages in *Sniadach*. Thus, to withstand constitutional scrutiny, prejudgment seizure statutes must require notice and a hearing for the debtor.[29]

The next prejudgment garnishment case decided by the United States Supreme Court was *Mitchell v. W. T. Grant Co.*[30] In *Mitchell* the Court upheld Louisiana's sequestration procedure[31] even though the procedure did not require notice or a hearing before deprivation occurred.[32] The Court noted that Louisiana had other procedures intact that would allow an immediate hearing upon seizure of a debtor's property to minimize the risk of a wrongful deprivation.[33] The Court concluded that these procedures would protect the debtor's rights to due process.[34]

Relying on its earlier decisions, the Supreme Court invalidated Georgia's prejudgment garnishment statutes[35] in *North Georgia Finishing, Inc. v. Di-Chem, Inc.*[36] The Court relied heavily upon *Fuentes*

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25. *Id.* at 340. *See also* Dunham, *supra* note 22, at 95; Note, *Constitutional Law—Due Process—Garnishment Procedures Must Provide for Notice to Postjudgment Debtor*, 9 U. ARK. LITTLE ROCK L.J. 517, 518-19 (1987).

26. 407 U.S. 67 (1972).

27. FLA. STAT. ANN. §§ 78.01 to .13 (West Supp. 1972-73).

28. 407 U.S. at 84-85.

29. *Id.* at 85.

30. 416 U.S. 600 (1974).

31. LA. CODE CIV. PROC. ANN. art. 3571 (West 1961 & Supp. 1990).

32. 416 U.S. at 610, 620. Louisiana provides that the debtor can seek immediate dissolution of the writ unless the creditor can prove the basis for his claim, such as the underlying debt, lien, and delinquency. If the creditor fails to do this, the debtor can receive his property back along with damages and attorney's fees. *Id.* at 606.

33. *Id.* at 618. The other procedures intact included a requirement that the creditor appear before a judge and make a clear showing from the facts that a writ is proper. The judge shall not issue the writ until after the creditor obtains a bond sufficient to protect the debtor in the event the sequestration is improper. In addition, the debtor can immediately challenge the writ, which will be extinguished unless the creditor proves the basis for the writ. *Id.* at 605-06.

34. *Id.* at 619.

35. GA. CODE ANN. §§ 46-101 to -401 (1974) (current version as amended at §§ 18-4-1 to -118 (1982 & Supp. 1990)).

36. 419 U.S. 601 (1975).

to extend the prejudgment garnishment due process notice and hearing requirement to any type of property deprivation, including wage garnishments.[37] The Court noted that *Mitchell* provided no support for the Georgia statute because the statute did not have other safeguards in place to insure adherence to due process.[38]

In *Mathews v. Eldridge*[39] the Supreme Court realized that some kind of mechanism for a flexible approach to due process was required[40] and proceeded to formulate a balancing test to determine whether adequate due process exists.[41] The challenged procedure in *Mathews* was the Social Security Administration's termination of disability payments without a prior evidentiary hearing.[42] In reviewing its prior decisions in *Sniadach, Fuentes*, and *North Georgia Finishing*, the Court said that due process is not a rigid set of rules, but " 'is flexible and calls for such procedural protections as the particular situation demands.' "[43] Accordingly, the Court established a three-part test that considers the interest of the individual being deprived, the risk of an improper deprivation, and the interest of the government.[44] Based on this three-part test, the Court determined that a prior evidentiary hearing is not required to terminate benefits because the existing administrative procedures adequately provide for due process.[45]

Mathews is the cornerstone of procedural due process cases during the last decade.[46] In *Betts v. Tom*[47] the United States District Court

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37. *Id.* at 608. "We are no more inclined now than we have been in the past to distinguish among different kinds of property in applying the Due Process Clause." *Id.*

38. *Id.* at 606-07.

