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Can Georgia Bank on Its Garnishment Laws?*

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COMMENTS

Can Georgia Bank on Its Garnishment Laws?*

Since the late sixties the field of creditors' remedies has undergone a series of changes brought about by several U.S. Supreme Court decisions. Old concepts of protection for the creditor have been changed or modified to recognize procedural due process rights of the debtor. While it is easy to say that there have been changes, it is becoming increasingly more difficult to identify exactly what is required by the courts to satisfy the Due Process Clause of the Fourteenth Amendment.

When the U.S. Supreme Court declared the Georgia prejudgment garnishment statutes unconstitutional in *North Georgia Finishing Co. v. Di-Chem*,[1] the Georgia legislature responded by passing new statutes[2] which were apparently aimed at meeting the due process requirements established by earlier cases.[3] Before this new statute could be tested, a challenge to the old code section as applied to post-judgment garnishment came before the Georgia Supreme Court. *Coursin v. Harper*[4] presented the question of whether post-judgment garnishment required due process protection similar to pre-judgment garnishment. The supreme court answered in the affirmative.

The Georgia Supreme Court held that due process was required in post-judgment garnishment as well as pre-judgment cases.[5] But what proce-

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* After this article was written, the Georgia Supreme Court decided City Finance Co. v. Winston, No. 31483 (Oct. 19, 1976). That case held unconstitutional the 1976 amendments to the Georgia garnishment laws, Ga. Laws, 1976, pp. 1608-29, which made provisions for post-judgment garnishment different from those for pre-judgment garnishment. The 1976 changes were unconstitutional for the same reason the provisions considered in Coursin v. Harper, 236 Ga. 729, 225 S.E.2d 428 (1976), were unconstitutional: There was no provision for notice to the defendant and no judicial supervision initially. It is apparent that any garnishment statute, to be upheld by the Georgia Supreme Court, must meet the standards of North Georgia Finishing Co. v. Di-Chem, 419 U.S. 601 (1975), Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974), and Carey v. Sugar, ___ U.S. ___, 96 S.Ct. 1208 (1976). In *City Finance*, the supreme court said *Coursin* had said that "the 1975 amendment . . . to the garnishment laws supplied the deficiencies in the former law."

1. 419 U.S. 601 (1975).

2. Ga. Laws, 1975, p. 1291.

3. *See* Mitchell v. Grant, 416 U.S. 600 (1974), where the Court approved the Louisiana ex parte pre-judgment sequestration procedure to forestall waste or alienation of property subject to a security interest. Louisiana required judicial supervision of the process and proof of claim and provided for a prompt post-seizure hearing for dissolution of the writ and damages award for wrongful use of the procedure. *See also* Note, 26 MERCER L. REV. 325 (1974).

4. 236 Ga. 729, 225 S.E.2d 428 (1976). The Georgia statutes in effect prior to July 1, 1975, were applicable since the affidavit was made and summons issued on June 30, 1975. *Id.* at 729-30, 225 S.E.2d at 428.

5. *Id.* at 733, 225 S.E.2d at 430.

dures meet due process standards? The question now facing Georgia lawyers is whether the new Georgia Code section[6] dealing with garnishment is constitutionally sufficient.

This comment will review recent developments in due process requirements for creditors' remedies with particular emphasis on their impact on Georgia garnishment law, and will include a meaningful background in this field as well as present an analysis of the status of Georgia garnishment law with suggestions as to the probable direction future decisions will take.

I. HISTORICAL DEVELOPMENT

Sniadach v. Family Finance Corp.[7] struck the first blow against what had been accepted procedures in the field of creditors' remedies and initiated a period in which the courts have more closely scrutinized and defined the procedural due process rights of the debtor. In *Sniadach*, the U.S. Supreme Court held that notice and a hearing were required before prejudgment garnishment of wages could be enforced.[8]

In the period following its decision in *Sniadach* and *Goldberg v. Kelly*[9] it was thought that the Court might be carving out a position that required due process only when necessary items such as wages and welfare benefits were jeopardized. However, three years after *Sniadach*, the Court, in *Fuentes v. Shevin*,[10] clarified its position on the types of property that required notice and hearing. In *Fuentes*, the Court invalidated Florida and Pennsylvania statutes that allowed "summary seizure of goods or chattels in a person's possession under a writ of replevin."[11] The statutes allowed issuance of a writ of replevin based on an ex parte application upon the posting of a security bond.[12]

