PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: GREGORY CHERNUSHIN, Debtor. --- ROBERTSON B. COHEN, as Chapter 7 Trustee Plaintiff - Appellant, v. ANDREA CHERNUSHIN; JUDY T. COX REVOCABLE TRUST; ALLEN E. COX REVOCABLE TRUST, Defendants - Appellees.	No. 18-1068

Appeal from the United States District Court for the District of Colorado (D.C. No. 1:17-CV-00962-RBJ)

(Filed Dec. 21, 2018)

Mark A. Larson, Larson Law Firm, LLC, Louisville, Colorado (James S. Helfrich, Allen Vellone Wolf

Helfrich & Factor P.C., Denver, Colorado, with him on the brief), for Plaintiff - Appellant.

Michael J. Gates, Foster Graham Milstein & Calisher, LLP, Denver, Colorado, for Defendant - Appellee Andrea Chernushin.

Before **BRISCOE**, **MURPHY**, and **McHUGH**, Circuit Judges.

McHUGH, Circuit Judge.

Gregory and Andrea Chernushin owned a second home in Colorado in joint tenancy with right of survivorship. Eventually, Mr. Chernushin (but not Ms. Chernushin) filed for bankruptcy. During the bankruptcy proceedings, Mr. Chernushin died. The bankruptcy trustee, Robertson B. Cohen, then filed an adversary complaint against Ms. Chernushin, seeking to sell the home. Ms. Chernushin argued the bankruptcy estate no longer included any interest in the home because Mr. Chernushin's joint tenancy interest ended at his death. The bankruptcy court agreed with Ms. Chernushin, as did the district court on appeal. Mr. Cohen now appeals to this court.

Because the bankruptcy estate had no more interest in the home than Mr. Chernushin and Mr. Chernushin's interest extinguished when he died, we affirm.

I. INTRODUCTION

On August 17, 2015, Mr. Chernushin filed a voluntary Chapter 13 bankruptcy petition. Ms. Chernushin did not join his bankruptcy petition, nor did she file her own. Mr. Chernushin listed two real properties in his petition—a primary residence not at issue and a second home that is the subject of this appeal. Both homes were owned in joint tenancy with right of survivorship. Mr. Chernushin claimed a bankruptcy exemption for the primary residence but not for the second home. A little over a month later, on September 30, 2015, Mr. Chernushin moved to convert his Chapter 13 reorganization proceeding to a Chapter 7 liquidation proceeding. The bankruptcy court converted the case and appointed Mr. Cohen as trustee.

On or about June 9, 2016, Mr. Chernushin committed suicide. One week later, Mr. Cohen initiated an adversary proceeding and filed a complaint against Ms. Chernushin in bankruptcy court seeking authorization to sell the second home. In response, Ms. Chernushin argued the second home was "no longer an asset of the Debtor's Estate since the Debtor's death in June 2016." App. at 159. The bankruptcy court agreed with Ms. Chernushin and granted summary judgment in her favor.

Mr. Cohen appealed to the district court, and the court affirmed the bankruptcy court. *Cohen v. Chernushin* (*In re Chernushin*), 584 B.R. 567 (D. Colo. 2018). Mr. Cohen then filed a timely appeal from the district court's decision.

II. DISCUSSION

A. *Standard of Review*

"Our review of the bankruptcy court's decision is governed by the same standards of review that govern the district court's review of the bankruptcy court." *Conoco, Inc. v. Styler* (*In re Peterson Distrib., Inc.*), 82 F.3d 956, 959 (10th Cir. 1996). "[W]e review the bankruptcy court's legal determinations *de novo* and its factual findings under the clearly erroneous standard." *Id.* Here, there are no disputed factual issues—we are reviewing only the bankruptcy court's legal determination. "Although we may look to the district court's intermediate appellate analysis to inform our review, we owe no deference to that court's decision." *Search Mkt. Direct, Inc. v. Jubber* (*In re Paige*), 685 F.3d 1160, 1178 (10th Cir. 2012). Before proceeding to our de novo review of the bankruptcy court's decision, we pause to provide an overview of the relevant legal principles.

B. *Bankruptcy Estates*

The commencement of a bankruptcy case "creates an estate." 11 U.S.C. § 541(a). "Section 541(a)(1) provides that the property of the estate includes 'all legal or equitable interests of the debtor in property as of the commencement of the bankruptcy case." *Parks v. FIA Card Servs., N.A.* (*In re Marshall*), 550 F.3d 1251, 1255 (10th Cir. 2008). In bankruptcy proceedings, "[p]roperty interests are created and defined by state law." *Butner v. United States*, 440 U.S. 48, 55 (1979); *In re Marshall*, 550 F.3d at 1255 (quotation marks omitted).

"Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." *Butner*, 440 U.S. at 55. "Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.'" *Id.* (quoting *Lewis v. Mfrs. Nat'l Bank of Detroit*, 364 U.S. 603, 609 (1961)). But "[o]nce that state law determination is made, . . . we must still look to federal bankruptcy law to resolve the extent to which that interest is property of the estate." *In re Marshall*, 550 F.3d at 1255 (internal quotation marks omitted).

We have "emphasize[d] § 541(a)(1) limits estate property to the debtor's interests 'as of the commencement of the case.'" *Sender v. Buchanan* (*In re Hedged-Invs. Assocs., Inc.*), 84 F.3d 1281, 1285 (10th Cir. 1996). And "[t]his phrase places both temporal and qualitative limitations on the reach of the bankruptcy estate." *Id.* Temporally, "it establishes a clear-cut date after which property acquired by the debtor will normally not become property of the bankruptcy estate." *Id.* And qualitatively, "the phrase establishes the estate's rights as no stronger than they were when actually held by the debtor." *Id.* "Congress intended the trustee to stand in the shoes of the debtor and 'take no greater rights than the debtor himself had.'" *Id.* (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 368, *reprinted in* 1978 U.S.C.C.A.N. 5963, 6323); *see id.* at 1284 (the

trustee "stands in the shoes of the debtor . . . and takes no greater rights than the [debtor] had as of the bankruptcy filing").

It is uncontested that Mr. Chernushin and Ms. Chernushin owned the second home in joint tenancy with right of survivorship and the joint tenancy was not severed by Mr. Chernushin's bankruptcy petition nor at any time prior to his death.[1] And "since there is no federal law of property, it is necessary to look to state law to determine the nature, extent, and effect of the debtor's interest in a [joint tenancy with right of survivorship]." *Zubrod v. Duncan* (*In re Duncan*), 329 F.3d 1195, 1198 (10th Cir. 2003) (quotation marks omitted).