39. 424 U.S. 319 (1976). For an in-depth analysis of this case see Note, *Mathews v. Eldridge Reviewed: A Fair Test on Balance*, 67 GEO. L.J. 1407 (1979).

40. 424 U.S. at 335.

41. *Id.*

42. *Id.* at 333.

43. *Id.* at 334 (quoting Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

44. *Id.* at 335.

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id.

45. *Id.* at 349. For a further discussion of this case and its relation to prejudgment deprivation, see Note, *Constitutional Law—Due Process—Garnishment Procedures Must Provide for Notice to Postjudgment Debtor*, 9 U. ARK. LITTLE ROCK L.J. 517, 521-22 (1987).

46. *E.g.*, Dionne v. Bouley, 757 F.2d 1344 (1st Cir. 1985); Finberg v. Sullivan, 634 F.2d 50

for the District of Hawaii used the *Mathews* test to declare Hawaii's postjudgment garnishment procedures[48] unconstitutional with regard to exempt property. In *Betts* the exempt funds were welfare payments enabling the recipient to purchase the basic necessities of life, such as food and shelter.[49] Even though the debtor recovered the exempt funds, the court applied the *Mathews* balancing test in favor of the judgment debtor. The court decided that any erroneous deprivation could cause a hardship on the welfare recipient.[50] The court concluded that requiring notice and a prior hearing would not place an undue burden on the state when compared to the potential hardships the debtor could experience from an erroneous deprivation.[51]

In *Finberg v. Sullivan*[52] the United States Court of Appeals for the Third Circuit reviewed Pennsylvania's postjudgment garnishment statutes under the *Mathews* balancing test. The court considered whether a creditor could garnish exempt social security funds of a debtor without notice or a prior hearing.[53] The court initially looked at the holding in *Endicott*, which did not require notice before garnishment of wages could occur, but quickly distinguished the case. The Supreme Court in *Endicott* "did not consider the possibility that the garnishment might deprive the judgment debtor of exempt property, which is critical to this case."[54] Next the court examined the holdings in the prejudgment garnishment cases[55] and concluded that those holdings would govern the due process issue in *Finberg*.[56] In considering the in-

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(3d Cir. 1980); Davis v. Paschall, 640 F. Supp. 198 (E.D. Ark. 1986); Deary v. Guardian Loan Co., 534 F. Supp. 1178 (S.D.N.Y. 1982); Betts v. Tom, 431 F. Supp. 1369 (D. Haw. 1977); McCrory v. Johnson, 296 Ark. 231, 755 S.W.2d 566 (1988). See Note, *supra* note 39.

47. 431 F. Supp. 1369 (D. Haw. 1977). In this case, Betts' bank account, which consisted of AFDC grant funds exempt from garnishment under Hawaii law, was garnished after a judgment was rendered against her. Although Betts received her funds back after four weeks, she argued that the postjudgment execution laws were unconstitutional because they did not provide for notice and a hearing to determine whether any of the funds were exempt from seizure. *Id.*

48. HAW. REV. STAT. § 652-1(a) to (b) (Supp. 1975).

49. 431 F. Supp. at 1376. The court stated, "By definition, the AFDC recipient needs the grant in order to survive." *Id.*

50. *Id. See also* Note, *supra* note 45, at 525.

51. 431 F. Supp. at 1378. *See also* Note, *Due Process, Postjudgment Garnishment, and "Brutal Need" Exemptions*, 1982 DUKE L.J. 192, 204-05 (1982).

52. 634 F.2d 50 (3d Cir. 1980). *See also* Note, *supra* note 51, at 192-94.

53. 634 F.2d at 52.

54. *Id.* at 56-57.

55. *Id.* at 57. The cases in question are *Sniadach, Fuentes, Mitchell*, and *North Georgia Finishing, Inc.* which were discussed previously in the text.

