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STATE OF WASHINGTON
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No. 35567-1-II

COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

GEORGE GERVIN,

Appellant

v.

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

Respondent

BRIEF OF RESPONDENT CADLES OF GRASSY MEADOWS II, LLC, ASSIGNEE OF TCAP CORPORATION, f/k/a TRANSAMERICAN CAPITAL CORPORATION

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I. INTRODUCTION

Respondent Cadles of Grassy Meadows II, LLC ("Cadles") is the holder of a judgment lien against Appellant George Gervin. The judgment lien stems from a foreign judgment that was entered with the Pierce County Superior Court on October 17, 1996.

For the past ten years, Respondent Cadles and its predecessors have been attempting to enforce their judgment lien rights against a limited partnership interest owned by George Gervin. Mr. Gervin has engaged in a ten year litigious battle to hinder, delay and thwart the efforts by Cadles and its predecessors. Mr. Gervin's efforts include filing two bankruptcy petitions in the U.S. Bankruptcy Court for the Western District of Texas, two bankruptcy adversary proceedings, and appeals to this Court, the Federal District Court of the Western District of Texas, and the Fifth Circuit Court of Appeals. While none of the legal proceedings provided substantive relief to Mr. Gervin, he has benefited from numerous stays issued by the courts preventing Cadles and its predecessors from enforcing their judgment lien rights.

Because of Mr. Gervin's ten year battle, Cadles and its predecessors were unable to complete the foreclosure sale of Mr. Gervin's partnership interest within ten years of the date of entry of the foreign

judgment. The Pierce County Superior Court recognized that it would be inequitable to allow Mr. Gervin to benefit from his ten year litigious battles at the expense of Cadles. The Pierce County Superior therefore equitably extended the term of the judgment lien pursuant to *Hensen v. Peter,* 95 Wash. 628, 164 P. 512 (1917). Mr. Gervin disagrees that the trial court had authority to extend the term of the judgment lien. Mr. Gervin further contends that the trial court erred by ordering the sale of his partnership interest. Cadles respectfully ask this court to affirm the trial court decision and to allow Cadles to complete the foreclosure of Mr. Gervins' partnership interest.

II. STATEMENT OF THE CASE

RAP 10.3(a)(5) states that the statement of the case should set forth a fair statement of the facts and procedure relevant to the issues presented for review, without argument, and with a reference to the record for each factual statement. The statement of the case in appellant's briefs blatantly violates that rule by setting forth a one-sided recitation. The following are the facts as found by the trial court.

On February 27, 1989, George Gervin executed an agreed judgment in favor of TCAP Corporation in the principal amount of $250,000.00. CP 53-54. The judgment was recorded in the District Court

for Collin County, Texas. The judgment was subsequently recorded with the Pierce County Superior Court in the state of Washington as a foreign judgment on October 17, 1996 (the "TCAP Lien"). CP 1-3.

On October 31, 1996, TCAP applied to the Pierce County Superior Court for an order charging the Defendant's partnership interest in the 401 Group. The 401 Group is a Washington limited partnership that was formed to own and operate an apartment complex located in Tacoma, Washington (the "Partnership"). When the motion for the charging order was filed with the court, George Gervin was a general partner in the Partnership. As part of its motion, TCAP requested an order directing the managing partner and/or its agent delegated with the management of the real property owned by the Partnership to disburse all of Gervin's share in the distribution of income and all other amounts coming due to Gervin until such time as judgment was satisfied in full.

The Pierce County Superior Court granted TCAP's request and entered an order on December 6, 1996, charging the partnership interest of the Defendant in 401 Group in favor of TCAP. CP 4-6. The Court further ordered that the managing partner was instructed to pay to TCAP all of Gervin's distribution of income and all other amounts coming due to

Gervin until such time as the judgment was satisfied in full or until further order of the Court. CP 4-6.

On April 25, 1997, the Gervins filed a petition for relief under Chapter 13 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the Western District of Texas under case No. 97-53032. CP 80. That case was subsequently converted to a proceeding under Chapter 11 of the U.S. Bankruptcy Code. CP 84. While that case was pending, the Gervins filed another petition for relief under Chapter 7 of the U.S. Bankruptcy Code in the U.S. Bankruptcy Court for the Western District of Texas under case No. 98-52186 (the "Chapter 7 Proceeding"). CP 98.

In the Chapter 7 Proceeding, Gervin filed an adversarial complaint to determine the validity, priority or extent of liens asserted by the Internal Revenue Service and TCAP under Adversary Proceeding Case No. 98-05059 filed in the U.S. Bankruptcy Court for the Western District of Texas (the "1998 Adversary"). CP 90-96. On December 2, 1998, the Bankruptcy Court entered an order in the 1998 Adversary determining that the Plaintiff's judgment was discharged in the Chapter 7 Proceeding but that the TCAP Lien survived the Chapter 7 Proceeding (the "1998 Adversary Judgment"). CP 90-96. The Bankruptcy Court also determined that the Federal tax liens were superior to the interest of the TCAP Lien.

On March 8, 2000, the Internal Revenue Service filed a motion to intervene in the Pierce County proceeding, and on April 6, 2000, filed a petition to remove the Pierce County Superior proceeding to U.S. District Court for the Western District of Washington. The Petition was granted and the Pierce County case was removed to U.S. District Court of the Western District of Washington under case no. 05197 (the "Washington Federal District Court Proceeding"). CP 126. In the Washington Federal District Court Proceeding, the Internal Revenue Service filed a motion for an order requesting disbursement of the funds that had been collected and held by the Partnership. CP 127. That motion was granted and the funds were disbursed to the Internal Revenue Service. The Washington Federal District Court Proceeding was subsequently remanded back to Pierce County Superior Court. CP 128.

On June 9, 2000, George and Joyce Gervin filed a motion in the 1998 Adversary proceeding asking the court to set aside the 1998 Adversary Judgment. CP 93. This was remarkable since the Gervins had stipulated to entry of the 1998 Adversary Judgment. The Bankruptcy Court did not rule on the motion until January 17, 2001, when it denied the Gervins' motion. CP 95.

Cadles of Grassy Meadows II, LLC ("Cadles"), subsequently acquired all right, title and interest in the claims of TCAP Corporation against George Gervin. On September 16, 2004, Cadles filed a motion with the Pierce County Superior Court seeking an order directing the issuance of a Writ of Execution to the Pierce County Sheriff to sell the ownership interest of Defendant George Gervin in the 401 Group at a public sale pursuant to RCW 6.32.085.

In response to Cadles' motion, Joyce Gervin filed a new adversary complaint with the United States Bankruptcy Court in the Western District of Texas on September 24, 2004, under Adversary No. 04-05138C (the "2004 Adversary"). CP 182-187. Joyce Gervin sought, among other things, a declaratory ruling from the Bankruptcy Court that she owned a 50 percent partnership interest in George Gervin's 50 percent partnership interest in the 401 Group, and that her interest was not subject to the TCAP Lien. CP 182-187. Joyce Gervin also filed with the Bankruptcy Court a motion for a preliminary injunction to enjoin Cadles from selling her claimed interest in the 401 Group. CP 182-187. The Court granted her request and Cadles was stayed from enforcing the TCAP Lien with respect to any interest that she may have in the 401 Group. CP 195.

