
Volume 71
Issue 3 *Dickinson Law Review - Volume 71,*
1966-1967

3-1-1967

Porter v. Porter: Specific Partnership Property Seized to Satisfy Debt of Individual Partner Without Determination of Intervening Partners' Interest

Robert H. Long Jr.

Follow this and additional works at: <https://ideas.dickinsonlaw.psu.edu/dlra>

Recommended Citation

Robert H. Long Jr., *Porter v. Porter: Specific Partnership Property Seized to Satisfy Debt of Individual Partner Without Determination of Intervening Partners' Interest*, 71 DICK. L. REV. 487 (1967).
Available at: <https://ideas.dickinsonlaw.psu.edu/dlra/vol71/iss3/5>

This Article is brought to you for free and open access by the Law Reviews at Dickinson Law IDEAS. It has been accepted for inclusion in Dickinson Law Review by an authorized editor of Dickinson Law IDEAS. For more information, please contact lja10@psu.edu.

**PORTER v. PORTER: SPECIFIC PARTNERSHIP
PROPERTY SEIZED TO SATISFY DEBT
OF INDIVIDUAL PARTNER WITHOUT
DETERMINATION OF INTERVENING
PARTNERS' INTEREST**

The Supreme Court of Arizona, in *Porter v. Porter*,¹ recently upheld an execution upon alleged specific partnership property without judicial determination of the alleged partners' rights in the property. This decision appears to be contrary to the letter and spirit of the Uniform Partnership Act² which is in force in Arizona.

The purpose of this Note is to evaluate the *Porter* decision in light of the Uniform Partnership Act's policy of protecting the business enterprise from disruption by creditors of the individual partner. Guidelines will be suggested for future determination of cases in this area that will effectuate the policies of the Act.

Mr. Porter, the debtor partner, was domiciled in Idaho. His wife, who had moved to Arizona, brought an action in the Arizona courts for separate maintenance. Mr. Porter was served constructively and did not appear in the Arizona action. The complaint alleged that the Arizona Hotel in Phoenix was community property, and an order was granted attaching the hotel. Mr. Porter's two sisters then intervened claiming a partnership interest in the hotel. The court issued a pendente lite order for support of Mrs. Porter and her children, and appointed a receiver to satisfy the order out of hotel profits. The intervenors petitioned the Arizona Supreme Court for a writ of prohibition. The court quashed the petition on the ground that since prohibition is for questioning jurisdiction in extraordinary circumstances the intervenors' remedy was at trial.³

In August 1959, although the partnership interest had not yet been adjudicated, an execution was issued for sale of the hotel. The proceeds were to be applied to arrearages in the pendente lite support order. Shortly thereafter Mrs. Porter purchased the hotel at sheriff's sale. The partners moved to vacate the execution sale, but their motion was denied by the trial court.

During the litigation in Arizona the husband sued for divorce in Idaho. The wife and partners appeared in this action, the partners asserting their interest in the hotel. In December of 1960, after the sheriff's sale in Arizona, the Idaho divorce decree was

1. 416 P.2d 564 (Ariz. 1966).

2. ARIZ. REV. STAT. ANN. §§ 29-225, 29-228 (1956).

3. *Porter v. Stanford*, 86 Ariz. 402, 347 P.2d 35 (1959), cert. denied, 371 U.S. 829 (1962). The receiver also petitioned for a writ of prohibition and his petition was quashed on the same day as the partners' petition. *Kemble v. Stanford*, 86 Ariz. 392, 347 P.2d 28 (1962).

entered. The Idaho court found a valid partnership interest in favor of the intervenors, ordered Mrs. Porter to execute quit claims and releases of her interest in the hotel, and awarded her other community property. On appeal, the Idaho Supreme Court upheld this portion of the decree,⁴ which was the first determination of the partnership question since Arizona had not yet tried that issue.⁵

The partners returned to the Arizona trial court and filed a supplemental complaint asking that Arizona give full faith and credit to the Idaho divorce decree as *res judicata* concerning the partnership interest. At trial copies of the Idaho decree were excluded, no testimony was given, and the only other evidence presented was the quitclaim deed. A motion for directed verdict was made and sustained in favor of Mrs. Porter. After a motion for a new trial was denied, the partners appealed to the Court of Appeals of Arizona.⁶

The court of appeals reversed on the ground that the husband had never appeared and was not subject to in personam jurisdiction in the separate maintenance suit.⁷ The court also decided that since all the parties were present in the Idaho divorce court, its judgment was the first valid one on the partnership claim and was *res judicata*. Notably, the court of appeals did not consider the trial court's failure to protect the partners' claim or the possibility that the execution and sale should not be held *res judicata* because of the decree's lack of finality among the parties.