56. *Id.* at 58. The court noted that notice and a prior hearing were not necessary if other protective procedures were in place to prevent erroneous seizures. *Id.*

terest of the debtor, the court noted that the purpose of exempting social security benefits from garnishment is to provide the debtor with funds to purchase the necessities of life.[57] The court believed that existence of the exemptions was not widely known and stated that providing notice to judgment debtors would not place a significant burden on the state.[58] Thus, the court found Pennsylvania's law violated the Constitution.[59]

Similarly, the United States District Court for the Southern District of New York invalidated New York's postjudgment execution laws in *Deary v. Guardian Loan Co.*[60] As in *Finberg*, the judgment debtors claimed that seizure of their property without notice of possible exemptions violated due process.[61] The court determined that the postjudgment creditors had a substantial interest in collecting their judgments.[62] The court concluded, however, that the debtor's interest in claiming allowable exemptions and the risk of erroneous deprivations outweighed the interest of the creditors.[63] Furthermore, requiring notice to the judgment debtors before the seizure would not cause any major delay or expense to the creditors.[64]

In *Dionne v. Bouley*[65] the First Circuit held Rhode Island's postjudgment attachment procedures to be unconstitutional. The court found that Rhode Island's postjudgment attachment laws[66] did not provide the debtor with notice or an opportunity to be heard.[67] With regard to its conflicting pronouncement in *Endicott*,[68] the court stated, "[W]e believe this expansive language is no longer the law given the more recent Supreme Court precedent in the area of property seque-

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57. *Id.* at 62.

58. *Id.*

59. *Id.*

60. 534 F. Supp. 1178 (S.D.N.Y. 1982).

61. *Id.* at 1180. The debtors in this case received supplementary security income and social security benefits which were seized under New York's execution statutes without notice to the debtors. *Id.* at 1182.

62. *Id.* at 1186.

63. *Id.* at 1187.

64. *Id.*

65. 757 F.2d 1344 (1st Cir. 1985). This case involved the postjudgment attachment of the debtor's checking account which contained mostly social security benefits exempt from attachment. *Id.* at 1346.

66. The writ of attachment provision cited by the court is R.I. GEN. LAWS § 10-5-2 (1969 Reenactment) (Supp. 1984). *Id.* at 1346.

67. 757 F.2d at 1350.

68. For a discussion of *Endicott*, see *supra* notes 20-22 and accompanying text.

strations and due process."[69] Thus, the First Circuit adopted the balancing approach used in *Mathews*.[70]

The development of due process with regard to prejudgment and postjudgment executions in Arkansas is similar to its development at the federal level. In *Wade v. Deniston*,[71] an early case concerning the notice requirement, a judgment creditor obtained a writ of execution in accordance with Arkansas law.[72] The creditor seized and sold the property without any notice to the debtor.[73] On appeal, the Arkansas Supreme Court noted that the statutes[74] contemplated notice to the debtor, even though it was not specifically spelled out. The court ordered the execution sale set aside.[75]

The next major case involving notice to debtors decided by the Arkansas Supreme Court was *Springdale Farms, Inc. v. McIlroy Bank & Trust*,[76] which examined the validity of Arkansas' prejudgment attachment statutes.[77] The court considered United States Supreme Court precedent[78] and applied a due process analysis similar to that of *Mitchell*.[79] The court decided that although notice was not provided to the judgment debtor, other procedural safeguards existed to protect the debtor's due process rights.[80]

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69. 757 F.2d at 1351.

70. *Id.* at 1352.

71. 180 Ark. 326, 21 S.W.2d 424 (1929).

72. *Id.* at 327, 21 S.W.2d at 425. See C. & M. DIG. ch. 59 § 4253 (1921), for the statute under which the execution occurred.

73. 180 Ark. at 327, 21 S.W.2d at 425.

74. *Id.* at 328, 21 S.W.2d at 425. See C. & M. DIG. ch. 59 § 4277 (1921), for the statute which the court said contemplates notice to the debtor.

