

# JOINT TENANCIES IN BANKRUPTCY: PRESERVING POST-PETITION SURVIVORSHIP RIGHTS FOR DEBTORS AND NON-DEBTORS ALIKE

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## INTRODUCTION

Fourteen years ago, Debora and her sister Sandra decided to help Federico, their father, buy a house worth \$250,000. Federico had recently secured employment as a project foreman, so the sisters thought if he handled the monthly mortgage payments, they could contribute \$30,000 (proceeds from their hard-won Mary Kay cosmetics sales), toward the fifteen percent down payment the bank required for a mortgage. Their father, who had lived many years in a moldy basement apartment, was touched by the sisters' plan and heartily accepted it. The bank approved the loan, and Debora, Sandra, and Federico signed the note and deed to the property, taking title as joint tenants with right of survivorship. A joint tenancy served Federico's interests best because he wanted the sisters to have the home when he died. The sisters, though initially not wanting to profit from what they considered a gift to their father, honored his wish, and Federico moved in, assured of both a mold-free house and the succession to it.

As the years rolled by, the national economy suddenly took a sharp turn for the worse. Bubbles burst, the job market sagged, and housing prices fell through the roof. Nevertheless, Federico never missed a payment on the home loan. His daughters, however, were not so lucky. Sandra pulled out of the Mary Kay sales business, and Debora, sadly without a steady income, fell seriously behind on her mortgage, car, and credit card payments. At the same time, Debora was burdened with excess cosmetics inventory no one wanted to buy during a recession. Faced with nearly imminent foreclosure, daily phone calls from creditors, and several court judgments against her, Debora approached a lawyer to file a Chapter 7 bankruptcy petition.

Debora's bankruptcy lawyer was knowledgeable and reasonably experienced, but as he began listing Debora's real property on Schedule A of her bankruptcy petition, the amount and nature of Debora's interest in Federico's home grew perplexing. Does Debora's interest include all the equity Federico built up in the home over the years, or is Debora's interest merely some one-third portion thereof?<sup>1</sup> And what about personal property Debora holds in joint tenancy, like

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1. Under Indiana law, Debora would be assigned a one-third undivided interest in the whole

the car Debora and her husband own? Can she exempt the full value of the car, saving it from sale by the bankruptcy trustee, or is Debora entitled to exempt only half its value?<sup>2</sup> These difficult questions led the lawyer to a broader question of greater impact that significantly affected Debora and her family: Will filing Debora's bankruptcy petition sever her joint tenancies, causing them to devolve into tenancies in common?<sup>3</sup>

The joint tenancy with right of survivorship provides tenants with a convenient way of avoiding the expense of probate in the event of sudden death, and for that reason, joint property is sometimes called "the poor man's estate plan."<sup>4</sup> Thus, it comes as little surprise that when "poor" men and women fall into bankruptcy, a joint tenant's property interest also falls subject to the Bankruptcy Code<sup>5</sup> and the demands of creditors.<sup>6</sup> Although it appears in Debora's case to be a threshold issue determining the nature and extent of the bankruptcy estate, surprisingly few courts have ruled on whether filing a bankruptcy petition severs a joint tenancy with right of survivorship,<sup>7</sup> and courts that have decided the question merely contribute to an ever-prevailing split of authority.<sup>8</sup> Facing a dearth of published work on the issue,<sup>9</sup> this Note documents the extent of the split of authority on whether filing a bankruptcy petition severs a joint tenancy,<sup>10</sup> and giving due deference to state law with respect to property interest formation, urges Congress to amend the Bankruptcy Code to provide that filing a bankruptcy petition does not sever a joint tenancy.<sup>11</sup> The Note presents

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tenancy. *See infra* Part III.

2. Debora would likely be able to claim the full vehicle exemption allowed under state law no matter the number of existing debtor and non-debtor cotenants. *See, e.g., In re McLean*, 505 B.R. 361, 364 (Bank. D. Me. 2014) (holding that since joint tenants own coequal shares (*per my*) of the whole (*per tout*), the debtors, filing jointly as husband and wife, could each claim the full state exemption under Maine law in one of two jointly owned vehicles, thus exempting them both); *In re Halcomb*, No. 2:10-CV-334-WTL-DKL, 2011 WL 2133560, at \*3 (S.D. Ind. May 25, 2011) (unpublished opinion) (ruling that "[b]ecause the Jeep cannot be divided, and because each Debtor has a right to use and enjoy the whole vehicle, either the Husband or the Wife could exempt the entire value of the Jeep.").

3. *See infra* notes 20-21; *see also infra* Part III.

4. 2 RICHARD L. STOCKTON, EST. TAX & PERS. FIN. PLAN. § 17:45 (Edward F. Koren ed., 2012).

5. The Bankruptcy Code of 1978, 11 U.S.C. §§ 101-1532 (2006).

6. *See, e.g., Mangus v. Miller*, 317 U.S. 178, 184 (1942) ("Utah accepts the general common law rules relating to joint tenancies, including the rules permitting alienation of the interest of a joint tenant, and making it property subject to execution and separate sale. . . . When so locally recognized the interest of a joint tenant is a property interest subject to the jurisdiction of the bankruptcy court. . . .").

7. *See infra* Part II.

8. *Id.*

9. *See infra* notes 31-33.

10. *See infra* Part II.

11. *See infra* Part V.

draft language for such an amendment.<sup>12</sup>

This Note also recommends that courts hold that filing a bankruptcy petition only severs a joint tenancy in a limited number of Chapter 7 cases and not in the Chapter 11 or 13 case.<sup>13</sup> In this way at least, the nature of a debtor-tenant's property will not change unnecessarily when a petition is filed where the debtor intends to maintain property in its original state throughout the bankruptcy process. So holding would provide the benefit of preserving survivorship rights for Chapter 11 and 13 debtors and non-debtor cotenants once the case is closed. The preferred alternative, however, would be amending the Code itself because it would also preserve the survivorship rights of non-debtor cotenants who by no fault of their own have those rights terminated because a fellow joint tenant filed Chapter 7 bankruptcy. These proposed changes are rooted in concepts of "fundamental fairness"<sup>14</sup> and the idea that bankruptcy law should not alter the nature and extent of estate property unless federal reasons exist for doing so.<sup>15</sup> Short of an argument that the Bankruptcy Code causes title to estate property to pass to the bankruptcy trustee,<sup>16</sup> courts have only used state law rationales in the past for severing joint tenancies in bankruptcy.<sup>17</sup>

Courts seemingly address this severance question as part of a deathbed repentance, postponing its address until a tenant—debtor or not—actually dies during the bankruptcy process.<sup>18</sup> At this point in the proceedings, players involved in the bankruptcy gain a strong incentive to litigate severance because of the right of survivorship, the joint tenancy's chief feature.<sup>19</sup> The right of survivorship ensures that when a joint tenant dies the surviving tenant takes the property "free and clear of the claims of the creditors or heirs of the deceased tenant."<sup>20</sup> In contrast, a surviving cotenant's interest in a tenancy in common "is subject to the liability of the surviving estate for the debts of the deceased tenant in common, a liability which does not exist in the case of a survivorship incident

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12. See *infra* Part V.A.

13. See *infra* Part II.C.

14. See *infra* Part V.B.

15. See *Butner v. United States*, 440 U.S. 48, 54 (1979) ("Property interests are created and defined by state law. 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. 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." (quoting *Lewis v. Manufacturers Nat'l Bank*, 364 U.S. 603, 609 (1961))).

16. See *infra* Part II.

17. See *infra* Part II.

18. See *infra* Part II.A-B.

19. Many courts recognize the right of survivorship as the joint tenancy's chief characteristic. See, e.g., *In re Estelle's Estate*, 593 P.2d 663, 665 (Ariz. 1979) (naming the right the joint tenancy's "distinguishing feature"); *Tenhet v. Boswell*, 554 P.2d 330, 334 (Cal. 1976) (its "principal feature"); *In re Estate of Thomann*, 649 N.W.2d 1, 7 (Iowa 2002) (its "hallmark characteristic").

20. 48A C.J.S. *Joint Tenancy* § 2 (2013).

to a properly created joint tenancy.”<sup>21</sup> Therefore, when a debtor-tenant or non-debtor cotenant dies during the bankruptcy process, creditors claim that filing a bankruptcy petition severs a joint tenancy and creates a tenancy in common; the surviving cotenants, seeking the protection of the survivorship right, argue no severance occurred.<sup>22</sup> These arguments come before the bankruptcy court every so often when a joint tenant dies, but this has not always been the case.

Before Congress enacted the Bankruptcy Code of 1978, courts had a clear answer to the question of whether a joint tenancy severs when a debtor-tenant files a bankruptcy petition. Section 70a of the then-current Bankruptcy Act of 1898 provided that the bankruptcy trustee held title to all estate property once the petition was filed.<sup>23</sup> Given the plain language of section 70a, courts reasoned that passing title from the petitioner to the bankruptcy trustee disrupted unity of title, one of the four common law unities traditionally required to create and maintain joint tenancies.<sup>24</sup> Consequently, under the former Bankruptcy Act, courts concluded that a joint tenancy necessarily severed when a joint tenant filed a bankruptcy petition.<sup>25</sup>

However, the Bankruptcy Code of 1978 replaced the title-transfer provision of section 70a with expansive granting language which left the courts in doubt about whether trustees in bankruptcy continued to hold legal title to estate property.<sup>26</sup> In broad strokes, section 541 of the Code provides that “all legal or equitable interests of the debtor in property as of the commencement of the case” pass to the bankruptcy estate.<sup>27</sup> Because title no longer passes by the plain language of current law to the trustee,<sup>28</sup> the trustee’s claim on title to estate property is in doubt. The trustee’s current role under the Code is simply “the representative of the estate.”<sup>29</sup>

Because of this change in bankruptcy law, courts began fighting in the 1980s over the implications for both debtor-tenants who file bankruptcies and their

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21. 86 C.J.S. *Tenancy in Common* § 5 (2013) (quoting *Anson v. Murphy*, 32 N.W.2d 271, 273 (1948)).

22. *See infra* Part II.

23. *See* The Bankruptcy Act of 1898, 11 U.S.C. § 70a (1976) (repealed 1978) (“Title to Property. a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appointment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this title, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located.”).

24. *See, e.g., Flynn v. O’Dell*, 281 F.2d 810, 817 (7th Cir. 1960) (discussing Illinois law on severance in view of the four unities).

25. *See id.* (“If one joint tenant becomes a bankrupt, the involuntary transfer of his interest to the trustee, which then takes place, [presumably operates] to effect a severance. . .”).

26. *See infra* Part II.A-B.

27. 11 U.S.C. § 541(a)(1) (2006).

28. *Id.* § 323 (makes no mention of trustee gaining title to estate property).

29. *Id.* § 323(a).

fellow non-debtor cotenants.<sup>30</sup> Former wisdom about the severance of joint tenancies became moot, and surprisingly, scholars have yet to fully unpack the split of authority that still plagues this issue. Although the literature on the joint tenancy itself is well developed, scholarly treatment of what happens to it in the event of bankruptcy has fallen by the wayside. Commentators who have taken up the issue either treat one side of cases in the split as undisputed law,<sup>31</sup> in some cases even developing legal theories based on this unsupported view,<sup>32</sup> or mention the split and do not discuss its implications.<sup>33</sup>

This Note clarifies the positions courts have taken on this issue, and based on current bankruptcy law and justifications for holding joint tenancy property, recommends a statutory solution favoring joint tenancies given their increasing prevalence and long-standing donative utility. Simply filing a bankruptcy petition should not create millions more tenancies in common in real and personal property when joint tenancies were originally intended. While some creditors may find it easier to recoup their losses if joint tenancies immediately convert to tenancies in common in the event of a tenant's bankruptcy, there are many reasons for avoiding this result. Severing a joint tenancy upon bankruptcy disrupts the original intent of the grantor merely because of the malfeasance or plain misfortune of the grantee, destroys what has become an important estate planning tool,<sup>34</sup> and as an ultimate consequence, further debilitates the bankrupt debtor in a process that is supposed to work towards his rehabilitation.<sup>35</sup> However, this recommendation does not come without due consideration given to the equitable rights of creditors. States can appropriately address the great weight of this concern by following Indiana's example in its treatment of mortgage liens. Ultimately, though, Congress needs to address the overall issue by amending the Code to provide that filing a bankruptcy petition does not sever a joint tenancy.

