Mississippi Valley Title/ Old Republic Title Agent Seminar

Tuesday, March 7, 2017 – Montgomery

Thursday, March 9, 2017 – Huntsville

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Pending Legislation

Ad valorem taxation—interest to be paid at the time of redemption from a tax sale would be set at a rate of twelve percent (12%) on the amount of actual taxes due "at the time of default". SB44

Ad valorem taxation—the full homestead exemption from all state ad valorem taxes for a retired person due to a permanent and total disability would be altered as of October 1, 2019, to limit the exemption to $20,000 of assessed value. SB226

Age of Majority—reduces age of majority to 18 subject to various exceptions. HB70

Alabama Memorial Preservation Act—a bill has been introduced to create the Alabama Memorial Preservation Act which would provide for protecting, preserving, caring for, repairing, and restoring various historical monuments within the State of Alabama. HB99

Attorneys-at-Law—this bill would provide that an attorney who holds a special law license may provide pro bono legal services. HB27

Attorneys-at-Law—lawyers would be required to disclose to a client whether the lawyer has a current malpractice insurance policy prior to entering into an agreement for professional services for the client. HB207

Attorneys-at-Law—presently, if an attorney pays another person to encourage bringing a civil action, he or she is guilty of a misdemeanor; the bill would increase the criminal penalty for a violation of Ala. Code §34-3-24 to provide for a fine of $10,000.00 and imprisonment for up to one year. HB306

Cooperative Housing—establishes the Alabama Cooperative Housing Corporation Act of 2017. HB72

District Courts—jurisdiction of the district court would be increased from $10,000 to $20,000 exclusive of interest and costs. HB42

Eminent Domain—this bill will require an inverse condemnation action to be commenced within two years after property is appropriated for public use. HB194

Eminent Domain—in the event the Alabama Department of Transportation's last written offer to condemn the properties exceeded by more than twenty percent (20%) upon a final determination, the department would be required to pay the condemnee's attorney, appraisal, and engineering fees incurred in the action. SB157

Entertainment Districts—a bill has been introduced that would include Class 2 municipalities as municipalities authorized to establish five entertainment districts. HB185

Entertainment Districts—Class 5 municipalities would be allowed to establish no more than two entertainment districts within the corporate limits. HB188

Judicial Inquiry Commission—a bill has been introduced that would propose an amendment to the Constitution of 1901 requiring that any complaint against an appellate court judge be filed with the House Judiciary Committee who would have impeachment authority. The Judicial Inquiry Commission would have jurisdiction over non-appellate judges only in Alabama. HB166

Judicial Inquiry Commission—a constitutional amendment has been proposed that would require legislative approval in the event of an affirmance by the Supreme Court of decisions of the Court of Judiciary removing a judge from office. SB8

Judicial Inquiry Commission—the Judicial Inquiry Commission and the Court of the Judiciary would be abolished. SB11

Judicial Resources—the Judicial Resources Allocation Commission would be established and the bill would specify criteria for determining the need for increasing or decreasing the number of judgeships and would allow the Commission to reallocate judgeships based on such criteria. HB65

Juries—a constitutional amendment has been proposed to amend §11 of the Constitution of 1901 to authorize the legislature to set the size of juries to 6 persons for criminal cases that involve misdemeanor charges and civil cases in which an appeal would be taken to the Alabama Court of Civil Appeals. SB197

Municipalities—elected officials in Class 8 municipalities may designate person in his or her place to serve on any local agency, board, commission, or other entity of which the official is an ex officio member. HB14

Municipal Telecommunications Service—Section 11-50B-3 would be amended to provide that fair and reasonable compensation for telecommunications providers to municipalities shall not include in-kind fiber or network buildouts and right-of-way fees and will henceforth be cost based irrespective of whether present permitting fees are based on a per linear foot or percentage of gross revenues. HB62

Oil, Gas, and Mineral Leasing—Ala. Code §26-2A-137 would be amended to allow for the leasing of oil, gas, and other mineral rights of a protected person by a court without the appointment of a conservator if the court determines that the transaction is in the best interest of a protected person. HB168

Probate Judges—licensed attorneys who are probate judges granted same civil contempt powers as circuit judges. The bill would provide that probate judges would no longer be liable to a person injured as a result of a judge not taking from a conservator a good and sufficient surety bond based upon neglect or omission but would diminish the probate judge's liability to one of fraudulent and intentional misconduct. HB25, SB58

Probate Judges—HB68 would give a probate judge the same power to punish for civil contempt as circuit judges provided the probate judge is licensed to practice law in Alabama. HB68

Public Housing —limitation on liability of non-profit affiliates of the Alabama public housing authorities that meet prescribed criteria. HB56

Public Works Contracts—are to be awarded by a county or municipality to a contractor whose principal place of business is within the county where the project is located if the contractor is a responsible bidder. HB40

Recording Taxes—the mortgage recording tax would be doubled and this bill would provide for the distribution of the revenues created by the increase. HB159

Weed Abatements—Class 8 municipalities would be given the authority to abate grass or weeds which become a nuisance under certain conditions and in accordance with the procedures set out. SB111

Alabama Cooperative Housing Corporation Act of 2017

HB72

181560-1

By Representative Pringle

RFD: State Government

First Read: 07-FEB-17

PFD: 01/27/2017

181560-1:n:01/25/2017:JET/th LRS2017-370

SYNOPSIS: This bill would establish the Alabama Cooperative Housing Corporation Act of 2017, to regulate cooperatives, a form of ownership of real property in which legal title is vested in a corporation or other entity, and the cooperative unit's occupants receive an exclusive right to occupy the unit.

This bill would require any cooperative housing corporation formed after January 1, 2018, to organize under the Alabama Nonprofit Corporation Act, and be subject to all the duties, requirements, obligations, rights, and privileges under the act, and would require the filing of certain cooperative documents with the Secretary of State.

This bill would require the Secretary of State to implement and maintain an electronic database, organized by cooperative name and accessible by the public through the Secretary of

State's website, with the capability to search and retrieve cooperative filings.

The bill also provides requirements for the adoption of certain governing documents of the cooperative, including the master declaration, bylaws, and master list; provides for the transfer or sale of shares of the cooperative under certain conditions and allows for the exercise of a right of first refusal; and authorizes cooperative housing corporations to claim a homestead exemption on cooperative property, with the tax reduction to be apportioned among the owners on a per unit basis.

A BILL

TO BE ENTITLED

AN ACT

To create the Alabama Cooperative Housing Corporation Act; to add Chapter 8C to Title 35, Code of Alabama 1975, to define terms; to require certain cooperatives to organize under the Alabama Nonprofit Corporation Act; to require the filing of certain cooperative documents with the Secretary of State; to require the Secretary of State to implement and maintain a public searchable electronic database of cooperative filings; to provide for the adoption of governing documents, including requirements for master

declarations, bylaws, and master lists; to provide for the transfer or sale of shares of the cooperative under certain conditions; to provide for obligations of owners toward the association; to authorize a cooperative to amend cooperative documents under certain conditions; to provide for liens; to provide for the right of first refusal under certain conditions; and to add Section 40-9-19.2 to Chapter 9 of Title 40, Code of Alabama 1975; to authorize cooperatives to claim a homestead exemption under certain conditions.

BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

Section 1. A new Chapter 8C is added to Title 35 of the Code of Alabama 1975, to read as follows:

Chapter 8C. ALABAMA COOPERATIVE HOUSING CORPORATION ACT OF 2017.

§35-8C-1.

This chapter shall be known and may be cited as the Alabama Cooperative Housing Corporation Act of 2017.

§35-8C-2.

For the purposes of this chapter, the following terms shall have the following meanings:

(1) ASSESSMENT. A share of the funds required for the payment of common expenses, which from time to time is assessed against the unit owner.

