

Joint Tenancy Law traps- Lawyers Beware!

Or “How your client can lose lien rights before you know it”

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(with thanks to our current Section Chair, Jean Arnold for her suggestion of this topic)

This is meant for real estate, trusts and estates, family law, creditor attorneys and litigators.

Did you know that if your client holds a lien against just one joint tenant owning property in a joint tenancy (not a good idea) and that joint tenant dies before your client has levied or attached on the lien, your client’s lien is extinguished on death? Colorado cases say that upon the death of a joint tenant the surviving tenant becomes the sole owner of property free from any liens that may have existed on the extinguished interest of the deceased tenant?

Why? “The Rule derives from the theory that the “right of survivorship” interest of a joint tenant is an estate in land which vests on creation of the joint tenancy, making a joint tenancy interest with right of survivorship analogous to a life estate....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, [so] 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.” Park State Bank v. McClean and Smith, 660 P.2d 13, 16 (Colo App. 1982) and Webster v Mauz, 702 P.2d 297 (Colo App. 1985).

Consider in light of these cases:

- Don’t allow your client to take a mortgage/DOT from just one of two joint tenants.
- If your client records a transcript of judgment and it attaches to a property owned by the judgment debtor in joint tenancy, under these cases, the lien will not survive the death of your client’s debtor joint tenant, unless the lien has been attached and levied upon before death (or unless the creditor makes a timely claim in the debtor’s estate, see next).
- Don’t ignore those (4 month) claim notices from an estate when a debtor joint tenant has died. The Park State Bank case says that if the Bank had presented its judgment lien as a claim in the estate, the assets of the estate would have been chargeable with the judgment amount. But failure to file that claim timely meant application of the joint tenancy rule above and the creditor was out of luck and the lien was unenforceable.
- For estate and trust lawyers representing the surviving joint tenant, be sure to give those 4 month claim notices, and it’s possible that the creditor will not respond, and the property will be free of the judgment or lien of the deceased joint tenant.
- For family lawyers, since one of these cases involved a divorce (that didn’t become final before the debtor joint tenant died), be careful allowing or taking mortgages from joint tenants who are divorcing in case the debtor dies first. Your surviving joint tenant (still-

spouse) might have to incur lots of legal fees to defeat the creditor's claims under these cases.