Part I of the Note introduces the issue, discussing the current prevalence of joint tenancies and bankruptcies in general, in order to reach the conclusion that courts will inevitably be forced to continue to address the dying debtor-tenant or non-debtor cotenant issue. Part II discusses the split of authority in the bankruptcy courts, contributing to it with an analysis of the different duties the trustee fulfills under the Code's various chapters. Part III summarizes Indiana's

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30. See *infra* Part II.

31. See, e.g., Donald L. Swanson, *Bankruptcy-Probate and the Twain Shall Meet*, 20 CREIGHTON L. REV. 435, 446-48 (1987) (discussing only cases which hold that the tenancy severs).

32. See Jacquelyn L. Mascetti, Note, *Going for Broke in the Music Industry: Aligning the Code with the Interests of Recording Artists*, 19 AM. BANKR. INST. L. REV. 185, 196 (2011). (relying exclusively on cases which do not sever the joint tenancy to argue that co-authors of copyrights should be treated as joint tenants in bankruptcy).

33. See, e.g., R. H. Helmholz, *Realism and Formalism in the Severance of Joint Tenancies*, 77 NEB. L. REV. 1, 31 (1998).

34. See generally 2 STOCKTON, *supra* note 4, § 17:45.

35. *In re Morris*, 10 B.R. 448, 451 (Bankr. N.D. Iowa 1981), *vacated in part*, 21 B.R. 816 (Bankr. N.D. Iowa 1982) (stating that the ultimate goal of bankruptcy is rehabilitation).

law on joint tenancies and provides a necessary state law backdrop to the discussion overall. Part IV relies on Indiana law and decisions of courts across the country to urge courts in Indiana and similarly situated states to hold that filing a bankruptcy petition does not sever a joint tenancy. In view of this recommendation, Part V concludes by providing a sample amendment to the Bankruptcy Code to resolve this problem, while also considering Supreme Court precedent and additional justifications for such an amendment in property theory and the Bankruptcy Code itself.

#### I. BANKRUPTCY AND THE GROWING PREVALENCE OF THE JOINT TENANCY WITH RIGHT OF SURVIVORSHIP

This particular severance problem will continue to compound in the courts until Congress amends the Code because of two considerations that, when taken together, form a recipe for continued confusion. First, the use of the joint tenancy as a form of property ownership has been increasing steadily throughout the past century, and indications are that this trend will continue.<sup>36</sup> Second, bankruptcy has taken its place as a mainstay of the U.S. economy, and based on current data, the number of bankruptcies in the United States is increasing, or at the very least, the number of filings per year remains high irrespective of the economic climate.<sup>37</sup> The interaction of these two variables will inevitably force courts to face more cases of dying debtor-tenants or non-debtor cotenants in the future. And because the Code is unclear on whether severance occurs upon filing bankruptcy, further cases will only contribute to the current split of authority. Given that bankruptcy law is at its core code-based, a statutory solution is necessary to protect survivorship rights that have been the defining characteristic of the joint tenancy for hundreds of years.

##### *A. Joint Tenancies Were Historically Favored*

The joint tenancy has been in use since the Middle Ages as an efficient means of passing property from one tenant to another, admittedly without the dreaded incidents which accompanied a property-holder's death. However, tax interests notwithstanding, during the Middle Ages, the common law favored joint tenancies over tenancies in common. The joint tenancy allowed owners to consolidate a fee interest in the hands of a few individuals, which made feudal services and incidents easier to enforce at the time.<sup>38</sup> Additionally, the joint tenancy remained the only means of estate planning for many years. These considerations caused courts to find a presumption in favor of joint tenancy creation.

Slow changes in English law from 1500-1700 CE, while at times eliminating the need for this presumption, nevertheless did not cause the joint tenancy to fall

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36. *See infra* Part I.B.

37. *Id.*

38. PAUL GOLDSTEIN & BARTON H. THOMPSON, JR., PROPERTY LAW: OWNERSHIP, USE, AND CONSERVATION 738 (Robert C. Clark et al. eds., 2006).

out of favor. The Statute of Uses in 1535 transformed equitable estates into legal estates and eliminated the need for the presumption in favor of joint tenancies.<sup>39</sup> Statutes adopted in 1539 and 1540 allowed for the partition of land, including joint tenancies.<sup>40</sup> The Statute of Wills in 1540 provided for direct succession of property at death, finally provisioning a legal alternative to joint tenancies.<sup>41</sup> Ultimately, the Statute of Tenures in 1660 abolished feudal dues.<sup>42</sup>

These statutes, though illustrating feudalism's steady decline, did not overturn property holders' favor of the joint tenancy, however.<sup>43</sup> Once the need for feudal dues was eliminated, property holders still saw the survivorship rights attached to a joint tenant's interest as a great benefit to their estate and heirs.<sup>44</sup> These benefits, derived from the equitable title that each joint tenant held, were manifold:

[T]he joint tenancy gained strength as a means of avoiding the charges payable to the overlord on succession at death (i.e., the relief). The inability to transfer freely at death, the limitations on the types of future interests that could be created, and the problem of a minor heir could all be avoided by delaying legal succession of land ownership at death. By transferring the land to a group of individuals as joint tenants, succession was avoided until the last of the joint tenants finally died. Joint tenancy, thus, separated equitable ownership ("for the use of") from legal ownership.<sup>45</sup>

Therefore, as the legal strictures that held feudalism in place slowly gave way, property owners still found that the joint tenancy served their best interests as a way to evade incidents at death.<sup>46</sup> Because legal title did not pass to an heir until all joint tenants died, death taxes did not mature immediately upon a grantor's death.<sup>47</sup> However, the presumption in favor of joint tenancy creation did not last long.<sup>48</sup> Perhaps paradoxically, the very elements that made a joint tenancy desirable in England from the Middle Ages through the Late Renaissance caused the joint tenancy to fall into nearly universal legal disfavor as the new American Republic was born.<sup>49</sup>

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39. Stephanie J. Willbanks, *Taxing Once, Taxing Twice, Taxing Joint Tenants (Again) at Death Isn't Nice*, 9 PITT. TAX REV. 1, 4-5 (2011).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 4.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.* at 5.

49. *Id.*

*B. Joint Tenancies Are Currently Disfavored at Law but Are Widely in Use*

In a trend that began in early nineteenth century America, state statutes began to disfavor the creation of joint tenancies.<sup>50</sup> Although tax benefits at death remained in place, courts and legislatures continued to object to the right of survivorship, the joint tenancy's most distinctive feature, as "an 'odious thing' that too often deprived a man's heirs of their rightful inheritance."<sup>51</sup> Following this trend, which works in favor of devisees, assignees, and intestate heirs, modern state statutes and courts continue—nearly universally—to announce disfavor with the joint tenancy as a form of property ownership.<sup>52</sup>

However, despite the current presumption against joint tenancy creation, many states provide for the creation of joint tenancies by statute or common law.<sup>53</sup> Persons living together, whether as couples or in groups, take liberal advantage of these statutes. For example, one scholar noted in the mid-1980s that "[the joint] tenancy is the most popular form of spousal residential property ownership in the United States. Indeed, it is safe to say that millions of land titles representing billions of dollars of capital investment are held in joint tenancy in this country."<sup>54</sup> It is also notable that "[m]any same-sex couples view joint tenancy with its automatic right of survivorship as an attractive way to own their property."<sup>55</sup>

Empirical evidence demonstrates that use of the joint tenancy in the United States has increased significantly over the past century. As part of a resurgence of interest in the joint tenancy as a form of property ownership, legal scholars in the 1960s published a study of real estate deeds of counties in California revealing that, in 1959 and 1960, residents held over two-thirds of the property

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50. GOLDSTEIN & THOMPSON, *supra* note 38, at 740.

51. N. William Hines, *Real Property Joint Tenancies: Law, Fact, and Fancy*, 51 IOWA L. REV. 582, 585 (1966), *cited in* GOLDSTEIN & THOMPSON, *supra* note 38, at 740.

52. *See, e.g.*, *Larson v. Anderson*, 167 N.W.2d 640, 644-45 (Iowa 1969) ("Our court as early as 1869 . . . said that estates in joint tenancy are disfavored by our law."); *Edwin Smith, L.L.C. v. Synergy Operating, L.L.C.*, 285 P.3d 656, 663 (N.M. 2012) ("Th[e] preference for tenancies in common over joint tenancies has been incorporated into our law since territorial times."); *Smith v. Cutler*, 623 S.E.2d 644, 647 n.4 (S.C. 2005) ("[C]ourts have moved away from construing language in conveyances in favor of a joint tenancy.").

53. The number of states that allow for joint tenancies is a topic of dispute (mainly on the question of whether a state that allows for tenancies by the entirety for married couples also allows for a joint tenancy held by those couples), but it is accepted that the vast majority of states allow for common law joint tenancies or a statutory variant. *See* Samuel M. Fetters, *An Invitation to Commit Fraud: Secret Destruction of Joint Tenant Survivorship Rights*, 55 FORDHAM L. REV. 173, 173 n.1 (1986) (refuting the idea that the twenty-two states which allow tenancies by the entirety between married couples do not also allow them to hold their property as joint tenants).

54. *Id.* at 173-74.

55. 1 PATRICIA A. CAIN, *SEXUAL ORIENTATION AND THE LAW* § 5:24 (Karen Moulding ed., 2012).



as cotenants.<sup>56</sup> Additionally, eighty-five percent of the couples held the property as joint tenants.<sup>57</sup> A second study published in 1966 found that joint tenancies in Iowa “rose from less than 1 percent of land acquisitions in 1933 to over a third of farm acquisitions and over half of urban acquisitions in 1964.”<sup>58</sup>

More recent studies confirm the growing trend toward using the joint tenancy as a preferred form of property ownership. A survey in 1999 of three hundred randomly selected deeds in Michigan discovered twenty-four of the deeds “specified a joint tenancy. Of those 24 deeds, four (16.7 percent of the joint tenancy deeds) described the grantees as joint tenants without express words of survivorship. The other 20 (83.3 percent) all specified some form of a right of survivorship.”<sup>59</sup> And, more broadly, in a sample of deeds recorded in 1890, 1920, 1940, 1960, and 1980, in Bucks County, Pennsylvania, “nearly all real estate was in the name of a single individual. Usually the husband in a married couple took title solely for the pair; however, by 1980, almost 70% of Bucks County deeds named a husband and wife as co-grantees—typically as joint tenants with right of survivorship.”<sup>60</sup>

This Author was unable to find a published study rebutting this evidence. Although some scholars and practitioners recommend that married couples take advantage of the more durable survivorship rights attached to tenancies by the entirety,<sup>61</sup> the great weight of the evidence supports the conclusion that over the past century persons living together have increasingly favored the joint tenancy as a form of property ownership.<sup>62</sup> This tendency appears to continue despite the ongoing legal presumption against joint tenancy creation in courts and state legislatures.<sup>63</sup> Therefore, because the joint tenancy has proven resilient and popular in the face of this adverse presumption, and because no contradicting evidence suggests otherwise, the joint tenancy will likely continue as a permanent and well-used feature of American property law for years to come.

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56. Yale B. Griffith, *Community Property in Joint Tenancy Form*, 14 STAN. L. REV. 87, 88 n.4 (1961).

57. *Id.*

58. GOLDSTEIN & THOMPSON, *supra* note 38, at 740 (construing Hines, *supra* note 51, at 586).

59. Byron D. Cooper, *Continuing Problems with Michigan’s Joint Tenancy “With Right of Survivorship,”* 78 MICH. B.J. 966, 966 (1999).

60. CAROLE SHAMMAS ET AL., *INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT* 172 (1987), cited in Robert C. Ellickson, *Unpacking the Household: Informal Property Rights Around the Hearth*, 116 YALE L.J. 226, 261 (2006).

61. See, e.g., Damaris Rosich-Schwartz, *Tenancy by the Entirety: The Traditional Version of the Tenancy Is the Best Alternative for Married Couples, Common Law Marriages, and Same-Sex Partnerships*, 84 NOTRE DAME L. REV. 23, 24 (2008) (listing asset protection, probate avoidance, and protection against unilateral severance as some of the possible overarching advantages of a tenancy by the entirety).