(2) ASSOCIATION. The nonprofit corporation that is responsible for the administration of a cooperative.

(3) BUYER. A person who purchases a share or shares of a cooperative. The term may be used interchangeably with the term purchaser.

(4) BYLAWS. The governing regulations adopted under this chapter for the administration and management of the property.

(5) COMMON ELEMENTS. Includes all of the following:

a. The land described in the master deed, declaration, and other documents creating the cooperative.

b. As to any improvement, the foundations, structural and bearing parts, supports, main walls, roofs, basements, halls, corridors, lobbies, stairways, elevators, entrances, and exits and other means of access, excluding any specifically reserved or limited to a particular unit or group of units.

c. Yards, gardens, walkways, parking areas, and driveways, excluding any specifically reserved or limited to a particular unit or group of units.

d. Portions of the land or any improvement or appurtenance reserved exclusively for the management, operation, or maintenance of the common elements.

e. Installations of all central services and utilities.

f. All apparatus and installations existing or intended for common use.

g. All other elements of any improvement necessary or convenient to the existence, management, operation,

maintenance, and safety of the cooperative property or normally in common use.

h. Other elements and facilities that are designated in the master deed as common elements.

(6) COMMON EXPENSES. Expenses for which the unit leases are proportionately liable, including, but not limited to, all of the following:

a. All expenses of administration, maintenance, repair, and replacement of the common elements.

b. Expenses agreed upon as common by all lessees or owners.

c. Expenses declared common by this chapter or by master deed or bylaws.

(7) COOPERATIVE HOUSING CORPORATION OR COOPERATIVE. Any system of land ownership and possession in which the fee title to the land and structure is owned by a corporation in which the shareholders or other owners each have a long term proprietary lease or other long term arrangement of exclusive possession for a specific unit of occupancy within the structure.

(8) LIMITED COMMON ELEMENTS. Those common elements which are for the use of one or more specified units to the exclusion of other units.

(9) MASTER DECLARATION. The master declaration as amended and recorded under the terms of this chapter by which the owner in fee simple or lessee of the property submits to a cooperative plan of ownership.

(10) OWNER. A person listed in the master register as a holder of a share in a cooperative.

(11) PROPRIETARY LEASE. A grant of a long term exclusive right of possession and occupancy of a designated unit to a owner or a grant of a leasehold of the cooperative structure.

(12) UNIT. A part of the cooperative structure designed or intended for occupancy and includes the proportionate undivided interest in the common elements and in any limited common elements as assigned in the provisions of the master declaration or any amendment thereof.

§35-8C-3.

(a) The principles of law and equity, including, but not limited to, the law of nonprofit corporations in Chapter 3 of Title 10A (commencing with Section 10A-3-1), the law of real estate, and the law relative to the capacity to contract, principal and agent, eminent domain, estoppel, negligence, fraud, misrepresentation, duress, coercion, mistake, receivership, substantial performance, or other validating or invalidating cause supplement this chapter, except to the extent inconsistent with this chapter.

(b) Every duty governed by this chapter imposes an obligation of good faith in its performance or enforcement.

(c) The remedies provided in this chapter shall be liberally administered so that the aggrieved party is put in as good a position as if the other party had fully performed.

§35-8C-4.

(a) On or after January 1, 2018, a cooperative housing corporation created pursuant to a master declaration shall be organized as a nonprofit corporation pursuant to Chapter 3 of Title 10A (commencing with Section 10A-3-1), and shall be governed in all respects as a nonprofit corporation.

(b)(1) A cooperative housing corporation, its members, and directors shall be subject to all of the obligations, duties, and responsibilities of and shall have all of the rights and benefits provided in Chapter 3 of Title 10A (commencing with Section 10A-3-1).

(2) In addition or supplemental to any other filing required in Chapter 3 of Title 10A (commencing with Section 10A-3-1), a cooperative housing corporation shall file the master declaration with the Secretary of State.

(3) The Secretary of State shall implement and maintain an electronic database, organized by cooperative name and accessible by the public through the Secretary of State's website, with the capability to search and retrieve the master declaration required in subdivision (2). Any documents filed with the Secretary of State shall be filed in accordance with Division 4 of Article 3, Chapter 4 of this title (commencing with Section 35-4-120), provided such documents filed with the Secretary of State pursuant to this chapter shall not be deemed to provide notice pursuant to Chapter 4 of this title (commencing with Section 35-41-1).

(c) The Secretary of State may adopt rules necessary for the implementation of this section, including reasonable fees for the filing of documents.

§35-8C-5.

(a) The master declaration of a cooperative housing corporation shall contain all of the following information:

(1) A legal description by metes and bounds and tax lot and block of the lands to be dedicated to the cooperative form of ownership.

(2) A statement dedicating the land described in the master declaration to the cooperative form of ownership.

(3) The name by which the cooperative is to be identified, which name shall include the words "Cooperative Housing Corporation," "Cooperative," or "Coop."

(4) A copy of the recorded deed that vests ownership in the person who signs the master declaration to create the cooperative.

(5) The bylaws that regulate the cooperative.

(6) The master register containing all cooperative units allocated for separate occupancy.

(7) A written description and architectural plans prepared to scale by an architect or engineer licensed in this state which detail the improvements existing or to be erected on the lands to create the cooperative and identify the locations and dimensions of the common elements, limited common elements, and each unit. The written description and architectural plans shall be signed, certified, and sealed by

an engineer or architect authorized to practice his or her profession in this state. The certification shall state that the description and plans are a correct and accurate representation of the improvements described and shown on the plans.

(8) A statement of existing financing that is a lien on the building and the manner in which the financing will be paid and discharged as a lien before or after closing of units.

(9) Other provisions, including, but not limited to, restrictions or limitations upon the use, occupancy, transfer, leasing, or other disposition of any unit, if the restriction or limitation is otherwise permitted by law, and limitations upon the use of common elements.

(10) A method of amending the master declaration which requires recording of any amendment with the Secretary of State before it becomes effective.

(b) The bylaws of a cooperative housing corporation may provide for any or all of the following:

(1) The election of directors and other officials by unit or district.

(2) Voting by owners on the basis of one vote per member or one vote per unit rather than one vote per share.

(3) Action required or permitted to be taken at a meeting of owners may be taken by mail ballot.

(4) A method of proportional membership representation of owner meetings by delegates from units.

(5) Redemption or recall of stock.

(6) Termination of membership rights and privileges of owners, including the forced sale of a share or shares of the cooperative for continuing and unresolved violations, restrictions, limitations, or requirements after all other remedies provided in the bylaws have been exhausted.

(7) Standards for eligibility to become an owner.

(8) Allocation of net savings of the corporation among the permitted uses.

(9) A right of first refusal by the association.

(c) The master register shall contain all of the following information:

(1) Separate identification of each unit by distinctive letter, name, or number or combination thereof.

(2) The percentage of common ownership representing each owner's proportionate undivided interest in the common elements; the interests shall be stated as percentages aggregating 100 percent.

(3) The name and present address of each present owner and occupant of each identified unit.

§35-8C-6.

The master declaration or master register may be amended in the manner set forth in this chapter, provided that no amendment shall affect any cooperative unit unless the possessor of record thereof and the holders of record of any liens thereon join in the execution of the amendment or execute a consent thereto with the formalities of a deed.

§35-8C-7.

(a) The association, to the extent authorized by the bylaws, may do any of the following:

(1) Suspend an owner's right to use facilities, common elements, or services provided directly through the cooperative for nonpayment of assessments, to the extent that access to the owner's unit is not denied.

(2) Assess reasonable penalties against an owner for any violation of the rules adopted by the association and included in the bylaws after the owner is afforded the opportunity to be heard and represented by counsel before the association.

