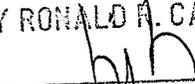


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SUPREME COURT
OF THE STATE OF WASHINGTON

TCAP CORPORATION, f/k/a TRANSAMERICAN CAPITAL
CORPORATION,

Respondent,

v.

GEORGE GERVIN and JOYCE GERVIN,

Appellants.

401 GROUP, a Washington limited partnership,

An Interested Party.

APPELLANTS' ANSWER TO
BRIEF OF AMICUS CURIAE 401 GROUP

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**FILED AS ATTACHMENT
TO E-MAIL**

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Appellants George and Joyce Gervin respectfully file this answer to the brief filed by Amicus Curiae 401 Group.

**1. Foreclosure of an Interest in a Limited Partnership Is Not
Authorized Under Washington Law**

The 401 Group's first argument is that Washington law authorizes foreclosure of limited partnership interests. Amicus Brief, pp. 1-10. It urges this Court to adopt what it refers to as the majority rule. Amicus Brief, p. 10. In support of this rule, the 401 Group cites four cases. Amicus Brief, p. 6. Its reliance on these cases is misplaced.

Under the Washington Revised Uniform Partnership Act (WRUPA), the charging creditor of a partner in a *general* partnership may foreclose on the debtor partner's transferable interest in the partnership. RCW 25.05.215(2). However, nothing in the Washington Uniform Limited Partnership Act (WULPA) expressly authorizes foreclosure of a charged *limited* partnership interest. Under the WULPA, the rights of a creditor who obtains a charging order against a limited partnership interest are only those of an assignee of the partnership interest. RCW 25.10.410. Such rights are no more than the right to share in such profits and losses, and to receive such distributions and allocations, as the partner was entitled to share in and receive. RCW 25.10.400(1)(c). These rights are narrower than those of a judgment creditor who obtains a charging order

against a partner in a general partnership under the WRUPA. Under the latter statute, the judgment creditor may also obtain “all other orders, directions, accounts, and inquiries” that the judgment debtor might have obtained. RCW 25.05.215(1). It has been noted that “[t]his disparity in the rights of charging creditors under the UPA and the ULPA suggests that the two sections are not consistent. *Madison Hills Limited Partnership II v. Madison Hills, Inc.*, 35 Conn.App. 81, 644 A.2d 363, 367 (Conn. App. Ct. 1994).

In the four decisions relied upon by the 401 Group, the courts engrafted the foreclosure remedy under their state’s version of the UPA onto the charging order provision of the ULPA. *See, Centurion Corp. v. Crocker National Bank*, 208 Cal.App.3d 1, 255 Cal.Rptr. 794, 798 (Cal. App. 1989); *Madison Hills Limited Partnership II v. Madison Hills, Inc.*, 644 A.2d at 368; *Baybank v. Catamount Construction, Inc.*, 141 N.H. 780, 693 A.2d 1163, 1166 (N.H. 1997); and *Lauer Construction, Inc. v. Schrift*, 123 Md.App. 112, 716 A.2d 1096, 1099 (Md. Ct. Spec. App. 1998). The latter three of these cited cases found authority for such engrafting in statutory provisions linking the UPA and the ULPA.¹

¹ The earliest of the four cases, *Centurion Corp.*, does not specifically address the relationship between the UPA and the ULPA, but simply applies the UPA remedy. It may be noted that the charging order provision of California’s version of the ULPA provided that its remedies “shall *not* be deemed exclusive of others which may exist.” Calif. Corp. Code § 15522(3) (emphasis added), cited at *Centurion Corp. v. Crocker*

The principal statutory linkage relied upon by these courts was in the UPA. Washington's former version was typical, and provided: "This chapter shall apply to limited partnerships except insofar as the statutes relating to such partnerships are inconsistent herewith." RCW 25.04.060(3) (1955). However, in 1998, the Washington legislature repealed this provision. Laws of 1998, ch. 103, § 1308(6). Therefore, we must look elsewhere for the linkage under current Washington law.

The linkage now is limited to a provision of the WULPA, which states: "In any case not provided for in this chapter, the provisions of the Washington revised uniform partnership act, or its successor statute, govern." RCW 25.10.660. One of the cases cited by the 401 Group addresses a similar linkage provision. The New Hampshire Supreme Court concluded that the ULPA "does not provide a method for enforcing the charging order." *Baybank v. Catamount Construction, Inc.*, 693 A.2d at 1166. Therefore, it found that the ULPA did not provide for this case. *Id.* Although the Connecticut and Maryland appellate courts based their analysis on the UPA linkage provision, not the ULPA provision, they were similarly motivated by a concern that the charging creditor of a limited partnership interest had no means to enforce the charging order under their

National Bank, 255 Cal.Rptr. at 797. By way of contrast, the Washington version does not include any such disclaimer.

states' laws. *Madison Hills Limited Partnership II v. Madison Hills, Inc.*, 644 A.2d at 88; and *Lauer Construction, Inc. v. Schrift*, 716 A.2d at 1099.