The Court in *Fuentes* pointed out that even a temporary, nonfinal deprivation of property was a deprivation recognized under the Fourteenth Amendment.[13] In the case of a Fourteenth Amendment deprivation, due process requires notice and a hearing at a "meaningful time."[14] The Court noted that in property deprivation cases the only meaningful time for a hearing is at a time when the deprivation can still be prevented.[15] The

6. Ga. Laws, 1975, p. 1291.
7. 395 U.S. 337 (1969).
8. *Id.* at 342.
9. 397 U.S. 254 (1970). The Court held that welfare benefits were a statutory entitlement for qualified persons and that notice and a hearing were required before state officials could terminate benefits already being paid.
10. 407 U.S. 67 (1972).
11. *Id.* at 69.
12. *Id.* at 69-70.
13. *Id.* at 85.
14. *Id.* at 80.
15. *Id.* at 81.

Court pointed out that "no later hearing and no damage award can undo the fact that the arbitrary taking that was subject to the right of procedural due process has already occurred."[16]

While the Court firmly stated the requirements for due process, they did not "question the power of the state to seize goods prior to final judgment in order to protect the security interests of creditors" after a hearing.[17] The Court also left open the question of the nature and form of the hearings.[18]

Before *Fuentes* the definition of property had been held to include "any significant property interest."[19] *Fuentes* broadened this definition by holding that a possessory interest in chattels was such a "significant property interest."[20] With *Fuentes*, the Court appeared to be forging a firm set of rules to provide procedural due process protection to debtors, including those who held property encumbered with an outstanding security interest.

However, two years later in *Mitchell v. W.T. Grant Co.*,[21] the U.S. Supreme Court upheld the Louisiana *ex parte* sequestration statute that provided for neither notice nor a hearing before judicial seizure of property for the purpose of preserving it pending litigation over the debt secured by the property. In *Mitchell*, W. T. Grant sued for the overdue balance owed on personal property alleging a vendor's lien on the property and requesting sequestration of the goods.[22]

In upholding the Louisiana procedure, the U. S. Supreme Court recognized that the possessor of the property and the lien-holder each had a recognized interest in the property.[23] Thus, the Court held that Louisiana's statute authorizing judicial sequestration of such property to preserve the property's value pending outcome of the suit on the debt had sufficient safeguards built into it to meet due process requirements without a pre-seizure hearing.[24] The Court distinguished *Sniadach*[25] and *Fuentes*[26] without specifically overruling either.

Mitchell apparently retreated from the proposition in *Fuentes* that no-

16. *Id.* at 82.
17. *Id.* at 96.
18. *Id.* at 96-97.
19. Boddie v. Connecticut, 401 U.S. 371, 378-79 (1971).
20. 407 U.S. at 84.
21. 416 U.S. 600 (1974).
22. *Id.* at 601-02.
23. *Id.* at 607.
24. These safeguards were: (1) the nature and amount of the claim should clearly appear from the facts presented in a verified affidavit or petition; (2) judicial supervision of the procedure; (3) provision for a prompt post-seizure hearing for dissolution of the writ; (4) if the writ were dissolved, damages and attorney's fees could be awarded. *Id.* at 616-17.
25. The Court pointed out that in *Sniadach* the creditor had no prior interest in the property attached and that the opinion in that case did not deal with the typical installment seller situation found in *Mitchell*. *Id.* at 614.
26. The Court said that since the statutes examined in *Fuentes* did not provide for judicial supervision, affidavit of facts, or a speedy post-seizure hearing, that case was sufficiently different from the statute before the Court in *Mitchell*. *Id.* at 615-16.

tice and hearing were required before any deprivation. It was widely thought that the Court was de facto overruling *Fuentes*[27] and returning to what had formerly been the recognized remedies of creditors.