On October 17, 2004, George Gervin filed a motion to intervene in the 2004 Adversary Proceeding. CP 132. George Gervin sought, among other things, a declaratory ruling from the Bankruptcy Court that his interest in the 401 Group was not subject to the TCAP Lien. CP 188-193. George Gervin also filed a motion for a preliminary Injunction. The Bankruptcy Court did not immediately rule on George Gervin's motion.

The complaint filed by George Gervin in the 2004 Adversary Proceeding was a direct attempt to re-litigate issues that had been previously addressed by the Pierce County Superior Court. It was evident that George Gervin elected to engage in forum shopping by filing the adversary complaint in the 2004 Adversary Proceeding. Paragraph 23 of the adversary complaint states in relevant part that: "A declaratory judgment should be entered that any judgment lien, if any, to George Gervin's economic interest in the 401 Group Ltd. Partnership has expired and is no longer enforceable or no longer exists under Texas and Washington law." CP 191-192. The requested relief was identical to the relief George Gervin requested in his response that he filed with the Pierce County Superior Court on October 20, 2004.

On October 22, 2004, Pierce County Superior Court granted Cadles' request and entered an order authorizing the sale of Gervin's

partnership interest. CP 6-7. The order states in relevant part that a "Writ of Execution be issued to the Pierce County Sheriff 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 6-7. The order was not appealed.

Cadles, however, was prevented from enforcing the October 22nd Order. On November 18, 2004, the Bankruptcy Court for the Western District of Texas granted George Gervin's Motion for a Preliminary Injunction. CP 201-202. Cadles did attempt to quash the temporary restraining order. That motion was denied by the Bankruptcy Court on December 14, 2004. CP 211-212. Accordingly, Cadles was enjoined from taking any action in the Pierce County proceeding pending the outcome of the 2004 Adversary Proceeding.

On April 1, 2005, the Bankruptcy Court, in an oral decision, held that the restraining order issued by the court on November 18, 2004 would remain in place until the summary judgment was final and non-appealable. CP 154. On May 18, 2005, an order was entered denying George Gervin's motion for summary judgment. CP 157. Accordingly, Cadle was stayed

from enforcing the judgment lien from November 18, 2004 until May 28, 2005, a period of six months.

The Bankruptcy Court ruled that Cadles was entitled to proceed with the foreclosure of George Gervin's partnership interest in the 401 Group. That decision was appealed by George Gervin to the Federal District Court for the Western District of Texas under Case No. 5:05-cv-01100-WRF. CO-217-220.

The Bankruptcy Court also determined that Joyce Gervin owned 50% of George Gervin's partnership interest in the 401 Group, and that her interest was not subject to the charging order. That decision was appealed by Cadles to the Federal District Court for the Western District of Texas under Case No. 5:06-cv-00439-WRF. Cp 235-237/

On August 1, 2006, the Pierce County Superior Court issued a Praecipe and Writ of Execution of Personal Property instructing the Pierce County Sheriff to sell George Gervin's partnership interest in the 401 Group. CP 19-21. The sale date was scheduled for September 28, 2006. CP 106-112

On September 7, 2006, Joyce Gervin filed a motion with the Pierce County Superior Court asking the court to set aside from the sale a 10%

interest in the 401 Group that she claimed to have received from Pat Healey. The motion was denied.

On September 13, 2006, George Gervin filed a motion in the U.S. Bankruptcy Court of the Western District of Texas to reopen his Chapter 7 Bankruptcy Case so that he could file a motion seeking to have Cadles held in contempt arguing that the foreclosure sale violated the discharge injunction. CP 98-105. The Bankruptcy Court denied George Gervin's request. CP 101 George Gervin also asked the Bankruptcy Court to enter an order to stay the Sheriff's Sale. That motion was also denied by the Bankruptcy Court. CP 101.

On September 25, 2006, George Gervin filed a motion with the Pierce County Superior Court on shortened time to amend the Writ of Execution. The motion was to be heard on September 27, 2006, a day before the scheduled Sheriff's sale.

George Gervin also filed a motion with the U.S. District Court for the Western District of Texas on September 25, 2006.CP 222-230. George Gervin asked the court to stay the Pierce County Sheriff's Sale pending his appeal. CP 222-230. In support of his motion, George Gervin represented to the court that:

> 25. The partnership is not going anywhere. In fact, the charging order has not be [sic] foreclosed for almost 10

> years. The bankruptcy was filed in 1998, almost 8 years ago. There will be no harm to the parties delaying the sale of the property. Rather, the opposite will occur. A sale as indicated above will irreparable harm the rights of the appellant and possibly moot this appeal.
>
> 26. The granting of the stay would serve the public interest in that the public has an interest in making sure a person's property rights are protected and that the discharge injunction under 11 U.S.C. § 524 is protected. The public also has an interest in giving parties a right to have the issues heard on appeal.
>
> If the appeal is not successful, the property can be sold.
>
> CP 227.

The U.S. District Court for the Western District of Texas granted George Gervin's request, and entered an order staying the sale for a period of 45 days on September 27, 2006. CP 232-233. At the hearing, District Court Judge declared that the 45 day stay would provide sufficient time for him to issue rulings in the appeals that had been filed by George Gervin and Cadles.

There was also a hearing on September 27, 2006, in this Court. At that hearing, counsel for George Gervin withdrew the motion to amend the Writ of Execution informing the court that the issue had become moot because of the ruling earlier that morning by the United States District Court for the Western District of Texas staying the Sheriff's sale.

Because of the stay entered by the Texas Federal District Court, the Sheriff's sale scheduled for September 28, 2006 did not occur. The sale was rescheduled for November 14, 2006, pending the decisions of the Texas Federal District Court.

On October 31, 2006, the Gervins filed a motion with the Pierce County Superior Court asking the court to quash the writ of execution and dismiss the proceedings. CP 36-47. On November 9, Judge Nelson denied the Gervins' motion, and entered an order ruling:

> The court finds that the scope of the writ of execution is not overly broad because it complies with the Washington Limited Partnership Act, RCW 25.10. The court further fines that the court has discretion to exercise its equitable power to extend the duration of the judgment lien pursuant to *Hensen v. Peter*, 95 Wash. 628 (1917) and that the court is hereby exercising its equitable power to extend the duration of the judgment lien. The court hereby orders that Defendant's motion to quash the writ of execution is denied.
>
> CP 275.

The Gervins filed a notice appeal of Judge Nelson's order on November 9, 2006. Along with the notice of appeal, the Gervins filed a motion with this Court seeking a stay of the writ. This Court denied Gervins' motion ruling that the determination of the amount of the bond or the adequacy of alternate security is the prerogative of the superior court.

This Court did, however, grant the Gervins a stay of the writ of execution until December 22, 2006. As a result, the Sheriff's sale scheduled for December 15, 2006, did not occur.