Under Colorado law, "[u]pon the death of a joint tenant, the deceased joint tenant's interest is terminated. In the case of one surviving joint tenant, his or her interest in the property shall continue free of the deceased joint tenant's interest." Colo. Rev. Stat. § 38-31-101(6)(c). Each joint tenant possesses an undivided interest in the whole property. *Mangus v. Miller*, 532 P.2d 368, 369 (Colo. App. 1974), and any "[s]everance must occur prior to the death of one of the joint

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[1] Prior cases in the District of Colorado held that a bankruptcy petition filed by one joint tenant severed joint tenancy. *See Hahn-Martinez v. Slifco* (*In re Slifco*), No. 06-cv-01781-EWN, 2007 WL 1732782 (D. Colo. June 14, 2007); *In re Lambert*, 34 B.R. 41 (Bankr. D. Colo. 1983). After *In re Slifco*, the Colorado General Assembly amended the joint tenancy statute to expressly provide "[f]iling a petition in bankruptcy by a joint tenant shall not sever a joint tenancy." Colo. Rev. Stat. § 38-31-101(5)(b).

tenants, since the right of survivorship instantly vests title to the whole property in the surviving tenant at the moment of death of the other joint tenant," *Place v. Carmack*, 522 P.2d 592, 593 (Colo. App. 1974), *rev'd on other grounds*, 535 P.2d 197 (Colo. 1975).

This would seemingly resolve the appeal. Under Colorado law, Mr. Chernushin's interest in the joint tenancy "terminated," Colo. Rev. Stat. § 38-31-101(6)(c), and "the right of survivorship instantly vest[ed] title to the whole property in [Ms. Chernushin,] the surviving tenant[,] at the moment of death," *Place*, 522 P.2d at 593. And because the trustee "take[s] no greater rights than the debtor himself had," *In re Hedged-Invs. Assocs., Inc.*, 84 F.3d at 1285 (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 368), the trustee's, and the estate's, rights in the property terminated at Mr. Chernushin's death. As a result, Ms. Chernushin owns the entire property and it is no longer part of the bankruptcy estate.

Mr. Cohen has not cited any case where a court has determined that a joint tenancy survived the bankruptcy petition and yet failed to vest full title to the surviving tenant upon the death of a debtor joint tenant.[2] Instead, he presents several arguments, based on

[2] It appears every court that has considered a case involving a joint tenancy where either a debtor joint tenant or non-debtor joint tenant died has assumed, without explanation, that the joint tenancy operates exactly as it would in the absence of the bankruptcy. *See*, *e.g.*, *In re Peet*, No. 11-62549, 2014 WL 11321405, at *3 (Bankr. W.D. Mo. Aug. 25, 2014) (finding a lack of severance of joint tenancy and thus, after the death of the non-debtor joint tenants, "the [bankruptcy] estate now holds the entire interest" in

the Supremacy Clause, why federal law requires a different result: (1) Federal Rule of Bankruptcy Procedure 1016 provides that the death of the debtor does not impact the bankruptcy estate; (2) the Chapter 7 trustee has plenary authority over the bankruptcy estate subject to bankruptcy court approval; and (3) the Chapter 7 trustee has greater rights than the debtor under the strong arm clause, § 544(a). We address each argument in turn.

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the property), *aff'd sub nom. Peet v. Checkett* (*In re Peet*), 529 B.R. 718 (B.A.P. 8th Cir. 2015), *aff'd*, 819 F.3d 1067 (8th Cir. 2016); *In re Benner*, 253 B.R. 719, 723 (Bankr. W.D. Va. 2000) (finding a lack of severance of joint tenancy so, at the non-debtor joint tenant's death, "the trustee had no one else to share the property with and, therefore, he takes it all"); *Durnal v. Borg-Warner Acceptance Corp.* (*In re DeMarco*), 114 B.R. 121, 126–27 (Bankr. N.D.W.Va. 1990) (finding a lack of severance of joint tenancy so, at the death of the debtor joint tenant, "there remains no interest or property right in the deceased" and the property was no longer in the bankruptcy estate).

At least two other courts have mentioned in dicta the same conclusion with respect to the effect of a joint tenancy or life estate death on a bankruptcy estate. *See Daff v. Wallace* (*In re Cass*), No-12-1513-Kipata, 2013 WL 1459272, at *3 (B.A.P. 9th Cir. Apr. 11, 2013) (quoting, without comment, from a bankruptcy court order that "[u]pon the Debtor's death, the life estate terminated and no longer constituted property of bankruptcy estate which could be administered by the Trustee for the benefit of creditors"); *Feldman v. Panholzer* (*In re Panholzer*), 36 B.R. 647, 651–52 (Bankr. D. Md. 1984) (after determining that filing for bankruptcy severed joint tenancy, opining that under joint tenancy, the bankruptcy estate would either be "depleted by the death of the debtor who is a joint tenant" or "enriched by the death of a joint tenant survived by the debtor").

C. *Federal Rule of Bankruptcy Procedure 1016*

Federal Rule of Bankruptcy Procedure 1016[3] provides: "Death or incompetency of the debtor shall not abate a liquidation case under chapter 7 of the Code. In such event the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death or incompetency had not occurred."

Nothing in the plain text of the rule states that the bankruptcy *estate* can never change upon the death of the debtor. Instead, the rule directs that the bankruptcy *proceedings* shall continue and the estate "shall be administered and the case concluded in the same manner, *so far as possible*," as though death had not transpired. This is a *procedural rule*. It says nothing about the *substance* of the bankruptcy estate. Consistent with this rule, the bankruptcy *proceedings* here should continue as though Mr. Chernushin had not died.

Mr. Cohen argues otherwise and urges a reading of this rule that would prevent the bankruptcy estate from changing upon the death of the debtor. In support, he cites *Redfield v. Ansbro* (*In re Goldberg*), 98 B.R. 353 (Bankr. N.D. Ill. 1989). We are not persuaded. *In re Goldberg* involved a contested proceeding between the

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[3] The Supreme Court promulgated the Federal Rules of Bankruptcy Procedure pursuant to 28 U.S.C. § 2075. "As such, the Rules have the force of law." *Brooks Fashion Stores, Inc. v. Mich. Emp't Sec. Comm'n* (*In re Brooks Fashion Stores, Inc.*), 124 B. R. 436, 440 (Bankr. S.D.N.Y. 1991).

executor of the deceased debtor's probate estate and the trustee of the debtor's bankruptcy estate. *Id.* at 354. There, the court first noted, referring to the debtor's pension fund, that the debtor's "death did not change the Debtor's entitlement to the funds," and under Bankruptcy Rule 1016, the debtor's death did not affect the status of bankruptcy estate. *Id.* at 358. The court next considered the legislative history of § 541 as it relates to property properly considered part of the *probate estate* of a deceased debtor. *See id.* ("Consequently, if the debtor dies during the case, only property exempted from property of the estate or acquired by the debtor after the commencement of the case and not included as property of the estate will be available to the representative of the debtor's *probate estate*." (emphasis added) (quoting S. Rep. No. 95-989, 95th Cong., 2d Sess. 83, *reprinted in* 1978 U.S.C.C.A.N. 5787, 5869)). The facts of *In re Goldberg* are readily distinguishable from those present here: Mr. Chernushin's death *did* change his entitlement to the second home—at death *his interest extinguished and he had no entitlement to it*. And unlike property that must pass through probate, as a joint tenancy, title to the property here was "instantly vest[ed]" in Ms. Chernushin upon Mr. Chernushin's death. *Place*, 522 P.2d at 593.

Federal Rule of Bankruptcy Procedure 1016 does not prevent Mr. Chernushin's joint tenancy in the home from terminating at his death to the detriment of the bankruptcy estate.