62. See *supra* notes 50-60 and accompanying text.

63. See *supra* notes 50-52 and accompanying text; see also Part III.

*C. The Widespread Use of Bankruptcy and the Inevitability of  
More Court Conflict*

The United States has also experienced a widespread use of the bankruptcy process in recent years to discharge, repay, and reorganize debt. In the United States, 1,311,602 people filed bankruptcy from June 2011 to June 2012 alone.<sup>64</sup> Yearly filings as reported in June since 2000 have consistently been over one million, except for the years 2007 and 2008.<sup>65</sup> It is widely speculated that this decrease was due to uncertainties caused by the Bankruptcy Abuse Prevention and Consumer Protection Act (BAPCPA), which was taking effect at the time.<sup>66</sup>

However, towards the end of the Great Recession of 2007-2009, yearly filings increased to over one million once again in 2009 and exceeded 1.5 million in both 2010 and 2011.<sup>67</sup> Furthermore, even if the U.S. economy returns to peak output levels as experienced during the mid-to-late 1990s, it is likely that the number of bankruptcies filed in the United States will remain high because national filings consistently exceed one million even during relatively healthy economic periods.<sup>68</sup>

The social stigma that once attached to bankruptcy is perhaps also fading, thus contributing a social factor to the greater number of bankruptcy filings.<sup>69</sup> One commentator has pointed to two social causes for the increased public perception that bankruptcy is losing its stigma: one, a “shifting societal attribution of fault [to outside forces] for financial failure;” and two, the decline of “both guilt internalization and external non-legal sanctions [like the shaming and

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64. THE UNITED STATES COURTS, U.S. BANKRUPTCY COURTS—BANKRUPTCY CASES COMMENCED, TERMINATED AND PENDING DURING THE 12-MONTH PERIODS ENDING JUNE 30, 2011 AND 2012, TABLE F (2012).

65. THE UNITED STATES COURTS, U.S. BANKRUPTCY COURTS—BANKRUPTCY CASES COMMENCED, TERMINATED AND PENDING DURING THE 12-MONTH PERIODS ENDING JUNE 30, 2007 AND 2008, TABLE F (2008); THE UNITED STATES COURTS, U.S. BANKRUPTCY COURTS—BANKRUPTCY CASES COMMENCED, TERMINATED AND PENDING DURING THE 12-MONTH PERIODS ENDING JUNE 30, 2006 AND 2007, TABLE F (2007).

66. Lois R. Lupica, *The Costs of BAPCPA: Report of the Pilot Study of Consumer Bankruptcy Cases*, 18 AM. BANKR. INST. L. REV. 43, 51 (2010) (“In recent years, however, numerous consumers in financial distress chose not to file for bankruptcy: the number of consumers filing for bankruptcy protection declined following BAPCPA’s enactment.”).

67. THE UNITED STATES COURTS, U.S. BANKRUPTCY COURTS—BANKRUPTCY CASES COMMENCED, TERMINATED AND PENDING DURING THE 12-MONTH PERIODS ENDING JUNE 30, 2010 AND 2011, TABLE F (2011); THE UNITED STATES COURTS, U.S. BANKRUPTCY COURTS—BANKRUPTCY CASES COMMENCED, TERMINATED AND PENDING DURING THE 12-MONTH PERIODS ENDING JUNE 30, 2009 AND 2010, TABLE F (2010).

68. See THE UNITED STATES COURTS, U.S. BANKRUPTCY COURTS—BANKRUPTCY FILINGS, 12-MONTH PERIOD ENDING JUNE, BY CHAPTER AND DISTRICT 19-30 (1983-2003).

69. See generally Rafael Efrat, *Bankruptcy Stigma: Plausible Causes for Shifting Norms*, 22 EMORY BANKR. DEV. J. 481 (2006).

ostracizing of bankrupts].”<sup>70</sup> Although a continuing point of contention in the literature,<sup>71</sup> some argue that the crippling stigma once associated with bankruptcy has faded,<sup>72</sup> and some even posit that bankruptcy is beneficial for persons in certain careers.<sup>73</sup>

Whether debtors’ motives are economic or social, the data support a projection that a high number of bankruptcy filings will continue nationally.<sup>74</sup> When considered alongside increasing numbers of joint tenancies in real and personal property,<sup>75</sup> it becomes evident that courts will continually confront the issue of the dying debtor-tenant or non-debtor cotenant in the future. Add to this calculation the notorious backlog that both state and federal courts face, and the problem exacerbates.<sup>76</sup> Because the current Code makes bankruptcy courts ill-equipped to deal with the issue of whether a tenancy severs when a bankruptcy petition is filed, and because bankruptcy should not fundamentally change the nature of estate or post-petition property, Congress should amend the Code to provide that filing a bankruptcy petition does not sever a joint tenancy.

## II. DISCUSSION OF THE BANKRUPTCY CODE IN LIGHT OF A SPLIT OF AUTHORITY IN THE COURTS

The bankruptcy courts, and now a state appellate court, have been split since the 1980s over whether filing a bankruptcy petition severs a joint tenancy under the current Code, and as previously stated, commentators have given this legal problem little consideration.<sup>77</sup> As for the courts, they did not fully flesh out the

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70. *Id.* at 489.

71. *See, e.g.,* Teresa A. Sullivan et al., *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 246 (2006) (“The declining fortunes of those who are willing to file for bankruptcy, the significant underreporting of bankruptcy, and the characterization of bankruptcy as a terrible event only slightly less awful than losing a child all point to the possibility that stigma might be increasing even as bankruptcy filings continue to climb.”).

72. *See* Efrat, *supra* note 69.

73. *See* Mascetti, *supra* note 32, at 185 (“[W]hile filing bankruptcy may not be exactly what the recording artist envisioned as a part of his or her career, it may be the recording artist’s best option for success.”).

74. *See supra* notes 64-68 and accompanying text.

75. *See supra* notes 56-60 and accompanying text.

76. *See* Christopher D. Bryan, *The Role of Law Clerks in Reducing Judicial Backlog*, 36-MAY COLO. LAW. 91, 94 (2007) (“By FY 2008, filings will have increased by 139 percent in a thirty year period, while judicial officers will have increased only 48 percent . . . . Judicial officers have not kept pace with increases in population which will have increased 76 percent over the same time period.” (emphasis in original)); *see also* Toby J. Stern, *Federal Judges and Fearing the “Floodgates of Litigation,”* 6 U. PA. J. CONST. L. 377, 391 (2003) (“[T]he future of the federal court caseloads remains in a ‘setting of profound uncertainty.’”) (quoting RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 123 (1996)).

77. *See supra* notes 31-33.

reasoning found in the bankruptcy cases until the Appellate Court of Illinois decided *Maniez v. Citibank, F.S.B.*<sup>78</sup> in 2010. Although the *Maniez* court accomplished this feat, it ultimately decided the case on state law grounds, thus leaving the federal question open for further review.<sup>79</sup>

Upon review, it appears bankruptcy courts have generally confined their discussion of this issue to three subjects: 1) the strength of the trustee's claim to title over estate property as judged from the administrative chapters of the Code (Chapters 3 and 5); 2) the legislative history behind these sections; and 3) state laws, whether touching on bankruptcy or not, which may independently resolve the severance question. Sensing a need for clarity in this area, this part of the Note will review the split of authority in the bankruptcy courts based on their interpretations of the first two subjects and will reserve a discussion of the third topic for Parts III and IV. Going beyond mere recitation, this part will also conclude with a brief contribution to the courts' severance debate by providing a discussion of the bankruptcy trustee's roles as described in Chapters 7, 11, and 12 of the Bankruptcy Code. Despite the long-standing split of authority outlined below, no court or published opinion found by this Author has fully examined the roles of the trustee to resolve the bankruptcy severance debate.<sup>80</sup>

#### A. *The Case for Severance*

Courts rely mainly on legislative history and emphasize certain language in the Code to find a complete severance of a joint tenancy once a debtor files a bankruptcy petition. Three cases, two involving Chapter 7 liquidations and one involving a Chapter 11 reorganization, provide the principal support for this position. As the facts show in most cases, a debtor joint tenant or non-debtor cotenant died during the bankruptcy process, forcing the court to address the issue of whether filing a Chapter 7 or Chapter 11 petition severs a joint tenancy.

According to *Maniez*, the chief case providing the legal basis for severance is *In re Lambert*.<sup>81</sup> In *Lambert*, the debtor was a joint tenant in property along with his sister.<sup>82</sup> The debtor filed a Chapter 7 bankruptcy petition, and he and his cotenant argued that the bankruptcy estate's interest in the property was subject to the sister's survivorship right.<sup>83</sup> In other words, the debtor took the rather dubious position that the bankruptcy estate had no interest in the joint tenancy because of the right of survivorship.<sup>84</sup> In response, the court held that filing a

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78. 937 N.E.2d 237 (Ill. App. Ct. 2010).

79. *Id.* at 251 (“[U]nder Illinois law, more than a transfer of the debtor’s interest in property is required to sever the joint tenancy. Illinois law requires a conveyance, which does not occur until the trustee sells or otherwise disposes of the property and title passes. Therefore, in Illinois, the filing of a bankruptcy petition does not sever a joint tenancy.”).

80. *See infra* Part II.C.

81. 34 B.R. 41 (Bankr. D. Colo. 1983).

82. *Id.* at 42.

83. *Id.*

84. *Id.* at 41.

petition severs a joint tenancy, giving “an undivided one-half interest in the subject property which is property of the [bankruptcy] estate.”<sup>85</sup>

In reaching this conclusion, the court relied heavily on legislative history. The court noted that although it is true Congress deliberately replaced the title granting language of section 70a of the Bankruptcy Act, the court quoted the following lines from a Senate report suggesting that Congress intended title to pass from the debtor under § 541:

“The debtor’s interest in property also includes ‘title’ to property, which is an interest, just as are a possessory interest, or leasehold interest, for example. . . .” And further, in that same report, it is stated: “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 . . . will be available to the representative of the debtor’s probate estate. The bankruptcy proceeding will continue *in rem* with respect to property of the estate, and the discharge will apply in personam to relieve the debtor, and thus his probate representative, of liability for dischargeable debts.”<sup>86</sup>

The debtor did not provide any contradictory legislative history to refute the contents of this Senate Report, and the court did not feel that the removal of the title-granting language alone won the debtor’s case.<sup>87</sup> However, even the contents of this report do not completely support the proposition that the Code causes title to pass to the trustee, disrupting the essential common law unity of title.

For additional support, the court looked to two Code sections:<sup>88</sup> Section 363, which allows the trustee to sell estate property,<sup>89</sup> and Section 522, which allows the debtor to exempt property from the estate.<sup>90</sup> In both sections, the court found special significance in the Code’s use of the past tense of the verb “to have.”<sup>91</sup> The court emphasized that subsection 363(h) provides that “the trustee may sell both the estate’s interest . . . and the interest of any co-owner in property which the debtor had, immediately before the commencement of the case, an undivided interest as a . . . joint tenant.”<sup>92</sup> The court accentuated similar language in section 522: “[A] debtor may exempt from property of the estate ‘any interest in property in which the debtor had, immediately before the commencement of the case, an interest as a . . . joint tenant. . . .’”<sup>93</sup>

Considering that the Senate Report provided that title passes from the debtor and that two sections of the Code included the past tense of “to have,” the court

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85. *Id.* at 43.

86. *Id.* (quoting S. REP. NO. 95-989, at 82-83 (1978)).

87. *Id.*

88. *Id.*

89. 11 U.S.C. § 363 (2006).

90. *Id.* § 522.

91. *In re Lambert*, 34 B.R. at 43.

92. *Id.* (quoting 11 U.S.C. § 363(h) (1982)).

