

**May 9, 2014**

**Blaine F. Bates**  
Clerk

NOT FOR PUBLICATION

**UNITED STATES BANKRUPTCY APPELLATE PANEL  
OF THE TENTH CIRCUIT**

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IN RE TUNG THANH NGUYEN and  
PAMELA S. NGUYEN,

Debtors.

BAP No. KS-13-002

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CARL B. DAVIS, Trustee,

Plaintiff – Appellant,

v.

THI PHO PHAM, NOEL ESPLUND,  
and LISA DANG,

Defendants – Appellees.

Bankr. No. 09-11640  
Adv. No. 11-05027  
Chapter 7

OPINION\*

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Appeal from the United States Bankruptcy Court  
for the District of Kansas

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Before THURMAN, Chief Judge, CORNISH, and MOSIER<sup>1</sup>, Bankruptcy Judges.

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CORNISH, Bankruptcy Judge.

The Chapter 7 trustee seeks review of the bankruptcy court's ruling that a debtor's transfer of unimproved real property by quit claim deed to his sister could not be avoided as fraudulent because debtor held only bare legal title. Having reviewed the record and applicable law, we AFFIRM the bankruptcy court's order.

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\* This unpublished opinion may be cited for its persuasive value, but is not precedential, except under the doctrines of law of the case, claim preclusion, and issue preclusion. 10th Cir. BAP L.R. 8018-6.

<sup>1</sup> Honorable R. Kimball Mosier, United States Bankruptcy Judge, United States Bankruptcy Court for the District of Utah, sitting by designation.

## I. BACKGROUND AND BANKRUPTCY COURT PROCEEDINGS<sup>2</sup>

In this adversary proceeding, Carl B. Davis, the Chapter 7 trustee (“Trustee”), seeks to avoid a transfer of property from debtor Tung Thanh Nguyen (“Debtor”) to his sister Lisa Dang (“Sister”). The unimproved real property (“Property”) was purchased in 2007 by Debtor’s and Sister’s mother, Thi Hoa Pham (“Mother”), and her common law husband, Noel Esplund (“Husband”),<sup>3</sup> with Mother providing two-thirds of the purchase price of the Property and Husband providing one-third. Mother and Husband initially took title to the Property as joint tenants, but immediately thereafter executed a new warranty deed conveying the Property to Debtor, Sister, and Husband as joint tenants with right of survivorship.

Debtor never saw the Property or benefitted therefrom. Mother paid two-thirds of the property taxes and received two-thirds of the income from the Property. In 2008, Debtor transferred his interest in the Property to Sister and Husband by quit claim deed for no consideration.

Debtor and his wife, Pamela S. Nguyen, filed for Chapter 7 relief in May 2009. Trustee filed this adversary proceeding in January 2011, seeking to avoid Debtor’s transfer to Sister as constructively fraudulent pursuant to 11 U.S.C. § 548(a)(1)(B),<sup>4</sup> and recover his interest in the Property for the estate. Mother answered Trustee’s complaint, claiming to be the actual and equitable owner of a

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<sup>2</sup> Unless otherwise indicated, the undisputed facts are taken from the bankruptcy court’s memorandum opinions and orders dated September 5, 2012, and January 15, 2013.

<sup>3</sup> For simplicity, the term Husband is used throughout although Noel Esplund was not yet Mother’s common law husband at the time the Property was purchased.

<sup>4</sup> Unless otherwise indicated, all future statutory references in text are to the Bankruptcy Code, Title 11 of the United States Code.

two-thirds interest in the Property.<sup>5</sup> After discovery was conducted, the bankruptcy court held a trial on the matter in June 2012.

Trustee contended the transfer from Mother to Debtor was a gift, relying on a presumption arising under Kansas law that when one who pays the purchase price of property takes title in the name of a wife, child, or other natural object of bounty, a gift is intended. However, that presumption can be rebutted by evidence of a contrary intent, and both Debtor and Mother testified that Debtor agreed to hold a one-third interest in the Property for the benefit of Mother. Essentially, they argued the arrangement was an estate planning device, as Mother had concerns about her health at the time she and Husband purchased the Property. At the conclusion of the trial, the bankruptcy court directed the parties to file post-trial briefs,<sup>6</sup> in part to specifically address the applicability, if any, of *Morris v. Kasperek (In re Kasperek)*.<sup>7</sup> *Kasperek* is a 2010 decision of this Court involving a Kansas trustee's motion to sell joint tenancy property pursuant to § 363(h) using his § 544(a)(3) powers of a hypothetical bona fide purchaser to avoid an unrecorded equitable interest in the debtor's record one-third interest.<sup>8</sup>