D. *Chapter 7 Trustee Plenary Authority*

Mr. Cohen next argues that allowing Mr. Chernushin's interest in the second home to terminate at his death would vitiate Mr. Cohen's plenary power over the bankruptcy estate's assets as the trustee. Under the bankruptcy code, the trustee may, "after notice and a hearing," sell property of the estate. 11 U.S.C. § 363(b)(1). That power includes selling "both the estate's interest . . . and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a . . . joint-tenant." *Id.* § 363(h). And because Federal Rule of Bankruptcy Procedure 6007 requires that the trustee "give notice of a proposed . . . disposition of property," and requires "a hearing" if a party objects to the disposition, Mr. Cohen contends that Colorado's joint tenancy regime might violate the due process rights of creditors.

In addition, Mr. Cohen argues that "property of the estate is not affected by inaction." Appellant's Br. at 19. Under the bankruptcy code, "property of the estate that is not abandoned under this section and that is not administered in the case remains property of the estate." 11 U.S.C. § 554(d). And the trustee has the power to "avoid a transfer of property of the estate." *Id.* § 549(a). Mr. Cohen asserts that allowing property to be removed from the bankruptcy estate by the death of a debtor is inconsistent with the trustee's significant authority over the bankruptcy estate and "would create considerable disorder" and "essentially usurp the rights of [the debtor's] creditors." Appellant's Br. at 19.

But nothing about Colorado's joint tenancy law interferes with Mr. Cohen's obligations or authority as the trustee. Instead, Mr. Cohen's argument is based on a misunderstanding about the property in Mr. Chernushin's bankruptcy estate. As noted above, the bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the bankruptcy case." 11 U.S.C. § 541(a). Mr. Cohen mistakenly concludes that the second home "was property of the bankruptcy estate." Appellant's Br. at 7. As discussed, however, § 541(a)(1) limits the property in the estate not only temporally, but also *qualitatively*. *See In re Hedged-Invs. Assocs., Inc.*, 84 F.3d at 1285. And that qualitative limitation here establishes, as correctly noted by Ms. Chernushin, that only a joint tenancy interest in the second home was ever part of the estate. The "estate's rights [are] no stronger than they were when actually held by the debtor," *id.*, and the trustee "take[s] no greater rights than the debtor himself had," *id.* (quoting H.R. Rep. No. 595, 95th Cong., 1st Sess. 368). Thus, the bankruptcy estate contained the same interest held by Mr. Chernushin—a joint tenancy subject to extinguishment in favor of the surviving joint tenant upon Mr. Chernushin's death.

Contrary to Mr. Cohen's assertions, Colorado's joint tenancy law did not interfere with federal law or with his ability to manage the bankruptcy estate. Upon Mr. Chernushin's death, there was no transfer of property that he could avoid. The joint tenancy held by the estate extinguished automatically. And while § 363(h) allows Mr. Cohen to sell "both the estate's

interest . . . and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a . . . joint-tenant," he had to do so while the estate still had an interest in the property. By the time the trustee attempted to sell the second home, the estate no longer had any interest in it. Consequently, § 363(h) confers no power on Mr. Cohen to sell the second home.

E. *Strong Arm Clause*

Mr. Cohen finally contends the strong arm clause, 11 U.S.C. § 544, prohibits recognition of the effects of Mr. Chernushin's death on the estate property. Again, we disagree. The strong arm provision is inapplicable in this situation, as Mr. Cohen perhaps unwittingly concedes when he acknowledges that the strong arm clause "gives a bankruptcy Trustee special powers to defeat the status of certain *creditors*." Appellant's Br. at 20 (emphasis added). Ms. Chernushin is not a creditor, nor is there any question about the status of any creditors related to the second home. She was a joint tenant and is now the sole owner of the second home.

Under the strong arm provision:

> (a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by—

> (1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;
>
> (2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or
>
> (3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

11 U.S.C. § 544. By its terms, the strong arm provision allows the trustee of the bankruptcy estate to "avoid any transfer . . . or any obligation" that is voidable by judicial lien holders and bona fide purchasers. *Id.* To reiterate, no transfer occurred here. Ms. Chernushin held and continues to hold an interest in the entire property. That interest is simply no longer subject to Mr. Chernushin's joint tenancy because his interest

extinguished upon his death. There are likewise no obligations subject to avoidance. Thus, § 544 is inapplicable.

Mr. Cohen, however, latches onto language in a previous decision of this court interpreting the strong arm clause: we noted that "[a] bankruptcy trustee, who acts in the interests of the debtor's general creditors, may acquire for the bankruptcy estate a *greater right to a debtor's real property than the debtor himself had*." *Hamilton v. Wash. Mut. Bank FA* (*In re Colon*), 563 F.3d 1171, 1172–73 (10th Cir. 2009) (emphasis added); *see* Appellant's Br. at 10 (quoting *In re Colon*); Appellant's Reply Br. at 9–10 (same). But a closer reading of *In re Colon* provides important context for this quote: "In particular, if there is a *lien* on a piece of property, the bankruptcy estate may take the property free of the *lien* (that is, avoid the lien) if the lien would not bind a hypothetical bona fide purchaser (BFP) of the property from the debtor." *In re Colon*, 563 F.3d at 1173 (emphasis added); *see id.* at 1173–74 ("Under 11 U.S.C. § 544(a) a bankruptcy trustee can avoid a *mortgage* if it could be avoided by a hypothetical lien creditor or by a hypothetical BFP of the property." (emphasis added) (footnote omitted)). Not surprisingly, Mr. Cohen has cited no Colorado decision granting hypothetical lien creditors or bona fide purchasers the power to avoid the effects of joint tenancy. *Cf. id.* at 1174 (noting that under § 544, "[t]he status and rights of the hypothetical lien creditor and BFP are determined by state law."). Thus, nothing in the strong arm clause allows Mr. Cohen to avoid the automatic and immediate

extinguishment of the bankruptcy estate's interest in the property upon Mr. Chernushin's death.

Mr. Cohen nevertheless contends that the estate prevails under § 544 either as the equivalent of a judicial lien holder or with the status of a bona fide purchaser for value. For the reasons we now explain, we disagree.

1. Hypothetical Lien Creditor under §§ 544(a)(1), (2)

Mr. Cohen argues that his status "[a]s a hypothetical lien creditor" "empowers him to liquidate, or 'redeem' the Debtor's undivided interest in jointly held property." Appellant's Br. at 22. He stresses that "he retains the right to sell the [second home] under § 363(h) and distribute the proceeds accordingly, even after the Debtor's death." *Id.*

Mr. Cohen is incorrect. Under Colorado law, "the lien of a judgment debtor against a joint tenant attaches to the interest of only the joint tenant debtor, and . . . the lien terminates if the joint tenant debtor dies prior to the attachment or levy having been made upon his interest." *Park State Bank v. McClean*, 660 P.2d 13, 15 (Colo. App. 1982).

> It therefore follows that because the death of a joint tenant does not result in a transfer of that tenant's interest to the survivor, but merely terminates any interest the decedent may have had, any liens existing against the deceased joint tenant's interest are likewise

> extinguished, and the survivor becomes the sole owner of the entire property free from any liens which may have previously existed on the now extinguished interest of the joint tenant debtor.