93. *Id.* (quoting 11 U.S.C. § 522(b)(2)(B) (1982)).

concluded that, in effect, title indeed passes to the trustee upon the filing of a bankruptcy petition.<sup>94</sup> On this basis, the court ultimately held that “the filing of a petition in bankruptcy effects a severance of any joint tenancy the debtor may have had in property and that the Trustee and the other former joint tenants of the debtor become tenants in common.”<sup>95</sup>

Other courts were quick to follow *Lambert*'s lead. *In re Tyson*<sup>96</sup> involved a Chapter 11 reorganization of a husband and wife's estate.<sup>97</sup> The estate included property held in joint tenancy, but the husband died while the case was still pending.<sup>98</sup> The *Tyson* court quoted much of the court's reasoning in *Lambert* and concluded that by filing a joint Chapter 11 reorganization petition, the husband “lost any joint tenancy he may have had in real estate he owned with his wife. As a result, the bankruptcy estate of [the husband] has a one-half interest in the property in question.”<sup>99</sup> In other words, by jointly filing a bankruptcy petition, the husband and wife had converted their separate, undivided interests in the property to tenancies in common.<sup>100</sup>

However, the *Tyson* court was faced with an argument that did not exist in *Lambert*: a trustee had not yet been appointed in *Tyson*, and therefore, the debtors argued, title had not passed to anyone in particular.<sup>101</sup> To resolve this Chapter 11 (and Chapter 13) problem, the *Tyson* court emphasized the differences between the debtor prepetition and the debtor's new, distinct, and unrelated role as debtor in possession—a role whose “rights, powers, and duties [are] analogous to those of a trustee had a trustee been appointed.”<sup>102</sup> The court found that, although the Tysons had held the property jointly as husband and wife prepetition, and they continued in possession during the bankruptcy, the doctrine of the debtor in possession had, in effect, caused the debtors to pass title from themselves as debtors to themselves as debtors in possession, thus severing the tenancy.<sup>103</sup> *Tyson* therefore extended *Lambert*'s severance regime to Chapter 11 cases where the debtor assumes the trustee's role while remaining in possession.

Two Maryland cases following *Lambert* demonstrate that the case for severance of the joint tenancy in bankruptcy has modern staying power. *In re Panholzer*<sup>104</sup> and *In re Un Chin Kim*<sup>105</sup> arose out of two Chapter 7 bankruptcies in which the debtor died and the non-debtor cotenant died, respectively. *Panholzer* contributed some additional support to *Lambert*'s Code analysis in the form of a

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94. *Id.*

95. *Id.*

96. *In re Tyson*, 48 B.R. 412 (Bankr. C.D. Ill. 1985).

97. *Id.* at 413.

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.* at 414.

102. *Id.* (emphasis in original).

103. *Id.*

104. *In re Panholzer*, 36 B.R. 647 (Bankr. D. Md. 1984).

105. *In re Yun Chin Kim*, 288 B.R. 431 (Bankr. D. Md. 2002).

hearing before the U.S. House of Representatives in 1976.<sup>106</sup> The transcript offered the opinion of Professor Stefan A. Riesenfeld on whether the new Bankruptcy Code forced severances of tenancy property once a petition was filed: ““In a joint tenancy the trustee has title but it results in severance. Bankruptcy affects and converts anything that is joint tenancy into a tenancy in common.””<sup>107</sup> Based on this observation, and *Lambert*’s prior reasoning, the court found that

[t]he conclusion is inescapable, that if a joint tenancy is terminated ‘if one of the cotenants conveys his interest to a third person,’ that upon the filing of a voluntary Chapter 7 petition by a cotenant, 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 § 541(a).<sup>108</sup>

*Yun Chin Kim*, a 2002 case, followed *Panholzer*’s “inescapable” conclusion as binding precedent.<sup>109</sup> The court noted that, based on *Panholzer*’s holding, “[a]t the time of the bankruptcy filing, the joint tenancy would have been severed, and the Property would have been held as tenants in common.”<sup>110</sup>

*Lambert* and its progeny thus stand for the surprising proposition that joint tenancies cannot exist in bankruptcy. Based on a combination of legislative history and emphasized readings of a few Code sections, these cases conclude that the Bankruptcy Code is embedded with a sort of innate enmity towards the joint tenancy as a form of property ownership in bankruptcy. If the *Lambert* line of cases were applied to Debora’s case introduced at the beginning of this Note, filing a bankruptcy petition would cause her joint tenancies to sever, thus making them tenancies in common. Solely on this basis, if Debora were then to unfortunately die intestate, Sandra, unprotected by rights of survivorship and as closest of kin, would be liable for any of Debora’s personal judgment liens that attached to her previous joint tenancy interest in Federico’s home. However, a separate line of cases dismisses the legislative history the *Lambert* line finds persuasive and looks at Congress’s intent and the Bankruptcy Code in a different light.

#### *B. The Case for Preservation of the Right of Survivorship*

*In re Anthony*<sup>111</sup> and *In re Spain*<sup>112</sup> oppose the *Lambert* line of cases and

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106. *In re Panholzer*, 36 B.R. at 651.

107. *Id.* (quoting *Hearings on H.R. 31 and H.R. 32, pt. 3 Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 1519 (1976) (statement of Prof. Riesenfeld)).

108. *In re Panholzer*, 36 B.R. at 651 (quoting CORNELIUS J. MOYNIHAN, A PRELIMINARY SURVEY OF REAL PROPERTY 131 (1st ed. 1940)).

109. *In re Yun Chin Kim*, 288 B.R. at 433 n.1.

110. *Id.*

111. 82 B.R. 386 (Bankr. W.D. Pa. 1987).

112. 55 B.R. 849 (Bankr. N.D. Ala. 1985).

refute their severance arguments in two ways.<sup>113</sup> First, *Anthony* endeavored to find textual support to show that the *Lambert* leap to vesting title in the trustee simply did not hold up under closer analysis of § 363.<sup>114</sup> Second, *Spain* vigorously refuted *Panholzer*'s assertion that § 541 also served to pass title to the trustee and combated legislative history with the fact that Congress intentionally took out section 70a, which previously had explicitly given title to the trustee in estate property.<sup>115</sup> These two cases form the bulwark of the case for preservation of the right of survivorship under the current Code.

In *Anthony*, the debtor owned her residence jointly with her elderly mother, but during the debtor's Chapter 7 bankruptcy proceedings, her mother died.<sup>116</sup> The lender argued that the joint tenancy severed and became a tenancy in common when the debtor filed the bankruptcy petition.<sup>117</sup> Following this argument would have meant that while the debtor's liens could be avoided under § 522(f) only in the debtor's one-half of the estate, the liens could not be avoided in the deceased mother's one-half.<sup>118</sup> The lender pressed the case, arguing that because the debtor inherited the common tenancy property and not "by right of survivorship," the debtor also inherited her mother's lien at death.<sup>119</sup>

As in *Lambert*, the court looked to subsections (h), (i) and (j) of § 363 for clues as to whether the joint tenancy is automatically severed by the filing of a bankruptcy petition.<sup>120</sup> The court found that "[t]he trustee is permitted to sell only if partition is impractical, if sale of the total would produce significantly more than the parts, and if the benefits to the estate outweigh the detriment to co-owners."<sup>121</sup> From this language the court concluded that the trustee's right to sell was not absolute: "It sounds permissive, as though the trustee may sever a joint tenancy if the estate benefits and if the rights of the non-debtor/co-tenant are protected."<sup>122</sup> *Anthony* thus attempted to refute *Lambert*'s past tense analysis of "to have" by looking at what it viewed as the section's permissive language.

On this basis, the *Anthony* court held that the filing of a petition does not sever a joint tenancy with right of survivorship "unless the trustee actually executes against such property by attempting to sever or to sell the whole in order to liquidate such property."<sup>123</sup> The court then allowed the debtor to amend the value of the property and avoid the judicial lien and constable's levy to the extent that the liens impaired the debtor's exemption.<sup>124</sup> *Anthony* stands out among

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113. See *id.* at 853; see also *In re Anthony*, 82 B.R. at 388.

114. *In re Anthony*, 82 B.R. at 388.

115. *In re Spain*, 55 B.R. at 853.

116. *In re Anthony*, 82 B.R. at 386.

117. *Id.* at 387.

118. *Id.*

119. *Id.*

120. *Id.* at 388.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*



federal bankruptcy jurisprudence in this area because it rebutted *Lambert*'s conclusion that § 363 continued to vest title to estate property in the trustee, reasoning instead that it merely gives the trustee permission to sell joint property in limited circumstances.<sup>125</sup>

Predating *Anthony*, *In re Spain* shores up the case against the *Lambert* line because it recounted the history behind tossing out section 70a of the old Bankruptcy Act, and ultimately, concluded that it did not have jurisdiction to decide whether the trustee has title to joint property not included in the bankruptcy estate.<sup>126</sup> *Spain* involved a case in which a husband filed an individual Chapter 7 bankruptcy petition including property held with his wife in joint tenancy with right of survivorship.<sup>127</sup> The trustee sought to sell the entire property, including the interest the wife had in joint tenancy as a non-debtor cotenant.<sup>128</sup> The wife objected in the strongest terms, arguing that the joint tenancy itself is indestructible and not subject to levy or sale under the laws of Alabama.<sup>129</sup> Although *Spain* cited state precedent which refuted the wife's state law argument, the court was not prepared to find that the tenancy severed because of the husband's bankruptcy petition.<sup>130</sup>

In reviewing the severance question, the *Spain* court first recounted that Congress had discarded section 70a of the old Bankruptcy Act,<sup>131</sup> thus causing the then-prevailing conception that the trustee held title over estate property to become moot.<sup>132</sup> Thereafter, the court concluded that, while "[i]t was the declared purpose of the drafters of the 1978 Act to disregard state law and to take as property of the estate any lands of the husband and wife for the payment of the husband's debts,"<sup>133</sup> Congress did not give the bankruptcy trustee title over the property in order to do so. In the court's words, bankruptcy law had become "confused,"<sup>134</sup> and "if it was the purpose of the drafters of the Code to disregard titles as defined under state law, Section 541 falls short of doing so. Of course, title to land was never created by federal law and it was clearly not Congress' intention to devise new estates in property."<sup>135</sup> Therefore, *Spain* drew on Congress's disposal of section 70a and state governments' traditional hold over

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125. *Id.*

126. *In re Spain*, 55 B.R. 849, 854 (Bankr. N.D. Ala. 1985).

127. *Id.* at 855.

128. *Id.* at 850.

129. *Id.*

130. *Id.* at 855.

131. *See id.* at 852 ("There is yet a more perplexing problem when the *trustee* in bankruptcy of the husband's estate seeks to sell the wife's interest against her will and consent. This issue brings into play a glaring defect in the title of the trustee caused by the failure to carry forward into the Bankruptcy Reform Act of 1978, former Section 70(a) of the Bankruptcy Act, which transferred title of the bankrupt to the trustee.").

132. *See id.* (referencing 4A Collier on Bankruptcy § 70, at 60 (14th ed. 1978)).

133. *Id.* at 853.

134. *Id.* at 854.

135. *Id.*

granting title to property, while ignoring *Lambert's* use of legislative history, to find that the trustee lacked title to estate property.

Assured in this conclusion, the court then proceeded to attack the opposing precedents that supported severance, namely *Lambert*, which the trustee presumably cited for support. The court in *Spain* began its attack with vigorous opposition to *Lambert's* view that the tenancy severed because the trustee took title to bankruptcy property:

Where does he get this? This concept is evidently from the fantasy world of make believe or born as a result of wishful thinking. It is just not true. . . . The debtor retains the full use, possession and enjoyment jointly with the trustee and the right to refuse to turn over or deliver such property in proper cases. There is no voluntary or involuntary transfer of property upon filing. . . . The trustee has no title to property of the estate until he elects to take affirmative action and proceedings are had or orders made.<sup>136</sup>

The court then moved to *Lambert's* emphasis on the past nature of the debtor's property, the past tense analysis on Section 363, in which the *Lambert* court italicized "had" in subsection (h) to conclude that non-debtor cotenants had lost title to property when the debtor files a bankruptcy petition.<sup>137</sup> In response, *Spain* highlighted the words "at the time of the commencement of the case" which come after the "had" in subsection (h) in order to show that such analysis was not dispositive.<sup>138</sup>

Ultimately, the court refrained from ordering a sale of the wife's property, finding that the decision turned on a question of unsettled state law "because there are no provisions in the Code standing alone that would render it a matter of federal law."<sup>139</sup> The court even directed the trustee "to bring a bill of sale for division in the proper state court and test his title against that of the wife and debtor and have that court determine the quantum and nature of his estate."<sup>140</sup> *Spain* thus leveled an attack against *Lambert* and its progeny by emphasizing Congress's deletion of Section 70a, looking at the plain letter of Section 541 and ignoring its legislative history, finding no severance of joint tenancies when a bankruptcy petition is filed, and finally concluding that the Court lacked jurisdiction to decide the extent and nature of the estate the trustee would have otherwise.