After considering the parties' post-trial briefs, the bankruptcy court issued a memorandum opinion and order on September 5, 2012 ("First Memorandum Opinion"), finding that the challenged transfer met the elements of a constructively fraudulent transfer under § 548(a)(1)(B) because Debtor: 1) made the transfer within two years of the date he filed for Chapter 7 relief; 2) received

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<sup>5</sup> Trustee sued Mother, Husband, and Sister. Husband and Sister each filed separate answers, but they are not contained in the record on appeal. *See Docket Sheet in Adversary Proceeding 11-05027, Docket ## 16, 30, in Appellant's App.* at 7, 9.

<sup>6</sup> *Transcript of Proceedings held on June 19, 2012* at 109, *in Appellant's App.* at 169.

<sup>7</sup> 426 B.R. 332 (10th Cir. BAP 2010).

<sup>8</sup> *Id.* at 341.

no consideration in exchange for the transfer; and 3) was insolvent on the date of the transfer and/or made the transfer to an insider. However, the bankruptcy court also found that Debtor held only bare legal title to the Property, and therefore, his quit claim deed did not transfer any equitable interest to Sister. The bankruptcy court stated that Trustee relied on *Kasperek* to support his position, but did not adequately explain the reasons for its applicability to this case.<sup>9</sup> The bankruptcy court then “decline[d] to rule upon the appropriate remedy at this time because the issue ha[d] not been fully briefed.”<sup>10</sup> Accordingly, it directed Trustee to file an additional brief addressing the appropriate remedy and gave the defendants the option to respond to that filing.<sup>11</sup>

In his second post-trial brief, Trustee proposed a two-part approach for obtaining Debtor’s interest in the Property for the benefit of the bankruptcy estate. First, Trustee argued that Debtor’s transfer to Sister should be avoided pursuant to § 548(a)(1)(B) and legal title transferred to the estate. Thereafter, he would file another adversary complaint asserting his § 544(a)(3) avoidance powers as a hypothetical bona fide purchaser to reach Mother’s equitable interest in the Property, as was done in *Kasperek*. After considering the parties’ additional briefs, the bankruptcy court issued another memorandum opinion and order on January 15, 2013 (“Second Memorandum Opinion”) reversing course:

After reviewing the supplemental briefs on the remedy question and conducting further research on § 548 litigation, the Court is now convinced that its prior ruling that the elements of a fraudulent transfer under § 548(a)(1)(B) are present was not correct. Recovery under § 548, in addition to the elements litigated by the Trustee and discussed by the Court in the Memorandum Opinion, also requires that the transfer be of an interest in property. Bare legal title is not such an interest. Several courts under similar circumstances have held that transfers of bare legal title for no consideration are not

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<sup>9</sup> *First Memorandum Opinion* at 11, in Appellant’s App. at 182.

<sup>10</sup> *Id.* at 12, in Appellant’s App. at 183.

<sup>11</sup> *Id.*

avoidable under § 548.<sup>12</sup>

The bankruptcy court then held that “Debtor’s transfer to his [S]ister of bare legal title to the property by quit claim deed cannot be avoided under § 548(a)(1)(B). The relief prayed for by the Trustee in the complaint is denied.”<sup>13</sup> Trustee timely appealed the bankruptcy court’s decision to this Court on January 22, 2013.

## **II. APPELLATE JURISDICTION**

This Court has jurisdiction to hear timely filed appeals from “final judgments, orders, and decrees” of bankruptcy courts within the Tenth Circuit, unless one of the parties elects to have the district court hear the appeal.<sup>14</sup> Neither party elected to have this appeal heard by the United States District Court for the District of Kansas. The parties have therefore consented to appellate review by this Court.

A decision is considered final “if it ‘ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.’”<sup>15</sup> The bankruptcy court’s judgment fully resolved the adversary proceeding by denying the relief sought in its entirety, and thus is a final order for the purposes of appeal.

## **III. ISSUES ON APPEAL AND STANDARD OF REVIEW**

On appeal, Trustee argues the bankruptcy court erred in numerous ways, but most relate to the bankruptcy court’s alleged error, either for legal or factual reasons, in concluding that Debtor held bare legal title and Mother held the

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<sup>12</sup> *Second Memorandum Opinion* at 6, in Appellant’s App. at 203 (footnotes omitted).