By way of contrast, statutory law in Washington expressly provides the trial court with authority to enforce a charging order. RCW 6.32.085(1) authorizes a court, to the extent consistent with Title 25 RCW, "in aid of the charging order, [to] make such other orders as a case requires" RCW 6.32.085(1). Thus, for example, in the present case, the trial court's 1996 charging order did not merely charge George Gervin's partnership interest with payment of the judgment, but also, and separately, ordered the managing partner of the 401 Group to –

– pay all of defendant George Gervin's share of the distributions of income and all other amounts coming due to defendant George Gervin, to the plaintiff ... for application to payment of the Judgment, plus accruing interest, until such time as the Judgment is satisfied in full or until further Order of the Court.

CP at 5.

Therefore, unlike the situations facing the courts in the cases cited by the 401 Group, the courts of Washington are expressly authorized to issue such orders as are required in aid of the charging order. It is not necessary, then, to engraft onto the WULPA the charging order remedies available under the WRUPA in order to enforce a charging order issued against a limited partnership interest. That function is accomplished by

RCW 6.32.085(1).

The 401 Group also cites the Revised Uniform Limited Partnership Act, proposed by the National Conference of Commissioners on Uniform State Laws in 2001, stating that “the 2001 revision now expressly provides for foreclosure.” Amicus Brief, p. 10. However, Washington has not adopted the 2001 proposed revisions.

**2. The Writ of Execution Is Overly Broad Because It Describes
Property Interests Not Subject to the Charging Order**

The 401 Group’s second argument is that the description of the property for sale in the writ of execution is not overly broad. Amicus Brief, pp. 10-14. The 401 Group argues that it does not matter how the writ describes the property because a purchaser may only acquire what is authorized by law. Amicus Brief, pp. 11-13. In support of this conclusion, the 401 Group cites *Tupper v. Kroc*, 88 Nev. 146, 494 P.2d 1275 (Nev. 1972), but turns the logic of the case upside down. Additionally, the 401 Group argues that a foreclosure sale of a limited partnership interest may include the sale of all of the partner’s property interest in the partnership, relying on the general statutory authority for sales by execution. Amicus Brief, pp. 13-14. However, later-enacted statutes make clear that the charging order is the exclusive method for a judgment creditor to reach a debtor’s property interests in a partnership.

a. The property description in the writ of execution is confusing and overly broad.

A charging order against a limited partnership interest applies to “the partnership interest of the partner”. RCW 25.10.410. A “partnership interest” is defined as “a partner’s share of the profits and losses of a limited partnership and the right to receive distributions of partnership assets.” RCW 25.10.010(10). If this Court holds that the WRUPA’s foreclosure remedy is engrafted onto the WULPA, this would do no more than authorize the trial court to “order a foreclosure of the interest subject to the charging order ...” (i.e., the partnership interest as defined under WULPA). RCW 25.05.215(2). Nevertheless, the description given in the writ of execution to the property that is to be sold by the sheriff is not limited to George Gervin’s “partnership interest.” Instead, it extends to his “entire interest in the 401 Group, ... including but not limited to” the following:

- (1) George Gervin’s entire limited partnership interest in the 401 Group;
- (2) All past and future distributions owed to George Gervin by the 401 Group by virtue of his partnership interest including accrued distributions and interest currently held by Pan Pacific Properties, property manager for the 401 Group;
- (3) All rights and claims of any kind and nature past and future of George Gervin based upon or arising from or in connection with the partnership agreement (and any amendment) of the 401 Group; and
- (4) All claims of George Gervin against the 401 Group and all its past, present and future partners, principals, agents,

successors and assigns.

CP at 19-20.

Relying on the *Tupper* case, the 401 Group argues that, “no matter what the Writ says,” a purchaser at a foreclosure sale would be limited to the rights of an assignee of a partnership interest. Amicus Brief, pp. 11-12. This is not actually an argument that the writ provides an accurate description of the property subject to sale, but rather an argument that the property description in the writ does not matter. That is not what *Tupper* held.

The issue in *Tupper* was whether more information should be provided, such as “the amount of current profits, if any, or the estimated value of the surplus, if any”. *Tupper v. Kroc*, 494 P.2d at 1279. In other words, the question was not whether the description of property was overly broad, but rather whether the property was too narrowly described. The court held that such additional information was not necessary, stating: “Any further or more extensive description would have been confusing or redundant.” *Id.* In fact, as discussed below, the writ of execution in this case expressly identifies certain valuable, but non-chargeable, property interests as being subject to the sale. This is a situation that *Tupper* seeks to avoid – where the property description is confusing (albeit, in this case, not because it is redundant but because it is overly broad).

b. A charging order applies only to the partner's partnership interest, not all of his property interests in the partnership.