On December 14, 2006, the Gervins filed a motion with the Pierce County Superior Court seeking an order approving alternate security for a stay of enforcement of the writ of execution. The hearing on the motion was scheduled for December 22, 2006. Judge Nelson, however, was at recess until January 5, 2007. Accordingly, the parties agreed to stay enforcement of the writ until the Gervins' motion could be heard on January 5, 2007.CP 372. In that regard, On December 19, 2006, counsel for Cadles sent an email to the Pierce County Sheriff stating:

> Last week I sent you an email in which I explained that we had filed a motion to schedule the date of the Gervin Sheriff Sale. The motion was originally to be argued this Friday, and we had asked the Court to schedule the date of the sale for Friday, December 29, 2006. We recently learned that the presiding judge, Judge Nelson, will be on recess until Friday, January 5, 2007. Accordingly, all of her motions have been continued. Accordingly, the Gervins' attorney and I have agreed to continue the motions until January 5. Please see the attached letter. This means that any sale cannot occur until after that date. CP 368.

The attached letter that is referenced in the December 19th email is a letter that was sent by counsel for Cadles to counsel for the Gervins, and which stated:

> This letter will confirm our recent conversation in which we agreed not to schedule an emergency hearing this Friday, and instead will allow Judge Nelson to hear the pending motions on January 5, 2007, when she returns from her vacation. I am sending a copy of this letter to the Pierce County Sheriff's Office to inform them that our motion for an order scheduling the date of the Sheriff's sale has been continued until January 5, 2007. Accordingly, any sale cannot occur until after that date. CP 372.

The Pierce County Superior Court denied the Gervins' motion and set the supersedeas bond in the amount of $100,000.00. In a separate order, the Pierce County Superior Court stayed enforcement of the writ of execution for a period of 14 days.

On January 8, 2007, the Gervins filed a motion with this Court seeking to modify the Pierce County Superior Court's January 5th order. In a letter ruling dated January 22, 2007, this Court denied the Gervins' motion, but did stay enforcement of the writ of execution for an additional period of 14 days.

On February 5, 2007, upon the expiration of the stay issued by this Court, Cadles contacted the Pierce County Sheriff to schedule the sale of George Gervin's partnership interest. CP 364-381. In an email dated February 8, 2007, Christine Eaves, who is the Legal Assistant to the Pierce County Sheriff's Office, stated that Craig Adams would be addressing this Court to discuss the writ of execution. CP 364-381. Carole Kendall,

Cadles' account representative, contacted Mr. Adams and was informed that he would be filing a motion with this Court seeking direction. The motion was never filed, and on or about February 23, 2007, the Pierce County Sheriff returned the writ unsatisfied.

On March 8, 2007, both Cadles and the Gervins filed motions with the Pierce County Superior Court. The Gervins filed a motion to dismiss the charging order, again arguing that the judgment lien had expired. CP 304-315. Cadles filed a motion seeking to set aside the Pierce County Sheriff's Return of the writ of execution, or, in the alternative, for this Court to issue a new writ of execution directing the sale of George Gervin's partnership interest. CP 352-366.

The Pierce County Superior Court entered an order on March 30, 2007, denying the Gervins' motion and entered an order extending the term of the judgment lien for a period of twenty-one days. CP 549-550. On reconsideration, the Court entered detailed findings and made conclusions of law, and entered an order extending the term of the judgment lien through May 25, 2007 to allow Cadles to complete the foreclosure sale of George Gervin's limited partnership interest. CP 636-647.

The Gervins filed a notice of appeal of the March 30th order, and the findings, conclusions of law, and order extending the term of the

judgment lien on May 21, 2007. This Court subsequently consolidated the two appeals filed by George Gervin.

III. ARGUMENT

A. The Pierce County Superior Court decision authorizing the issuance of a Writ of Execution that Directed the Sheriff to sell a Partner's Entire Interest in a Limited Partnership is not subject to appeal.

On October 22, 2004, Pierce County Superior Court granted Cadles' request for an order authorizing the sale of George Gervin's Partnership Interest. The order states in relevant part that a "Writ of Execution be issued to the Pierce County Sheriff 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". The order was not appealed. Consequently, George Gervin is not entitled to review of that decision and the issue of whether the Pierce County Superior Court has authority to direct the sale of a limited partnership interest.

When a judgment disposes of all claims and all parties, it is both appealable and preclusive. *Kemmer v. Keiski,* 116 Wn. App. 924, 932, 68

P.3d 1138 (2003)[Citations Omitted]. It remains appealable for 30 days. *Id.* citing RAP 2.2(a)(1); RAP 5.2(a). If not appealed in that period of time, it directly precludes all further proceedings in the same case, except "clarification" and enforcement proceedings, and it collaterally precludes other suits based on the same claim. *Id.* [Citations Omitted]

In the present case, the trial court's order entered on October 22, 2004, considered and disposed of the issues including (1) whether the court had authority to issue a Writ of Execution directing the Sheriff's sale of George Gervin's partnership interest, and (2) whether the TCAP Lien was a valid lien. George Gervin's appeal improperly asks this Court to revisit the order entered on October 22, 2004. Specifically, George Gervin contends that the Pierce County Superior Court erred in authorizing the foreclosure sale of a partnership interest in a limited partnership.

Similarly, George Gervin asks this Court to find that the Pierce County Superior Court erred in deciding that the TCAP Lien is a valid lien. George Gervin contends that the TCAP lien expired on February 27, 2001. Again, that issue was decided two years before this appeal was filed.

George Gervin failed to preserve his ability to appeal the Pierce County Superior Court decisions of whether the court erred in authorizing the sale of his partnership interest and whether the TCAP lien was a valid

lien. Accordingly, this Court should not consider those issues on appeal. The only issue that should be considered by this Court is whether the Pierce County Superior Court properly extended the duration of the judgment lien. Those issues, however, are addressed in this brief.

B. The Pierce County Superior Court Properly Authorized the Sale of George Gervin's Partnership Interest.

Both Washington's Partnership Act, and RCW 6.32.085 authorize the foreclosure sale of George Gervin's partnership interest. On October 22, 2004, the Pierce County Superior Court entered and order authorizing that a Writ of Execution be issued to the Pierce County Sheriff 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.

RCW 6.32.085 governs the sheriff's sale of partnership interests. The statute states:

> If it appears from the examination or testimony taken in the special proceedings authorized by this chapter that the judgment debtor owns an interest in a partnership, the judge who granted the order or warrant or to whom it is returnable may in his or her discretion, upon such notice to other partners as the judge deems just, and to the extent permitted by Title 25 RCW, (1) enter an order charging the partnership interest with payment of the judgment, directing

> that all or any part of distributions or other amounts becoming due to the judgment debtor, other than earnings as defined in RCW 6.27.010, be paid to a receiver if one has been appointed, otherwise to the clerk of the court that entered the judgment, for application to payment of the judgment in the same manner as **proceeds from sale on execution and, in aid of the charging order, the court may make such other orders as a case requires, or (2) enter an order directing sale of the partnership interest in the same manner as personal property is sold on execution**. (Emphasis added)

The writ of execution that was issued pursuant to the October 22, 2004 order simply describes George Gervin's partnership interest. It does not convey any rights beyond his partnership interest. In fact, the Order specifically states that it does not affect any interest held by Joyce Gervin. Counsel for the Gervins were present at the hearing on plaintiff's motion for an order authorizing the sale of George Gervin's partnership interest, actively participated in the drafting of the order authorizing the sale of George Gervin's partnership interest, and did not appeal the order. Consider the circumstances surrounding George Gervin's partnership interest, the scope of the writ was appropriate.