Id. at 16; *see also Webster v. Mauz*, 702 P.2d 297, 298 (Colo. App. 1985) ("Upon the death of a joint tenant, the surviving tenant becomes sole owner of the property free from any liens which may have existed on the extinguished interest of the deceased. . . . Thus, unless the joint tenancy was severed prior to [the debtor]'s death, plaintiff became the sole owner of the property, free of any liens which may have existed on [the debtor]'s interest.").

Even as a "hypothetical lien creditor," Mr. Cohen's interest in the property and right to sell the property ended with Mr. Chernushin's death. And, under Mr. Cohen's status as a hypothetical lien creditor, he would be able to defeat only prior transfers, conveyances, or encumbrances placed on the property, none of which has occurred here.

2. Bona Fide Purchaser

Mr. Cohen argues that because § 544(a)(3) treats him as a bona fide purchaser, he has "all of the rights and powers that a bona fide purchaser would have under state law, including the right and power to avoid a prior conveyance." Appellant's Br. at 24. Again, he fails to identify any prior conveyance he could avoid. To recap, there has been no conveyance of the second home

because at Mr. Chernushin's death, his interest terminated and title vested instantly in Ms. Chernushin.

Mr. Cohen next asserts that either he, as the trustee, or the bankruptcy estate itself, became a joint tenant with Ms. Chernushin upon Mr. Chernushin's bankruptcy petition. According to Mr. Cohen, upon Mr. Chernushin's death the joint tenancy continued between the estate and Ms. Chernushin. He cites no law in support of this proposition and we have found none. Nor do we see anything in § 544(a)(3) or in Colorado law that authorizes a "transfer" of joint tenancy to another party as the protection afforded bona fide purchasers.

Under Colorado law, "[r]ecording acts have been adopted for purposes including the protection of subsequent purchasers of real property against the risk of prior secret and unknown instruments affecting title to [a property]." *City of Lakewood v. Mavromatis*, 817 P.2d 90, 94 (Colo. 1991). "Very generally, they permit a purchaser to rely on the condition of title as it appears of record." *Id.* (quoting *Page v. Fees-Krey, Inc.*, 617 P.2d 1188, 1193 (Colo. 1980)). Thus, under Colorado law, bona fide purchasers of real estate are protected from prior *unrecorded* conveyances or encumbrances of which they had *no actual knowledge or notice*. *Id.* As a hypothetical bona fide purchaser, Mr. Cohen would be protected against any unrecorded conveyances on the second home even if Mr. Chernushin himself were not protected against those conveyances (and hence would have, as we have previously described, "a greater right to a debtor's real property than the debtor himself

had"). But here, there are no unrecorded conveyances against which a bona fide purchaser would be protected. Thus, Mr. Cohen's status as a hypothetical bona fide purchaser for value does not grant him any greater rights in this particular property.

In summary, Mr. Cohen and the bankruptcy estate have no interest in the second home that extends beyond Mr. Chernushin's death.

III. CONCLUSION

Colorado's joint tenancy law does not conflict with federal bankruptcy law. Because Mr. Chernushin and Ms. Chernushin owned the second home in joint tenancy with right of survivorship at the time of the bankruptcy filing and joint tenancy was not severed prior to Mr. Chernushin's death, the bankruptcy estate's interest in the second home terminated at Mr. Chernushin's death. No interest in the second home remains in the bankruptcy estate. We AFFIRM the district court's decision upholding the bankruptcy court's judgment.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge R. Brooke Jackson

Civil Action No 17-cv-0962-RBJ

In re: GREGORY CHERNUSHIN,

Debtor.

ROBERTSON B. COHEN, as Chapter 7 Trustee,

Plaintiff,

v.

GREGORY CHERNUSHIN,
ANDREA CHERNUSHIN,
THE JUDY T. COX REVOCABLE TRUST,
and THE ALLEN E. COX REVOCABLE TRUST,

Defendants.

ORDER AFFIRMING BANKRUPTCY
COURT'S DETERMINATION

(Filed Jan. 26, 2018)

This matter is before the Court on Robertson B. Cohen's ("the Trustee") appeal from the judgment of the Bankruptcy Court, which determined that property owned by now-deceased Gregory Chernushin ("the Debtor") is not part of the Debtor's bankruptcy estate but instead is owned by Defendant Andrea Chernushin free of the interest of others. This Court exercises jurisdiction over the appeal pursuant to 28 U.S.C. §§ 1334(a) and 158(a)(1). The Court has reviewed the

record and the parties' briefs. For the reasons set forth below, the Bankruptcy Court's judgment is AFFIRMED.

BACKGROUND

The following facts are undisputed. On August 17, 2015 the Debtor filed a voluntary Chapter 13 bankruptcy petition. ECF No. 7-1 at 54. His wife, Mrs. Andrea Chernushin, neither joined his petition nor filed her own. At the time of his bankruptcy filing, the Debtor owned a vacation property located in Crested Butte, Colorado ("the Property"). The Debtor and Mrs. Chernushin owned the Property in joint tenancy with the right of survivorship. Pursuant to 11 U.S.C. § 541, the Debtor's interest in the Property became part of his bankruptcy estate when he filed for bankruptcy.

On October 2, 2015 the Court converted the Debtor's case to one under Chapter 7 of the Bankruptcy Code and the Trustee was appointed. On either June 8 or June 9, 2016 the Debtor died, but his death did not affect the progression of the bankruptcy case pursuant to Fed. R. Bankr. P. 1016. Days later, on June 15, 2016, the Trustee filed an adversary proceeding against the Debtor, Mrs. Chernushin, and two secured creditors in an effort to sell the Property. Mrs. Chernushin filed an answer in which she asserted that the Debtor's interest in the Property was terminated by operation of law on the day that he died, and therefore the Property was no longer part of the bankruptcy estate. Both parties filed motions for summary judgment

on the issue. ECF No. 7-1 at 54. In an April 3, 2017 order, the United States Bankruptcy Court for the District of Colorado granted Mrs. Chernushin's motion for summary judgment and determined that:

> the Debtor's interest in the Property remained in joint tenancy, with its accompanying right of survivorship, until the time of his death. At the time of his death, the Debtor's interest in the Property terminated. The Defendant [Mrs. Chernushin] now owns the Property free of any interest of the Debtor. The Property is not property of the Debtor's bankruptcy estate, and the Trustee is not entitled to sell it.

Id. The Bankruptcy Court thus entered judgment for Mrs. Chernushin and dismissed the adversary proceeding. *Id.* On May 3, 2017 the Trustee filed an appeal of the Bankruptcy Court's decision. The issues have been fully briefed and are ripe for this Court's review.