(b) The amount of any penalty assessed under this section shall be considered an assessment for purposes of Section 35-8C-8.

§35-8C-8.

(a) Except as may be otherwise provided in the master declaration or bylaws of the cooperative housing corporation, the cooperative has, and there is declared, a lien on every unit for unpaid assessments levied against the unit arising on and from the date the assessment is due as fixed and determined by the association at an annual meeting after giving notice as provided in Chapter 3 of Title 10A (commencing with Section 10A-3-1). The lien may be enforced or foreclosed as provided in the master declaration or bylaws or as provided in this section. Written notice of the assessment and lien shall be given to the owner of any unit on which the

assessment and lien is claimed by personal delivery or first class United States mail, postage prepaid.

(b) A lien declared by this section shall have priority, except as may be otherwise provided in Chapters 4 and 11 of this title, over all other subsequent liens and encumbrances except state and county ad valorem taxes, municipal improvement assessments, UCC fixture filings, mortgages, and deeds of trust securing an indebtedness.

(c) The cooperative, within 12 months from the date any assessment becomes due, shall record a statement of lien, verified by an officer or director of the association having personal knowledge of the facts, in the office of the judge of probate of the county in which a unit subject to the assessment is located. The statement of lien shall contain all of the following:

(1) A description of the unit on which the lien is claimed.

(2) The name of the cooperative claiming the lien.

(3) The name of the owner or owners of the unit on which the lien is claimed.

(4) The amount of any unpaid assessments together with the date of the assessments.

(5) The amount of any other interests and costs claimed by the cooperative.

(d) At least 30 days prior to recording a statement of lien, the cooperative shall give written notice by certified mail to the owner of the unit or other person

obligated for the lien, as shown on the books and records of the cooperative, that the statement will be recorded in the office of the judge of probate.

(e) A cooperative may bring an action in a court having jurisdiction to enforce a lien declared in this section in the county where the unit is located by filing a verified complaint, attaching a copy of the statement of the lien, alleging those facts showing it is entitled to a lien for the claimed unpaid assessment in accordance with the Alabama Rules of Civil Procedure.

§35-8C-9.

(a) The sale or transfer of a cooperative share or an assignment thereof or other like instrument is achieved by the recording of the transfer document or a short form memorandum thereof with the Secretary of State, which is executed and acknowledged in recordable form and which contains the following information:

(1) All information set forth in subsection (a) of Section 35-8C-5.

(2) The name of the cooperative housing corporation as set forth in the master declaration and master register, including the name of the political subdivision and county in which the property is located.

(3) The unit designation as set forth in the master declaration and register.

(4) A reference to the last prior transfer of the unit, if previously transferred.

(5) A statement of the proportionate undivided interest in the common elements appurtenant to the unit as set forth in the master declaration and master register or any amendments thereof.

(6) The full name and address of the transferor and transferee of the unit.

(7) An executed and acknowledged consent of the cooperative board authorizing and approving the transfer or assignment.

(8) The number of shares transferred.

(9) A statement of the full consideration paid for the cooperative unit which includes the purchase price paid plus the amount derived from application of the percentage of ownership held in conjunction with the unit to the unpaid balance of the fee or leasehold mortgage encumbering the entire structure as of the date of the transfer or assignment.

(10) All other information, consistent with this chapter, which the parties may deem appropriate.

§35-8C-10.

A cooperative housing corporation may exercise a right of first refusal to buy a unit pursuant to a right of first refusal provision included in the bylaws of the cooperative, provided that the exercise of the right of first refusal does not otherwise violate state or federal law.

§35-8C-11.

(a) Any cooperative property may be exempted from this chapter by a deed of revocation duly executed by all unit

lessees or the sole owner of the property and the holders of all mortgages or other liens affecting all units and recorded in the master register.

(b) The exemption of any property from this chapter does not bar the subjection of the property to this chapter at a later date.

Section 2. Section 40-9-19.2 is added to Chapter 9 of Title 40 of the Code of Alabama 1975, to read as follows:

§40-9-19.2.

(a) A cooperative housing corporation organized under Chapter 8C of Title 35 (commencing with Section 35-8C-1) may apply for an exemption under Section 40-9-19, to be applied against the valuation of property of the corporation that is occupied by owners.

(b) The application for the homestead exemption must include a list of all owners and must be updated annually to reflect changes in the ownership and residency of qualifying shareholders.

(c) The exemption shall be equal to the amount specified in subsection (a) of Section 40-9-19, multiplied by the number of units in the cooperative property occupied by owners.

(d) A cooperative housing corporation that receives an exemption pursuant to this section shall apportion the property tax reduction resulting from the exemption among the owners on a per unit basis.

(e) Any supplemental assessment resulting from ineligibility for the homestead exemption must be applied in the same manner against the owners for whom the ineligibility applies.

Section 3. This act shall become effective on January 1, 2018, following its passage and approval by the Governor, or its otherwise becoming law.

Ex Parte Arvest Bank

2016 WL 4943250
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Supreme Court of Alabama.

Ex parte Arvest Bank
(In re Iberiabank f/k/a Capitalsouth Bank
v.
Raymond E. Niland)

1141421
|
Sept. 16, 2016

Petition for Writ of Mandamus (Autauga Circuit Court, CV-09-900010)

Opinion

MURDOCK, Justice.

*1 Arvest Bank ("Arvest") petitions this Court for a writ of mandamus directing the Autauga Circuit Court to vacate its order denying Arvest's motion to quash a writ of execution obtained by Iberiabank f/k/a Capitalsouth Bank ("Iberia") against real property owned by Evelyn L. Niland ("Evelyn") and to issue an order granting the motion. We treat the petition as an appeal, and we reverse and remand.

I. Facts

The facts in this case are undisputed and were recounted in the trial court's final order of September 7, 2015:

> "1. On July 8, 2004, Thomas M. Karrh, II, transferred the property that Iberia seeks to sell ('the property') to Raymond E. Niland [('Raymond')] and Evelyn L. Niland as joint tenants with right of survivorship.
>
> "2. On August 8, 2007, the Nilands quitclaimed the property to [Evelyn], removing [Raymond's]

name from the title.

"3. In October of 2008, [Raymond] stopped paying an existing indebtedness to Iberia.[1]

"4. On March 26, 2009, Iberia obtained a judgment against [Raymond] for $124,589.56.

"5. On April 9, 2009, Iberia filed its judgment for record in the probate office of Autauga County, creating a lien on all of [Raymond's] property in the county.

"6. On September 11, 2012, [Evelyn] transferred the property back to herself and [Raymond], attempting to create a joint tenancy with right of survivorship. The Nilands executed a mortgage to Arvest Bank the same day.

"7. [Raymond] died on December 5, 2012, less than three months after title was returned to his name."

In January 2015, Iberia secured a writ of execution against the property, which was amended on June 15, 2015, to include postjudgment interest. On August 10, 2015, Arvest, as the mortgage holder, moved to intervene and to quash the scheduled sheriff's sale of the property. The trial court granted the motion to intervene, stayed the sale pending further argument, and set a hearing for August 28, 2015. On August 26, 2015, Iberia filed an opposition to the motion to quash the sheriff's sale.

On September 7, 2015, the trial court denied the motion to quash the sheriff's sale and vacated its previous order staying the sheriff's sale. On October 1, 2015, Arvest filed this petition for a writ of mandamus, after which the trial court received a supersedeas bond and again stayed the sheriff's sale.

II. Standard of Review

[1]For reasons that will be explained in the analysis below, we believe this mandamus petition should be treated as an appeal. Thus, we do not apply the standard of review ordinarily associated with a mandamus petition. The trial court in this case applied the law to undisputed facts. Our review on appeal therefore is de novo.