<sup>13</sup> *Id.* at 6-7, in Appellant’s App. at 203-04.

<sup>14</sup> 28 U.S.C. § 158(a)(1), (b)(1), and (c)(1); Fed. R. Bankr. P. 8002; 10th Cir. BAP L.R. 8001-3.

<sup>15</sup> *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996) (quoting *Catlin v. United States*, 324 U.S. 229, 233 (1945)).

equitable interest in the Property.<sup>16</sup> Trustee asserts the bankruptcy court erred in concluding the joint tenancy warranty deed created a resulting trust because the deed was clear and unambiguous, preventing construction of the deed under parol evidence. Further, Trustee asserts that even if parol evidence was permissible, the clear and convincing evidence standard of proof applies in considering the claim of a resulting trust, and not the preponderance of the evidence standard the bankruptcy court applied.<sup>17</sup>

For purposes of standard of review, decisions by trial courts are traditionally divided into three categories, denominated: 1) questions of law, which are reviewable *de novo*; 2) questions of fact, which are reviewable for clear error; and, 3) matters of discretion, which are reviewable for abuse of discretion.<sup>18</sup>

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<sup>16</sup> Trustee does not argue on appeal that the bankruptcy court erred in concluding that, if Debtor had only bare legal title to the Property, then his quit claim deed to Sister did not constitute a transfer of an interest that could be avoided under § 548(a)(1)(B). As the bankruptcy court pointed out, numerous other courts have so held. *Second Memorandum Opinion* at 6, in Appellant's App. at 203 nn. 13, 14 (citing *Krommenhoek v. A-Mark Precious Metals, Inc. (In re Bybee)*, 945 F.2d 309, 315 (9th Cir. 1991)(citations omitted); *Geremia v. Dwyer (In re Dwyer)*, 250 B.R. 472 (Bankr. D. R.I. 2000); *Swanson v. Stoffregen (In re Stoffregen)*, 206 B.R. 939 (Bankr. E.D. Wis. 1997); *Furr v. Reynolds (In re Reynolds)*, 151 B.R. 974 (Bankr. C.D. Fla. 1993); *Jensen v. Gillman (In re Gillman)*, 120 B.R. 219 (Bankr. M.D. Fla. 1990)); *see also Tolz v. Miller (In re Todd)*, 391 B.R. 504, 509 (Bankr. S.D. Fla. 2008) ("valueless asset transferred for no consideration neither hurts nor benefits the estate"); *Belford v. Cantavero (In re Bassett)*, 221 B.R. 49, 54 (Bankr. D. Conn. 1998) ("bare legal title is not an interest of any value to the Debtor, or to his bankruptcy estate upon a putative avoidance and recovery of such bare legal title").

<sup>17</sup> On appeal, Trustee also complains that the bankruptcy court did not factor in Debtor's "admitted transfer in contemplation of bankruptcy," arguing that "transfers of real property without consideration and while contemplating bankruptcy are marked by 'badges of fraud.'" Trustee's Opening Brief at 16. Trustee's argument is not altogether clear, but in this regard he appears to be arguing the transfer was made with actual fraud. However, Trustee's complaint and the bankruptcy court's pretrial order were both limited to the issue of a constructively fraudulent transfer under § 548(a)(1)(B). *See Trustee's Complaint Pursuant to 11 U.S.C. § 548 to Avoid and Recover Transfer, in Appellant's App.* at 21; *Pretrial Order, in Appellant's App.* at 34. Therefore, we decline to address this assertion of error on appeal.

<sup>18</sup> *Pierce v. Underwood*, 487 U.S. 552, 558 (1988); *see Fed. R. Bankr. P.*  
(continued...)

The issue on appeal here is whether the bankruptcy court correctly held that Trustee could not avoid Debtor's quit claim deed of the Property under § 548 because, under Kansas law, Debtor had no "interest" in the Property that could be transferred. This conclusion involves both state and federal legal issues that are reviewed on appeal *de novo*.<sup>19</sup> *De novo* review requires an independent determination of the issues, giving no special weight to the bankruptcy court's decision.<sup>20</sup> The bankruptcy court's finding that the parties to the relevant deeds "intended" a resulting trust in favor of Mother is an issue of fact that is reviewed for clear error.<sup>21</sup> A factual finding is "clearly erroneous" when "it is without factual support in the record, or if the appellate court, after reviewing all the evidence, is left with the definite and firm conviction that a mistake has been made."<sup>22</sup>

#### IV. ANALYSIS

In broad terms, the issue on appeal is whether all of the requirements necessary to establish a constructively fraudulent transfer under § 548(a)(1)(B) are met in this case.<sup>23</sup> For purposes of the facts here, those elements are:

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<sup>18</sup> (...continued)  
8013; *Fowler Bros. v. Young (In re Young)*, 91 F.3d 1367, 1370 (10th Cir. 1996).