ANALYSIS

A. Standard of Review.

This Court reviews the Bankruptcy Court's legal determinations de novo. *See In re Baldwin*, 593 F.3d 1155, 1159 (10th Cir. 2010). The Court also reviews de novo mixed questions of law and fact that primarily involve legal issues. *See In re Wes Dor Inc.*, 996 F.2d 237 (10th Cir. 1993). The Bankruptcy Court's factual findings are reviewed for clear error. *See In re Johnson*, 477 B.R. 156, 168 (10th Cir. BAP 2012). If a "lower court's

factual findings are premised on improper legal standards or on proper ones improperly applied, they are not entitled to the protection of the clearly erroneous standard, but are subject to de novo review." *Id.*

Because the Trustee's appeal is premised on his argument that the Bankruptcy Court improperly applied the law, I will review the Bankruptcy Court's decision de novo. *See In re Baldwin*, 593 F.3d at 1159.

B. Trustee's Arguments.

The Trustee makes three arguments on appeal, but they boil down to one basic assertion: the Bankruptcy Court ignored federal law when it ruled that the Property was removed from the bankruptcy estate upon the death of the Debtor. ECF No. 9.[1] The Bankruptcy Court made its determination based upon Colorado joint tenancy law, as codified in C.R.S. § 38-31-101. ECF No. 7-1. The Trustee alleges that the Bankruptcy Court "ignored the Supremacy Clause of the United States and 11 U.S.C. § 541" and other

[1] Specifically, the Trustee's arguments are as follows: (1) "The Bankruptcy Court Erred when it Ignored the Supremacy Clause of the United States Constitution and 11 U.S.C. § 541 to Mandate that Property is Removed from a Bankruptcy Estate Pursuant to C.R.S. § 38-31-101 Without Administration or Due Process;" (2) "The Bankruptcy Court Erred when it Ignored the Bankruptcy Code With Respect to the Trustee's Standing in the Place of the Debtor and Represents the Interests of the Bankruptcy Estate with all rights to administer all of a Debtor's Property as the Property Existed on the Partition Date;" and (3) "The Bankruptcy Court Erred when it Failed to Address the Authority of the Chapter 7 Trustee Under 11 U.S.C. § 544."

provisions of the Bankruptcy Code in making this decision, and the Trustee argues that had the Bankruptcy Court properly applied federal law it would have ruled in the Trustee's favor. *Id.* After reviewing the briefs and relevant law, I AFFIRM the Bankruptcy Court's grant of summary judgment and determination that the Property is no longer part of the bankruptcy estate. My reasoning is explained below.

The Debtor and Mrs. Chernushin owned the Property as joint tenants. "[J]oint tenancy is a form of ownership in which each joint tenant possesses the entire estate, rather than a fractional share." *Taylor v. Canterbury*, 92 P.3d 961, 964 (Colo. 2004). When a joint tenant dies, his or her interest in the property is terminated, and the surviving joint tenant's interest in the property continues free of the deceased joint tenant's interest. C.R.S. § 38-31-101(6)(c). Jointly held property remains in a joint tenancy unless that joint tenancy is severed. *Taylor*, 92 P.3d at 964. The filing of the bankruptcy petition did not sever the joint tenancy, C.R.S. § 38-31-101(5)(b) and here neither party makes any other argument that severance occurred.[2]

[2] As far as this Court's research has unveiled, courts that have addressed the effect of a joint tenant's death as it relates to bankruptcy have only touched on the issue of severance. Because the parties here agree that there has been no severance, I will not address the issue. *See*, *e.g.*, *Hahn-Martinez v. Slifco*, Adversary No. 05-01923-EEB (Bankr. D. Colo. Aug. 29, 2006), *aff'd*, Case No. 06-CV-01781-EWN, 2007 WL 1732782 (D. Colo. June 14, 2007); *In re Peet*, No. 11-62549, 2014 WL 11321405, at *5 (Bankr. W.D. Mo. Aug. 25, 2014) (applying Missouri law and finding no severance), *aff'd*, 529 B.R. 718 (B.A.P. 8th Cir. 2015), *aff'd*, 819 F.3d 1067 (8th Cir. 2016); *In re Benner*, 253 B.R. 719, 721 (Bankr.

Therefore, the parties concur that the joint tenancy remained intact until at least the day the Debtor died, and the only issue remaining is whether the Debtor's interest in the Property survives with the Trustee despite the Debtor's death.

When a person files for Chapter 7 bankruptcy, his or her property is put into a "bankruptcy estate" from which his or her creditors will be paid. 11 U.S.C. § 541(a). The bankruptcy estate "includes all legal or equitable interests of the debtor, including properties held in joint tenancy, at the commencement of this case." *Id.* A trustee is appointed to oversee the bankruptcy estate and has a duty to recover and liquidate assets for the benefit of the Debtor's creditors. *Id*. at § 704(a). In this case, one such asset that the Trustee sought to liquidate for the benefit of the Debtor's creditors is the Property. The parties agree that when the Debtor filed for bankruptcy protection on August 17, 2015, the Trustee (on behalf of the bankruptcy estate) took over the Debtor's interest as a joint tenant in the Property and held this interest until at least the date of the Debtor's death.

However, the parties disagree about the impact, if any, that the Debtor's death had on the Trustee's interest in the Property. The Trustee argues that the

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W.D. Va. 2000) (applying Virginia law and finding no severance); *Durnal v. Borg–Warner Acceptance Corp. (In re DeMarco)*, 114 B.R. 121 (Bankr. N.D. W. Va. 1990) (applying West Virginia law and finding no severance); *Feldman v. Panholzer (In re Panholzer)*, 36 B.R. 647 (Bankr. D. Md. 1984) (applying Maryland law and finding severance).

Debtor's death had no impact on the Trustee's interest in the Property because "all of his property [had become] property of [the] bankruptcy estate," and the Trustee remained standing in the Debtor's place after he died. ECF No. 9 at 10. Put differently, because the Trustee had taken the Debtor's place, the Trustee argues that the Debtor's death and resulting extinguishment of the Debtor's joint tenancy rights in the Property did not mean that the Trustee figuratively "died" and also lost rights to the Property. Instead, the Trustee argues that the Trustee lives on, and as a result, the joint tenancy interest does as well. Mrs. Chernushin contests this assertion, arguing that the Trustee acquired the same rights that the Debtor held in the Property, and that the Trustee cannot assert greater title than the Debtor himself could have asserted. Therefore, Mrs. Chernushin argues that when the Debtor died and his interest in the Property was terminated, the Trustee's interest in the Property was likewise terminated. I agree with Mrs. Chernushin.

The Tenth Circuit has made clear that while a trustee "stands in the shoes" of a debtor, the trustee is to "take no greater rights than the debtor himself had." *Sender v. Buchanan* (In re Hedged-Investments Assocs., Inc.), 84 F.3d 1281, 1285 (10th Cir. 1996) (internal citations omitted). Therefore, even though the Trustee acquired and controlled the Debtor's interest in the Property, the Trustee's interest remained subject to the same limitations as those limiting the Debtor. *Id.* Under joint tenancy law, the Debtor's rights in the Property were to be terminated upon his death. Because the

Trustee stood in the Debtor's shoes, he too was encumbered by the statutory mandate that a joint tenant's rights are terminated upon death. Thus, when the Debtor died, his death terminated both his rights to the Property *and* the Trustee's rights to the Property. "Standing in the shoes" of the Debtor does not mean that the Trustee's life can mitigate the Debtor's death in the context of joint tenancy rights. As stated by the Bankruptcy Court in this case, "the Trustee has not cited any court to so hold, and this Court will not be the first." ECF No. 7-1 at 57.