At this juncture in the development of procedural due process, the Court apparently had decided that judicial supervision was sufficient to protect the debtor. This is important in garnishment cases since *Fuentes* had been thought to have expanded due process rights of notice and hearing to virtually all property rights, thereby negating the interpretation of *Sniadach* that had restricted the holding to wage garnishment procedures.[28] *Mitchell* apparently distinguished garnishment, leaving the *Fuentes* requirement of notice and hearing in garnishment cases intact.[29]

In *North Georgia Finishing Co. v. Di-Chem*,[30] the U.S. Supreme Court attempted to establish due process guidelines for non-wage garnishment. The challenged Georgia statutes authorized garnishment in pending actions on the affidavit of the plaintiff or his attorney based upon conclusory allegations. There was no provision for judicial supervision, notice, or an early hearing. The only method available for dissolution of the writ was for the defendant to post a bond.[31]

In *North Georgia Finishing*, the plaintiff corporation had garnished the defendant corporation's bank account under the Georgia statute which permitted garnishment as a pre-judgment remedy. The Court discussed both the *Sniadach/Fuentes* approach and the *Mitchell* view and decided that the Georgia statute failed to meet due process requirements under either approach. In the view of *Sniadach* and *Fuentes*, the bank account was property protected by the Fourteenth Amendment. The defendant corporation had been deprived of this property without notice and hearing and without participation by a judicial officer.[32] Further, the Georgia statute did not have the "saving characteristics" of the Louisiana statute in *Mitchell*. There was no judicial supervision or entitlement to an immediate hearing. In addition, the affidavit called for by the statute did not require statements clearly setting out the facts entitling the garnishor to relief.[33]

North Georgia Finishing served to underscore the Court's indecision as to what is required for due process. *Fuentes* had apparently held that if the property in question was property protected by the Fourteenth Amendment, then notice and a hearing were required before deprivation. *Fuentes* had also expanded the definition of protected property to include a vast spectrum of interests that included debts available for process of garnish-

27. *Id.* at 623 (Powell, J., concurring); *Id.* at 634 (Stewart, Douglas, & Marshall, J.J., dissenting).
28. 407 U.S. at 72, n. 5.
29. 416 U.S. at 614-15.
30. 419 U.S. 601 (1975).
31. *Id.* at 607.
32. *Id.* at 605.
33. *Id.* at 607.

ment.[34] Then *Mitchell* had apparently distinguished garnishment from security interests in personal property, requiring something less than notice and hearing in property cases and not laying down new standards for garnishment cases.

The decision in *North Georgia Finishing* did not clarify matters. First, the Court laid out the *Fuentes* rule, apparently supporting the requirements of notice and hearing in pre-judgment garnishment cases. Then, in the next sentence, the Court said that *Fuentes* required notice and hearing *or* "other safeguards against mistaken repossession."[35] The decision then pointed out that the Georgia statute did not meet the *Mitchell* standards: apparently the "other safeguards against mistaken repossession."[36]

II. COURSIN V. HARPER

In *Coursin v. Harper*,[37] the Supreme Court of Georgia held that the procedure for post-judgment garnishment which had existed in Georgia prior to July 1, 1975, had failed to provide the alleged judgment debtor with procedural due process.[38] Plaintiff's attorney had made affidavit before a superior court deputy clerk on June 30, 1975.[39] Bond with security was given by the attorney at that time, and the clerk issued a writ of attachment which required the sheriff to serve a summons of garnishment. The summons was then issued by the clerk designating the United States of America as garnishee. After the summons had been served, the garnishee mailed notice of the garnishment to the defendant. On August 6, 1975, the defendant or judgment debtor filed pleadings in the action. In the interim, the garnishment was answered by the garnishee and funds owed to the alleged debtor were paid into the court registry.[40] The trial court rendered a judgment that dismissed the plaintiff's action and held that the making of an affidavit before the clerk and the issuance of a summons on the basis of that affidavit was an unconstitutional procedure. The plaintiff appealed, and the Supreme Court of Georgia affirmed.[41] The court observed that the case was controlled by the statutes that were in effect prior to July 1, 1975.[42]

In reaching the decision in *Coursin*, the court stated that *North Georgia*

34. 407 U.S. at 89-90.

35. 419 U.S. at 606.

36. *Id.* at 607.

37. 236 Ga. 729, 225 S.E.2d 428 (1976). The decision stated that the proceedings were garnishment in attachment. GA. CODE ANN. ch. 8-5 (1973) while *North Georgia Finishing* was concerned with the garnishment procedures of GA. CODE ANN. tit. 46 (1974).