<sup>19</sup> *Parks v. FIA Card Serv., N.A. (In re Marshall)*, 550 F.3d 1251, 1254 (10th Cir. 2008) (whether debtor's conduct constitutes a transfer of an interest in property is a legal issue, reviewed *de novo*); *In re Adair*, EO-06-078, 2007 WL 283074, at \*1 (10th Cir. BAP Jan. 31, 2007) (appellate court must reach its own conclusions regarding state law issues).

<sup>20</sup> *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991).

<sup>21</sup> *DSC Nat'l Props., LLC v. Johnson (In re Johnson)*, 477 B.R. 156, 168 (10th Cir. BAP 2012).

<sup>22</sup> *Las Vegas Ice & Cold Storage Co. v. Far W. Bank*, 893 F.2d 1182, 1185 (10th Cir. 1990) (quoting *LeMaire ex rel. LeMaire v. United States*, 826 F. 2d 949, 953 (10th Cir. 1987)).

<sup>23</sup> Section 548, Fraudulent transfers and obligations, provides in pertinent part:

(continued...)

1) Debtor had an interest in the Property; 2) Debtor transferred that interest within two years of filing bankruptcy; 3) Debtor received less than a reasonably equivalent value in exchange for the transfer; and 4) Debtor was insolvent at the time he made the transfer or became insolvent as a result of the transfer, *or* transferred his interest in the Property to an insider.<sup>24</sup> It is undisputed that Debtor executed the quit claim deed in favor of Sister, an insider, within two years of the date he filed for Chapter 7 relief and received nothing in return, and that Debtor was insolvent when he made the transfer.

The dispute here centers on the most fundamental element of § 548, i.e., whether there was *a transfer of an interest of Debtor in the Property* that Trustee may avoid. In its First Memorandum Opinion, the bankruptcy court found that

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<sup>23</sup> (...continued)

(a)(1) The trustee may avoid any transfer . . . of an interest of the debtor in property . . . that was made . . . within 2 years before the date of the filing of the petition, if the debtor voluntarily or involuntarily—

. . .

(B) (i) received less than a reasonably equivalent value in exchange for such transfer or obligation; and

(ii) (I) was insolvent on the date that such transfer was made or such obligation was incurred, or became insolvent as a result of such transfer or obligation; [or]

. . .

(IV) made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

Section 548(a)(1)(A) permits a trustee to avoid transfers that are made with actual intent to hinder, delay, or defraud his creditors, and this provision allows a trustee to avoid transfers which “may be free of actual fraud, but which are deemed to diminish unfairly a debtor’s assets in derogation of creditors.” 5 *Collier on Bankruptcy* ¶ 548.05, 548-67 (Alan N. Resnick & Henry J. Sommer eds., 16th ed. 2014).

<sup>24</sup> 11 U.S.C. § 548(a)(1)(B); *BFP v. Resolution Trust Corp.*, 511 U.S. 531, 535 (1994).

Debtor possessed only bare legal title in the Property and held the equitable interest in trust for the benefit of Mother. Therefore, in its Second Memorandum Opinion, the bankruptcy court held that Debtor's quit claim deed to Sister did not convey an "interest" as contemplated by § 548, and as a result, there was no transfer to avoid.

On appeal, Trustee first argues that pursuant to the warranty deed executed by Mother and Husband conveying the Property to Debtor, Sister, and Husband as joint tenants with right of survivorship, Debtor held more than bare legal title to the Property and there was no resulting trust for Mother's benefit. Kansas Statutes Annotated ("KSA") § 58-2406 provides that "[w]hen a conveyance [of real property] for a valuable consideration is made to one person and the consideration therefor paid by another," no trust shall arise and title shall vest in transferee, except as provided by certain statutory exceptions.<sup>25</sup> Pursuant to KSA § 58-2408, one of those exceptions is:

where it shall be made to appear that by agreement and without any fraudulent intent the party to whom the conveyance was made, or in whom the title shall vest, was to hold the land or some interest therein in trust for the party paying the purchase money or some part thereof.<sup>26</sup>