> " 'When this Court must determine if the trial court misapplied the law to the undisputed facts, the standard of review is de novo, and no presumption of correctness is given the decision of the trial court. State Dep't of Revenue v. Garner, 812 So.2d 380, 382 (Ala.Civ.App.2001); see also Ex parte Graham, 702 So.2d 1215 (Ala.1997).' "

*2 American Res. Ins. Co. v. H & H Stephens Constr., Inc., 939 So.2d 868, 873 (Ala.2006) (quoting Bean Dredging, L.L.C. v. Alabama Dep't of Revenue, 855 So.2d 513, 516–17 (Ala.2003)).

III. Analysis

A. Iberia's Motions to Dismiss

Iberia has filed two motions to dismiss Arvest's petition. In its first motion, Iberia contends that this Court has never formally determined that a ruling on a motion to quash an execution is reviewable by a petition for a writ of mandamus. Iberia cites early cases from this Court stating that a motion to quash an execution was reviewable by a writ of error, the predecessor to an appeal.[2] See, e.g., Howard v. Kennedy's Ex'rs, 4 Ala. 592 (1843) (reviewing an order refusing to set aside a judgment and execution in ejectment by writ of error); Creighton v. Denly, Minor 250, 250 (Ala.1824) (reversing by writ of error a trial court's denial of a motion to quash a writ of execution). "[T]he Code of 1852 abolished the writ of error as the method of bringing civil cases to [the supreme] court for review, and ... established appeal as the remedy." Theo. Poull & Co. v. Foy–Hays Constr. Co., 159 Ala. 453, 458, 48 So. 785, 785 (1909). Consequently, Iberia argues, "the court has since reviewed rulings on motions to quash by appeal."

[2]In this regard, Iberia's position is well taken. There are ample examples of this Court reviewing a motion to quash an execution by way of an appeal.[3] Here, Arvest seeks review of a final judgment; its petition to this Court is properly treated as an appeal. See generally Kirksey v. Johnson, 166 So.3d 633, 643 (Ala.2014) (noting that "[t]his Court has treated a notice of appeal as a petition for a writ of mandamus ... and, conversely, treated a petition for a writ of mandamus as a notice of appeal").[4]

*3 [3]In its second motion to dismiss Arvest's mandamus petition, Iberia contends that the petition is untimely because it was not filed within 14 days of the date of the trial court's order it seeks to have reviewed. Iberia reasons that Arvest's mandamus petition is actually an appeal from an interlocutory order under Rule 4(a)(1)(A), Ala. R. App. P.. Iberia contends that Arvest seeks review of an order dissolving an injunction because the trial court's September 7, 2015, order vacated a stay of the sheriff's sale that it had ordered on August 11, 2015. Specifically, Iberia contends that "[t]he 'stay' order dated August 11, 2015, was an 'injunction' because it 'prevent[ed] an action': namely, the Sheriff's Sale." It further argues that "[t]he order dated September 7, 2015—that Arvest contests—was an 'order dissolving an injunction' because it dissolved the injunction issued on August 11, 2015, which prevented the Sheriff's Sale."

There are several problems with Iberia's argument. To begin with, it contradicts the trial court's view of its September 7, 2015, order. In that order, the trial court stated: "There are no other issues before the court; this is a final order disposing of all parties and issues." (Emphasis added.) Indeed, Iberia does not point to anything that remains for the trial court to adjudicate in this matter, and nothing presents itself from the materials before us. The trial court's order cleared the way for the sheriff's sale of the property to proceed. There were no other issues before the trial court. Given that the September 7, 2015, order was a final order, Arvest's submission to this Court could not be considered an interlocutory appeal.

Moreover, a review of the procedural history of this case shows that Iberia misconstrues what Arvest seeks to have reviewed by this Court. Iberia initially secured its writ of execution on January 26, 2015. On June 12, 2015, it amended the writ to include postjudgment interest. Arvest filed a motion to intervene on August 10, 2015. On August 11, 2015, the trial court granted Arvest's motion to intervene and entered an order stating that "the Sheriff's Sale scheduled for August 17, 2015 is stayed pending further Order" of the court. On September 7, 2015, the trial court entered its order denying Arvest's motion to quash execution of the sheriff's sale. Arvest filed its petition for a writ of mandamus on October 1, 2015.

Arvest's motion to quash was not a motion requesting an injunction but, rather, a request that the trial court nullify the writ of execution of Iberia's judgment. Arvest was not seeking a delay; it was seeking a nullification. The stay the trial court imposed was solely for the sake of giving the parties time to prepare, and the trial court time to hear, arguments concerning Arvest's motion to quash. Merely because the trial court's September 7, 2015, order had the effect of dissolving that stay does not mean that Arvest is seeking review in this Court of the dissolution. Clearly, Arvest is seeking review of the denial of the motion to quash the execution of the judgment. Therefore, Arvest is not seeking review of an order dissolving an injunction under Rule 4(a)(1)(A), Ala. R. App. P..

Based on the foregoing, Iberia's motions to dismiss Arvest's petition are denied. Review by appeal is appropriate in this case. Arvest filed its petition within the 42-day period for filing an appeal under Rule 4(a)(1), Ala. R. App. P.., and provided an appropriate supersedeas bond.

B. Review of the Trial Court's Judgment

Arvest in essence argues that the trial court erred in declining to grant its motion to quash Iberia's writ of execution because, it says, the trial court misunderstood the effect Raymond's death had on Iberia's judgment lien in the context of a joint tenancy with a right of survivorship. Arvest contends that Iberia's claim was extinguished when Raymond died and Evelyn assumed sole ownership of the property. Iberia offers various arguments in response to this contention, some of which mirror the trial court's reasoning. For the reasons explained below, we believe that Arvest's argument reflects an accurate understanding of the law.

*4 The trial court provided the following reasons in its September 7, 2015, order for why Iberia could execute its judgment lien on Evelyn's property:

> "1. Iberia's judgment lien attached to Mr. Niland's interest in 'the property' simultaneously with Mrs. Niland's conveyance to him on September 11, 2012.
>
> "2. Iberia's judgment lien therefore takes priority over, or primes, the survivorship feature of the deed, if it is effective. It is unnecessary for the court to decide whether the conveyance of September 11, 2012, was effective to create a joint tenancy with right of survivorship. Mr. Niland owned an

undivided, one-half interest in the property at his death.

"3. If the deed created a survivorship estate, then when Mr. Niland died on December 5, 2012, his one-half interest in the property 'pass[ed] to the surviving joint tenant,' Mrs. Niland, subject to Iberia's lien. Ala. Code § 35–4–7 (1975). If the deed did not create a survivorship estate, then Mr. Niland's one-half interest in the property passed to his estate subject to Iberia's lien.

"4. Section 6–9–93[, Ala. Code 1975,] preserves Iberia's right to execute 'against any property on which the judgment was a lien at the time of the death of the defendant [Mr. Niland] ... in the same manner ... as if the defendant were living.' Consequently, Iberia may now execute on Mr. Niland's one-half interest in the property."

The first problem with the trial court's reasoning is that it is absolutely necessary to determine whether Raymond and Evelyn in fact created a joint tenancy with right of survivorship in the conveyance of September 11, 2012, in order to decide whether Iberia's judgment lien is attached to the property. This Court observed in Johnson v. Keener, 425 So.2d 1108, 1109 (Ala.1983):

> "Where a conveyance provides for concurrent ownership with the survivor to receive the fee, analysis of the survivor's interest must begin with determining whether the grantees took as tenants in common or as joint tenants. See Durant v. Hamrick, 409 So.2d 731, 738 (Ala.1981). If they took as tenants in common, then the estate created is characterized as a tenancy in common with indestructible cross-contingent remainders in fee to the survivor."