At the time that the charging order was entered, George Gervin claimed to have a general partnership interest. While the charging order was in place, evidence was submitted that the interest of George Gervin was converted from a general partnership interest to a limited partnership

interest. It is unclear whether the 401 Group or George Gervin had authority to convert the partnership interest while the charging order was in place. That issue is not before this Court.

The writ of execution was also issued at a time in which the partnership interest of George Gervin was, and continues to be, the subject of litigation in the federal courts for the Western District of Texas. Since 1998, when George Gervin filed the 1998 Adversary Proceeding, George Gervin has been contesting, without success, the TCAP Lien. George Gervin filed a second adversary proceeding in 2004. When the bankruptcy court denied his request for relief, he appealed the decision to the Federal District Court for the Western District of Texas. It was during that appeal that writ was issued. The Federal District Court has since denied George Gervin's request for relief. George Gervin has appealed that decision to the Fifth Circuit Court of Appeals.

Similarly, Joyce Gervin's interest in the 401 Group has been the subject of extensive litigation. Currently there is a case pending before the Fifth Circuit Court of Appeals.

A final factor contributing to the uncertainty surrounding George Gervin's partnership interest is that George Gervin's partnership interest is not documented by a certificate. RCW 25.10.400(2) states that a

partnership interest may be evidenced by a certificate. Specifically, the statute states that "the partnership agreement may provide that a partner's interest in a limited partnership may be evidenced by a certificate of partnership interest issued by the limited partnership and may also provide for the assignment or transfer of any partnership interest represented by such a certificate and make other provisions with respect to such certificates." RCW 25.10.400(2). Cadles has no knowledge, and the Gervins have never presented a copy of any certificate evidencing George Gervin's partnership interest in the 401 Group.

Because of the circumstances surrounding George Gervin's partnership interest in the 401 Group, the writ of execution generally describes George Gervin's entire interest in the 401 Group. This description is consistent with Washington's laws governing limited partnerships.

The 401 Group is a Washington limited partnership, and is therefore governed by RCW Ch. 25.10. Washington's Limited Partnership Act is modeled on the Revised Uniform Limited Partnership Act (RULPA). See *Obert v. Environmental Research and Development Corp.* 51 Wn. App. 83, 88, 752 P.2d 924 (1988).

RCW 25.10.390 specifies that a partnership interest is personal property. RCW 25.10.410 describes the rights of a creditor, stating:

> On application to a court of competent jurisdiction by any judgment creditor of a partner, the court may charge the partnership interest of the partner with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, the judgment creditor has only the rights of an assignee of the partnership interest. This chapter does not deprive any partner of the benefit of any exemption laws applicable to his partnership interest.

RCW 25.10.400 governs the assignment of a partnership interest. RCW 25.20.400(1)(b) states that "an assignment of a partnership interest does not dissolve a limited partnership or entitle the assignee to become or to exercise any rights or powers of a partner". RCW 25.400(1)(c) specifies the rights acquired by an assignee. It states "an assignment entitles the assignee to share in such profits and losses, to receive such distribution or distributions, and to receive such allocation of income, gain, loss, deduction, or credit or similar item to which the assignor was entitled, to the extent assigned." RCW 25.400(1)(c). Finally, RCW 25.400(1)(d) describes the status of a partner after the assignment of his or her partnership interest. It states that 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." RCW 25.400(1)(d).

The rights of an assignee are governed by RCW 25.10.420. RCW 25.10.420(1) states that an "assignee of a partnership interest, including an assignee of a general partner, may become a limited partner if and to the extent that (a) the assignor gives the assignee that right in accordance with authority described in the partnership agreement, or (b) all other partners consent." RCW 25.10.420(2) further provides that an assignee who has become a limited partner has, to the extent assigned, the rights and powers, and is subject to the restrictions and liabilities, of a limited partner under the partnership agreement and this chapter. An assignee who becomes a limited partner also is liable for the obligations of his or her assignor to make and return contributions as provided in Articles 5 and 6 of this chapter. However, the assignee is not obligated for liabilities unknown to the assignee at the time he or she became a limited partner."

When a partner's interest is assigned, as is the case of a sheriff's sale, then such partner ceases to be a partner for all purposes and has no power to exercise any rights or powers of a partner. The transferring partner's entire partnership interest has been lost. The assignee of the partnership interest does not obtain the status of a partner automatically, but can acquire the status of a full partner if all of the existing partners so agree. The partner whose interest is transferred is no longer a partner for

any purpose and has no residual rights or powers relating to the partnership.

Following the sheriff's sale, George Gervin's entire partnership interest will be gone and he will have no residual rights or authority in the 401 Group. Therefore, as a result of the sheriff's sale, Mr. Gervin's entire interest in the 401 Group as described in the Writ of Execution has in fact been transferred from him. George Gervin's rights and duties as a partner are not being sold or transferred to the buyer at the sheriff's sale by operation of the writ of execution, but those rights and duties are extinguished as a result of the sale pursuant to RCW 25.10.400(1)(d).

The purchaser of George Gervin's partnership interest at the sheriff sale will have at a minimum the rights of an assignee which will allow the purchaser (i) to share in the profits and losses, (ii) to receive such distribution or distributions, and (iii) to receive such allocation of income, gain, loss, deduction, or credit or similar item to which George Gervin was entitled prior to the sale of his partnership interest. The purchase may also be entitled to become a limited partner of the 401 Group, if the partnership so elects. The writ of execution merely describes George Gervin's interest.

George Gervin contends that the Superior Court lacked authority to order the sheriff's sale of his partnership interest because Washington's

Limited Partnership Act does not expressly provide for such sale. This argument is not well taken.

First, as noted, RCW 6.32.085 does specifically provide for the sheriff's sale of a limited partnership interest. Second, Washington's General Partnership Act also provides for the foreclosure of a partnership interest. See RCW 25.05.215. Finally, RCW 25.10.620 states that Washington's Limited Partnership Act is to be applied and construed to effectuate its general purpose and to make uniform the law with respect to other states that have adopted the RULPA. In that regard, Pierce County Superior Court's decision to authorize the sale of George Gervin's limited partnership interest is consistent with decisions from other states which have considered the issue of whether a limited partnership interest may be foreclosed.