75. 180 Ark. at 328, 21 S.W.2d at 425.

76. 281 Ark. 371, 663 S.W.2d 936 (1984). Here the judgment debtor did not bring the suit. A postjudgment garnishment creditor, who wanted to set aside a prejudgment attachment of the debtor's property, challenged the prejudgment attachment laws. *Id.* at 372, 663 S.W.2d at 937.

77. ARK. STAT. ANN. § 31-101 (1962) (Current version at ARK. CODE ANN. §§ 16-110-101 to -309 (1987 & Supp. 1989)).

78. For a discussion of the Supreme Court cases discussing precedent, see *supra* notes 23-38 and accompanying text.

79. 281 Ark. at 374-75, 663 S.W.2d at 938.

80. *Id.* at 376-77, 663 S.W.2d at 939. The court declared:

> There are six general safeguards necessary for a valid prejudgment seizure. They are: 1) the affidavit for the writ of attachment must allege specific facts which justify attachment; 2) the petitioner must post a bond guaranteeing the defendant damages if the writ is dissolved; 3) the respondent or defendant must be allowed to regain possession by posting bond; 4) requisite proof of the need for a writ must be made before a judge; 5) an immediate hearing must be allowed, and at the hearing, the burden of proof is with the petitioner to justify the attachment; and 6) if the writ is dissolved, damages and attorney fees must be awarded to the debtor.

In *Davis v. Paschall*[81] the United States District Court for the Eastern District of Arkansas declared that Arkansas' postjudgment garnishment procedures[82] were unconstitutional.[83] In *Davis* a judgment debtor challenged the postjudgment garnishment procedures alleging that due process was violated because she did not receive notice and a prompt hearing to claim exemptions.[84] Citing *Finberg* and the prejudgment garnishment cases,[85] the court recognized that other courts had begun to extend the prejudgment due process notice and hearing requirement to postjudgment garnishment cases.[86] Likewise, the court found that Arkansas' postgarnishment procedures did not provide for notice or a prompt hearing and, therefore, violated due process.[87]

The Arkansas Supreme Court had a second opportunity to consider the constitutionality of the state's prejudgment attachment statutes in *McCrory v. Johnson*.[88] In *McCrory* a debtor claimed that Arkansas' prejudgment attachment statutes[89] violated due process by not requiring notice of possible exemptions and a prompt hearing to claim the exemptions.[90] The court recalled that four years earlier it had decided *Springdale Farms*, declaring the prejudgment attachment statutes constitutional.[91] However, the court observed that *Springdale Farms* did not follow the *Mathews* balancing approach.[92] The court analyzed the prejudgment attachment statutes under *Mathews* and decided that the statutes were unconstitutional because they did not provide for notice to the debtor or the right to a prompt hearing to claim

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Id. at 374-75, 663 S.W.2d at 938.

81. 640 F. Supp. 198 (E.D. Ark. 1986). For a discussion of this case, see Note, *supra* note 45.

82. ARK. STAT. ANN. §§ 31-501 to -521 (1962) (Current version as amended at ARK. CODE ANN. §§ 16-110-401 to -415 (1987 & Supp. 1989)).

83. 640 F. Supp. at 203.

84. *Id.* at 200.

85. For a discussion of *Finberg*, see *supra* notes 52-59 and accompanying text.

86. 640 F. Supp. at 201.

87. *Id.* at 203.

88. 296 Ark. 231, 755 S.W.2d 566 (1988).

89. ARK. CODE ANN. §§ 16-110-101 to -309 (1987).

90. 296 Ark. at 234, 755 S.W.2d at 567. When the debtor failed to pay the rent as due under the lease agreement, the landlord notified her to either pay or move. The debtor did not respond to these notices. Thereupon, the landlord removed the debtor's personal property and filed for a writ of attachment, which was granted. *Id.* at 233-34, 755 S.W.2d at 567.