Together, *Anthony* and *Spain* stand for the proposition that the debtor's property held in joint tenancy does not sever at the commencement of the case. *Anthony* found that *Lambert's* interpretation of Section 363 was wanting:<sup>141</sup> the trustee does not have an absolute right to sell co-owned property not included in

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136. *Id.*

137. *Id.* at 855.

138. *Id.*

139. *Id.*

140. *Id.*

141. *In re Anthony*, 82 B.R. 386, 388 (Bankr. W.D. Pa. 1987).

the estate because his ability to sell such property is limited to circumstances where partition of the property is impracticable, the sale of the estate free and clear of such interests realizes significantly more for the estate than if the estate simply sold the debtor's prior interest, and the benefit to the estate from the sale outweighs the detriment to the non-debtor co-owners.<sup>142</sup> Reasoning that because these restraints on the sale of property would otherwise not exist if the trustee had title, *Anthony* concluded that the trustee had no title over estate property, and therefore no severance occurs.<sup>143</sup> Additionally, *Spain* contributed to the case for the preservation of the right of survivorship by finding that the legislative history *Anthony* propounded did not match up with the plain letter of Section 541.<sup>144</sup> The *Spain* court added a reading of subsection 363(h) which took emphasis away from the past nature of the co-owner's interest, held that the trustee did not have title to estate property, and even if the trustee had title, the court found it did not have jurisdiction to determine the quantum and nature of it.<sup>145</sup> *Anthony* and *Spain* are therefore the chief cases finding no severance of joint tenancies when either a voluntary or involuntary case commences under the Bankruptcy Code.

### C. The Role of the Trustee

The *Lambert* line of cases and both *Anthony* and *Spain* centered their severance discussion around whether the trustee possesses title to estate property, pouring through relevant sections of the Code and looking to legislative history for guidance, but it appears these cases did not examine the differing roles the Bankruptcy Code assigns to the trustee under Chapters 7, 11, and 13—particularly with respect to the trustee's rights of alienation of estate property. Because the ability to sell and transfer title to property is incident to the rights of ownership,<sup>146</sup> it is also an indicator that the transferor likely possesses title to the property.<sup>147</sup> This generally being the case, it follows *a fortiori* that if the Code

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142. See 11 U.S.C. §§ 363(h) (1)-(4) (2006).

143. *In re Anthony*, 82 B.R. at 388.

144. *In re Spain*, 55 B.R. at 853-54.

145. *Id.* at 855.

146. The incidents of property ownership—particularly alienation—are ancient common law rights. See *Brandon v. Robinson*, 18 Vesey, 429 (“[O]ne of the inseparable incidents to the ownership of personal property, is, that it shall be liable for the debts of the owner, and that a restraint upon its alienation is void.”) (quoted in *Lenoir v. Rainey*, 15 Ala. 667, 670 (1849)).

147. Indeed, longstanding precedent in New York states,

The ownership of the fee cannot exist in one person while the ownership of the right of alienation and of its fruits, exists in a different person. This is a principle older than the common law of England. *Grotius*, (*Book 1, Ch. 6, § 1*.) says, “Since the establishment of property, men who are masters of their own goods, have by the law of nature the power of disposing of, or of transferring all or any part of their effects, to other persons; for this is the very nature of property; I mean of full and complete property;” and, therefore, Aristotle says, “It is the definition of property to have in one's self the power of alienation.”

gives the power to sell property to the trustee in one instance, but not in another, then the trustee has a greater claim to title over property that she is entitled—or better yet *commanded*—to sell. The differences in the roles assigned to the trustee under each chapter of the Code reveal that, if there is any chapter of the Code under which the trustee could assert a claim to title over estate property, it is likely Chapter 7 and not any other chapter.<sup>148</sup> Only Chapter 7 commands the trustee to sell all non-exempt property of the estate.<sup>149</sup>

Section 704 of the Code lists twelve duties for a trustee in a Chapter 7 case.<sup>150</sup> These duties include being accountable for all estate property, investigating the financial affairs of the debtor, and opposing a discharge if advisable.<sup>151</sup> However, first on the list of the trustee's duties under Section 704(a)(1), and perhaps the Chapter 7 trustee's primary duty, is the following: “[C]ollect and reduce to money the property of the estate” and “close such estate as expeditiously” as possible.<sup>152</sup> The Code gives the Chapter 7 trustee broad powers in order to accomplish the sometimes tedious job of selling off estate property. These remarkable powers include the trustee's “strong arm” powers, typified by Sections 542 through 547, which among other things, provide for the turnover of estate property to the trustee,<sup>153</sup> grant to the trustee the rights and powers of a lien creditor or bona fide purchaser of real property in relation to other claimants,<sup>154</sup> and authorize the trustee to avoid preferential transfers to creditors ninety days before the petition is filed.<sup>155</sup> The Code reinforces the trustee's strong arm powers with the ability to sell, lease, and use estate property and, as *Lambert, Anthony*, and *Spain* make clear,<sup>156</sup> sell property interests that are not part of the estate like those of non-debtor cotenants.<sup>157</sup> The Code thus gives the Chapter 7 trustee extensive powers in order to sell property belonging to and not belonging to the estate in order to fulfill the trustee's mandate to “reduce to money” estate property.

Although the strong arm powers and the powers of sale of Chapters 3 and 5

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De Peyster v. Michael, 6 N.Y. 467, 493 (1852).

148. See 11 U.S.C. §§ 704(a)(1)-(12) (2006).

149. See *id.* § 704(a)(1); see also *Looney v. Hyundai Motor Mfg. Alabama, LLC*, 330 F. Supp. 2d 1289, 1292 (M.D. Ala. 2004) (“Under 11 U.S.C. § 704(1), the trustee of a Chapter 7 estate possesses a responsibility and power that a Chapter 13 trustee does not, that is, a Chapter 7 trustee shall ‘collect and reduce to money the property of the estate . . . .’” (quoting 11 U.S.C. § 704(a)(1))).

150. See 11 U.S.C. §§ 704(a)(1)-(12) (2006).

151. See *id.* §§ 704(a)(2)-(6).

152. *Id.* § 704(a)(1).

153. See *id.* § 542.

154. See *id.* § 544.

155. See *id.* § 547.

156. See *supra* Part II.A-B.

157. See 11 U.S.C. § 363(f)-(j) (2006).

are also available to trustees in Chapter 11<sup>158</sup> and Chapter 13<sup>159</sup> cases (and Chapter 12, for that matter), those powers are to be used for purposes other than the complete sale and closure of the estate. Because Chapters 11 and 13 aim at rehabilitating debtors and establishing payment plans for debts to creditors,<sup>160</sup> Sections 1106 and 1302 leave out the absolute command to sell all things belonging to the estate. Instead, Section 1106 makes the Chapter 11 trustee generally accountable for the property, maintenance, and betterment of the bankruptcy estate.<sup>161</sup> Similarly, the Chapter 13 trustee is not commanded to seek the rapid sale of estate assets under Section 1302, but rather that section mandates that she perform supervisory duties, like advising and assisting the debtor in performance of the approved Chapter 13 plan.<sup>162</sup> Although both sections provide that Chapter 11 and Chapter 13 trustees should account for all estate property, and in all cases both trustees are under fiduciary duties to vigorously pursue all property that should belong to the estate,<sup>163</sup> Chapter 11 and Chapter 13 trustees do not have an absolute mandate to expeditiously sell off estate property.

The difference in mandates between Chapter 7 trustees on one side and Chapter 11 and Chapter 13 trustees on the other impinges upon the severance debate. If what really is at stake in *Lambert* and *Spain* is the strength of the trustee's claim to title over estate property, and the ability to alienate certain property is the *sine qua non* of title ownership, then Section 704's command that the trustee sell estate property indicates that a Chapter 7 trustee's claim to title over estate property is greater than either a Chapter 11 or Chapter 12 trustee's claim. Therefore, this also indicates that if the transfer of title to a tenant's interest is required to sever a joint tenancy, then severance will likely occur only in a Chapter 7 context—rather than in a Chapter 11 or Chapter 13 case. This title analysis, which bankruptcy courts have determined to be crucial to the severance debate,<sup>164</sup> therefore reveals that federal courts operating under the Bankruptcy Code should sever joint tenancies, if at all, only when a debtor files a Chapter 7 bankruptcy petition.<sup>165</sup>

### III. INDIANA JOINT TENANCY LAW AS A HEURISTIC DEVICE

By and large, bankruptcy courts look to non-bankruptcy law in order to

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158. *See id.* § 1106.

159. *See id.* § 1302.

160. Chapter 11 bankruptcy, or reorganization, involves rehabilitation. CHAPTER 11 REORGANIZATIONS § 12.01 (2d ed. 2013). In addition, Chapter 13 bankruptcy is titled “Adjustment of Debts of an Individual with Regular Income,” suggesting the setting up of payment plans.

161. 11 U.S.C. § 1106(a)(1) (2006) (“A trustee shall perform the duties of a trustee, as specified in paragraphs (2), (5), (7), (8), (9), (10), (11), and (12) of section 704(a).”).

162. *See id.* § 1302(b)(1) (leaving section 704(a) out of the Chapter 13 trustee's mandate).

163. *See id.* 11 U.S.C. § 1106(a)(1); *see also id.* § 1302(b)(1).

164. *See supra* Part II.A-B.

165. *But see infra* Part IV (explaining that such a result will likely obtain only in states following the common law of joint tenancies).

determine the nature of the debtor's interest in property,<sup>166</sup> and by the same token, bankruptcy courts also look to state law in order to determine how joint tenancies sever.<sup>167</sup> In order to understand why some bankruptcy courts require the trustee to prove he has title to estate property before allowing the joint tenancy to sever, it will be useful to briefly explore the common law of joint tenancies. Indiana has been faithful to this law, with one important exception to be discussed later, and will serve both as an example of the common law of joint tenancies and as a valuable counterpoint to more contemporary trends in joint tenancy law to be discussed in Part IV.

By Indiana statute, there is a codified preference for tenancies in common over joint tenancies, but persons wanting to hold property as joint tenants can overcome the preference if either of the following are met: "(1) [I]t is expressed in the conveyance or devise that the grantees or devisees hold the land or interest in land in joint tenancy and to the survivor of them; or (2) the intent to create an estate in joint tenancy manifestly appears from the tenor of the instrument."<sup>168</sup> In addition, Indiana accepts the four common law unities of time, title, interest, and possession for the purposes of creating and maintaining a joint tenancy.<sup>169</sup> As Blackstone explained, "joint-tenants have one and the same interest, accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession."<sup>170</sup> Debora's joint tenancy introduced at the beginning of this Note would have had to fulfill the four common law unities in order to have been created in Indiana: Debora, Sandra, and Federico would all have had a one-third undivided fee interest in the estate (unity of interest); acquired their interest by the same deed (unity of title); obtained that interest at the same time (unity of time); and been entitled to possess the entire estate (unity of possession).

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166. See *Butner v. United States*, 440 U.S. 48, 54 (1979) ("Property interests are created and defined by state law. 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."); see also *In re Ford*, 3 B.R. 559, 565 (Bankr. D. Md. 1980) ("[I]n the absence of a federal law of property, the existence and nature of the debtor's interest in tenants by entireties property are determined by nonbankruptcy law.").

167. See, e.g., *In re Spain*, 55 B.R. 849, 854 (Bankr. N.D. Ala. 1985) (stating that the state court had jurisdiction over the issue).

168. IND. CODE § 32-17-2-1(b)(1)-(2) (2012).

169. See *Hornung v. Biggs*, 223 N.E.2d 359, 360-61 (Ind. App. 1967) ("[T]he prerequisites of an estate in joint tenancy are: 'First. The tenants must have one and the same interest. Second. The interest must accrue by one and the same conveyance. Third. The interest must commence at one and the same time. Fourth. It must be held by one and the same undivided possession.'" (quoting *Case v. Owen*, 38 N.E. 395, 395 (Ind. 1894)). However, the requirement of unity of time, at the very least, has been relaxed for joint tenancies in personal property. See *Robison v. Fickle*, 340 N.E.2d 824, 833 (Ind. Ct. App. 1976) ("[W]e consider them to be a vestige of the past with no requisite application to creation of joint tenancies with right of survivorship as to savings accounts, bank certificates of deposit or corporate common stock.").

170. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 180 (1979).