An excellent summary of the laws governing the foreclosure sale of limited partnerships is contained in an article in the 2004 July/August edition of Probate and Property. Daniel S. Kleinberger, et. al., *Charging Orders And The New Uniform Limited Partnership Act Dispelling Rumors Of Disaster,* 18-AUG Prob. & Prop. 30 (2004). The article completed a survey of the current state of the law governing charging orders, foreclosure, and limited partnerships. The article was published in

response to a previous article in Probate and Property which suggested that a charging order was a creditor's exclusive remedy under the Uniform Limited Partnership Act. The article states in pertinent part:

> The November/December article suggested that many practitioners believe that a judgment creditor's "exclusive remedy" under RULPA may be limited to a charging order and a court may lack the power to order foreclosure. This belief is wrong for several reasons. First, RULPA contains no exclusive remedy language. Second, although RULPA itself does not provide for foreclosure, each state's version of RULPA is "linked" to a general partnership statute. See RULPA § 1105 (1976) ("In any case not provided for in this [Act] the provisions of the Uniform Partnership Act govern."). Both the UPA and RUPA expressly contemplate foreclosure, UPA § 28(2) (1914); RUPA § 504(b) (1997), and, almost without exception, courts have held that a limited partnership charging order may therefore be foreclosed.
>
> For example, *Madison Hills Ltd. Partnership II v. Madison Hills, Inc.*, 644 A.2d 363, 368 (Conn. App. Ct. 1994), analyzed the linkage question in detail and held categorically that "the remedy provisions of the UPA are available to judgment creditors under the ULPA." *Crocker Nat'l Bank v. Perroton*, 255 Cal. Rptr. 794, 798 (Cal. Ct. App. 1989), involved a charging order obtained under a provision of the California *limited* partnership act but quoted the *general* partnership act's foreclosure/sale provision and stated: "Cases requiring creditors to obtain charging orders also indicate that sale of the partnership interest is permissible where the creditor has first obtained a charging order and has demonstrated that monies collected under the charging order are insufficient to satisfy the judgment."

> The weight of case law on this point is heavy, and the list of additional authority is long. See, e.g., *Baybank v. Catamount Constr., Inc.*, 693 A.2d 1163, 1165-66 (N.H. 1997); *Tupper v. Kroc*, 494 P.2d 1275 (Nev. 1972). Florida is the one notable exception. *Givens v. Nat'l Loan Investors, L.P.*, 724 So. 2d 610, 611 (Fla. Dist. Ct. App. 1998).

Id. at 33.

The article concludes to state:

> In sum, in the overwhelming majority of jurisdictions, a charging order on a limited partnership interest may be foreclosed by order of the court, and neither that foreclosure nor the resulting judicial sale will interfere with the legitimate interests of the partnership and the other partners.

Id. at 34.

As in Washington, the states which have considered and authorized the foreclosure sale of a limited partnership interest have adopted the ULPA and the Uniform Partnership Act. ("UPA"). See e.g., *Madison Hills Ltd. Partnership II v. Madison Hills, Inc.*, 35 Conn. App. 81, 644 A.2d 363 (1994); *Baybank v. Catamount Construction, Inc.,* 141 N.H. 780, 693 A.2d 1163 (1997). Those courts have also recognized that the ULPA does not expressly provide for the foreclosure sale of a limited partnership interest. Nevertheless, those courts have held that the foreclosure sale of a limited partnership interest was appropriate. In so holding, those courts

have relied upon the general provisions of the UPA which authorize the foreclosure sale of a limited partnership interest.

The court in *Madison Hills Ltd. Partnership II v. Madison Hills, Inc.*, *supra*, was confronted with nearly the identical issue that is before this Court as to whether a court could grant a creditor strict foreclosure of a limited partnership interest. In ruling for the creditor, the court held "We conclude, therefore, that the UPA does permit a charging creditor to enforce its charging order through strict foreclosure. In sum, we conclude that the charging order provisions of the UPA and the ULPA do not conflict, that the remedy provisions of the UPA apply to limited partnerships, that a charging creditor can foreclose on a partner's interest in the partnership and that strict foreclosure is available." *Id.* at 370. In so holding, the court noted that "Charging creditors under the UPA and ULPA logically are treated similarly because the purpose of the charging order provisions under both statutes is to balance the need to protect the orderly operation of the partnership and the rights of creditors." *Id.* at 368-369.

Similarly, the court in *Baybank v. Catamount Construction, Inc., supra,* considered the issue of whether the sale of a limited partnership interest was authorized. Again, the court recognized that New

Hampshire's limited partnership act did not expressly authorize such a sale. *Id.* at 1166. Nevertheless, the court relied upon the provisions of New Hampshire's partnership laws and held that the sale of a limited partnership was authorized. *Id.* The court stated:

> We also find that RSA 304-B:41 is not inconsistent with the remedial provisions of RSA 304-A:28, since, as the *Madison Hills* court noted, "the purpose of the charging order provisions under both statutes is to balance the need to protect the orderly operation of the partnership and the rights of creditors." Id. 644 A.2d at 368-69. In most cases, neither the appointment of a receiver to collect the debtor partner's share of distributed profits, nor the sale of the debtor partner's interest in the partnership, as opposed to partnership assets, would unduly interfere with the running of the partnership business. *See Hellman v. Anderson,* 233 Cal.App.3d 840, 284 Cal.Rptr. 830, 837-38 (1991) (making a similar observation in regard to general partnerships). Thus, we hold that a court may properly look to RSA 304-A:28 for the means to enforce a charging order under RSA 304-B:41 when the latter remedy alone would be insufficient. *See Madison Hills,* 644 A.2d at 368 (finding that "the remedy provisions of the UPA are available to judgment creditors under the ULPA"). *But see In re Stocks,* 110 B.R. 65, 67 (Bankr.N.D.Fla.1989) (finding no right under Florida ULPA to foreclose on charged limited partnership interest).

Id.

The same result was reached in *Centurion Corp. v. Croker National Bank*, 208 Cal. App. 3d 1, 255 Cal. Rptr 794 (1989). In authorizing the sale, the court noted:

> Crocker concedes that the "sale of Perroton's interest in Turn-Key Storage ordered by the superior court is *not* an order for the sale of any real or personal property owned by Turn-Key Storage. To the contrary, it is simply a sale of whatever interest, legal, equitable, or otherwise, which Perroton holds in Turn-Key Storage by virtue of his being a limited partner. The eventual purchaser ... will acquire no greater rights ... than Perroton would have if he had remained a limited partner."

Id. at 10.

Florida appears to be the sole exception to the general rule among the states that authorize the foreclosure sale of a limited partnership interest. It is curious to note, then, that Appellant relies upon the minority position of *Givens v. Nat'l Loan Investors, supra,* for its argument that the trial court erred in ordering the foreclosure sale of George Gervin's partnership interest. This argument is not well taken, and is contrary to RCW 25.10.620.

This Court is urged to adopt the majority reasoning from other jurisdictions and find that the foreclosure sale of a limited partnership is authorized pursuant to the Washington's General Partnership Act, Washington's Limited Partnership Act, and RCW 6.32.085. There is no reason to provide creditor protection to a debtor who has a limited partnership interest. This would result in an unintended consequence of Washington's Limited Partnership Act. It would also create an

inconsistency between the rights of a creditor attempting to foreclose upon a general partnership interest and a creditor who is attempting to foreclose upon a limited partnership interest.

Washington's Limited Partnership Act specifically recognizes that a limited partnership interest is personal property, and that it may be assigned, either voluntarily or by operation of law. The Limited Partnership provides protection to limited partnerships by defining the rights of an assignee of a limited partnership interest. The only party who is adversely affected by the foreclosure sale of a limited partnership is the judgment debtor.