91. *Id.* at 236, 755 S.W.2d at 569. The court noted that its previous decision declared that the statutes "met six procedural due process 'safeguards' necessary for a valid prejudgment attachment." *Id.* For a discussion of the safeguards, see *supra* note 80.

92. 296 Ark. at 238, 755 S.W.2d at 569.

the exemptions.[93] The court concluded by expressly overruling *Springdale Farms*.[94]

The due process sword having already laid waste to Arkansas' prejudgment attachment and postjudgment garnishment statutes, Arkansas' postjudgment execution laws' days were numbered.[95] *Duhon v. Gravett*[96] placed this issue squarely before the Arkansas Supreme Court. The court stated that the three-part balancing test of *Mathews* would control.[97]

In reviewing the writ of execution statutes,[98] the court said that the "statutes provide for procedures, including provisions for hearings, whereby a judgment debtor may claim all exemptions to which he or she is entitled by law."[99] The court emphasized that the hearing procedures are adequate to meet the requirements of due process.[100]

Turning to the issue of notice, the court cited *Wade*, and concluded that the common law of Arkansas contemplates that notice be provided to the judgment debtor at the time of seizure.[101] However, the court said that the express language of the statutes does not require that notice be given to the debtor.[102] This lack of express notice was the defeating blow that rendered the statutes "constitutionally deficient."[103]

The significance of *Duhon* will be both profound and short-lived. The immediate effect is to cease all executions in Arkansas under the writ of execution statutes. As long as the statutes remain constitutionally deficient, creditors lack the means to collect from judgment debtors. Similarly, in 1986 when the Arkansas Supreme Court declared the postjudgment garnishment statutes unconstitutional, all garnishments

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93. *Id.* at 240-41, 755 S.W.2d at 571. The court also stated, "Our postjudgment garnishment code provisions now require that a debtor be given notice of possible state or federal exemptions." *Id.* at 239, 755 S.W.2d at 570. *See* ARK. CODE ANN. § 16-110-402(1)(A) (Supp. 1988).

94. 296 Ark. at 242, 755 S.W.2d at 572.

95. The court had already decided *Davis* and *McCrory* wherein it had declared unconstitutional Arkansas' postjudgment garnishment statutes and its prejudgment attachment laws. 302 Ark. 358, 360, 790 S.W.2d 155, 156. For a discussion of *Davis*, see *supra* notes 81-87 and accompanying text. For a discussion of *McCrory*, see *supra* notes 88-94 and accompanying text.

96. 302 Ark. 358, 790 S.W.2d 155 (1990).

97. *Id.* at 360, 790 S.W.2d at 156 (citing Dionne v. Bouley, 757 F.2d 1344 (1st Cir. 1985)). For a discussion of the three-part test, see *supra* note 44.

98. ARK. CODE ANN. §§ 16-66-211 to -218 and 16-66-301 to -304 (1987).

99. 302 Ark. at 361, 790 S.W.2d at 157.

100. *Id.*

101. *Id.* See *supra* note 71 and accompanying text.

102. 302 Ark. at 361, 790 S.W.2d at 157.

103. *Id.* at 362, 790 S.W.2d at 157.

ceased.[104] The Arkansas Legislature subsequently amended the garnishment statutes to provide notice to the judgment debtor before garnishment.[105] A simple amendment to the writ of execution statutes will cure the constitutional deficiency.[106] However, until the legislature passes the amendment to the writ of execution statutes, creditors cannot seize a judgment debtor's property in satisfaction of the judgment.

The necessity of a legislative cure for the deficient statutes was reinforced by the decision of Chancery Judge John Ward in *Marks v.*

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104. *See* Note, *supra* note 45, at 528. However, Judge Overton issued an Amended Consent Judgment that provided for a temporary procedure for issuing writs of garnishment to prevent unfairness to creditors. *Id.* at 528-29.