38. 236 Ga. at 733, 225 S.E.2d at 430.

39. *Id.* at 729-730, 225 S.E.2d at 428. There had been a previous judgment against the defendant in a divorce action.

40. *Id.* at 729-30, 225 S.E.2d at 428-29.

41. *Id.* at 731, 225 S.E.2d at 429.

42. *Id.*

Finishing had held the "old garnishment procedure, both pre-judgment and post-judgment, unconstitutional on procedural due process grounds."[43] Further, the court noted that the majority opinion in *North Georgia Finishing* had distinguished between the Georgia statutes and the statutory scheme which was upheld in *Mitchell* by stating: "The Georgia garnishment statute has none of the saving characteristics of the Louisiana statute."[44]

The court in *Coursin* stated that there was "little difference between pre-judgment and post-judgment garnishment proceedings insofar as procedural due process of law is concerned."[45] Both a judgment debtor and a non-judgment debtor must be given due process, and there are certain requirements which must be met in order to avoid wrongful deprivation of property whether or not the creditor has obtained a judgment.[46] The court additionally supported its conclusion by giving several reasons why a judgment debtor must be afforded due process to avoid illegal deprivations of property.[47]

III. GEORGIA GARNISHMENT PROCEDURES

Under the statutes dealt with in *Coursin*, creditors were entitled to process of garnishment when a suit was pending or where judgment had been obtained.[48] The plaintiff, his agent or his attorney made an affidavit before an authorized officer or the clerk of the court in which the garnishment or case was filed. The affidavit stated the amount claimed due in any pending action or on any judgment already rendered. The affidavit would also state that there was reason to believe that all or part of such sum would be lost unless garnishment was forthcoming. Under the applicable statute, bond was given in an amount twice the sum claimed to be due. If the amount stated as being due was not recovered in the suit or that claimed on a judgment was not due, such bond was payable to the defendant for his costs and damages.[49] When the affidavit was made by an agent or an attorney, it could be sworn to according to the best of that individual's

43. *Id.* The Georgia court did express some disagreement with the U.S. Supreme Court decision in *North Georgia Finishing*. *Id.* at 732, 225 S.E.2d at 430.

44. *Id.* at 732, 225 S.E.2d at 429, *quoting from* 419 U.S. at 607. See note 25, *supra*.

45. *Id.* at 732-33, 225 S.E.2d at 430.

46. *Id.* at 733, 225 S.E.2d at 430. The requirements the court set out were judicial supervision over a proposed temporary deprivation along with notice and opportunity for an early hearing after the deprivation.

47. *Id.* "Some judgements are procured many years in advance of their attempted enforcement; there are instances of partial payment on judgments; there are installment judgments, especially in the alimony field; there are judgments that were procured illegally; and there are judgments which have expired and are unenforceable."

48. GA. CODE ANN. §46-101 (1974). As to a situation where suit was pending, the Court in *North Georgia Finishing* had, as previously discussed, held this to be unconstitutional.

49. GA. CODE ANN. §46-102 (1974).

knowledge and belief.[50] Under the former statutes the defendant could obtain dissolution of garnishment upon filing a bond with good security in the court where the judgment was obtained or where suit was pending. The bond was payable to the plaintiff for any judgment rendered on the garnishment.[51]

As the court in *Coursin* noted, the new procedures which had become effective on July 1, 1975, had made several changes in the prior statutes.[52] The affidavit must now be made before a judicial officer who has supervision over the garnishment process. Further, the affidavit must state that there is apprehension of loss of all or part of the claimed amount, and it must be made clearly setting out the facts under which such loss and issuance of garnishment is claimed.[53] An attorney or agent of the plaintiff who makes the affidavit swears to its contents according to his personal knowledge.[54] The official issuing summons of garnishment shall issue a copy directly to the defendant.[55] As to dissolution, which may still be obtained by the filing of a bond with good security, the defendant may, within twenty days of service, petition the court for an immediate hearing.[56] At such hearing plaintiff must show probable cause for issuance of the garnishment.[57]