The common law joint tenancy severs and becomes a tenancy in common if any one of these unities fails. Therefore, a joint tenancy in Indiana severs if a tenant alienates his interest, thus defeating the unity of title.<sup>171</sup> Debora, for example, could have accomplished this by unilaterally conveying her interest to her husband. Severance can also occur at the request of a joint tenant who files a petition in state court to partition the estate.<sup>172</sup> Indiana courts partition joint tenancies *pro rata* by giving each tenant coequal shares.<sup>173</sup>

Importantly, the Indiana joint tenancy is distinct at state law and bankruptcy law from similar forms of joint property ownership like the tenancy by the entirety. Only married couples can own entireties property in Indiana, and because the state has opted out of the federal bankruptcy exemptions, entireties tenants are allowed to take the homestead exemption for both husband and wife.<sup>174</sup> Indiana law exempts entireties property from the bankruptcy estate but not joint tenancy property.<sup>175</sup> These realities will be given due consideration in this Note's recommendations for state and national treatment of the joint tenancy when a debtor-tenant finds herself on the verge of bankruptcy.

#### IV. RECOMMENDATION FOR COURTS IN INDIANA AND SIMILARLY FORMALIST STATES

The distinction between realism and formalism in joint tenancy law among the several states plays a significant role in whether a joint tenancy severs when a bankruptcy petition is filed. States like Indiana, which follow a more formalist approach, consider whether one of the common law unities has failed once a petition is filed.<sup>176</sup> States like Colorado, however, which judicially discarded its notion of the common law unities in favor of a realist approach, focus on the debtor's intent in filing a bankruptcy petition to determine if severance occurs.<sup>177</sup> As may be expected,<sup>178</sup> it is easier to sever a tenancy in a realist state. Thus, a

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171. *Morgan v. Catherwood*, 167 N.E. 618, 622 (Ind. App. 1929).

172. *Cunningham v. Hastings*, 556 N.E.2d 12, 13 (Ind. Ct. App. 1990).

173. *Id.*

174. IND. CODE § 34-55-10-2(c)(1) (2012) (“(c) The following property of a debtor domiciled in Indiana is exempt: (1) Real estate or personal property constituting the personal or family residence of the debtor or a dependent of the debtor, or estates or rights in that real estate or personal property, of not more than fifteen thousand dollars (\$15,000). The exemption under this subdivision is individually available to joint debtors concerning property held by them as tenants by the entirety.”).

175. *See id.* § 34-55-10-2(c)(5) (“Any interest that the debtor has in real estate held as a tenant by the entirety. The exemption under this subdivision does not apply to a debt for which the debtor and the debtor's spouse are jointly liable.”).

176. *See Hornung v. Biggs*, 223 N.E.2d 359, 360-61 (Ind. App. 1967) (setting forth the four unities that are prerequisites for an estate in joint tenancy).

177. *See Taylor v. Canterbury*, 92 P.3d 961, 966 (Colo. 2004).

178. *See Helmholz, supra* note 33, at 31 (“If one looked honestly at the filer's probable intent, had he given it any thought, the severance would occur at the moment of filing.”).

state court in formalist Illinois held that filing a petition does not sever a joint tenancy,<sup>179</sup> while bankruptcy courts in Colorado held that filing a petition in that state does sever the tenancy.<sup>180</sup> Therefore, this Note recommends, at the very least, that courts in formalist states not sever joint tenancies when a debtor-tenant files a Chapter 11 or Chapter 13 bankruptcy petition.

*Maniez v. Citibank*, the recent Illinois case identifying the split of authority in the bankruptcy courts over the severance issue,<sup>181</sup> illustrates how formalist states interpret the Bankruptcy Code in relation to state property law when a debtor-tenant files a bankruptcy petition in the state.<sup>182</sup> As in many of the relevant bankruptcy cases, the facts involve a death in the family.<sup>183</sup> A wife, faced with a judgment lien against her and other personal debts, decided to file individually for bankruptcy.<sup>184</sup> She received a discharge, but shortly thereafter, her husband died.<sup>185</sup> The creditor holding the judgment lien argued that because the husband was not involved in the bankruptcy, the judgment lien passed to the wife despite her discharge because she inherited the estate and its encumbrances.<sup>186</sup> In support of this argument, the lien creditor advanced the theory that by filing the bankruptcy petition the wife severed the joint tenancy and her survivorship right, which would have protected her from inheriting the perfected lien attached to the property.<sup>187</sup>

In response, the *Maniez* court followed the reasoning of *Spain* and *Anthony*, and depended on Illinois' four unities requirements for the creation and maintenance of joint tenancies, to conclude that filing a bankruptcy petition does not sever a joint tenancy in Illinois.<sup>188</sup> The court first acknowledged that, in Illinois, simply filing a lien on property does not amount to a conveyance of title from the joint tenant title-holder to the lien-holder.<sup>189</sup> From this, the court

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179. See *Maniez v. Citibank*, F.S.B, 937 N.E.2d 237, 249 (Ill. App. Ct. 2010).

180. See *Taylor*, 92 P.3d at 967.

181. *Maniez*, 937 N.E.2d at 248.

182. *Id.* at 248-49.

183. *Id.* at 241.

184. *Id.*

185. *Id.* at 242.

186. *Id.* at 248.

187. For states like Illinois that reject the title theory of mortgages, a lien attached to joint property only survives as long as the mortgaging tenant survives and does not pass through right of survivorship to other co-tenants, though they may otherwise be the decedent's heirs. See, e.g., *Harms v. Sprague*, 473 N.E.2d 930, 934 (Ill. 1984) (internal citations omitted) (“[W]e find that the mortgage executed by John Harms does not survive as a lien on plaintiff's property. A surviving joint tenant succeeds to the share of the deceased joint tenant by virtue of the conveyance which created the joint tenancy, not as the successor of the deceased. The property right of the mortgaging joint tenant is extinguished at the moment of his death. While John Harms was alive, the mortgage existed as a lien on his interest in the joint tenancy. Upon his death, his interest ceased to exist and along with it the lien of the mortgage.”).

188. *Maniez*, 937 N.E.2d at 248.

189. *Id.* at 249.



explained, it follows that perfecting a lien interest in property does not disrupt the unity of title required to maintain the tenancy.<sup>190</sup> The court then summarized its holding as follows, relying on *Spain* and *Anthony*'s holdings that no transfer of title of debtor property occurs when the debtor files his petition:

[T]he Bankruptcy Code provides that the debtor's legal and equitable interests in property are transferred to the bankruptcy estate. However, under Illinois law, more than a transfer of the debtor's interest in property is required to sever the joint tenancy. Illinois law requires a conveyance, which does not occur until the trustee sells or otherwise disposes of the property and title passes. Therefore, in Illinois, the filing of a bankruptcy petition does not sever a joint tenancy.<sup>191</sup>

As a result, the judgment lien simply disappeared when the husband died, leaving the wife, as beneficiary of her survivorship rights, with title free and clear of the lien she had originally discharged in her Chapter 7 case.<sup>192</sup> Thus, formalist states, which require a full disruption of unity of title by complete conveyance to another entity, afford joint tenants greater protection from creditors by holding that the tenancy remains intact when a tenant files a bankruptcy petition.

In contrast, courts in realist states, which focus on the intent of a tenant rather than four unities continuity to decide severance questions, are more likely to hold that a tenancy severs when a debtor-tenant files a bankruptcy petition. The realist revolution in joint tenancy law began in the 1950s and continues to this day:

During the 1950s, a series of articles, comments, and case notes appeared in American law reviews dealing with the then-current law relating to severance of joint tenancies. It is not too much to say that they echoed a single theme: The inherited law of severance was based upon a needless and outmoded formalism. The commentators concluded that the law of severance of joint tenancies had become "thoroughly burdened with concepts which might be described as archaic."<sup>193</sup>

The Colorado Supreme Court, as an example of an authority bearing the realist torch, followed the call of the 1950s reformists in *Taylor v. Canterbury*,<sup>194</sup> observing that "[i]n stark contrast to traditional common law, the modern tendency is to not require that the act of the co-tenant be destructive of one of the essential four unities of time, title, possession or interest before a joint tenancy is terminated."<sup>195</sup> The better approach, according to the court, was to "[recognize] that a joint tenancy may be terminated by mere agreement between the joint

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190. *Id.* at 248.

191. *Id.* at 251.

192. *Id.* at 251-52.

193. Helmholz, *supra* note 33, at 1 (quoting Robert W. Swenson & Ronan E. Degnan, *Severance of Joint Tenancies*, 38 MINN. L. REV. 466, 466 (1954)).

194. 92 P.3d 961 (Colo. 2004).

195. *Id.* at 966 (citing *Mann v. Bradley*, 535 P.2d 213, 214 (1975)).

tenants, despite the fact that no property is conveyed or interests alienated.”<sup>196</sup> This led the court to discontinue looking to the four unities for issues of tenancy severance, relying instead on the intent of the parties in any particular case.<sup>197</sup> Under this scheme, the severance issue becomes a question of fact, as “[a]ctions that are inconsistent with the right of survivorship may terminate a joint tenancy.”<sup>198</sup>

After the Colorado Supreme Court’s *Taylor* decision in 2004, the federal district court in Colorado, the source of *In re Lambert* twenty-nine years earlier,<sup>199</sup> was “compelled” to hold in *In re Slifco*<sup>200</sup> that filing a bankruptcy petition severs a joint tenancy.<sup>201</sup> In *Slifco*, a husband and wife held four parcels of property in joint tenancy which were subject to a lien.<sup>202</sup> The husband independently filed a Chapter 7 bankruptcy petition and separated from his wife.<sup>203</sup> Meanwhile, as the wife attempted to sell the properties to satisfy the encumbering lien, the husband died while his petition was before the bankruptcy court.<sup>204</sup> Upon these facts and in view of *Taylor*, the court, although noting an independent basis for finding that the parties intended for the tenancy to sever,<sup>205</sup> concluded that “filing for Chapter 7 bankruptcy evinces an *intent* to sever joint tenancy interests in any property scheduled as nonexempt. This analysis is exactly what is prescribed by the Colorado Supreme Court in *Taylor*.”<sup>206</sup>

The *Slifco* court also partially based its conclusion on a second Colorado case, *Mangus v. Miller*,<sup>207</sup> which held that an option to purchase an interest in a joint tenancy causes it to sever.<sup>208</sup> Pointing to subsection 363(h) of the Bankruptcy Code, the district court observed that the trustee has the option of selling estate property “under certain conditions, at any time.”<sup>209</sup> And further, pointing to subsection 363(i), the court noted that if the trustee chooses to sell, non-debtor cotenants have a right of first refusal.<sup>210</sup> Taking these two options together in conjunction with the holdings in *Mangus* and *Taylor*, and setting aside

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196. *Id.*

197. *Id.*

198. *Id.* (citing *Mann*, 535 P.2d at 214-15).

199. *See supra* Part II.

200. *In re Slifco*, No. CIVA 06CV-01781-EWM, 2007 WL 1732782 (D. Colo. June 14, 2007) (unpublished opinion).

201. *Id.* at \*8.

202. *Id.* at \*1.

203. *Id.*

204. *Id.*

205. *Id.* at \*6 (finding that a previous agreement between the husband and wife to sell the properties and divide the proceeds was an action inconsistent with the right of survivorship).

206. *Id.* (emphasis in original).

207. *Mangus v. Miller*, 532 P.2d 368 (Colo. Ct. App. 1974).

208. *See id.* at 369-70 (“The right of either party to insist upon a sale to one or the other is wholly inconsistent with the continuance of a joint tenancy relationship.”).

209. *In re Slifco*, 2007 WL 1732782 at \*8.

210. *Id.*

the opposite holdings in *Anthony* and *Spain* as only dealing with four unities analysis, the federal court in *Slifco* felt it did not have to concern itself with where title falls when a bankruptcy petition severs a joint tenancy: “If the Colorado Supreme Court, in making severance easier, was not discouraged by any possible uncertainty with respect to property titles, this court is equally unconcerned.”<sup>211</sup> Therefore, the realist state law in Colorado caused the Colorado district court to observe that severance of joint tenancies is easy in the state, not concerning itself with unity of title problems, and thus filing a petition for bankruptcy causes a Colorado joint tenancy to sever.