Trustee argues KSA § 58-2408 does not apply to property held in joint tenancy with rights of survivorship, and that the bankruptcy court erred in admitting parol evidence to vary the terms of the instrument. To support his position, Trustee relies primarily on *In re Winsor*,<sup>27</sup> a 1972 Kansas Supreme Court decision, and *Dexter v. Dexter*,<sup>28</sup> a 1973 decision of the Tenth Circuit Court of Appeals ("Tenth Circuit") involving Kansas law. As discussed below, we reject Trustee's

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<sup>25</sup> Kan. Stat. Ann. § 58-2406 (West 2013).

<sup>26</sup> Kan. Stat. Ann. § 58-2408 (West 2013).

<sup>27</sup> 497 P.2d 292 (Kan. 1972).

<sup>28</sup> 481 F.2d 711 (10th Cir. 1973).

interpretation and application of these authorities.

In *Winsor*, the Kansas Supreme Court addressed creation of a trust by oral agreement in personal property held as joint tenants. The scenario was a dispute amongst six siblings over their deceased father's estate. Following the death of his first wife and his subsequent remarriage, the decedent titled all of his bank accounts and mutual funds in his and one of his daughter's names as joint tenants with rights of survivorship. Decedent did not, however, alter his last will and testament, which named all six of his children as beneficiaries of his estate. Trustee argues the *Winsor* court **held** that where a written grant or agreement uses the words "joint tenants with rights of survivorship," parol evidence is not admissible to vary the terms of the instrument.<sup>29</sup> But that is not in fact the *Winsor* court's holding, and Trustee's argument is based on selectively quoted language from the opinion taken out of context.

The *Winsor* court did acknowledge that some of its previous decisions prohibited admission of parol evidence when the "magic words" of joint tenancy were sufficient to manifest a grantor's intention.<sup>30</sup> But in *Winsor* itself, the Kansas Supreme Court in fact affirmed the trial court's admission of parol evidence regarding the decedent's intent that his daughter was to hold the personal property for the benefit of all six of his children. The *Winsor* court first opined that

As we view them, the rules which relate to trusts are applicable when property is titled in joint tenancy as well as when property is otherwise held. We are not persuaded that ownership in joint tenancy is incompatible with the legal concepts which govern the field of trusts, or that joint tenancy ownership was ever intended as a device to cloak injustice or to excuse overreaching. Such is the rationale underlying our opinion in the recent case of *Grubb, Administrator v. Grubb*, 208 Kan. 484, 493 P.2d 189 [1972], where

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<sup>29</sup> Trustee's Opening Brief at 6-7.

<sup>30</sup> *Winsor*, 497 P.2d at 299-300 (referring to *Simonich v. Wilt*, 417 P.2d 139 (Kan. 1966); *In re Smith*, 427 P.2d 443 (Kan. 1967)).

we applied the doctrine of constructive trusts in relationship to funds held in joint tenancy bank accounts.<sup>31</sup>

The *Winsor* court then relied on one of its much earlier decisions, stating:

The parol evidence rule does not exclude proof of the true consideration of written instruments. The situation of the parties and the circumstances under which written instruments are executed and delivered may be shown by parol in aid of interpretation[.]<sup>32</sup>

The *Winsor* court affirmed the trial court's admission of parol evidence and its holding that personal property held in joint tenancy between the deceased and his daughter was not an inter vivos gift, but was instead held in trust for the benefit of all six siblings. Thus, the *Winsor* decision does not support Trustee's argument in this case.

Trustee also asserts that the Tenth Circuit's 1973 decision in *Dexter*<sup>33</sup> prevents a resulting trust in this case.<sup>34</sup> In *Dexter*, a son contested his deceased father's will that disinherited him and left all property to his step-mother. The son argued that his deceased mother had left her property to his father with the understanding that father would provide amply for him. The trial court concluded that any oral agreement between the son's deceased parents was insufficient to create a trust in his favor, in part because the property actually passed to father from mother by joint tenancy deed and not under her will. The Tenth Circuit affirmed, stating

The trial court also rejected [son's] argument that a resulting trust arose by virtue of K.S.A. 58-2408. This statute provides, inter

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<sup>31</sup> *Winsor*, 497 P.2d at 300.