105. ARK. CODE ANN. § 16-110-402(1)(A) (Supp. 1989).

106. The writer suggests that the following notice provision, similar to ARK. CODE ANN. § 16-110-402(1)(A) (Supp. 1989), would provide adequate notice to judgment debtors:

The following procedure shall be followed in issuing writs of execution:

(1)(A) NOTICE TO DEFENDANT. Upon application for a writ of execution by any qualified creditor, the clerk of the court shall attach to said writ the following "Notice to Defendant":

NOTICE TO DEFENDANT OF YOUR RIGHT TO KEEP WAGES, MONEY, AND OTHER PROPERTY FROM THE LEVY BASED ON STATUTORY OR CONSTITUTIONAL EXEMPTIONS THAT MAY BE AVAILABLE WITH RESPECT TO YOUR PROPERTY

The Writ of Execution delivered to you with this Notice means that wages, money, or other property belonging to you can be levied against to pay a court judgment against you.

HOWEVER, YOU MAY BE ENTITLED TO CLAIM CERTAIN FEDERAL AND STATE STATUTORY OR CONSTITUTIONAL EXEMPTIONS THAT MAY KEEP YOUR MONEY OR PROPERTY FROM BEING TAKEN, SO READ THIS NOTICE CAREFULLY.

State and federal laws say that certain money and property may not be taken to pay certain types of court judgments. Such money or property is said to be 'exempt' from levy.

For example under the Arkansas Constitution and state law, you will be able to claim as exempt all or part of your wages or other personal property.

As another example, under federal law the following are also exempt from levy:

Social Security, SSI, Veteran's benefits, AFDC (welfare), unemployment compensation, and worker's compensation.

You have a right to ask for a court hearing to claim these or other exemptions. If you need legal assistance to help you try to save your wages, money, or other property from being levied, you should see a lawyer. If you can't afford a private lawyer, contact your local bar association or ask the clerk's office about any legal services program in your area.

You also have the right to select what propery shall be sold to satisfy the judgment. However, if sufficient property to satisfy the judgment is not listed, the sheriff may seize additional non-exempt property.

(B) HEARING. Upon receipt of the writ of execution by the judgment debtor, the judgment debtor is entitled to a prompt hearing in which to claim exemptions. Upon filing a claim of exempt property, wages, or money, a hearing will be held within eight (8) working days to determine the validity of the claimed exemptions. No hearing shall be required and a writ of supersedeas shall issue unless the judgment creditor files, within five (5) working days, a statement in writing that the judgment debtor's claim of exemption is contested.

Gravett.[107] After *Duhon* was decided, Pulaski County Sheriff Carroll Gravett, in an attempt to cure the statute through self-help, began providing written notice to judgment debtors that state and federal exemptions were available.[108] After providing the notice to the debtors, Gravett would seize their property under a writ of execution. Meyer Marks challenged Sheriff Gravett's procedure on the grounds that no statutory authority existed to seize property under a writ of execution because *Duhon* declared the execution statutes unconstitutional.[109]

On September 4, 1990, Judge Ward ruled in *Marks v. Gravett* that *Duhon* rendered the writ of execution statutes unconstitutional and, therefore, nonexistent.[110] Judge Ward recognized that the language used by Sheriff Gravett in the notice was proper, but concluded that "the Sheriff has no authority to shore up unconstitutional statutes with curative language."[111] On September 10, 1990, Sheriff Gravett filed a notice of appeal challenging the final order rendered in *Marks*.[112]

The past decisions of the Arkansas Supreme Court indicate that it is unwilling to add language to save an unconstitutional statute.[113] In

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107. No. 90-4943 (Pulaski County, Ark. Ch. Ct. 3d Div. Sept. 4, 1990).

108. The heading of the notice was printed in bold print and read as follows:

NOTICE TO DEFENDANT OF YOUR RIGHT TO CLAIM STATUTORY OR CONSTITUTIONAL EXEMPTIONS THAT MAY BE AVAILABLE WITH RESPECT TO PROPERTY SUBJECT TO THE LEVY.