Mrs. Porter appealed to the Arizona Supreme Court, which reversed the court of appeals and reinstated the directed verdict of the trial court. The supreme court held that the execution and sale of the hotel were entitled to full faith and credit in the Idaho divorce court as a final determination of Mr. Porter's interest in the property.⁸ The court's reasoning was that the sale converted the hotel into separate property, thereby depriving the Idaho court of jurisdiction since Idaho divorce courts have jurisdiction over community property only.⁹

4. *Porter v. Porter*, 84 Idaho 400, 373 P.2d 327 (1962). The portion of the decree modified was that which prohibited Mrs. Porter from taking any other action concerning the property distribution.

5. The Arizona trial court's proceedings were *ex parte* as to Mr. Porter since he was constructively served and never appeared. The execution and sale of the hotel were in the nature of a default judgment against Mr. Porter. The partnership issue, however, had never come to trial in Arizona at the time of the Idaho divorce decree.

6. *Porter v. Porter*, 1 Ariz. App. 363, 403 P.2d 298 (1965).

7. This conclusion appears to be erroneous since in personam jurisdiction is not necessary for jurisdiction to vest. A court has jurisdiction to enter a judgment in rem when the property is within the state and under the power of the court and the party is constructively served according to statute. *Pennington v. Fourth Nat'l Bank of Cincinnati*, 243 U.S. 269 (1917); *Porter v. Duke*, 34 Ariz. 217 (1928).

8. *Porter v. Porter*, 416 P.2d 564 (Ariz. 1966).

9. IDAHO CODE ANN. § 32-712 (1963) gives divorce courts power to

The problem in *Porter* was the trial court's failure to protect the substantive rights alleged by the intervening partners. This set the stage for the litigation that followed. The Arizona courts failed to consider the letter or policy of the Uniform Partnership Act,¹⁰ which protects partnership property from disruption or seizure for debts of individual partners. They also failed to consider how the Arizona Rules of Civil Procedure operate on partial judgments in multiple party actions. The rules gave finality to this type of judgment only under strict conditions.¹¹

Arizona's initial jurisdiction over the hotel appears to be valid.

distribute community property. See also *Heslip v. Heslip*, 74 Idaho 368, 262 P.2d 999 (1953) where this is interpreted as excluding separate property.

10. ARIZ. REV. STAT. ANN. § 29-225 (1956): *Nature of a partner's right in specific partnership property* provides in part:

- A. A partner is co-owner with his partner of specific partnership property holding as a tenant in partnership.
- B. The incidents of this tenancy are such that:

- 3. A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners or any of them or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

See UNIFORM PARTNERSHIP ACT § 25; ARIZ. REV. STAT. ANN. § 29-229 (1956) *Partner's interest subject to charging order*

- A. On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and any other money due or to fall due to him in respect of the partnership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require.
- B. The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased without thereby causing a dissolution:
 - 1. With separate property, by any one or more of the partners, or
 - 2. With partnership property, by any one or more of the partners whose interests are not so charged or sold.
- C. Nothing in this chapter shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership.

See UNIFORM PARTNERSHIP ACT § 28.

- 11. ARIZ. REV. STAT. ANN., Rules of Civ. Proc., Rule 54:b (1956): *Judgment upon multiple claims*. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, the court may direct the entry of a final judgment upon one or more but less than all the claims only upon an express determination that there is no just reason for delay and upon an express direction for entry of judgment. In the absence of such determination and direction, an order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.

Constructive service upon the defendant, Mr. Porter,¹² is a sufficient procedure because the property is within the state and subject to the court's power.¹³ An Arizona statute provides that separate maintenance actions be handled as actions for divorce,¹⁴ and the divorce statutes provide for the exercise of power over property in general.¹⁵ Up to this point everything was in order. The intervention into a suit by persons asserting partnership interests brings other law into the picture, however, despite the general rule that an intervenor cannot complain of the propriety of procedure and must take the case as he finds it.¹⁶ Cases considering the protection of partnerships in multiple party proceedings cannot be found. The Uniform Partnership Act, however, does not allow individual creditors of a partner to proceed directly against specific partnership property.¹⁷ That prohibition should be extended to cases where the partnership issue arises by way of intervention, since the protection of substantive partnership interests should not turn upon the number of litigants.