As noted above, the only property interests of a partner that are subject to a charging order are the partner's share of the partnership's profits and losses, and the right to receive distributions. However, the 401 Group argues that other valuable property rights of George Gervin may be sold in a foreclosure sale, specifically including his contractual right-of-first refusal with respect to another partner's sale of a partnership interest, and his cause-of-action arising from a breach of that contractual right. The 401 Group relies on RCW 6.17.090 for this argument. Amicus Brief, p. 13.

RCW 6.17.090 provides: "All property, real and personal, of the judgment debtor that is not exempted by law is liable to execution." This statute was enacted when Washington was still a territory. Laws of 1854, p. 177, § 251. One effect of the statute was to abrogate the common law rule that intangible property interests, such as choses in action, were not subject to execution. *Johnson v. Dahlquist*, 130 Wash. 29, 32, 225 P. 817 (1924). However, a later-enacted statute limits the extent to which a partner's property interest in the partnership may be subject to execution, limiting it to "the partnership interest," and that only "to the extent permitted by Title 25 RCW". Laws of 1987, ch. 442, § 1114 (RCW

6.32.085).

RCW 25.10.410, the limited partnership charging order statute, was enacted in 1981. Laws of 1981, ch. 51, § 41. It omits the language of the original limited partnership charging order statute that its remedies “shall not be deemed exclusive of others which may exist.” Laws of 1945, ch. 92, § 22 (Rem. Rev. Stat. § 9975-20). Discussing the charging order provision of the original Washington Uniform Partnership Act, Laws of 1945, ch. 137, § 28 (Rem. Rev. Stat. § 9975-67), which likewise has no provision preserving other remedies, Professor Gose offered the following observation:

In all probability, courts will be disposed to hold that section 28 of the Act supersedes any right to levy execution under an earlier statute. The charging order statute appears to occupy fully the field of satisfaction of the claims of judgment creditors against a partner’s interest and thus to constitute a repeal by implication of any previous procedures designed to accomplish the same result.

J. Gordon Gose, *The Charging Order Under the Uniform Partnership Act*, 28 Wash. L. Rev. 1, 20 (1953). See also, *Chrysler v. Peterson*, 342 N.W.2d 170, 172 (Minn. App. 1984) (“The charge order is the exclusive remedy for a judgment creditor of a limited partner.”).

In any event, even if Washington law authorized the foreclosure sale of a partner’s interest in a partnership beyond that described in RCW 6.32.085, no such broader authority was given by the trial court in this

matter. In this case, the trial court order authorized the issuance of a writ of execution “directing the Pierce County Sheriff to sell the ownership interest of Defendant George Gervin in the 401 Group, a Washington limited partnership, at public sale in the same manner as personal property is sold on execution, *pursuant to RCW 6.32.085.*” CP at 6-7 (emphasis added). In other words, even if a charging order is not the exclusive method by which to foreclose a partner’s property interest in a partnership, it was the only method authorized by the trial court in this case.

The decisions in the two cases cited by the 401 Group on this issue do not address the question. In *Taylor v. S & M Lamp Co.*, 190 Cal.App.2d 700, 12 Cal.Rptr. 323, 330 (Cal. App. 1961), the court held that the transferee of partnership assets that were transferred merely to frustrate a charging creditor was liable in tort to the creditor. In *Bank of Bethesda v. Koch*, 44 Md.App. 350, 408 A.2d 767, 770 (Md. Ct. Spec. App. 1979), the court held that where the debtors made bona fide assignments of their partnership interests before a creditor obtained a charging order, there were no partnership interests to charge. These decisions do not address the question posited by the 401 Group – that is, whether a judgment creditor may execute on a debtor partner’s property interests in a partnership by a method other than a charging order.

3. George Gervin's Rights Vis-à-Vis the 401 Group Is Not an Issue Before This Court

Finally, the 401 Group raises an issue that is not before this Court, arguing that George Gervin would have no remaining rights as against the partnership or its partners if his partnership interest were sold in a foreclosure sale. Amicus Brief, pp. 15-20. In effect, it is asking this Court for declaratory relief concerning the rights that George Gervin would have vis-à-vis the 401 Group, or his current and former partners in the 401 Group, should his partnership interest be sold in a foreclosure sale. Not only have the parties not raised the issue, they could not raise it because there is no justiciable controversy between the Appellants and the Respondent with respect to that issue.