The body of the notice read as follows:

> State and federal laws say that certain money and property may not be taken to pay certain types of suit judgments. Such property is said to be "exempt".
>
> You have a right to ask for a court hearing to claim these exemptions. If you need a legal assistance to help you try to save your property, you should see a lawyer. If you can't afford a private lawyer, contact your local bar association or ask the clerk's office about any legal services program in your area.
>
> You also have the right to select what property shall be sold to satisfy the judgment. However, if sufficient property to satisfy the judgment is not listed, the sheriff may seize additional property.

A copy of the sheriff's notice was obtained from the court records of *Marks* (No. 90-4943).

109. Complaint at 4, *Marks* (No. 90-4943).

110. Order, *Marks* (No. 90-4943).

111. *Id.* In addition, Judge Ward said the court could sever unconstitutional language from a statute leaving the remainder intact, but the court "cannot approve adding language the statute needs, in order to be constitutional, when that addition comes from a non-legislative source." *Id.*

112. Notice of Appeal, *Marks* (No. 90-4943).

113. In Huffman v. Dawkins, 273 Ark. 520, 622 S.W.2d 159 (1981), the Arkansas Supreme Court was faced with a case involving a statute that had been declared unconstitutional. The court ruled, "We have generally held that when a statute is declared unconstitutional it must be treated as if it had never been passed." *Id.* at 527, 622 S.W.2d at 162. Similarly, in Green v. Carder, 276 Ark. 591, 637 S.W.2d 594 (1982), the Arkansas Supreme Court quoted its language

addition, the court has made it clear that only the legislature can amend an unconstitutional statute.[114] Thus, the supreme court should uphold the chancery court's decision in *Marks*. Of course, if the Arkansas Legislature enacted a new writ of execution statute before the appeal is heard it would render the appeal moot.

The unavailability of postjudgment execution severely limits a creditor's ability to collect money judgments. Creditors can now garnish wages and bank accounts under the reenacted garnishment statutes.[115] Many times though, garnishment provides little or no funds for the creditor after the debtor claims all available state and federal exemptions. Prior to *Duhon*, a creditor's next step was to seize and sell the debtor's property via the writ of execution. However, the writ of execution statutes are unenforceable in Arkansas and, until the Arkansas Legislature enacts a new statute, judgment creditors are left out in the cold.

For the time being, creditors have no choice but to patiently await the enactment of a new collection procedure. In the meantime, they should keep all judgments current and all liens perfected.[116] This will enable a creditor to execute on property once new procedures are enacted.

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in *Huffman*, and said that an unconstitutional statute would be treated as nonexistent. *Id.* at 593-94, 637 S.W.2d at 596.

114. In Weston v. State, 258 Ark. 707, 528 S.W.2d 412 (1975), the Arkansas Supreme Court stated that "[w]hile this Court must strive to uphold the constitutionality of a statute, it may not read words into a statute to save its constitutionality." In addition, "[T]his Court has no authority to legislate or to construe a statute to mean anything other than what it says, if the statute is plain and unambiguous." *Id.* at 713, 528 S.W.2d at 415-16.

115. ARK. CODE ANN. §§ 16-110-401 to -415 (1987 & Supp. 1989).

116. ARK. CODE ANN. § 16-56-114 (1987) provides: "Actions on all judgments and decrees shall be commenced within ten (10) years after cause of action shall accrue, and not afterward." In general, ARK. CODE ANN. § 16-65-117 (Supp. 1989) provides that a judgment shall become a lien on any real estate owned by the defendant in the county in which the judgment was rendered after a certified copy of the judgment is filed in the office of the clerk of the circuit court of that county. In addition, a judgment shall be a lien on real estate owned in other counties after filing a certified copy of the judgment in the office of the clerk of the county in which the land lies. The liens are good for ten (10) years and can be revived.