IV. THE COURSIN DECISION AND THE U.S. SUPREME COURT

In its decision in *Coursin*, the Georgia Supreme Court faced the question of whether due process was required in post-judgment garnishment cases, and, if so, what would satisfy such requirements. After answering the question affirmatively, the court attempted to define the necessary standards.[58] The court apparently concluded that the criteria set forth in *Mitchell* was a minimum acceptable standard.[59] This conclusion was apparently the result of the court's analysis of the decision of the U. S. Supreme Court in *North Georgia Finishing*. However, a close reading of *North Georgia Finishing* indicates that the decision was based on the fact that the Georgia statutes did not meet the standards set forth in either *Fuentes* or *Mitchell* and did not purport to establish what due process standards were actually required in garnishment cases.[60]

The old statutes construed in *Coursin* failed to meet the due process

50. GA. CODE ANN. §46-103 (1974).
51. GA. CODE ANN. §46-401 (1974).
52. 236 Ga. at 731, 225 S.E.2d at 429.
53. GA. CODE ANN. §46-102 (Supp. 1975).
54. GA. CODE ANN. §46-103 (Supp. 1975).
55. GA. CODE ANN. §46-105.1 (Supp. 1975).
56. GA. CODE ANN. §46-401(b) (Supp. 1975).
57. GA. CODE ANN. §46-401(c) (Supp. 1975).
58. 236 Ga. at 733, 225 S.E.2d at 430.
59. *Id.*
60. 419 U.S. at 605-08.

requirements of *Sniadach* and *Fuentes*. In a post-judgment garnishment situation the Coursin court's reliance on *North Georgia Finishing* was correct as to the constitutionality of the statute in that "the probability of irreparable injury . . . is sufficiently great so that some procedures are necessary to guard against the risk of initial error."[61] There was the probability of initial error in that the old statutes did not have the notice or hearing[62] of *Fuentes* and *Sniadach*, nor did the statutes "minimize the risk of error of a wrongful interim possession."[63]

V. Constitutionality of the New Garnishment Procedures

The question which now must be answered is whether the new garnishment provisions will satisfy the Due Process Clause of the Fourteenth Amendment. Obviously, there is a failure to meet the requirements of *Fuentes* before seizure in either a pre-judgment or post-judgment situation since there is no provision for a pre-seizure hearing.

As to satisfaction of *Mitchell* criteria, the statutes do provide for judicial supervision, and the affidavit must be based on more than mere conclusory allegations.[64] The statutes also provide the defendant in a garnishment proceeding with the right to petition for an immediate hearing for dissolution of the garnishment.[65] Yet, while the garnishment statute does appear to satisfy the criteria of *Mitchell*, the Court added in *Mitchell* that "this is not a case where the property sequestered by the court is exclusively the property of the defendant debtor."[66] *Mitchell* involved property with a "heavily encnmbered" title.[67] The Court was concerned with and gave several reasons for the need to protect the interests of the creditor.[68] Finally, the Court in *Mitchell* distinguished the factual situation presented there from that presented in *Sniadach* by stating: "The suing creditor . . . had no prior interest in the property."[69] Referring to *Sniadach*, the Court said that "the creditor's claim could not rest on the danger of destruction of wages, [which were] the property seized, since their availability to satisfy the debt remained within the power of the debtor who could simply leave his job."[70]

61. *Id.* at 608.
62. *Id.* at 606.
63. 416 U.S. at 618.
64. Ga. Code Ann. §46-102 (Supp. 1975).
65. Ga. Code Ann. §46-401(b) (Supp. 1975).
66. 416 U.S. at 604.
67. *Id.*
68. *Id.* at 608-10. The Court was particularly concerned with the erosion of the property as security for the seller's interest and the risk that with continued possession the buyer could destroy or conceal.
69. *Id.* at 614.
70. *Id.*

VI. CAREY V. SUGAR

While the Court in *Mitchell* carefully distinguished the property interest involved, the recent case of *Carey v. Sugar*[71] has caused further confusion in any attempt to limit the *Mitchell* standards to the type of secured property interest involved in *Mitchell*. In *Carey*, the constitutionality of the pre-judgment attachment statutes of New York were challenged.[72] The property for which attachment was sought was a debt owed by one corporation to another.[73] Attachment in New York under the applicable statutes could be granted in favor of a plaintiff by a judge prior to any judgment.[74] Such a procedure, however, would have to be supported by an affidavit showing a cause of action and demonstrating that one of the applicable grounds existed.[75] In addition, the judge could require the plaintiff to post a bond for any legal costs or damages the defendant would incur if he prevailed in the law suit.[76] The defendant could gain dissolution by posting a bond equal to the value of the property attached[77] or by moving to vacate.[78]