Recently, this Court reiterated the elements of a justiciable controversy for purposes of a declaratory judgment action:

The elements of a justiciable controversy under the UDJA are: (1) parties must have existing and genuine rights or interests; (2) these rights or interests must be direct and substantial; (3) the determination will be a final judgment that extinguishes the dispute; (4) the proceeding must be genuinely adversarial in character.

Nelson v. Appleway Chevrolet, Inc., 160 Wn.2d 173, 186, 157 P.3d 847 (2007). If this matter were a lawsuit between George Gervin and the 401 Group, perhaps these elements would be met. However, this matter is not

between George Gervin and the 401 Group. The Respondent in this matter is not the 401 Group, nor is it a partner in the 401 Group. Even if George Gervin's partnership interest were sold in a foreclosure sale, and if it were speculated that the Respondent would be the purchaser, the Respondent would not become a partner absent the consent of all other partners. RCW 25.10.420.

The Respondent has no "existing and genuine rights and interests" in a controversy that may exist between George Gervin and the 401 Group, or his current or former partners. The 401 Group is not entitled to, in effect, intervene in this matter in order to obtain declaratory relief from this Court with respect to a question in which the Respondent has no justiciable interest.

Even if the issue raised by the 401 Group were before this Court, the 401 Group is wrong on the merits of its argument, which is based on its erroneous conclusion that, in the event of a foreclosure sale, RCW 25.10.400(1)(d) would deprive George Gervin of choses in action he has against the 401 Group and his current and former partners.

RCW 25.10.400(1)(d) provides: "A partner ceases to be a partner and to have the power to exercise any rights or powers of a partner upon assignment of all of his or her partnership interest." In the first place, a charging creditor has the rights of an assignee, but as the 401 Group points

out in a different section of its brief, a charging creditor “is not actually an assignee, and owns no part of the charged interest.” Amicus Brief, p. 8 (quoting Daniel S. Kleinberger, et al., *Charging Orders and the New Uniform Limited Partnership Act Dispelling Rumors of Disaster*, 18-July/August Prob. & Prop. 31 (2004)).

Furthermore, even if a foreclosure sale of a partnership interest were held to dissociate the debtor partner from the partnership, that would not deprive him of choses of action he has against the partnership or his current and former partners. A partnership agreement is a contract, and a dissociated partner may bring a lawsuit against his former partners for breach of that contract. *Parker v. Tumwater Family Practice Clinic*, 118 Wn.App. 425, 431, 76 P.3d 764 (Div. 2 2003). Therefore, the mere occurrence of a dissociation from the partnership, if that were to happen here, would not terminate any chose of action that George Gervin may have with respect to the 401 Group or his current and former partners.

CONCLUSION

In short, the Gervins answer the 401 Group as follows:

First, those courts that have engrafted the WRUPA’s foreclosure remedy onto the WULPA have done so largely because of their concerns that, under their states’ laws, a charging creditor would otherwise be unable to enforce the order. However, in Washington, RCW 6.32.085(1)

provides the trial court with broad authority to enforce a charging order. Therefore, the WULPA provides for this case, and it is neither necessary or appropriate to engraft the foreclosure remedy onto WULPA. For this reason, the trial court had no authority to issue the order to sell the partnership interest in 2004, and its action doing so should be reversed.

Second, the writ of execution's description of the property to be sold is confusing and overly broad, in that it specifically describes property other than George Gervin's partnership interest, which, by definition, is limited to his share of the profits and losses of the 401 Group and his right to receive distributions of partnership assets. For this reason, the writ is facially defective, and the trial court erred when it denied the Gervins' motion to quash.

Third, the 401 Group is not entitled to raise the issue of the nature or extent of rights that George Gervin may have against the 401 Group or his current and former partners because that is not a justiciable issue between the parties to this case. Even if the issue were properly before this Court, the 401 Group's fundamental argument is simply wrong, in that a dissociated partner may still own a valuable chose of action against the partnership and his former partners.

Therefore, the Gervins respectfully argue that the 401 Group's arguments in their amicus curiae brief are not availing, and renew their

request for relief as laid out in the pleadings and arguments before this
Court.

DATED this 5th day of March, 2008.

THE GILLETT LAW FIRM

A handwritten signature in cursive script, appearing to read "Michael B. Gillett", written in black ink.

Michael B. Gillett
Attorney for Appellants

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2008 MAR -5 A 9:33 Declaration of Service

I, MICHAEL B. GILLETT, declare under penalty of perjury under
BY RONALD R. CARPENTER
the laws of the State of Washington that the following is true and correct:
CLERK

I am the attorney-of-record for Appellants George Gervin and Joyce Gervin in the above-entitled matter. I am over 18 years of age, knowledgeable of the matters stated herein, and competent to testify as to the same. On this day, I caused to be served on the persons indicated below the Appellants' Answer to Brief of Amicus Curiae 401 Group, by hand delivery via ABC Legal Services:

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