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When she filed this Chapter 7 case, Donna J. Monroe (the “Debtor”) and Thomas J. Swisher, Sr. (“Swisher”) owned real property known as 914 S. Baylis Street (the “Property”) jointly, as joint tenants. Swisher died during the pendency of this Chapter 7 case. After Swisher’s death, Mark J. Friedman,

Chapter 7 Trustee (the “Trustee”), obtained approval from the court to sell the Property. An issue arose in connection with the closing, namely, whether the Trustee could convey full fee title to the purchaser or whether the descendants of Swisher, who had died intestate, retained an interest in the Property, that had to be separately conveyed. The Trustee filed this adversary proceeding under Section 363(h) to authorize the Trustee to convey to the purchaser all of the interest, if any, of Swisher in the Property. This result was effected by a Consent Order Granting Final Judgment in Favor of Trustee as to Complaint to Sell the Deceased Co-Owner’s Purported Interest in Real Property Known as 914 S. Baylis Street Free and Clear of All Liens, Claims and Encumbrances With Consent of Surviving Issue (the “Consent Order”).

The Consent Order provided, inter alia, that the Trustee would reserve a portion of the net proceeds (the “Reserved Real Estate Net Sale Proceeds”) for disposition pursuant to a further order that would determine the interest of Swisher, by his children, in the reserved proceeds. To determine the issue, the Trustee has filed this Motion to Distribute Real Estate Net Sale Proceeds. The Trustee and the children of Swisher have filed written memoranda. The Debtor has not responded.

The Trustee frames the issues as follows: “did the bankruptcy estate acquire the Debtor’s right of survivorship in the Property and, in effect, remain a joint tenant with Swisher upon the commencement of the bankruptcy case or did the bankruptcy filing transform the bankruptcy estate’s interest into a tenancy in common with Swisher?”

Because the Property was held prepetition as joint tenants, with rights of survivorship, the court must determine what portion of the Property is part of this Chapter 7 bankruptcy estate. “All of a debtor’s property becomes part of the bankruptcy estate upon the filing of the bankruptcy petition and therefore becomes subject to the substantive provisions of the Bankruptcy Code.” United States v. Gold (In re

Avis), 178 F.3d 718, 720 (4th Cir. 1999). This includes “all legal or equitable interests of the debtor in the property as of the commencement of the case.” 11 U.S.C. § 541(a)(1). The date of the petition defines what is included in the bankruptcy estate, and generally, property acquired after the petition is filed may be retained by the debtor. Avis, 178 F.3d at 720.

As authority for the proposition that the Chapter 7 estate acquired the right of survivorship in the Property, the Trustee relies on the articulation in In re Benner, 253 B.R. 719 (Bankr. W.D. Va. 2000). In Benner, the debtor filed a chapter 7 petition. The debtor and her non-debtor co-tenant owned a mobile home on real property as joint tenants. The trustee moved to sell the property and retain the debtor’s share of the proceeds for the benefit of creditors. During administration of the case, the non-debtor co-tenant died. After the non-debtor’s death, “the trustee took the position that [the non-debtor’s] share of the property was also subject to administration in the Debtor’s estate.” 253 B.R. at 721.

The Benner court held that at the time the non-debtor died, the Chapter 7 estate had one less person with whom to share the property, and that the entire real property was included in the bankruptcy estate. Id. At 723. At the time the petition was filed, each joint tenant had a legal right to dispose of her interest, to force partition, or to otherwise unilaterally destroy the joint tenancy. In re Benner, 253 B.R. at 722. The court reasoned that at the time the Debtor filed her bankruptcy petition, she owned the entire property because she could not devise it, and she needed only to wait until her co-tenant died “in order to have one less person to share in the ownership.” Id. at 722. This is because “the survivors already own all the property, but at the death of a joint tenant they merely have one less person with whom to share that ownership.” Id. The operative facts are almost identical in the instant case.

For the opposite proposition, namely, that by filing this Chapter 7 case Debtor severed the joint tenancy in the Property and thus transformed it into a tenancy in common, the parties point to In re Panholzer, 36 B.R. 647 (Bankr.D. Md. 1984) (Mannes, J.). As existing authority in this district, Panholzer should not be disregarded without good reason.

In Panholzer, when he filed his Chapter 7 petition, the debtor owned real property jointly with his mother as joint tenants. Debtor's mother died during administration of the case. Pursuant to a settlement, the trustee sold the real property with the net proceeds reserved for a determination by the Bankruptcy Court as to the interest of the bankruptcy estate on the date of filing and the effect of the death of the co-owner upon the interest of the bankruptcy estate. 36 B.R. at 649.

The court in Panholzer distinguished a joint tenancy from a tenancy by the entirety by stating that, unlike a tenancy by the entirety, a joint tenancy may be terminated by the action of one joint tenant and that such termination can occur by a voluntary or involuntary conveyance. Id. Additionally, the court analyzed the trustee's "strong arm" powers under Section 544 (a)(2) and determined that since the status of the trustee is that of a creditor whose execution is "returned unsatisfied", Section 544(a)(2) does not effect a severance of the joint tenancy. The reasoning of the court is summarized in the following conclusion.

"The conclusion is inescapable, that if a joint tenancy is terminated 'if one of the co-tenants conveys his interest to a third person;' that upon the filing of a voluntary Chapter 7 petition by a co-tenant, he has similarly effected a conveyance that severs the tenancy. A comprehensive conveyance by the debtor to the Chapter 7 trustee takes place with the commencement of the proceeding and the creation of the bankruptcy estate under Section 541(a)." See generally Collier on Bankruptcy, Section 541.01, Fifteenth Ed. (1983).

36 B.R. at 651. The court ended by stating: “[j]ust as a bankruptcy estate is not depleted by the death of the debtor who is a joint tenant, so ought it not be enriched by the death of a joint tenant survived by the debtor.” Id. at 651-52.

The holding in Panholzer was recently accepted and applied in In re Yun Chin Kim, 288 B.R. 431, 433, fn. 1, 434 (Bankr.D. Md. 2002) (Keir, J.). In Yun Chin Kim the Debtor had owned when he filed under Chapter 7 real property with his mother as joint tenants. A creditor had obtained a judgment against the Debtor, but not his mother. His mother died intestate post-petition within 180 days after the petition date. On the Chapter 7 Trustee’s complaint for a declaratory judgment as to the ownership interests, the court held, inter alia, that the filing of the Chapter 7 petition severed the joint tenancy, and Debtor’s one half interest in the property became property of the bankruptcy estate as a tenant in common. The creditor’s judgment lien did not attach to the property prepetition because of the joint tenancy, and it did not attach postpetition because of the automatic stay. The bankruptcy estate also acquired under 11 U.S.C. § 541(a)(5) the Debtor’s 1/3 interest by intestate distribution of his mother’s ½ interest in the property as a tenant in common.

The court recognizes that there is an issue raised by some recent cases such as Benner as to whether the mere act of filing a Chapter 7 petition effects a conveyance which is sufficient to sever a joint tenancy. However, the court also recognizes the importance of the doctrine of stare decisis. In this District the decision in Panholzer is longstanding, and it has recently been endorsed in Yun Chin Kim. This court is not writing on fresh paper.

The court will respect the established case law in this district, and it finds that the bankruptcy estate's interest in the Property is as a tenant in common with Swisher. A separate order will be entered to effect the conclusions reached herein.

End of Opinion

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