As an alternative argument, the Trustee posits that Colorado's joint tenancy laws are irrelevant because Colorado law is superseded by federal law in this case due to the Supremacy Clause of the United States Constitution. *See* ECF No. 9 (citing U.S. Const., Art. VI, Cl. 2). Here, the Trustee believes that the Bankruptcy Court's decision conflicts with federal laws that indicate that a debtor's death has no impact on a bankruptcy proceeding. For example, the Trustee cites Federal Rule of Bankruptcy Procedure 1016, which states that in the event the Debtor dies, "the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death . . . had not occurred." Further, the Trustee notes that under 11 U.S.C. § 541(a) a bankruptcy estate "includes all legal or equitable interests of the debtor, including properties held in joint tenancy, *at the commencement of this case*," and therefore argues that the Debtor's death does not change the interest in the Property that the Trustee acquired from the Debtor at the

commencement of the case. 11 U.S.C. § 541(a) (emphasis added). In the Trustee's view, the fact that the Debtor died is of no consequence to the Trustee's interest in the Property because there exists "no provision or rule of the Bankruptcy Code that vitiates the Bankruptcy Estate's rights to the Crested Butte Property" due to the death of the Debtor. ECF No. 9 at 4. The Trustee also points to a portion of the House Congressional Record that states: "Once the estate is created, no interests in property of the estate remain in the debtor. Consequently, if the debtor dies during the case, only property exempted from property of the estate/ acquired by the debtor after the commencement of the case . . . will be available to the representative of the probate estate." HR Rep. 95-595, 368, 1978 U.S.C.C.A.N. 5963, 6324. Based on these federal laws and Congressional record, the Trustee argues that under federal law the Property remains a part of the bankruptcy estate despite the Debtor's death. Because state joint tenancy law leads to the opposite result, the Trustee argues that Colorado law is in conflict with the federal laws. And because the Supremacy Clause mandates that federal laws trump conflicting state laws, the Trustee posits that it is improper to rely on Colorado joint tenancy law to determine this issue.

This argument is unavailing. While the Trustee is correct that there are federal laws describing the way trustees should treat property interests they hold in the event that a debtor dies, these federal laws do not displace the role of state law in answering the initial question of which property interests belong to the

Trustee to begin with. The Supreme Court has made clear that "[p]roperty interests are created and defined by state law" in bankruptcy proceedings. *In re Marshall*, 550 F.3d 1251, 1255 (10th Cir. 2008) (citing *Butner v. United States*, 440 U.S. 48, 55 (1979)). *See also In re Duncan*, 329 F.3d 1195, 1201 (10th Cir. 2003) (holding that the Bankruptcy Court and the BAP erred because their determination undermined well-established state joint tenancy law); *In re Tung Thanh Nguyen*, 783 F.3d 769, 776 (10th Cir. 2015) (affirming the Bankruptcy Court's and the BAP's interpretation of state law in determining property interests of the bankruptcy estate). It is not a violation of the Supremacy Clause for the Bankruptcy Court to apply state law in determining the property interests of the parties involved in the bankruptcy proceeding; indeed, that is the proper procedure. Here, the Bankruptcy Court correctly turned to Colorado law to determine the property interests of the parties. Because Colorado law expressly dictates that the property interests of a joint tenant (and thus of a trustee standing in his shoes) are terminated upon death, the Bankruptcy Court's determination that the Trustee's interest in the Property was also terminated is proper.

Finally, the Trustee argues that the Bankruptcy Court erred when it "failed to address the authority of the Chapter 7 Trustee [u]nder 11 U.S.C. § 544." ECF No. 9. Section 544, commonly referred to as the strong-arm provision, "gives the trustee power, as of the commencement of the bankruptcy case, to avoid transfers and obligations of the debtor to the same extent as

certain hypothetical ideal creditors." *In re Moreno*, 293 B.R. 777, 781 (Bankr. D. Colo. 2003). This section is designed to prevent a debtor from surreptitiously transferring his property interests beyond the reach of the bankruptcy estate. *See id.* Here, however, the Debtor's interest (and therefore the Trustee's interest) in the Property could not be transferred because it was in fact *terminated* upon Debtor's death. Therefore, there was no "transfer" that the Trustee can avoid by using the strong-arm provision. Because 11 U.S.C. § 544 is inapplicable to block the transfer of a property interest that no longer exists, the Bankruptcy Court made no error in failing to address that provision, and its decision is AFFIRMED.

DATED this 26th day of January, 2018.

BY THE COURT:

/s/ Brooke Jackson
R. Brooke Jackson
United States District Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF COLORADO

In re: GREGORY CHERNUSHIN, Debtor.	Case No. 15-19178 HRT Chapter 7
ROBERTSON B. COHEN, as Chapter 7 Trustee, Plaintiff, v. GREGORY CHERNUSHIN, ANDREA CHERNUSHIN, THE JUDY T. COX REVOCABLE TRUST, and THE ALLEN E. COX REVOCABLE TRUST, Defendants.	Adversary No. 16-01233 HRT

ORDER ON CROSS-MOTIONS
FOR SUMMARY JUDGMENT

(Filed Apr. 3, 2017)

THIS MATTER comes before the Court on the Motion for Partial Summary Judgment (docket #29) filed by the Plaintiff, Robertson B. Cohen, Chapter 7 Trustee (the "Trustee"), the Response thereto and Cross-Motion for Summary Judgment (docket #33) filed by Defendant Andrea Chernushin (the "Defendant"), and the Response thereto (docket #37) filed by the Trustee.

BACKGROUND

The following facts are undisputed. On August 17, 2015, the Debtor, Gregory Chernushin (the "Debtor"), filed his voluntary Chapter 13 bankruptcy petition. His wife, the Defendant, neither joined his petition nor filed her own petition. At the time of his bankruptcy filing, the Debtor's interest in vacation property located at 17 Treasury Road, Mt. Crested Butte, Colorado 81225 (the "Property"), which he owned with the Defendant in joint tenancy, became property of his bankruptcy estate under 11 U.S.C. § 541.

On October 2, 2015, the Court converted the Debtor's case to one under Chapter 7, and the Trustee was appointed.

On June 9, 2016, the Debtor died.[1] Under Fed. R. Bankr. P. 1016, the Debtor's bankruptcy case continued, unaffected by his death.

On June 15, 2016, the Trustee filed the above-captioned adversary proceeding against the Debtor, the Defendant, and two secured creditors, seeking to sell the Property under 11 U.S.C. § 363(h). The Defendant asserts the Debtor's interest in the Property terminated by operation of law on his death, and the estate no longer has an interest in the Property. The Trustee and the Defendant seek partial summary judgment on this issue.

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[1] The cause of the Debtor's death is not relevant to the matter before the Court.