In contrast,

"[a]t common law a joint tenancy was severed by any act which destroyed any of the four unities of time, title, interest and possession which were required for a joint tenancy to exist. Nunn [v. Keith, 289 Ala. 518, 268 So.2d 792 (1972),] held ... that the joint tenancy estate is destructible as at common law.

"At common law, one way in which the joint tenancy could be severed was by the death of one of the joint tenants. Of course, this normally vested the entire estate in the survivor."

Kempaner v. Thompson, 394 So.2d 918, 921 (Ala.1981).

In other words, if the Nilands created a tenancy in common, then upon Raymond's death a one-half interest in the property would pass through his estate, and Evelyn would own the other half of the property. If they created a joint tenancy with a right of survivorship, then upon Raymond's death Evelyn owned the entire property in fee. See, e.g., Porter v. Porter, 472 So.2d 630, 632 (Ala.1985) (observing that "[t]he major distinction between a tenancy in common and a joint tenancy is that the interest held by tenants in common is devisable and descendible, whereas the interest held by joint tenants passes automatically to the last survivor"); Fitts v. Stokes, 841 So.2d 229, 231 (Ala.2002) ("If the joint tenancy was not extinguished, Betty Stokes owned the entire interest in the property upon the

death of Richard Fitts by virtue of her right of survivorship. If the divorce judgment extinguished the joint tenancy, both Wanda Fitts [Richard Fitts's second wife] and Betty Stokes [Richard Fitts's first wife] would have a one-half interest in the property as tenants in common.").

*5 Section 35–4–7, Ala. Code 1975, provides:

> "When one joint tenant dies before the severance, his interest does not survive to the other joint tenants but descends and vests as if his interest had been severed and ascertained; provided, that in the event it is stated in the instrument creating such tenancy that such tenancy is with right of survivorship or other words used therein showing such intention, then, upon the death of one joint tenant, his interest shall pass to the surviving joint tenant or tenants according to the intent of such instrument. This shall include those instruments of conveyance in which the grantor conveys to himself and one or more other persons and in which instruments it clearly appears that the intent is to create such a survivorship between joint tenants as is herein contemplated."

(Emphasis added.)

This Court has stated (referring to § 19, Title 47, Code of Alabama 1940, the identical predecessor Code provision of § 35–4–7) that this section "recognizes joint tenancy, with right of survivorship in realty and personalty. The statute requires intent of survivorship expressed in the instrument of conveyance, and eliminates common law unity of time. Nunn v. Keith, 289 Ala. 518, 268 So.2d 792 (1972)." Germaine v. Delaine, 294 Ala. 443, 445, 318 So.2d 681, 682 (1975).

[4]There is no dispute that the Nilands met the requirement in § 35–4–7 of clear intent to create a right of survivorship. The warranty deed by which Evelyn conveyed the property to herself and Raymond was titled "Warranty Deed Jointly for Life with Remainder to Survivor," and the text of the deed stated that Evelyn conveyed the property to Evelyn and Raymond "for and during their joint lives, and upon the death of either of them, then to the survivor of them in fee simple, together with every contingent remainder and right of reversion."

Iberia does dispute that Raymond and Evelyn met the common-law requirements of unity of interest and title.[5] Iberia contends that its judgment lien attached to Raymond's interest in the property the moment the property was transferred into his name by the warranty deed. Iberia argues that, "[a]s a result, there was never a unity between [Evelyn's] 'title' or 'interest' and [Raymond's] 'title' or 'interest.' [Raymond's] title was encumbered by Iberia's lien, but [Evelyn's] title was not. [Evelyn's] title was 'good,' but [Raymond's] title was 'bad.' "

[5] [6]Iberia misunderstands the concepts of unity of interest and unity of title in the context of a joint tenancy.

> "Unity of title meant that all must acquire title by the same deed or will or by a joint

> adverse possession. Unity of interest meant that the joint tenants must have identical interests both as to the share of the common property and as to the period of duration of the interest of each. One could not take as a life tenant and the other in fee or in fee tail; one could not have a one-fourth interest and the other three-fourths."

*6 2 American Law of Property § 6.1, 5-6 (A. James Casner ed., 1952) (footnotes omitted)). As for unity of title, there is no question that Raymond and Evelyn acquired title by the same deed. As for unity of interest, if the September 11, 2012, deed was effective at all, it was effective in accordance with its terms, thereby vesting in both Raymond and Evelyn an estate in fee simple held by joint tenancy. The fact that, upon its conveyance, Raymond's interest in the property became encumbered by a lien did not affect the unity of title or interest.

> "[T]he judgment lien does not invest the [creditor] with title, hence [the creditor] has no estate in the land and is not a joint owner, and his judgment only attaches to the undivided interest of [the judgment debtor], which is subject to sale under execution issued in the name of [the judgment creditor], or the lien may be enforced in equity."

Hargett v. Hovater, 244 Ala. 646, 648, 15 So.2d 276, 278 (1943). In other words, the judgment lien does not alter or diminish the intrinsic nature of the interest in the land held by the debtor; it does not operate to make the debtor's interest in the land of a different nature than that of the cotenant. It therefore does not change the "unity of interest" of the joint tenants.[6]

Because the warranty deed conveying the property to Raymond and Evelyn contained a clear expression of intent to create a joint tenancy with a right of survivorship that fulfilled the unities of interest, title, and possession, Evelyn and Raymond created a joint tenancy with a right of survivorship.

Iberia is correct, and Arvest concedes, that because the judgment was recorded, the lien attached to Raymond's interest in the property upon its conveyance to him in September 2012. See, e.g., W.T. Rawleigh Co. v. Patterson, 239 Ala. 309, 311–12, 195 So. 729, 730 (1940) (stating that "[t]he statutory judgment lien attaches to property of the debtor subject to levy and sale, acquired after the registration of the judgment"); Shrout v. Seale, 287 Ala. 215, 217, 250 So.2d 592, 594 (1971) (observing that "[o]n the recording of the judgment certificate, the judgment lien attached to the life estate of Farmer Seale").

But in order for the judgment lien to attach to Raymond's property interest, Raymond must first have or receive a property interest. Here, the interest Raymond received—the only interest he received pursuant to the September 11, 2012, deed—was a specific one, i.e., a joint tenancy with right of survivorship. The nature and limitations of this interest were first defined by the deed conveying that interest to him; the recorded judgment could effect a lien only as to that interest. The conveyance to Raymond—such as it is—must come before any lien attaches to that interest.

*7 [7] [8]This Court has noted:

> "Recording a judgment is not the same as execution on a judgment. The filing of the judgment ... only creates a lien in favor of the judgment creditor and although this filing can preserve assets for the creditor, in the event an execution later occurs, filing has no other interlocking aspects with execution on the judgment."

Kiker v. National Structures, Inc., 342 So.2d 746, 748 (Ala.1977). In other words, as is implicit from the passage from Hargett quoted above, recording a judgment lien in itself does not sever a joint tenancy. Execution on a judgment severs a joint tenancy—but not the mere recording of a lien. See 48A C.J.S. Joint Tenancy § 53 (2014) (stating that "[a] levy on and sale of a joint tenant's interest pursuant to a judgment against him or her terminates the joint tenancy").

American Jurisprudence puts it this way:

> "The mere docketing of a judgment against a joint tenant, even though a lien results from it, does not result in a severance of a joint estate. A judgment lien against the interest of a joint tenant is not, of itself, sufficient to operate as a severance of the joint tenancy, since if the judgment debtor should die prior to execution on, sale of, or expiration of the period of redemption after sale of the property subject to the lien, the surviving tenant becomes the sole owner of the property, free from any lien by reason of the judgment."