The defendants in *Carey* did not attempt dissolution under either method. Instead they attacked the constitutionality of the statutes, seeking an injunction and order vacating the attachment of the debt.[79] The three-judge court found for the defendant holding that the hearing on a motion to vacate was an inadequate safeguard.[80] The court reasoned that such a hearing would not compel "the plaintiff to litigate the question of the likelihood that it would ultimately prevail on the merits."[81]

In the per-curiam decision the U.S. Supreme Court remanded to the lower court with instructions to "abstain from a decision of the federal constitutional issues until the parties . . . obtain a construction of New York law from the New York state courts."[82] The Court, referring to the dissolution hearing, cited both *Mitchell* and *North Georgia Finishing* in holding that "an inquiry consistent with constitutional standards is by no means automatically precluded."[83] Such standards apparently would

71. ___ U.S. ___, 96 S.Ct. 1208 (1976).
72. *Id.* at ___, 96 S.Ct. at 1208.
73. *Id.*
74. N.Y. CIV. PRAC. §6211 (McKinney 1963).
75. N.Y. CIV. PRAC. §6212(a) (McKinney 1963).
76. N.Y. CIV. PRAC. §6212(b) (McKinney 1963).
77. N.Y. CIV. PRAC. §6222 (McKinney 1963).
78. N.Y. CIV. PRAC. §6223 (McKinney 1963).
79. ___ U.S. at ___, 96 S.Ct. at 1210.
80. The lower court felt that it was inadequate in that such a hearing would be concerned only with the necessity of attachment as security for the plaintiff. *Id.* at ___, 96 S.Ct. at 1210.
81. *Id.* at ___, 96 S.Ct. at 1210.
82. *Id.* at ___, 96 S.Ct. at 1211.
83. *Id.* at ___, 96 S.Ct. at 1210.

be "adequate preliminary inquiry into the merits of a plaintiff's underlying claim."[84]

The Court's opinion in *Carey* related only to the nature of the hearing after attachment.[85] The procedures before the order of attachment was issued, which were similar to the safeguards of *Mitchell*, were not questioned.

VII. CONCLUSION

In view of the *Carey* decision, an area of many inconsistencies has become even more confusing. The decision raises more questions than it answers. The primary question is whether *Carey* is an expansion of the *Mitchell* procedures beyond the type of encumbered personal property found in *Mitchell*. The result of such an expansion would be that *Sniadach* and *Fuentes* could be relegated to oblivion.[86]

If *Carey* may rightly be viewed as expanding *Mitchell*, the Court apparently has forgotten the careful distinctions it made in *Mitchell* regarding garnishment.[87] Garnishment statutes such as Georgia's, with only the safeguards of *Mitchell*, will be held to be constitutional.[88] The *Coursin* court's reliance on the reference to *Mitchell* in *North Georgia Finishing* would then be proven correct and Georgia's new garnishment statute would be held to be constitutional.[89]

Carey appears to be a preview of the direction the U.S. Supreme Court will take in garnishment cases. However, the Court still has two alternatives in garnishment cases. The first is to follow the *Sniadach-Fuentes* preseizure notice and hearing requirement; the other is to expand *Mitchell* as the Court appeared ready to do in *Carey*. Only a clear, unambiguous decision in a future case will remove the uncertainty that permeates garnishment laws in Georgia and elsewhere.

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84. *Id.*

85. The Court pointed out that the three-judge court had noted that the plaintiff had no "special property interest in the property attached" as the plaintiff in *Mitchell* had. The decision did not discuss this any further. *Id.* at ____, 96 S.Ct. at 1210, n.2.

86. In *Fuentes* the Court had stated that it is "a prior hearing that is the only truly effective safeguard against arbitrary deprivation of property." 407 U.S. at 83.

87. See notes 66, 67, 69, 70, *supra*.

88. In support of this the Court did state in *North Georgia Finishing*: "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." 419 U.S. at 608. *See also* 407 U.S. at 89-90.

89. This would be true provided that the dissolution hearing provided by GA. CODE ANN. §46-401 (Supp. 1975) is of the nature stated in *Carey*.