DISCUSSION

Colorado law recognizes joint tenancy, with its accompanying right of survivorship:

> The major distinguishing characteristic of a joint tenancy, as opposed to a tenancy in common, is the right of survivorship in each of the co-tenants. Upon the death of one of the co-tenants in joint tenancy, the entire undivided interest of the deceased passes, by operation of law, to the surviving co-tenant.[2]

Property held in joint tenancy remains in joint tenancy, with a right of survivorship, unless the joint tenancy is severed before the death of one of the tenants.[3] If the joint tenancy is severed, the property ownership is converted to tenancy in common, with no accompanying right of survivorship.[4]

Traditionally, courts determined whether joint tenancy was severed by looking to the "four unities" of time, title, interest, and possession, with the absence of any one unity severing the joint tenancy.[5] In *Bradley* and *Taylor*, the courts declined to apply the traditional four unities test, replacing it with the "more modern

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[2] *Bradley v. Mann*, 525 P.2d 492, 493 (Colo. Ct. App. 1974), *aff'd*, 535 P.2d 213 (Colo. 1975), *cited in Taylor v. Canterbury*, 92 P.3d 961 (Colo. 2004).

[3] *Id.*; *see also 2 Tiffany Real Prop.* § 419 (3d ed. rev. 2016).

[4] *Bradley*, 525 P.2d at 493; *Taylor*, 92 P.3d at 964.

[5] *Id.*

trend" of looking to whether the parties intended to sever the joint tenancy.[6]

Another division of this Court followed *Bradley* and *Taylor* when determining whether property the debtor held in joint tenancy with a non-debtor remained in the debtor's estate following his death. In *Hahn-Martinez v. Slifco (In re Slifco)*,[7] the Bankruptcy Court analyzed the intent of the parties and found an intent to sever the joint tenancy established before the debtor's death. Because the joint tenancy was severed, the parties' ownership interest was converted to tenancy in common, with no accompanying right of survivorship. The property therefore remained in the debtor's estate, unaffected by his death.[8] On appeal, the U.S. District Court affirmed the Bankruptcy Court's intent-to-sever factual finding and held, in the alternative, as a matter of law filing a bankruptcy petition evidences an intent to sever the joint tenancy of any property not claimed as exempt.[9]

In 2008, shortly after the U.S. District Court decided *Slifco*, the Colorado legislature amended the joint tenancy statute, Colo. Rev. Stat. § 38-31-101. The amendments restored the traditional four unities test, but specifically provided: "Nothing in this section shall

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[6] *Bradley*, 525 P.2d at 493; *Taylor*, 92 P.3d at 966.

[7] Adversary No. 05-01923-EEB (Bankr. D. Colo. Aug. 29, 2006), *aff'd*, Case No. 06-cv-01781-EWN, 2007 WL 1732782 (D. Colo. June 14, 2007).

[8] *Id.*

[9] *Id.*

be deemed to abrogate any existing case law to the extent that such case law establishes other means of severing a joint tenancy."[10] Presumably, the intent-to-sever test of *Bradley* and *Taylor*, applied by the Bankruptcy Court in *Slifco*, remains good law. The amendments also specified: "Filing a petition in bankruptcy by a joint tenant shall not sever a joint tenancy."[11] The amendments therefore abrogated the U.S. District Court's alternative holding in *Slifco*.

In *Slifco* and in other bankruptcy cases determining whether property held in joint tenancy was included in the debtor's estate after the death of one of the joint tenants, the question before the court was whether the joint tenancy was severed before the decedent's death.[12] The test for severance may have differed from case to case, but the focus on severance was the same. In each case, the court recognized absent severance of a joint tenancy, the right of survivorship operates to terminate a decedent's interest in the property on his death. In this case, however, the Trustee

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[10] *Id.* § 38-31-101(7).

[11] *Id.* § 38-31-101(5)(b).

[12] *See, e.g.*, *In re Peet*, No. 11-62549, 2014 WL 11321405, at *5 (Bankr. W.D. Mo. Aug. 25, 2014) (applying Missouri law, finding no severance), *aff'd*, 529 B.R. 718 (B.A.P. 8th Cir. 2015), *aff'd*, 819 F.3d 1067 (8th Cir. 2016); *In re Benner*, 253 B.R. 719, 721 (Bankr. W.D. Va. 2000) (applying Virginia law, finding no severance); *Durnal v. Borg–Warner Acceptance Corp. (In re DeMarco)*, 114 B.R. 121 (Bankr. N.D. W. Va. 1990) (applying West Virginia law, finding no severance); *Feldman v. Panholzer (In re Panholzer)*, 36 B.R. 647 (Bankr. D. Md. 1984) (applying Maryland law, finding severance).

does not argue the joint tenancy was severed prior to the Debtor's death.[13] Instead, the Trustee argues the Debtor's interest in property should be determined as a matter of federal law, and under 11 U.S.C. § 554, all property of the estate not abandoned or administered remains property of the estate. Thus, according to the Trustee, the Bankruptcy Code prevents the right of survivorship accompanying joint tenancy from becoming effective. The Trustee has not cited any court to so hold, and this Court will not be the first.

As the Supreme Court has made clear: "Property interests are created and defined by state law."[14] The applicable law is that of Colorado, which provides: "Upon the death of a joint tenant, the deceased joint tenant's interest is terminated. In the case of one surviving joint tenant, his or her interest in the property shall continue free of the deceased joint tenant's interest."[15] The right of survivorship is effected by termination of the decedent's interest, not by transfer of the decedent's interest to the survivor. As the Colorado Court of Appeals explained:

> [T]he surviving joint tenant of real property does not take any new or additional interest

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[13] Had the Trustee so argued, his argument would not likely have been successful. The four unities appear to have been preserved at all relevant times, the Court is not aware of evidence showing the parties intended to sever their joint tenancy, and the plain language of the applicable statute specifies a bankruptcy filing does not effect a severance.

[14] *Butner v. United States*, 440 U.S. 48, 55 (1979).

[15] Colo. Rev. Stat. § 38-31-101(c).

> by virtue of the death of his joint tenant under the laws of descent and distribution, but rather under the original conveyance by which the joint tenancy was created, his interest in the property is merely freed from the participation of the other. [T]he death of a joint tenant does not result in a transfer of that tenant's interest to the survivor, but merely terminates any interest the decedent may have had. . . .[16]

Because there is no transfer of interest, there is no transfer this Court need approve, and no transfer this Court could prevent. Instead, the Debtor's interest in the Property terminated on his death.

When the Debtor's interest in the Property became part of his bankruptcy estate on his petition date, and later became subject to the control of the Trustee,[17] the interest remained subject to the same limitations as those of the Debtor. "Congress intended the trustee to stand in the shoes of the debtor and 'take no greater rights than the debtor himself had.' "[18] The Bankruptcy

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[16] *Park State Bank v. McClean*, 660 P.2d 13 (Colo.App. 1982) (citations omitted).

[17] Under the Bankruptcy Code, a Chapter 7 Trustee controls the property of a debtor's estate, but the Trustee does not own the property. Unlike its predecessor, the Bankruptcy Act of 1989, the Bankruptcy Code does not provide for transfer of title to a Chapter 7 trustee. *See, e.g.*, *In re Peet*, 529 B.R. 718, 721 (8th Cir. BAP 2015), *aff'd*, 819 F.3d 1067 (8th Cir. 2016).