20 Am. Jur. 2d Cotenancy and Joint Ownership § 30 (2015) (footnotes omitted; emphasis added). See John W. Fisher II, Creditors of a Joint Tenant: Is There a Lien After Death? 99 W. Va. L. Rev. 637, 641 (1997) (explaining that, at common law, "it was generally recognized that the recovery of a judgment, without the execution thereon, did not sever survivorship"). See also Albright v. Creel, 236 Ala. 286, 289, 182 So. 10, 13 (1938) (opinion on rehearing) (noting that "the judgment, execution, and levy on the interest of Oscar Greathouse was evidence of a severance of the joint tenancy between Oscar and his mother").

In the words of the Hargett Court, the "judgment only attaches to the undivided interest of [the judgment debtor]," whatever that interest may be. 244 Ala. at 648, 15 So.2d at 278.

> "The lien of a judgment attaches to the precise interest or estate which the judgment debtor has actually and effectively in the property, and only to such interest.
>
> "... Stated another way, a judgment creditor cannot acquire more property rights in a property than those already held by the judgment debtor."

50 C.J.S. Judgments § 787 (2009).

[9]Iberia could have a lien only against whatever property Raymond held. Thus, we examine closer the "precise interest" Raymond held as a result of the September 11, 2012, conveyance.

> "An estate in joint tenancy is one held by two or more persons jointly, with equal

> rights to share in its enjoyment during their lives, and having as its distinguishing feature the right of survivorship. Because of this right of survivorship, upon the death of a joint tenant, the entire estate goes to the survivor or, in the case of more than two joint tenants, to the survivors, and so on to the last survivor. The estate passes free and exempt from all charges made by the deceased cotenant or cotenants."

*8 20 Am. Jur. 2d Cotenancy and Joint Ownership § 4 (2015) (footnotes omitted). " '[T]he right of survivorship ... is the sine qua non of joint tenancy.' " Watford v. Hale, 410 So. 2d 885, 886 (Ala.1982) (quoting Mann v. Bradley, 188 Colo. 392, 395, 535 P.2d 213, 215 (1975)). "The principal practical aspect of a joint tenancy consists in the fact that on the death of one of the joint tenants, no severance of his interest having theretofore occurred, the exclusive title inures to the surviving joint tenant or tenants." Annot., What Acts by One or More Joint Tenants Will Sever or Terminate the Tenancy? 64 A.L.R.2d 918, 922 (1959).

[10]In this case, it is apparent that no severance of the joint tenancy occurred during Raymond's lifetime. The joint mortgage executed by Evelyn and Raymond did not effect a severance. See 48A C.J.S. Joint Tenancy § 2 (2014) (explaining that "[a] mortgage to two or more persons as security for a single debt due to them jointly may be also held in joint tenancy"). More important in terms of the present issue, as we have seen from the above-quoted authorities, the judgment lien did not sever the joint tenancy because Iberia did not file an execution on the judgment during Raymond's lifetime.

[11]Because no severance of the tenancy occurred until Raymond's death, the entire estate in the property vested in Evelyn at Raymond's death because Raymond's interest ceased at that time. The judgment lien did not attach to Evelyn's interest because she assumed sole ownership of the property by virtue of the deed; Raymond's interest did not pass to her.[7] Because a joint tenant's property interest ceases at death, and because Iberia could hold only the same interest in the property that Raymond possessed, it follows that Iberia's claim on Raymond's property interest was extinguished when Raymond died. Indeed, in Fretwell v. Fretwell, 283 Ala. 424, 426, 218 So.2d 138, 140 (1969), this Court noted the idea that "a surviving joint tenant becomes the absolute owner of the property held in joint tenancy upon the death of the cotenant, free of the claims of the heirs, because the survivor does not acquire title through the deceased but by virtue of the deed." (Emphasis added.)

The rule governing this case is one with ancient roots: "So it is if one joint-tenant acknowledge a recognizance or a statute, or suffereth a judgment in an action of debt, ... and dieth before execution had, it shall not be executed afterwards. But if execution be sued in the life of the [cognizor], it shall bind the survivor." 1 Sir Edward Coke, Systematic Arrangement of Lord Coke's First Institute of the Laws of England 582 (1836).

> "In consequence of the right of survivorship among joint-tenants, all charges made by a joint-tenant on the estate determine by his death, and do not affect the survivor; for it is a maxim of law that jus accrescendi prœfertur oneribus [The right of

> survivorship is preferred to encumbrances]. ... But if the grantor of the charge survives, of course, it is good. ... So, if one joint-tenant suffers a judgment in an action of debt to be entered up against him, and dies before execution had, it will not be executed afterwards; but if execution be sued in the life of the cognizor, it will bind the survivor. ..."

*9 1 William Blackstone, Commentaries on the Laws of England 148 n.13 (Edward Christian et al., eds., W.E. Dean 1848).

[12]It is also an understanding that has been almost universally adopted.

> "According to the authorities cited in the annotation, it may be stated that in general, where land is held by joint tenants, one of whom is a judgment debtor, the mere docketing of the judgment does not effect a severance of the joint estate, and if the debtor dies before levy of execution, the judgment creditor loses his rights against the debtor's interest, all of which passes to the surviving joint tenant ...."

Annot., Rights and Remedies of Judgment Creditors or of Purchasers under Execution, 111 A.L.R. 171, 172 (1937).

> "It appears that all of the courts which have considered this issue in situations where the debtor-tenant died prior to execution, sale, or expiration of the period of redemption after sale have concluded that the lien did not sever the joint tenancy, reasoning that upon the death of the debtor that party's interest went to the survivor and therefore there was no property interest to which the lien could attach."

Francis M. Daugherty, Judgment Lien or Levy of Execution on One Joint Tenant's Share or Interest as Severing Joint Tenancy, 51 A.L.R.4th 906 (1987). See also 20 Am. Jur. 2d and 50 C.J.S., supra; 48A C.J.S. Joint Tenancy § 3 (2014) (observing that "[a] joint tenancy ends and the right of survivorship terminates once there is only a single surviving joint tenant as the last survivor holds the entire interest in the property, free from the claims of the heirs or creditors of the deceased cotenant").[8]

*10 One of the many cases reaching the foregoing conclusion explained well the reasoning behind and the fairness of the rule:

> "The legal proposition thus presented can be stated as follows: Where real property is held by joint tenants, one of whom is a judgment debtor, and the judgment debtor dies prior to a levy of execution but after an abstract of the judgment has been recorded, and a levy of execution is made after the death of the judgment debtor against the interest of the debtor, does the purchaser at the execution sale secure any rights in the property, or does the surviving joint tenant take the entire property free and clear of the lien of the judgment?
>
> "It is well settled in this and other states that, while all joint tenants are alive, execution may be had upon the interest of one of the joint tenants, and that upon the purchase of the interest of that joint

tenant at execution sale the joint tenancy is severed and the purchaser and the other joint tenant or tenants become tenants in common. See cases collected and commented on in 111 A.L.R. 171; Pepin v. Stricklin, 114 Cal.App. 32[, 299 P. 557 (1931)]; Hilborn v. Soale, 44 Cal.App. 115[, 185 P. 982 (1919)]. The question, in the present case, is whether a judgment lien on the interest of one joint tenant prior to execution severs the joint tenancy. We are of the opinion that it does not.