C. The Pierce County Superior Court Properly Found that the TCAP Judgment Lien is a valid lien.

Under Washington state law, a Washington state judgment adopting a judgment of a sister state is a new judgment standing on its own, and the time period for execution commences to run from the date of its entry in Washington. The Uniform Enforcement of Foreign Judgments Act states specifically that a judgment filed under the procedures of that act, "has the <u>same effect</u> and is subject to the same procedures ... as a judgment of a superior court of this state and may be <u>enforced, extended or satisfied in like manner</u>." (Emphasis added) RCW 6.36.025.

Likewise, Washington state and sister state precedents reiterate that a foreign judgment filed in a new state under the Uniform Enforcement of Judgments Act stands alone as an independent judgment. In *Wellington v. Wellington*, 19 Wn. App. 328, 575 P.2d 1088 (1978), *review denied*, 90 Wn.2d 1022 (1978), the Washington State Court of Appeals held that a "Washington judgment is a new judgment, standing on its own, and the time period for executing upon it commenced to run from the date of its entry." *Id.* at 330. In *Wellington*, the parties were divorced in California in 1968. *Id.* at 328-9. The defendant moved to the state of Washington in 1969, and in 1974, the plaintiff brought an action in Washington for past-due child support. *Id.* at 329. In 1976, the Washington state court entered a judgment against the defendant for past-due child support. The defendant contested the judgment on the grounds that it violated Washington's six year statute of limitations. *Id.* Finding that the plaintiff commenced the action in Washington state within the statue of limitations, the court rejected the defendant's argument and upheld the position of the lower court, stating: "If a judgment creditor, in good faith, timely commences an action upon a judgment of a sister state, he can in effect, extend the duration of that judgment beyond the period of six years following its rendition." *Id.* See also *Idaho Dep't of Health & Welfare v.*

Holjeson, 42 Wn. App. 69, 73 (1985) (holding that at a minimum, a foreign judgment is enforceable to the same extent as a final judgment entered in Washington.)

Moreover, in *Logemann Holding Inc v. Elfride Lieber*, an Illinois state court addressed precisely the issue before this Court and found that the life of a foreign judgment was measured from the date it was entered in Illinois, rather than the originating state. 341 Ill. App. 3d 689, 690 (2003). In *Logemann*, the plaintiff obtained a judgment against several defendants in the United States Court for the Eastern District of Wisconsin in January of 1992. *Id.* On September 13, 1995, the circuit court of Cook County registered the plaintiff's judgment. *Id.* The plaintiff did not attempt to enforce the Illinois judgment until January 8, 2000, eight years after entry of judgment in Wisconsin, and three years after the five-year Wisconsin statute of limitations on the enforcement of judgments had passed. *Id.* The plaintiff was within the seven-year Illinois statute of limitations. *Id.* The *Logemann* court nonetheless found that the judgment was enforceable in Illinois by relying in part upon Oklahoma authority that found that "a foreign judgment 'which is enforceable at the time the judgment creditor registers the foreign judgment in Oklahoma will be considered, for the purposes of enforcement, as a new judgment of this state to which

Oklahoma's five year dormancy statute will apply.'" *Id.* (citing *Drllevich Constr. v. Stock*, 1998 OK 39, 958 P.2d 1277 (Okla., 1998)).

Likewise, in *Drllevich*, the Supreme Court of Oklahoma found that a judgment creditor could enforce a Washington state judgment in Oklahoma, where the judgment debtor lived even where enforcement would have been barred by the Washington dormancy statute, RCW 6.17.020(1). *Drllevich*, 958 P.2d 1277, 1281. The Court reasoned that the judgment creditor registered its Washington judgment in Oklahoma within ten years of the original judgment and the foreign judgment was enforceable at the time of its registration. *Id.* Other out of state courts have reached similar conclusions on this issue. *See Pinilla v. Harza Engineering Co.*, 324 Ill. App. 3d 803, 257 Ill. Dec. 921, 755 N.E.2d 23 (2001) (finding that where a plaintiff seeking to enforce a judgment has attached appropriate documents relating to the judgment and has authenticated it in accordance with the statutes of Illinois, the properly authenticated judgment is to be treated as any other Illinois judgment); *Walnut Equipment Leasing Co., Inc., v. Wen Lung Wu & Chyong Jan Wu*, 39 Tex. Sup. J. 485 (1996) (noting that when a Pennsylvania judgment was filed in a Texas court under the Texas Uniform Enforcement of Judgments Act it became enforceable as a Texas judgment on the date it

was filed); *Hamilton v. Seattle Marine & Fishing Supply Co.*, 562 P.2d 333, 336-338 (Alaska 1977) (affirming a money judgment in favor of a creditor based on a Washington judgment against a debtor even where the judgment in Washington would have been barred by the statute of limitations because an independent judgment was entered in Alaska within the six-year statute of limitations). Given the weight of authority, it is clear that the December 1996, is an enforceable judgment that stands on its own merits.

Given that it stands on its own merits, the December 1996 Washington state judgment remains enforceable under the Washington state statute of limitations. RCW 6.17.020 (1) provides a ten year statute of limitations on the enforcement of judgments. The statute provides in pertinent part:

> The party in whose favor a judgment of a court has been or may be filed or rendered or the assignee or the current holder thereof, may have an execution, garnishment, or other legal process issued for the collection or enforcement of the judgment at any time within ten years from entry of the judgment or the filing of the judgment in this state. RCW 6.17.020(1).

In this case, a judgment was entered in Pierce County Superior Court on December 6, 1996, in favor of the assignor, TCAP. As such, the assignee, Cadles Grassy Meadows II, L.L.C., is well within the statute of

limitations on enforcement of this action. The purported dormancy of the Texas judgment is irrelevant to the question of the enforceability of the Washington state judgment.

D. The Pierce County Superior Court Properly Exercised its Discretion to Equitably Extend the Duration of the Judgment Lien.

A proceeding to enforce a lien is an equitable proceeding. *King County v. Seawest Investment Associates, LLC,* 2007 WL 3072459 (Wash. App. Division I, October 22, 2007) citing *Price v. Chambers,* 148 Wash. 170, 172, 268 P. 143 (1928). Courts have broad discretion when fashioning equitable remedies. and the trial court's decision is reviewed for an abuse of discretion. *Id.* citing *Sorenson v. Pyeatt,* 158 Wash.2d 523, 531, 146 P.3d 1172 (2006). A trial court abuses its discretion when its decision is manifestly unreasonable or based upon untenable grounds. *Id.* In the present case, the Pierce County Superior Court did not abuse its discretion in extending the term of the TCAP Lien. The decisions were based upon sound equitable principles.

Generally speaking, a judgment lien has a life of 10 years. RCW 4.56.210. It is well recognized, however, in Washington that the duration of a judgment lien may be equitably tolled. See *Hensen v. Peter,* 95 Wash. 628, 164 P. 512 (1917); *Hazel v. Van Beek,* 135 Wn.2d 45, 954 P.2d 1301

(1998) (recognizing that *Hensen* is still controlling); *Weyerhaeuser Pulp Employees Federal Credit Union v. Damewood*, 11 Wn. App. 12, 521 P.2d 953 (1974).