In Arizona, the property rights of partners, exemption of partnership property from certain legal processes, and the method by which creditors of individual partners can reach the debtor's interest in partnership property are controlled by statute. The Uniform Partnership Act provides that "a partner's right in specific partnership property is not subject to attachment or execution except on a claim against the partnership."¹⁸ The Act also describes the procedure by which a judgment creditor of one partner may gain access to the partnership property:

On due application to a competent court by a judgment creditor of a partner, the court which rendered the judgment, order, or decree, or any other court, *may charge the interest of the debtor partner* with payment of the unsatisfied debt with interest thereon; and may then *or later appoint a receiver of his share of the profits*, and of any other money due or to fall due to him in respect of the partner-

12. ARIZ. REV. STAT. ANN., Rules of Civ. Proc., Rule 4:e:1 (1956).

13. *Pennington v. Fourth Nat'l Bank of Cincinnati*, 243 U.S. 269 (1917); *Pennoyer v. Neff*, 95 U.S. 714 (1877); *Porter v. Duke*, 34 Ariz. 217, 270 Pac. 625 (1928). The court may subject the property to its power by attachment as in the *Pennington* case, by appointment of a receiver, *Burkhart v. Circuit Ct. of Eleventh Judicial Cir.* 146 Fla. 457, 1 So.2d 872 (1941); *Forrester v. Forrester*, 155 Ga. 722, 118 S.E. 373 (1923), or by having specific reference made to the property in the complaint, *Wilson v. Smart*, 324 Ill. 276, 155 N.E. 289 (1927); *Hamil v. Hamil*, 106 Okla. 14, 232 Pac. 823 (1924).

14. ARIZ. REV. STAT. ANN. § 25-342 (1956).

15. ARIZ. REV. STAT. ANN. § 25-315 (1956) does not exclude community property which the hotel appeared to be.

16. *E.g.*, *Bancroft v. Allen*, 128 Fla. 14, 174 So. 749 (1937); *Strader v. Board of Educ. of Community Unit School Dist. No. 1 of Coles County*, 413 Ill. 610, 110 N.E. 2d 191 (1953).

17. ARIZ. REV. STAT. ANN. § 29-225, 29-228 (1956).

18. ARIZ. REV. STAT. ANN. § 29-225 (1956).

ship, and make all other orders, directions, accounts or inquiries which the debtor partner might have made, or which the circumstances of the case may require.¹⁹

Under these sections, as construed in other jurisdictions, a partner's interest in specific partnership property is held subject to attachment or execution only when the claim is against the partnership.²⁰ The remedy for a judgment creditor of an individual partner (like Mrs. Porter) is the statutory charging order,²¹ which reaches only the distributive share of a debtor partner in specific partnership property. All claims against the partnership must first be satisfied and the other partners' shares protected. The charging order is not a lien against any specific property of the partnership.²² The Pennsylvania Superior Court has said:

The creditor of the individual partner . . . can be paid only out of what remains to the individual partner as his share of the profits after the partnership obligations, including those of any judgment credit of the partnership have been satisfied.²³

This procedure effectively protects the substantive rights of both the other partners and partnership creditors.

In *Porter* the initial attachment was proper as long as the two original parties were before the court. When third parties intervened alleging a partnership interest in the property, however, the procedure should have been modified to conform to that specified by the UPA, at least until the validity of the intervenors' claim was determined.

The Arizona Supreme Court had already settled the issue of priority of the partnership interest over a community property interest in a prior decision. In *Cummings v. West*²⁴ the court said:

[S]ubject to the primary charge of any liabilities to which the partnership may be subjected . . . the power of the partnership and its members over assets, either wholly or in part made up of community property predominates over any rights which the community may have in regard to the same. Community rights and powers can only become the prevailing consideration in such a case after all partnership obligations and powers have been fully discharged and satisfied.²⁵

In that case the husband had conveyed his interest in certain part-

19. ARIZ. REV. STAT. ANN. § 29-228 (1956). (Emphasis added.)

20. E.g., *Sherwood v. Jackson*, 121 Cal. App. 354, 8 P.2d 943 (1932); *Townsend v. L.J. Appel Sons, Inc.*, 164 Md. 255, 164 Atl. 679 (1933).

21. *Baum v. Baum*, 51 Cal.2d 610, 335 P.2d 481 (1959); *Weisinger v. Rae*, 19 Misc.2d 341, 188 N.Y.S.2d 10 (Sup. Ct. 1959).

22. *Cunningham v. Cunningham*, 303 Ill. 41, 135 N.E. 21 (1922); *Shirk v. Caterbone*, 201 Pa. Super. 544, 193 A.2d 664 (1963).

23. *Shirk v. Caterbone*, 201 Pa. Super. 544, 547, 193 A.2d 664, 665 (1963).

24. 72 Ariz. 93, 231 P.2d 439 (1951).