"The right of survivorship is the chief characteristic that distinguishes a joint tenancy from other interests in property. The surviving joint tenant does not secure that right from the deceased joint tenant, but from the devise or conveyance by which the joint tenancy was first created. (Green v. Skinner, 185 Cal. 435[, 197 P. 60 (1921)].) While both joint tenants are alive each has a specialized form of a life estate, with what amounts to a contingent remainder in the fee, the contingency being dependent upon which joint tenant survives. The judgment lien of respondent could attach only to the interest of his debtor, William B. Nash. That interest terminated upon Nash's death. After his death there was no interest to levy upon. Although the title of the execution purchaser dates back to the date of his lien, that doctrine only applies when the rights of innocent third parties have not intervened. Here the rights of the surviving joint tenant intervened between the date of the lien and the date of the sale. On the latter date the deceased joint tenant had no interest in the property, and his judgment creditor has no greater rights.

"....

"This rule is sound in theory and fair in its operation. When a creditor has a judgment lien against the interest of one joint tenant he can immediately execute and sell the interest of his judgment debtor, and thus sever the joint tenancy, or he can keep his lien alive and wait until the joint tenancy is terminated by the death of one of the joint tenants. If the judgment debtor survives, the judgment lien immediately attaches to the entire property. If the judgment debtor is the first to die, the lien is lost. If the creditor sits back to await this contingency, as respondent did in this case, he assumes the risk of losing his lien."

*11 Zeigler v. Bonnell, 52 Cal.App.2d 217, 219–22, 126 P.2d 118, 119–21 (1942). See, e.g., Toma v. Toma, 163 P.3d 540, 544–45 (Okla.2007); Jamestown Terminal Elevator, Inc. v. Knopp, 246 N.W.2d 612, 614 (N.D.1976); Northern State Bank v. Toal, 69 Wis.2d 50, 56, 230 N.W.2d 153, 156 (1975); and Musa v. Segelke & Kohlhaus Co., 224 Wis. 432, 272 N.W. 657, 658 (1937).

As contrary authority Iberia cites Dieden v. Schmidt, 104 Cal.App.4th 645, 128 Cal.Rptr.2d 365 (2002), and a couple of other California appellate court cases that relied upon Dieden, but the situation in Dieden differed from the one presented in this case and those cited above as authorities in one key respect: The original property interest held by the judgment debtor was not a joint tenancy, but a tenancy in common. The facts in Dieden were as follows:

"In 1981, Benjamin and Conchita Dieden sued Stanley Schmidt. The Diedens lost and the court entered judgment for Schmidt. The court awarded Schmidt his attorney fees and costs. Schmidt recorded an abstract of judgment (the first abstract) and obtained a lien against real property located in Berkeley owned by the Diedens. Schmidt, however, did not force a sale of the Berkeley property.

"In 1991, First Nationwide Bank made a loan to the Diedens secured by a deed of trust on the Berkeley property.

"Schmidt renewed his judgment in 1992, but only against Benjamin Dieden. Schmidt then recorded a second abstract of judgment. It is undisputed that at the time Schmidt recorded this abstract, the Diedens owned the Berkeley property as tenants in common.

"In 1994, the Diedens conveyed their interests in the Berkeley property to themselves as joint tenants.

"In 1998, Benjamin Dieden filed a complaint against Schmidt to quiet title to the Berkeley property. Benjamin, however, died in 1999, leaving Conchita as the surviving joint tenant."

Dieden, 104 Cal.App.4th at 648–49, 128 Cal.Rptr.2d at 367–68 (footnote omitted; emphasis added). Conchita Dieden argued that Schmidt's lien expired upon Benjamin Dieden's death because they held the property as joint tenants at that time. But the court rejected her argument, reasoning:

"As Schmidt points out, however, his judgment lien attached to Benjamin Dieden's interest as a tenant in common, before the creation of any right of survivorship. Until the lien was satisfied or extinguished, it was enforceable against Benjamin's interest in the Berkeley property regardless of who held that interest. Under Code of Civil Procedure section 697.390, subdivision (a), a subsequent conveyance or encumbrance of an interest in real property subject to a judgment lien does not affect the lien. Further, under section 695.070, the judgment lien may be enforced against the property in the same manner and to the same extent as if there had been no transfer, even after the death of the judgment debtor. (Id., § 695.070.)

"....

"In fact there is some logical appeal to Schmidt's argument that after the transfer, the judgment lien could be enforced against the entire property because the property interest Benjamin conveyed to himself was subject to the lien (see e.g., Code Civ. Proc, § 697.340, subd. (b)), as was the interest conveyed to Conchita. Once again, however, it is the language of the Code of Civil Procedure sections 697.390 and 695.070 that controls. Under those sections, Schmidt may enforce his judgment in the same manner and to the same extent as if the property had never been transferred. (See Oliver v. Bledsoe (1992) 5 Cal.App.4th 998, 1009[, 7 Cal.Rptr.2d 382] [lienholder's rights against the property remain as they were before the transfer].) Therefore, Schmidt retained his lien against a one-half interest in the property as if the transfer and Benjamin's death never occurred.

*12 "....

"Zeigler [v. Bonnell, 52 Cal.App.2d 217, 126 P.2d 118 (1942),] is inapposite here. The judgment lien in Zeigler attached to an existing joint tenancy interest. There was no transfer of property from one form of ownership to joint tenancy."

Dieden, 104 Cal.App.4th at 650–52, 128 Cal.Rptr.2d at 369–70 (footnote omitted; some emphasis added).

As we noted above, the property interest to which Iberia's judgment lien attached was Raymond's interest in the joint tenancy with Evelyn because that was the property interest conveyed to Raymond. In that context, Iberia's claim was extinguished when Raymond's interest in the property ceased upon his death. In contrast, in Dieden the property interest to which Schmidt's judgment lien attached was Benjamin Dieden's interest as a tenant in common with his wife. Under California's civil code, the Diedens' transfer of the property to themselves as joint tenants did not change the nature of the interest Schmidt held by virtue of his judgment lien; therefore, Benjamin's death had no effect on the survival of Schmidt's claim.

As Arvest notes, there are only two instances by statute under which a writ of execution may issue after a debtor's death, and these are prescribed in Ala. Code 1975, §§ 6–9–62 and 6–9–63. Iberia does not contend on appeal that § 6–9–62 is applicable in this case, as it plainly is not because that statute applies only when the writ of execution is "issued and received by the sheriff during the lifetime of the defendant," and that was not the case here. Iberia does argue, however, that § 6–9–63 provides it a statutory right to proceed with the sheriff's sale.

Section 6–9–63 provides:

> "After six months from the date of the grant of letters testamentary or of administration on the estate of any defendant, in a judgment for money, execution thereof may be had by leave of the court entering the judgment, or of the judge thereof, upon cause shown, against any property on which said judgment was a lien at the time of the death of the defendant, and a sale of such property may be made in the same manner and with the same effect as if the defendant were living. In case of the death of the defendant in a judgment for the recovery of real or personal property, execution may be had without revival in the same manner as if the defendant had not died."

Iberia argues that § 6–9–63 does not contain an exception for judgments against a property interest of a joint tenant and that, therefore, it has a right to have the property at issue in this case sold "in the same manner and with the same effect as if [Raymond] were living."

[13]The primary problem with this argument is that, in context, § 6–9–63 refers to executing upon property in the estate of the defendant. The introductory clause of § 6–9–63 provides: "After six months from the date of the grant of letters testamentary or of administration on the estate of any defendant, in a judgment for money, execution thereof may be had." This language clearly indicates that the judgment will be executed upon property in the estate. As we have already noted, however, a joint tenant's property interest in the tenancy—unlike a tenant in common's interest—does not pass into the tenant's estate upon death if he or she is survived by another joint tenant. Instead, the property interest is extinguished and the surviving tenant owns the property in fee under the conveying instrument. Therefore, § 6–9–63 is not applicable in this situation. Indeed, as Arvest notes:

*13 "Section 6–9–63 was adopted as part of the Code of Alabama of 1907 as section

> 4096.... This statute was adopted during the period of outright abolition of joint tenancies in Alabama that existed from the 1818 Act of the Alabama Territorial Legislature until 1945 when Ala. Acts No. 505 was adopted. At the time of the adoption of Ala. Code § 6–9–63 tenancies in common were the only form of co-ownership and joint tenancies did not exist."