Washington's Supreme Court adopted the principle that the duration of a judgment lien may be equitably tolled in *Hensen v. Peter,* 95 Wash. 628, 164 P. 512 (1917). The facts of that case are pertinent. In July 30, 1908, the plaintiff obtained a judgment against the defendant. *Id.* at 628-629. Five years later, on November 20, 1913, the plaintiff obtained a writ of execution to sell the defendant's real property. *Id.* at 629. The property was to be sold on January 10, 1914. *Id.* On January 9, 1914, the defendant obtained a temporary order enjoining the sale. *Id.* The injunction was not dissolved until January 4, 1916. *Id.* The property was sold at a sheriff sale on March 11, 1916. *Id.*

The defendant then filed a motion to set aside the sale arguing that the sale occurred beyond the 6 year life of the judgment. The Court denied the defendant's request and held that the life of the judgment was subject to equitable tolling. In so holding, the Court stated at 637-638:

> This view is not open to the criticism of being judicial legislation in that it amounts to reading exceptions into a statute that the Legislature has not seen fit to make. Nor does it rest upon the thought that the statute of limitations is inherently an unconscionable defense. Nor does it carry the implication that a litigant is to be penalized beyond the

> burdens ordinarily imposed by law for failing to maintain his position in a law-suit. It merely declares that one shall not, by waging unfounded litigation, be rewarded at the expense of his unwilling opponent. It is based upon the equitable principle that a party will not be permitted to avail himself of an unconscientious advantage obtained by his own wrongful act and without fault on the part of his adversary. It is sustained by the wholesome consideration that a party should not be permitted to profit by the abuse or misuse of legal process or by imposing upon judicial tribunals litigation without merit. It is also fortified by that sound public policy which sets its face against putting a premium upon unrighteous and vexatious litigation commenced and prosecuted by a party for the ulterior purpose of obtaining by indirection an advantage which in equity and good conscience he is not entitled to enjoy.

In *Hazel v. Van Beek, supra,* the Supreme Court declined to apply the equitable tolling rule enunciated in *Hensen v. Peter*. In that case, the plaintiff obtained a judgment lien on November 2, 1984. *Van Beek* at 48. The defendant/debtor then filed a Chapter 13 Case on January 31, 1984. *Id.* The case was dismissed on August 7, 1984. *Id.* The plaintiff then did nothing to enforce the judgment lien until nine years later in August 1993 when it obtained a writ of execution. *Id.* at 48-49. The defendant's house was sold on October 15, 1993, and the sheriff filed the return of sale with the Superior Court on October 25, 1993. *Id.* at 49.

The defendant filed an objection to the sale claiming that judgment lien expired on November 3, 1993, and that the plaintiff could not

complete the confirmation of the sale by that date. The Court agreed with the defendant and denied the sale finding that the judgment lien had expired.

The Court considered the *Hensen* decision in determining whether equitable tolling principles should be applied. In ruling that equitable tolling was not applicable, the Court held at 63:

> Hensen is still controlling, but the holding fails to apply to the facts of this case. Van Beek may have pursued meritless litigation to hinder Hazel's enforcement of the judgment when he filed for bankruptcy in 1984, but the bankruptcy court dismissed the action months later. While the bankruptcy action prevented Hazel from enforcing her judgment during that brief time period, it did not, as in Hensen, prevent Hazel from enforcing the judgment within the statutory lifetime. Hazel suffered no injury, nor were her rights prejudiced, since she had nine more years after 1984 to enforce her judgment.

In *Weyerhaeuser Pulp Employees Federal Credit Union v. Damewood*, *supra*, the Court of Appeals also refused to apply equitable tolling to extend the life of a judgment. The facts in that case, however, are dissimilar to the facts in the present case. In *Weyerhaeuser* the plaintiff waited until one year prior to the expiration of the judgment lien to begin to foreclose on the lien. The plaintiff also failed to timely comply with the requirements of a Sheriff's sale of real property. The Court held that the

plaintiff had sufficient time to complete the Sheriff's sale and that there was no reason to extend the life of the judgment. *Id.* at 16-17.

Unlike the plaintiffs in *Van Beek* and *Weyerhaeuser*, the holders of the TCAP Lien have not been dilatory, and instead have, since the date the TCAP Lien was entered with this Court, continuously attempted to enforce their lien rights. As in the *Hansen* case, however, the Pierce County Superior Court found that the Gervins engaged in continuous meritless litigation that has prevented Cadles' and its predecessors from enforcing the TCAP Lien.

The Pierce County Superior Court made detailed findings which the George Gervin has not challenged. Since George Gervin has not assigned error to specific findings of fact, the findings are treated as verities on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). The findings included:

- The Gervins filed a petition for relief under Chapter 13 of the U.S. Bankruptcy Code on April 25, 1997.
- The Gervins filed a petition for relief under Chapter 7 of the U.S. Bankruptcy Code on May 1, 1998.
- The Gervins filed an adversary complaint on May 1, 1998, in an attempt to set aside the TCAP Lien.
- Even though the Gervins agreed to a stipulated judgment in the 1998 Adversary Proceeding, the Gervins filed a motion

on June 9, 2000, in the 1998 Adversary Proceeding to set aside the stipulated judgment. That motion was denied.

- On September 24, 2004, Joyce Gervin filed the 2004 Adversary proceeding and obtained an order in the 2004 Adversary Proceeding staying enforcement of the TCAP Lien.

- On October 17, 2004, George Gervin filed a motion to intervene in the 2004 Adversary Proceeding, and subsequently obtained an order staying enforcement of the TCAP Lien.

- On September 7, 2006, Joyce Gervin filed a motion with this Court asking this court to set aside from the sale a 10% interest in the 401 Group. That request was denied.

- On September 13, 2006, George Gervin filed a motion to reopen his Chapter 7 Bankruptcy Case so that he could file a Motion seeking to have Cadles held in contempt arguing that the foreclosure sale violated the discharge injunction. That motion was denied.

- On September 25, 2006, George Gervin filed a motion on shortened time to amend the Writ of Execution. George Gervin withdrew the motion to amend the Writ of Execution informing the court that the issue had become moot because of the ruling earlier that morning by the United States District Court for the Western District of Texas staying the Sheriff's sale.

- On September 25, 2006, George Gervin filed an Emergency Motion for Stay Pending Appeal to Stop September 28, 2006 State Court Writ of Execution with the United States District Court for the Western District of Texas. That motion was granted. The stay benefited only the defendant George Gervin and stayed the proper execution of a non renewable (Texas foreign) judgment beyond ten years.

- On October 31, 2006, the defendants filed a motion with this Court seeking to quash the writ of attachment. That motion was argued before this Court on November 9, 2006. This Court denied the motion finding that it had authority to exercise its equitable powers to extend the duration of the TCAP Lien. In so ruling, this Court relied upon the decision of *Hensen v. Peters* 95 Wash. 628 (1917), "due to what this Court sees as abuse of process and prejudice during the current stay."