Taking stock of differences in state law between formalist and realist conceptions of joint tenancies, this Note recommends—at the very least—that courts in states still recognizing the four unities hold that filing a Chapter 11 or Chapter 13 bankruptcy petition does not sever a joint tenancy. Because analysis in these states focuses on whether title passes to the bankruptcy trustee, and a Chapter 7 trustee has an absolute mandate to sell off estate property (using section 363(h)), courts in those states may find that title passes in the Chapter 7 context. However, because the Chapter 11 and Chapter 13 trustee lacks such a mandate, state law centering around the four unities, as illustrated in *Maniez*, will likely cause states to find that no severance occurs.

#### V. A PROPOSED AMENDMENT TO THE BANKRUPTCY CODE

As illustrated in Part I, the joint tenancy is an increasingly prevalent form of property ownership across America.<sup>212</sup> Bankruptcy is also a common economic mainstay, critical for debt collection and debtor rehabilitation.<sup>213</sup> Thus, given the number of bankruptcy filings and the widespread use of the joint tenancy, the two will continue to collide until a resolution surfaces to the current split of authority in the bankruptcy courts. The collision will continue because the death of a tenant or non-debtor cotenant gives rise to severance litigation.<sup>214</sup> When a party in interest dies during the bankruptcy process, the trustee is obliged to pursue property which may belong to the estate, and the surviving tenants want their share of the pie—preferably without the deceased tenant’s obligations.

Further, the split of authority shows no sign of healing since its inception in the 1980s, and with the recent decisions in *Maniez*, *Yun Chin Kim*, and *Slifco*, it appears courts are splintering in their rationales rather than unifying behind a single authority.<sup>215</sup> State courts treat severance questions differently based on whether they have caught the tide of realist change or continue to analyze severance based on the age-old four unities test. Bankruptcy courts are at loggerheads over whether the Code provides for severance or not, with some

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211. *Id.*

212. *See supra* Part I.B.

213. *See supra* Part I.C.

214. *See supra* Part II.

215. *See supra* Part II. This paragraph summarizes its contents.

emphasizing the departure of old section 70a to find no severance<sup>216</sup> and with others searching in legislative history to find the trustee does have title, thus finding severance.<sup>217</sup> Others choose to emphasize the past tense of words in the Code, finding on this basis that non-debtor cotenants lost title to their property when the debtor-tenant filed his petition.<sup>218</sup> Opposing courts highlight words directly following the verb in past tense to show that such readings are strained.<sup>219</sup> While this may all be part of the diligent work of a lawyer, this is no way to run a railroad. The train seems only to lurch back and forth, and worse, someone usually must die for it to move at all.

At bottom, the question of whether a joint tenancy severs when a debtor-tenant files a bankruptcy petition should be resolved in section 541, where the Code delimits the boundaries of estate property. The following proposed amendment can be added as subsection 541(g): “Notwithstanding any other provision of this title, the commencement of a case under Sections 301, 302, and 303 does not sever a joint tenancy with right of survivorship.” By including this short addition to section 541, labeled “Property of the Estate,” it would ensure both that all debtor property passes to the bankruptcy estate and that the tenancy does not sever, preserving survivorship rights given by state codes. When a debtor-tenant files a bankruptcy petition, all legal and equitable rights to the joint property held by the debtor-tenant would pass to the estate under section 541(a)(1), and the bankruptcy estate—not the trustee—would assume the debtor’s previous survivorship rights. If a non-debtor cotenant died while the case was still pending, the bankruptcy estate would be enriched by a greater portion of the estate and would take the whole of the property in fee simple if no other tenants remain. Of course, in all cases, the trustee could exercise the Section 5 strong arm powers or Section 363 powers of sale in order to dispose of estate property, thus severing joint tenancies in favor of creditors if the estate’s portion of the equity in joint tenancy property exceeds appropriate exemptions.<sup>220</sup> Therefore, the proposed subsection 541(g) would only prevent joint tenancy severance when a bankruptcy case commences. Applicable state severance law would apply to all other severance questions as the case continues before the bankruptcy court or on appeal.

#### *A. Mending the Split of Authority*

In effect, the proposed subsection 541(g) addresses the disputed severance question *ex ante* instead of *ex post* as the courts in the split of authority have done. When a debtor fills out Schedule A of a Chapter 13 bankruptcy petition, she should be confident in describing the nature of her interest as a “joint tenant with right of survivorship” instead of wondering whether that status will change

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216. *See In re Spain*, 55 B.R. 849, 855 (Bankr. N.D. Ala. 1985).

217. *See In re Lambert*, 34 B.R. 41, 43 (Bankr. D. Colo. 1983).

218. *See id.*

219. *See In re Spain*, 55 B.R. at 854.

220. *See supra* Part II.C.

by filing the petition.<sup>221</sup> Subsection 541(g) would unequivocally provide that joint tenancies can exist in bankruptcy, assuring debtors, non-debtors, and their lawyers of the debt protections survivorship rights provide. This in turn would allow debtor-tenants like Debora, who does not want her father, Federico, or her sister, Sandra, to be potentially liable for her debts, to file bankruptcy petitions unworried about possible effects on family members or legatees.

In this way, 541(g) allows for a satisfying conclusion to the split of authority discussed in Part II. It is indeed notable that 541(g) provides this remedy without addressing the heart of the severance debate: whether the trustee has title to estate property.<sup>222</sup> Resolving the trustee title problem is unnecessary, however, to assure that cotenants maintain their rights of survivorship during bankruptcy. Addressing the trustee title issue directly would likely have unforeseen or deleterious effects on other areas of law<sup>223</sup> and would certainly tread on states' traditional authority to determine property rights.<sup>224</sup> Subsection 541(g) avoids these pitfalls by simply providing that a tenancy does not sever when a petition is filed.<sup>225</sup> The end goal of the proposed section is to allow joint tenancies to exist in and after bankruptcy, where *Lambert* and its progeny do not. Thus, under 541(g), joint tenancies and attendant survivorship rights may pass unharmed through Chapter 11, 13, and the "no asset" subset of Chapter 7 cases.<sup>226</sup>

Overruling the *Lambert* line and specifically the *Tyson* holding, subsection 541(g) ensures the preservation of joint tenant survivorship rights under Chapters

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221. Schedule A of a Chapter 7 or Chapter 13 petition requires debtors to describe the location of property, the nature of the debtor's interest in the property, its current value, and the amount of any secured claims on the property. See B6A (OFFICIAL FORM 6A), SCHEDULE A-REAL PROPERTY, available at [http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK\\_Forms\\_1207/B\\_006A\\_1207f.pdf](http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/BK_Forms_1207/B_006A_1207f.pdf), archived at <http://perma.cc/65V9-ZBUY>.

222. See *supra* Part II for a full discussion.

223. See, e.g., Lisa M. Hebenstreit, *Tying Together the Tax and Bankruptcy Codes: What Is the Proper Tax Treatment of Abandonments in Bankruptcy?*, 54 OHIO ST. L.J. 859 (1993) (illustrating the tax effects of giving title to the trustee in abandonment cases).

224. See *Butner v. United States*, 440 U.S. 48, 54 (1979) ("Property interests are created and defined by state law. 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. 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.") (quoting *Lewis v. Manufacturers Nat'l Bank*, 364 U.S. 603, 609 (1961)).

225. See *supra* Part V.

226. See Teresa A. Sullivan et al., *Less Stigma or More Financial Distress: An Empirical Analysis of the Extraordinary Increase in Bankruptcy Filings*, 59 STAN. L. REV. 213, 227 n. 46 (2006) (citing Michael J. Herbert & Domenic E. Pacitti, *Down and Out in Richmond, Virginia: The Distribution of Assets in Chapter 7 Bankruptcy Proceedings Closed in 1984-1987*, 22 U. RICH. L. REV. 303, 310 (1988) ("Almost all consumer bankruptcies are 'no asset' cases, with nothing available to be sold to pay creditors, primarily because of security interests, taxes, and exemptions.")).

11 and 13, where debtor rehabilitation is the focus. Consider Debora's case under a Chapter 11 or 13 scenario, where Debora, now with a solid monthly income but unable to service her debts, submits a plan to the bankruptcy court to repay outstanding obligations.<sup>227</sup> Her petition would list the joint ownership interests Debora, Sandra, and Federico possess in Federico's home. Once her plan is approved and her case is settled, her undivided stake in the joint tenancy would remain unchanged. Federico's original exercise of his right to devise and bequeath his property as he sees fit would go unmolested; creditors would be entitled their due under the approved plan; and Debora would have the chance of further rehabilitation under a non-probate scheme if Federico or Sandra die. Importantly, Federico and Sandra, who were never involved in Debora's bankruptcy, would also keep their survivorship rights after Debora's bankruptcy petition, during her bankruptcy, and afterwards in the event any tenant dies. Although this Note recommends that this Chapter 11 and 13 result should nevertheless obtain in bankruptcy filings in formalist states under the current Code,<sup>228</sup> the proposed subsection 541(g) would put to rest any claim that joint tenants lose survivorship rights because one of them restructures debts in bankruptcy.

Additionally, unlike the *Lambert* line's interpretation of the Bankruptcy Code, 541(g) would also preserve survivorship rights in common Chapter 7 "no asset" cases. Simultaneously, it would allow for severance in bankruptcy where the debtor's joint tenancy interest has any value which would further satisfy the debtor's obligations. For example, consider the situation where Federico has accumulated \$60,000 of equity in his home, and Debora's portion as a joint tenant is \$20,000. Debora's bankruptcy case would be a "no asset" case if her overstock of Mary Kay inventory were subject to a security interest up to the full value of the collateral and all her other personal and real property was exempt. If Debora lived with her father in a state opting out of the federal exemptions contained in section 522(d),<sup>229</sup> and the state allowed a \$17,600 exemption in real estate, then Debora's Chapter 7 case would not be a "no-asset" case because her joint tenancy interest exceeds the applicable exemption by \$2400. The trustee could justly seek the sale of Federico's home under section 363(h),<sup>230</sup> thus severing the tenancy, in order to obtain the \$2,400 to further satisfy Debora's unsecured credit card debts.

In contrast, if federal exemptions apply in Debora's case, she would be entitled to exempt up to \$21,625,<sup>231</sup> and her case would be a "no asset" case because the federal exemption covers the full \$20,000 value of her joint tenancy

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227. See generally 11 U.S.C. § 1123 (2006 & Supp. 2013); *id.* § 1322 (outlining the requirements of a Chapter 11 or 13 plan).

228. See *supra* Part IV.

229. See 11 U.S.C. §§ 522(b)(2)-(3) (2006 & Supp. 2013) (allowing states to opt out of federal exemptions and write their own).

230. See *id.* § 363(h) (permitting the trustee to sell interest in property).

231. See *id.* § 522(d)(1) (providing for an exemption in real property that the debtor or a dependent of the debtor uses as a residence).

interest. It makes little sense to sever the tenancy in such a “no asset” case, thus depriving cotenants of survivorship rights, where the trustee has no right or ability to sell the estate’s interest in the joint tenancy.<sup>232</sup> In order to preserve these rights, 541(g) would prevent the severance of joint tenancy when a debtor files a Chapter 7 petition in a “no asset” case.

This scheme does not depend on the inconclusive nature of the legislative history on which *Lambert* relied. Nor is it based on overemphasized readings of the verb “to have.” Additionally, it does not depend for a foundation upon Congress’s dismissal of section 70a of the Bankruptcy Act, as the court in *Spain* partially did to find no severance of joint tenancies in bankruptcy.<sup>233</sup> Instead, influenced by *In re Anthony*’s conclusion that the trustee’s powers of sale are permissively given, though his Chapter 7 mandate absolute,<sup>234</sup> 541(g) seeks a clean slate where joint tenancies enter the bankruptcy estate and leave intact if the debtor-tenant’s interest is of no practical value for creditors. This is a fair result for creditors, and importantly, it is fair for both debtors and non-debtor cotenants whose survivorship rights are at stake. Therefore, adding this subsection to the Bankruptcy Code will resolve the split of authority, advance the interests of the estate and debtor where necessary, and not inequitably dissolve the rights of persons not involved in the bankruptcy. Filing a bankruptcy petition in federal court in either a formalist or realist state should not unilaterally cause a joint tenancy with right of survivorship to sever.<sup>235</sup>

### B. Theoretical Underpinnings

Although bankruptcy courts deal in equity, the idea of “fairness” as the foundational rationale behind an amendment to the Bankruptcy Code may strike some as odd. After all, bankruptcy is like the Dickensian debtors’ prison where failed consumers go to atone for their sins and where creditors find cruel pleasure in exacting every last farthing from debtors’ impoverished families. Luckily, however, debtors’ prisons were federally abolished in the United States in 1948,<sup>236</sup> but a search for the “deep structure”<sup>237</sup> of bankruptcy law continues. To

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232. See 11 U.S.C. § 363(h)(3) (2006) (mandating in a sale of a co-owner’s interest that the benefit of the sale to the estate outweigh the detriment to the co-owners).