See, e.g., Nunn v. Keith, 289 Ala. 518, 523, 268 So.2d 792, 797 (1972) (explaining that "the purpose behind the passage of the original statute [the predecessor to § 35–4–7, Ala. Code 1975,] was to abolish common law joint tenancies with their inherent right of survivorship. ... Subsequently, in 1945, the legislature amended the statute (Title 47, § 19) to make it possible to convey in joint tenancy, with right of survivorship, simply by expressly stating such intention in the instrument of conveyance"). Thus, § 6–9–63 was not written with joint tenancies in mind inasmuch as such tenancies do not implicate the estate of the deceased.

Because it is clear that Raymond and Evelyn created a joint tenancy with a right of survivorship in the September 11, 2012, deed, and because Raymond's interest in the property to which Iberia's judgment lien attached was extinguished upon his death, Iberia has no interest in the property. It follows that Iberia lacks the authority to obtain a writ of execution on its judgment lien against the property. Therefore, the trial court erred in refusing to grant Arvest's motion to quash the writ of execution.

IV. Conclusion

Based on the foregoing, we reverse the trial court's order denying Arvest's motion to quash the writ of execution and remand the case for that court to enter an order granting Arvest's motion.

MOTIONS TO DISMISS DENIED; REVERSED AND REMANDED.

Stuart, Parker, Shaw, Main, Wise, and Bryan, JJ., concur.

Bolin, J., concurs in the result.

All Citations

--- So.3d ----, 2016 WL 4943250

Footnotes

[1] The debt consisted of two promissory notes Raymond executed to Capitalsouth Bank in October 2007. Capitalsouth

Bank was acquired by Iberiabank in September 2012.

[2] "A writ of error constitutes a direct attack on the judgment, and ... an appeal by writ of error is simply another mode of appeal." 4 C.J.S. Appeal and Error § 30 (2007).

[3] See, e.g., State ex rel. O'Dell v. Coker, 59 So.3d 670, 672 (Ala.2010); Wingard v. Little, 883 So.2d 677, 679 (Ala.Civ.App.2003); Cauthen v. Norman, 224 Ala. 371, 371, 140 So. 565, 565 (1932); McDaniel v. Johnston, 110 Ala. 526, 527, 19 So. 35, 36 (1895); Harrison v. Hamner, 99 Ala. 603, 12 So. 917 (1893) (reversing order granting a motion to quash an execution on the bond); Scheuer v. King, 100 Ala. 238, 239, 13 So. 912, 912 (1893); Sheffey v. Davis, 60 Ala. 548, 550 (1877); and Chambers v. Stone, 9 Ala. 260, 261 (1846).

[4] Although there are cases in which this Court has reviewed disputes over executions by way of petitions for a writ of mandamus, those commonly involved execution orders in service of or as part of some underlying dispute or litigation. See, e.g., Ex parte Alfab, Inc., 586 So.2d 889 (Ala.1991) (denying mandamus petition seeking to set aside trial court order staying execution of previously escrowed funds pending appeal of an underlying judgment); Ex parte Alabama Mobile Homes, Inc., 468 So.2d 156 (Ala.1985) (reviewing on the merits denial of motion to quash garnishment); and Ex parte Mid–Continent Sys., Inc., 470 So.2d 677 (Ala.1985) (denying mandamus petition seeking review of denial of motion to quash certain garnishments and executions).

[5] The Nunn Court held that the version of joint tenancy recognized in § 35–4–7

> "differs from the common law estate of the same name only in so far as (1) the statutory requirement that the intention to have the right of survivorship must be clearly expressed in the instrument of conveyance, and (2) elimination of the common law unity of time. We further hold that such estate is destructible as at common law."

Nunn v. Keith, 289 Ala. 518, 524, 268 So.2d 792, 797 (1972).

[6] In support of its argument Iberia cites Stewart v. AmSouth Mortgage Co., 679 So.2d 247, 249 (Ala.Civ.App.1995), which held that "a mortgage by one joint tenant severs the joint tenancy" because " 'a mortgage was a conveyance, so it necessarily destroyed the unities of title and interest.' 4 Thompson on Real Property § 31.08(b) at 49 (Thomas ed. 1994)." But a mortgage by this understanding is different than a judgment lien. Unlike a mortgage, a lien does not transfer ownership of property; it simply gives the judgment creditor a claim against any property owned by the judgment debtor. See Wozniak v. Wozniak, 121 Wis.2d 330, 334, 359 N.W.2d 147, 149 (1984) (explaining that "[w]hile a mortgage serves as security for a particular piece of property, a judgment lien ordinarily is not a lien on any specific real estate of the judgment debtor but is a general lien on all of the debtor's real property"). Hence a lien by itself does not interfere with the unities of a joint tenancy or cause a severance thereof.

[7] As one treatise on property law explains:

> "Survivorship is central to a joint tenancy. The joint tenant who survives the other cotenants takes the entire estate; the estates of deceased joint tenants have no interest. Theoretically the survivor's interest attaches by means of the original conveyance, not by transfer from the decedent."

Creation of Joint Tenancy, 7 Powell on Real Prop. (MB) ¶ 51.03[3] (June 2013) (footnotes omitted).

[8] Iberia contends that Raymond's interest in the property did not cease to exist upon his death because § 35–4–7 states that "upon the death of one joint tenant, his interest shall pass to the surviving joint tenant." Iberia argues that the statutory language means that Raymond's interest in the property and the attached lien passed to Eveyln upon Raymond's death. Iberia's only support for this interpretation is Johnson v. Keener, 425 So.2d 1108, 1109–10 (Ala.1983), which Iberia cites for the proposition that § 35–4–7 "modifies the common law estate of joint tenancy with right of survivorship." But in Nunn v. Keith, 289 Ala. 518, 268 So.2d 792 (1972), and other cases, the Court made it clear that § 35–4–7 modified the common law only in the senses that the conveying instrument must clearly provide for a right of survivorship and the unity of time is not required to create a joint tenancy.

Alabama cases are united with other authorities in indicating that the last survivor of a joint tenancy takes full ownership under the conveying instrument, not because the deceased joint tenant passed an interest to the surviving joint tenant. Indeed, the whole discussion in Johnson of tenancies in common with cross-contingent remainders versus joint tenancies with a right of survivorship is based on this assumption. The interest of the deceased joint tenant "passes" in the sense that the surviving joint tenant attains full ownership rather than sharing full ownership with the deceased joint tenant's heirs. As one court has explained it:

> "In a legal sense, [the deceased joint tenant's] death does not transfer the rights that he possessed in the property to the surviving tenants. Death does not enlarge or change the estate. Death terminates [the deceased joint tenant's] interest in the estate. It is rather a falling away of the tenant from the estate than the passing of the estate to others."

Fleming v. Fleming, 194 Iowa 71, 174 N.W. 946, 953 (1919), modified on reh'g, 194 Iowa 71, 184 N.W. 296 (1921). See also In re Estate of MacFarline, 14 P.3d 551, 558 n.5 (Okla.2000) (stating that "[t]his survivorship right does not pass anything from a deceased joint tenant to the survivor upon the death of the former since, by the very nature of the tenancy, title of the joint tenant who dies first terminates at death and vests eo instanti (i.e., immediately) in the survivor. ... Because joint tenants are seised of the whole while alive, the survivor's interest is simply a continuation, or extension, of his/her existing interest").

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