[18] *Sender v. Buchanan (In re Hedged-Investments Assocs., Inc.)*, 84 F.3d 1281, 1285 (10th Cir. 1996) (quoting H.R. Rep. No. 95-595, at 368 (1977), reprinted in 1978 U.S.C.C.A.N. 5963, 6323).

Code does not expand a debtor's interest in property. If, for example, a debtor has only a life estate interest in property, his interest would terminate on his death, and a trustee would have nothing to sell. Similarly, absent severance of the joint tenancy, a joint tenant's interest in property terminates on his death, and the remaining joint tenants own the property free of the decedent's interest. Here, the Debtor's interest in the Property remained in joint tenancy, with its accompanying right of survivorship, until the time of his death. At the time of his death, the Debtor's interest in the Property terminated. The Defendant now owns the Property free of any interest of the Debtor. The Property is not property of the Debtor's bankruptcy estate, and the Trustee is not entitled to sell it.

CONCLUSION

For the reasons discussed above, the Court finds there is no disputed issue of any material fact, and the Defendant is entitled to a judgment in her favor as a matter of law. The Trustee is not.

Accordingly,

THE COURT DENIES the Trustee's Motion for Summary Judgment (docket #29), and

THE COURT GRANTS the Defendant's Motion for Summary Judgment (docket #33). The Court will

enter a separate judgment dismissing this adversary proceeding.

Dated April 3, 2017 BY THE COURT:

/s/ Michael E. Romero
Michael E. Romero, Chief Judge
United States Bankruptcy Court

[Certificate Of Service Omitted]

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

In re: GREGORY CHERNUSHIN, Debtor. ---------- ROBERTSON B. COHEN, as Chapter 7 Trustee Plaintiff - Appellant, v. ANDREA CHERNUSHIN, et al., Defendants - Appellees.	No. 18-1068

ORDER

(Filed Jan. 15, 2019)

Before **BRISCOE**, **MURPHY**, and **McHUGH**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge

in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER,
Clerk

11 U.S. Code § 541 – Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is—

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date—

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

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11 U.S. Code § 363 – Use, sale, or lease of property

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if—

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

(i) Before the consummation of a sale of property to which subsection (g) or (h) of this section applies, or of property of the estate that was community property of the debtor and the debtor's spouse immediately before the commencement of the case, the debtor's spouse, or a co-owner of such property, as the case may be, may purchase such property at the price at which such sale is to be consummated.

(j) After a sale of property to which subsection (g) or (h) of this section applies, the trustee shall distribute to the debtor's spouse or the co-owners of such property, as the case may be, and to the estate, the proceeds of such sale, less the costs and expenses, not including any compensation of the trustee, of such sale, according to the interests of such spouse or co-owners, and of the estate.

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11 U.S. Code § 521 – Debtor's duties

(a) The debtor shall—

(4) if a trustee is serving in the case or an auditor is serving under section 586(f) of title 28, surrender to the trustee all property of the estate and

any recorded information, including books, documents, records, and papers, relating to property of the estate, whether or not immunity is granted under section 344 of this title;

Fed.R.Bankr.P. 1016 Death or Incompetency of Debtor

Death or incompetency of the debtor shall not abate a liquidation case under chapter 7 of the Code. In such event the estate shall be administered and the case concluded in the same manner, so far as possible, as though the death or incompetency had not occurred. If a reorganization, family farmer's debt adjustment, or individual's debt adjustment case is pending under chapter 11, chapter 12, or chapter 13, the case may be dismissed; or if further administration is possible and in the best interest of the parties, the case may proceed and be concluded in the same manner, so far as possible, as though the death or incompetency had not occurred.

C.R.S. § 38-31-101 Joint tenancy expressed in instrument – when

(1) Except as otherwise provided in subsection (3) of this section and in section 38-31-201, no conveyance or devise of real property to two or more natural persons shall create an estate in joint tenancy in real property unless, in the instrument conveying the real property or in the will devising the real property, it is declared

that the real property is conveyed or devised in joint tenancy or to such natural persons as joint tenants. The abbreviation "JTWROS" and the phrase "as joint tenants with right of survivorship" or "in joint tenancy with right of survivorship" shall have the same meaning as the phrases "in joint tenancy" and "as joint tenants". Any grantor in any such instrument of conveyance may also be one of the grantees therein.

(1.5) (a) The doctrine of the four unities of time, title, interest, and possession is continued as part of the law of this state subject to subsections (1), (3), (4), (5), (6), and (7) of this section and paragraph (b) of this subsection (1.5).

(b) Subsections (1), (3), (4), (5), (6), and (7) of this section are intended and shall be construed to clarify, supplement, and, limited to their express terms, modify the doctrine of the four unities.

(c) For purposes of this subsection (1.5), the "doctrine of the four unities of time, title, interest, and possession" means the common law doctrine that a joint tenancy is created by conveyance or devise of real property to two or more persons at the same time of the same title to the same interest with the same right of possession and includes the right of survivorship.

(2) (Deleted by amendment, L. 2006, p. 240, §1, effective July 1, 2006.)

(3) A conveyance or devise to two or more personal representatives, trustees, or other fiduciaries shall be presumed to create an estate in joint tenancy in real property and not a tenancy in common.

(4) An estate in joint tenancy in real property shall only be created in natural persons; except that this limitation shall not apply to a conveyance or devise of real property to two or more personal representatives, trustees, or other fiduciaries. Any conveyance or devise of real property to two or more persons that does not create or is not presumed to create an estate in joint tenancy in the manner described in this section shall be a conveyance or devise in tenancy in common or to tenants in common.

(5) (a) Except as provided in sections 38-35-118 and 38-41-202(4), a joint tenant may sever the joint tenancy between himself or herself and all remaining joint tenants by unilaterally executing and recording an instrument conveying his or her interest in real property to himself or herself as a tenant in common. The joint tenancy shall be severed upon recording such instrument. If there are two or more remaining joint tenants, they shall continue to be joint tenants as among themselves.

(b) Filing a petition in bankruptcy by a joint tenant shall not sever a joint tenancy.

(6) (a) The interests in a joint tenancy may be equal or unequal. The interests in a joint tenancy are presumed to be equal and such presumption is:

(I) Conclusive as to all persons who obtain an interest in property held in joint tenancy when such persons are without notice of unequal interests and have relied on an

instrument recorded pursuant to section 38-35-109 ; and

(II) Rebuttable for all other persons.

(b) This subsection (6) does not bar claims for equitable relief as among joint tenants, including but not limited to partition and accounting.

(c) Upon the death of a joint tenant, the deceased joint tenant's interest is terminated. In the case of one surviving joint tenant, his or her interest in the property shall continue free of the deceased joint tenant's interest. In the case of two or more surviving joint tenants, their interests shall continue in proportion to their respective interests at the time the joint tenancy was created.

(d) For purposes of the "Colorado Medical Assistance Act", articles 4, 5, and 6 of title 25.5, C.R.S., a joint tenancy shall be deemed to be a joint tenancy with equal interests among the joint tenants regardless of the language in the deed or other instrument creating the joint tenancy.

(7) Nothing in this section shall be deemed to abrogate any existing case law to the extent that such case law establishes other means of severing a joint tenancy.