- On November 9, 2006, Judge Ferguson for the United States District Court for the Western District of Texas entered an order extending the stay issued on September 28, 2006 for an additional period of thirty days.

- On December 14, 2006, the defendants filed a motion with this Court for an order approving alternate security for a stay of enforcement of the writ of execution. The hearing on the motion was scheduled for December 22, 2006. This Court, however, was at recess until January 5, 2007. The parties agreed to continue the hearing on the motion until January 5, 2007.. On December 19, 2006, Cadles attorney send an email to the Pierce County Sheriff stating: Last week I sent you an email in which I explained that we had filed a motion to schedule the date of the Gervin Sheriff Sale. The motion was originally to be argued this Friday, and we had asked the Court to schedule the date of the sale for Friday, December 29, 2006. We recently learned that the presiding judge, Judge Nelson, will be on recess until Friday, January 5, 2007. Accordingly, all of her motions have been continued. Accordingly, the Gervins' attorney and I have agreed to continue the motions until January 5. Please see the attached letter. This means that any sale cannot occur until after that date." At the same time, Cadles attorney sent a letter to the Gervins' attorney stating: "This letter will confirm our recent conversation in which we agreed not to schedule an emergency hearing this Friday, and instead will allow Judge Nelson to hear the pending motions on January 5, 2007, when she returns from her vacation. I am sending a copy of this letter to the Pierce

County Sheriff's Office to inform them that our motion for an order scheduling the date of the Sheriff's sale has been continued until January 5, 2007. Accordingly, any sale cannot occur until after that date." A copy of the letter was provided to the Pierce County Sheriff.

- On January 8, 2007, the defendants filed a motion with the Court of Appeals seeking to modify this Court's January 5th order. In a letter ruling dated January 22, 2007, The Court of Appeals denied the defendants' motion, but did stay enforcement of the writ of execution for a period of 14 days. This stay benefited only defendant George Gervin in that it gave him 14 days after the decision to post the $100,000 bond that would further stay the judgment's execution. This gave him after motion and decision by the Court of Appeals, the same 14 day period equitably given by this Court previously on January 5, 2007, but now the choice to post the supercedeas bond extended for 14 days beyond January 22, 2007.

In light of the extensive findings made by the Pierce County Superior Court, the *Hensen* holding is applicable to this case. Equitable tolling should be applied to allow Cadles to complete the Sheriff sale. Cadles should not be barred from completing the Sheriff's sale because of the Gervins' meritless litigation. The Gervins should not be able to profit from an abuse of the legal system.

In considering whether to apply the principles of equitable tolling, it is important for this Court to recall that the original judgment was entered upon stipulation by George Gervin. This is not a situation where the merits of the claim are at issue. It is also important for this Court to

recall that the 1998 Bankruptcy Adversary Judgment was similarly entered upon stipulation by George Gervin.

Finally, and perhaps most notably, the Federal District Court for the Western District of Texas granted a stay of proceedings based in part upon George Gervin's representation to the court that Cadles would not suffer an irreparable injury if the court granted the stay because George Gervin would allow the sale his partnership interest to be sold if his appeal was not successful. The stay was entered on September 27, 2006, and prevented the Pierce County sheriff from completing the sale of the partnership interest which had been scheduled for September 28, 2006. While the stay was in place, George Gervin subsequently argued before the Pierce County Superior Court that because the sale did not take place as scheduled on September 28, 2006, the judgment lien had expired.

The litigation that George Gervin has pursued since entry of the 1998 Bankruptcy Adversary Judgment has been solely to hinder the efforts of Cadles and its predecessors from enforcing the TCAP Lien. This Court entered an Order on October 22, 2004, approving the sale of George Gervin's partnership interest. Rather than accept this Court's decision, George Gervin has engaged in a 2 year battle in the Texas Federal Courts to prevent Cadles from exercising its legal rights that had been specifically

authorized by this Court. George Gervin's litigation has been without merit. It is difficult to imagine a set of facts that would be more appropriate for the application of equitable tolling that then facts that are before this Court.

IV. CONCLUSION

The Pierce County Superior Court properly found that a limited partnership interest may be foreclosed upon and sold in the same manner as personal property is sold on execution. To rule otherwise would provide asset protection to debtors who own a limited partnership interest. This ruling would result in an unintended consequence of Washington's Limited Partnership Act, and is contrary to Washington's laws on enforcement of judgments. Instead, this Court is urged to hold, as the overwhelming majority of courts from other jurisdictions have determined, the provisions of Washington's General Partnership Act, which authorize the foreclosure sale of a general partnership interest, supplement Washington's Limited Partnership Act, and allow for the sale of a limited partnership interest.

The Pierce County Superior Court also properly invoked the equitable tolling principles first enunciated in *Hensen v. Peter, supra,* and extended the term of the judgment lien. George Gervin should not be

entitled to profit by the abuse and misuse of the legal process. The Pierce County Superior Court made extensive findings detailing George Gervin's abuse of the legal process. Those findings can only support the conclusion that George Gervin pursued vexatious litigation commenced for the purpose of hindering Cadles and its predecessor's rights to enforce their judgment lien. As the court recognized in *Hensen v. Peter,* at 637, equity and good conscience will not allow such a debtor to be rewarded at the expense of a creditor.

Cadles respectfully requests this Court to affirm the Pierce County Superior Court decisions and to enter an appropriate order allowing the foreclosure sale of George Gervin's partnership interest to proceed.

RESPECTFULLY SUBMITTED this 19T day of November, 2007.

CHRISTOPHER E. ALLEN, WSBA #20877
Morton McGoldrick, P.S.
Attorneys for Respondent Cadles of Grassy Meadows, II, LLC

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DIVISION II

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STATE OF WASHINGTON
BY_____
DEPUTY

No. 35567-1-II
THE COURT OF APPEALS
DIVISION II
OF THE STATE OF WASHINGTON

TCAP CORPORATION, f/k/a TRANSAMERICAN CAPITAL CORPORATION, Respondent, vs. GEORGE GERVIN, Appellants, 401 GROUP, a Washington limited partnership An interested party.	CERTIFICATE OF SERVICE OF BRIEF OF RESPONDENT CADLES OF GRASSY MEADOWS II, LLC, ASSIGNEE OF TCAP CORPORATION, f/k/a TRANSAMERICAN CAPITAL CORPORATION

CERTIFICATE OF SERVICE

I declare under penalty of perjury under the laws of the state of Washington that the following is true and correct:

I am employed by the law firm of: Morton McGoldrick, P.S.

ORIGINAL

At all times hereinafter mentioned, I was and am a citizen of the United States of America, a resident of the state of Washington, over the age of eighteen (18) years, not a party to the above entitled action, and competent to be a witness herein.

On November 19, 2007 I served in the manner noted the document(s) entitled: Brief of Respondent Cadles of Grassy Meadows II, LLC, Assignee of TCAP Corporation, f/k/a Transamerican Capital Corporation.

Michael B. Gillett 6327 Ravenna Avenue, N.E. Seattle, WA 98115-7027	[ ] U.S. Mail [ ] Telecopier [X] Hand Delivery

DATED this 20th day of November 2007, at Tacoma, Washington.

Gordon W. Oakden