233. See *supra* Part II.B.

234. See *supra* Part II.C.

235. The Colorado Legislature came to this very conclusion in 2008 when it overruled the *Taylor* and *In re Slifco* decisions discussed in Part IV. See COLO. REV. STAT. ANN. § 38-31-101(5)(b) (2013) (“Filing a petition in bankruptcy by a joint tenant shall not sever a joint tenancy.”); see also Carl G. Stevens, *Evolution of Joint Tenancy Law in Colorado: Changes to CRS § 38-31-101*, 2009, 38-APR. COLO. LAW. 65, 65 (2009) (highlighting specific changes the law makes and the joint tenancy’s “sophisticated planning options”).

236. See 28 U.S.C. § 2007 (2006) (providing that debtors shall not be imprisoned for debts in federal courts in states where imprisonment for debt is abolished) (originally enacted as Act of June 25, 1948, ch. 646, 62 Stat. 960).

237. David G. Carlson, *Philosophy in Bankruptcy*, 85 MICH. L. REV. 1341, 1389 (1987).

explore the theoretical underpinnings of proposed section 541(g), this section focuses on the scholarly debate between Donald Korobkin's contractarianism<sup>238</sup> and Thomas Jackson's "creditors' bargain"<sup>239</sup> over the true function of bankruptcy in society. Although there may be room for subsection 541(g) in Jackson's theory, the proposed amendment's emphasis on the survivorship rights of non-debtor cotenants—a noncreditor entity—fits this amendment into "the probable implications"<sup>240</sup> of Korobkin's "bankruptcy choice model."<sup>241</sup> Korobkin's concern for including the voice of noncreditors in the formation of fundamentally fair bankruptcy law<sup>242</sup> matches proposed subsection 541(g)'s concern for the preservation of a joint tenant's survivorship rights in bankruptcy.

Korobkin's bankruptcy choice model views bankruptcy law as society's approach to resolving "financial distress."<sup>243</sup> Korobkin roots his theory in John Rawls's contractarian paradigm where persons unaware of their relative advantaged or disadvantaged positions in society "define an 'appropriate initial status quo.'<sup>244</sup> He then tasks these hypothetical persons to form the principles upon which "relationships in financial distress are to be governed."<sup>245</sup> As previously stated, these persons are placed behind the Rawlsian "veil of ignorance,"<sup>246</sup> where no one knows if they are creditor, debtor, employee, or cotenant as they essentially determine what is fair for all parties involved in financial distress. Backing this principle of anonymity, and militating against Jackson's creditors' choice model,<sup>247</sup> is the assumption that a piece of legislation "effectively mirrors the interests and concern of those persons who have chosen it."<sup>248</sup>

This Author maintains that if such a group of hypothetical, anonymous

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238. Donald R. Korobkin, *Contractarianism and the Normative Foundations of Bankruptcy Law*, 71 TEX. L. REV. 541 (1993).

239. Thomas H. Jackson, *Bankruptcy, Non-Bankruptcy Entitlements, and the Creditors' Bargain*, 91 YALE L.J. 857 (1982).

240. Korobkin, *supra* note 238, at 628.

241. *Id.* at 544.

242. *Id.* at 545-51.

243. See Donald R. Korobkin, *Rehabilitating Values: A Jurisprudence of Bankruptcy*, 91 COLUM. L. REV. 717, 763-66 (1991) (defining financial distress as including a set of conflicting interests, such as an embattled corporation and its employees).

244. Korobkin, *supra* note 238, at 545 (quoting JOHN RAWLS, A THEORY OF JUSTICE 12 (1971)).

245. *Id.*

246. *Id.* at 559 (quoting RAWLS, *supra* note 244, at 136-42).

247. See *id.* at 555 ("Because [participation in the creditors' choice model is limited to creditors], the creditors' bargain model generates results that disadvantage those persons who have been excluded from representation. Accordingly, it is not surprising that Jackson concludes that contract creditors would agree to maximize the value of assets available for distribution to contract creditors. Nor does the outcome of this normative model purport to protect the interests of other persons affected by financial distress.").

248. *Id.*



persons assembled to write the Bankruptcy Code, these persons would conclude that dissolving the survivorship rights of non-debtor cotenants when a debtor-tenant files a bankruptcy petition is fundamentally unfair. Given that the historical point of the right of survivorship was to lessen liabilities and consolidate land ownership,<sup>249</sup> and considering that survivorship rights are widely recognized as effective protection against a cotenant's creditors,<sup>250</sup> it flies in the face of fairness to deprive non-debtor cotenants of their survivorship rights when they need them most—when a debtor-tenant files bankruptcy. Add to this the fact that creditors elected to lend to a joint tenant singly, thus exposing themselves to the possibility of losing the benefit of their bargain to the well-known right of survivorship. In sum, the conclusion to be made here is one the California Supreme Court reached in 1976 in *Tenhet v. Boswell*,<sup>251</sup> when the court considered the policy behind allowing a surviving to succeed by right of survivorship to a tenancy encumbered by a lease:

More significantly, we cannot allow extraneous factors to erode the functioning of joint tenancy. The estate of joint tenancy is firmly embedded in centuries of real property law and in the California statute books. Its crucial element is the right of survivorship, a right that would be more illusory than real if a joint tenant were permitted to lease for a term continuing after his death. Accordingly, we hold that under the facts alleged in the complaint the lease herein is no longer valid.<sup>252</sup>

Therefore, the ancient character of the joint tenancy and its crucial rights of survivorship suggest that a body of legislators, acting behind a “veil of ignorance,”<sup>253</sup> should fairly protect the survivorship rights of non-debtor cotenants when a debtor-tenant files a bankruptcy petition.

Jackson's creditors' bargain theory, however, is not concerned with fairness. Instead, Jackson argues, “[a] more profitable line of pursuit might be to view bankruptcy as a system designed to mirror the agreement one would expect the creditors to form among themselves were they able to negotiate such an agreement from an *ex ante* position.”<sup>254</sup> Thus, according to Jackson, “most of the bankruptcy process is in fact concerned with creditor-distribution questions.”<sup>255</sup> To Jackson, the Bankruptcy Code originates in what amounts to a concerted effort among a debtor's common creditors to avoid a race to the courthouse when the debtor defaults. Races are an unfortunate result that likely “lead to a premature termination of debtor's business”<sup>256</sup> or profitability. Instead, bankruptcy allows creditors a common forum and establishes priorities that, in

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249. *See supra* Part I.A.

250. *See* Korobkin, *supra* note 238, at 553.

251. 554 P.2d 330 (Cal. 1976).

252. *Id.* at 337.

253. Korobkin, *supra* note 238, at 559 (quoting RAWLS, *supra* note 244, at 136-42).

254. Jackson, *supra* note 239, at 860.

255. *Id.* at 857.

256. *Id.* at 862.

Jackson's view, "reduce strategic costs,"<sup>257</sup> increase the aggregate pool of assets, and make collecting debt more administratively efficient.<sup>258</sup>

Because allowing for severance of joint tenancies upon the filing of a bankruptcy petition dispenses with survivorship rights, which effectively erase creditors' liens upon a debtor-tenant's death, creditors in the creditors' bargain model would likely force tenancies to sever in bankruptcy. Further, creating tenancies in common rather than joint tenancies in bankruptcy would allow debtors' interests to descend, with liens attached, to heirs who may contribute more to the aggregate pool of assets. It is therefore improbable that creditors would accept a situation in which survivorship rights continue during bankruptcy.

The following hypothetical, however, illustrates a situation in which allowing severance actually decreases the overall pool of assets, perhaps indicating that the creditors' bargain model would support the proposed subsection 541(g). Consider the situation in which Federico, in an effort to support a grandson in college, decides to take out a second mortgage of \$40,000 on \$60,000 of equity he built up in the home he owns jointly with Debora. Debora declares Chapter 7 bankruptcy, severing the joint tenancy when she files her petition. While her case is pending before the bankruptcy court, Federico dies, and Debora inherits Federico's interest in the tenancy in common along with the second mortgage lien. Although the value of the bankruptcy estate has increased by \$10,000, the bankruptcy estate now has an additional, unforeseen secured creditor which decreases the aggregate pool of assets available for distribution to unsecured creditors by \$40,000. This suggests there is perhaps something "unfair" about recognizing the surprise claims of secured creditors who appear because of the loss of the right of survivorship.<sup>259</sup>

Whether the creditors' bargain model accepts proposed subsection 541(g) or not, Korobkin's bankruptcy choice model provides a sound theoretical basis for accepting the new amendment. Because the bankruptcy choice model concerns itself with the representation of noncreditors in order to put together fair bankruptcy legislation,<sup>260</sup> Korobkin's theory provides a sound fit for 541(g), a main purpose of which is to allow non-debtor cotenants to keep their survivorship rights (and thus their defense against the debtor-tenant's creditors) before, during, and after bankruptcy.

#### CONCLUSION

The joint tenancy with right of survivorship is a prevalent form of property ownership in the United States and has existed for hundreds of years.<sup>261</sup> The principal feature of the joint tenancy is the right of survivorship, which affords

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257. *Id.* at 861.

258. *See id.* at 861-69.

259. Compare this scenario to the hypothetical Jackson presents with one foreseen secured creditor in the mix. *See id.* at 870.

260. Korobkin, *supra* note 238, at 609.

261. *See supra* Part I.A.

surviving tenants protection from a deceased tenant's creditors.<sup>262</sup> The joint tenancy's prevalence coincides with a widespread use of bankruptcy in order to discharge, reorganize, and collect debt. Because joint tenancy formation and bankruptcy are both frequent occurrences, joint tenancies will likely continue to appear with relative frequency in bankruptcy litigation.<sup>263</sup> Specifically, the question of whether filing a petition severs a joint tenancy continues to arise and is the source of a thirty-year-old split of authority in the bankruptcy courts.<sup>264</sup> The holdings of these courts have cemented over the years and show little sign of movement. Seeking to advance the discussion, this Note contributes to the courts' holdings,<sup>265</sup> suggests an alternative judicial solution to them,<sup>266</sup> and proposes a new amendment to the Bankruptcy Code in order to fully resolve the split.<sup>267</sup>

This Note contributes to the courts' holdings by examining the bankruptcy trustee's roles under Chapter 7, 11, and 13 of the Bankruptcy Code. This analysis, in conjunction with a review of the split of authority, reveals that if any trustee can assert title over estate property, it is the Chapter 7 trustee.<sup>268</sup> This suggests that, in states which still recognize the four unities test in order to create and maintain a joint tenancy at common law, bankruptcy courts should hold that a tenancy severs upon the filing of a bankruptcy petition only in the Chapter 7 case.<sup>269</sup>

The preferred alternative is to amend the Bankruptcy Code to state that filing a bankruptcy petition does not sever a joint tenancy.<sup>270</sup> A logical place for this short but powerful amendment is in section 541, where the Bankruptcy Code discusses what property of the debtor belongs in the bankruptcy estate.<sup>271</sup> This amendment resolves the split of authority but avoids resolving the dispute over whether the trustee has title.<sup>272</sup> Instead, it simply allows joint tenancies to exist during bankruptcy and afterwards. This result is fair for creditors because they should already be aware of the financial risks of lending singularly to joint tenants.<sup>273</sup> It is also fair because it protects non-debtor cotenants who, by no fault of their own, have their survivorship rights in jeopardy when a debtor-tenant declares bankruptcy. Therefore, in the interests of fundamental fairness, filing a bankruptcy petition should not sever a joint tenancy.

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262. See 48A C.J.S. *Joint Tenancy* § 2 (2013).

263. See *supra* Part I.B-C.

264. See *supra* Part II.

265. See *supra* Part II.C.

266. See *supra* Part II.C; see also *supra* Part IV.

267. See *supra* Part V.

268. See *supra* Part II.C; see also *supra* Part IV.

269. *Id.*

270. See *supra* Part V.

271. See 11 U.S.C. § 541 (2006).

272. See *supra* Part V.A.

273. See *supra* Part V.B.