25. *Id.* at 100, 231 P.2d at 443.

nership realty to his partner for cash, as an adjustment of the equities between them. The court held that the community interest of the conveying partner's wife in the property could not prevail over the rights of partners to adjust equities between themselves.

In *United States v. Worley*,²⁶ a federal court construed the Tennessee Uniform Partnership Act to protect the substantive rights in a partnership by holding that a widow's interest derived from a separation agreement was only an interest in the surplus after all partnership debts were satisfied. The wife there had no interest in specific partnership property. The case arose when the partnership's successor corporation became bankrupt, and the court decided that the widow had no interest in parcels of real estate that were assets of the partnership. The trustee was ordered to sell the land, and the wife shared in the proceeds only after the bankrupt's debts were satisfied.

In *Mazzuchelli v. Siberberg*,²⁷ the New Jersey Supreme Court said in dictum that the policy behind the Uniform Partnership Act is partially to protect "the business operations against the immediate impact of personal involvements of the partners."²⁸

Thus the procedural protection of substantive rights in partnerships is clear. The policy is to determine all of the rights to partnership property and to satisfy those interests before the property is applied to individual debts of a partner, whether or not they arise out of his marital status. The UPA and the cases arising under it indicate that the Arizona courts were wrong in the *Porter* case. The clarity of the Uniform Partnership Act and its policy foundations are reinforced by the fact that no other case can be found where the instant question was presented, much less decided as it was in *Porter*.

Another aspect of the *Porter* decision is the Arizona Supreme Court's failure to observe the Rules of Civil Procedure which the court itself had promulgated.²⁹ The rules, a code similar to the Federal Rules of Civil Procedure,³⁰ provide for a less than final judgment in the *Porter* setting. In regard to judgments in multiple party proceedings the rules provide:

54(b) *Judgment upon multiple claims.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, the court may direct the entry of a final judgment upon one or more but less than all the claims only after an express determination that there is no just reason for delay and

26. 213 F.2d 509 (6th Cir. 1954).

27. 29 N.J. 15, 148 A.2d 8 (1959).

28. *Id.* at 17, 148 A.2d at 11.

29. ARIZ. REV. STAT. ANN. §§ 12-109, 12-111 (1956) provide for promulgation of the rules of court by the Supreme Court of Arizona.

30. Compare ARIZ. REV. STAT. ANN. Rules of Civ. Proc. (1956) with FED. R. CIV. P.

upon express direction for entry of judgment. In the absence of such determination and direction, *any order or other form of decision, however designated, which adjudicates less than all the claims shall not terminate the action as to any of the claims*, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims.³¹

It is evident that in multiple party actions judgments affecting less than all the parties cannot be final as long as there are substantive rights to be decided. Decisions like the *Porter* execution sale, lacking finality, are therefore not entitled to full faith and credit.³² This is another ground upon which the trial court should have been reversed. The procedural rule, if followed, makes adequate provision for rectifying such errors by viewing these judgments as not final. In *Porter* no consideration was given to this obvious protection for third party intervenors.

CONCLUSION

If the Arizona Supreme Court had properly held that the execution sale was not entitled to full faith and credit in Idaho, the hotel would have still been community property. As such it would have been squarely within the power of the Idaho divorce court.³³ The Idaho decree would have been the first valid judgment on the property, entitling it to full faith and credit in Arizona. The Arizona court did not adjudicate the partnership issue until after the Idaho divorce decree, thereby ignoring the Uniform Partnership Act, prior case law, and its own procedural rules.

The Arizona Supreme Court should have held that an intervenor's substantive rights require protection even if it means a change in trial procedure. It should also have mandated that the Uniform Partnership Act's procedure be used and its policy observed whenever partnership rights are asserted. The court should also have concluded that the execution sale was not a final judgment under Arizona's Rules of Civil Procedure.

The *Porter* case in Arizona now stands for the proposition that when a partner's name is not on a deed to partnership property, the property may be sold by execution sale for the benefit of another partner's creditors after he has intervened, but before his interest has been determined. Jurisdictions adhering to the Uniform Partnership Act³⁴ should beware the obvious pitfalls of *Porter v. Porter*.

ROBERT H. LONG, JR.

31. ARIZ. REV. STAT. ANN., Rules of Civ. Proc., Rule 54: b (1956). (Emphasis added.)

32. *Sistare v. Sistare*, 218 U.S. 1 (1909). Under the full faith and credit clause a judgment must *inter alia* be a final adjudication to come under the purview of the Constitution.

33. IDAHO CODE ANN. § 32-712 (1963).

34. Forty-four jurisdictions had adopted the Uniform Partnership Act as of 1965. 7 UNIF. L. ANN. 7 (Supp. 1965).