<sup>32</sup> *Winsor*, 497 P.2d at 301-02 (quoting *Roseman v. Nienaber*, 166 P. 491, 492 (Kan. 1917)). *Winsor* also involved bank stock that decedent titled in his and his son-in-law's name as joint tenants with right of survivorship. After admitting parol evidence, the trial court found that decedent intended an inter vivos gift of the stock to his son-in-law, rather than a constructive trust for his children. This part of the trial court's decision was also affirmed by the Kansas Supreme Court.

<sup>33</sup> 481 F.2d 711 (10th Cir. 1973).

<sup>34</sup> Trustee's Opening Brief at 7-9.

alia, that a resulting trust arises when it appears that by agreement and “without any fraudulent intent the party to whom the conveyance was made, or in whom the title shall vest, was to hold the land or some interest therein in trust for the party paying the purchase money or some part thereof.” The Court holds this statute does not apply when title to property is taken in joint tenancy.<sup>35</sup>

Although *Dexter* appears to support his argument, Trustee neglects to take into consideration how different the *Dexter* facts and context are from this case. In *Dexter*, an implied trust based on an alleged oral agreement between two deceased parties was argued in a challenge to the testamentary disposition of property previously held in joint tenancy. Here, we have the testimony of both parties to a joint tenancy transaction proffered to rebut the presumption of an inter vivos gift. Moreover, Trustee discounts the impact of the Kansas Supreme Court’s decision in *University State Bank v. Blevins*,<sup>36</sup> which was decided seven years after *Dexter* and holds that “[t]he doctrine of resulting trusts is applicable whether property is held in joint tenancy or in severalty.”<sup>37</sup>

*Blevins* started as a bank foreclosure action against a commercial tract of real property titled jointly in the names of a father and his son and daughter-in-law. After the property was sold and the mortgage paid off, a dispute arose between the joint tenants over the proceeds from the sale. Father purchased the property for use in his business and put his son’s and daughter-in-law’s names on the deeds to facilitate their continuance of the business after his death. The trial court concluded that son and daughter-in-law held legal title to their interest in the real estate as trustees for father. On appeal, son and daughter-in-law, relying on *Dexter*, argued in part, “that the doctrine of resulting trusts is inapplicable to

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<sup>35</sup> *Dexter*, 481 F.2d at 714.

<sup>36</sup> 605 P.2d 91 (Kan. 1980).

<sup>37</sup> *Id.* at 92.

property held as joint tenants with right of survivorship.”<sup>38</sup>

The Kansas Supreme Court rejected that argument, stating that reliance on *Dexter* was misplaced. The court first explained that although resulting trusts are not presumed in Kansas, pursuant to KSA § 58-2408, “a resulting trust may be established upon proof that the one paying consideration and the one taking title entered into an agreement, without any fraudulent intent, that the latter was to hold the property or some interest therein for the former.”<sup>39</sup> The court affirmed the trial court’s finding of a resulting trust, holding:

The statute, K.S.A. 58-2408, speaks of “the land or some interest therein[.]”; joint interests are not excluded. In *Winsor v. Powell*, 209 Kan. 292, 497 P.2d 292 (1972), we found that the incidents of joint ownership of personal property (including right of survivorship) were no bar to a resulting trust. By the same rationale, the holding of title to realty in joint tenancy or as tenants in common does not prevent there being a resulting trust.<sup>40</sup>

*Blevins* remains good law. Further, this Court has previously indicated that if the elements of KSA § 58-2408 are met, an implied trust may arise with respect to real property held in joint tenancy.<sup>41</sup> We are not persuaded by Trustee’s argument that under Kansas law there could be no resulting trust for Mother’s benefit simply because the property was held in joint tenancy.

Trustee next argues that even if parol evidence was admissible to vary the

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<sup>38</sup> *Id.* at 94.

<sup>39</sup> *Id.* at 92.

<sup>40</sup> *Id.* at 94-95.

<sup>41</sup> *Morris v. Kasparek (In re Kasparek)*, 426 B.R. 332, 342-43 (10th Cir. BAP 2010). In *Kasparek*, this Court stated:

All joint tenants acquire equal undivided interests as a matter of law unless otherwise stated in the deed. If a party who paid the purchase price for real estate (who may or may not be named on the deed) claims that the record owners (who may or may not be joint tenants with the payor) hold their interests in trust for the payor’s benefit, no trust arises unless the alleged beneficial owner establishes the elements of Section 58-2408.

*Id.* at 342.

terms of the deed, the evidence was insufficient to establish that Debtor held his interest in the Property for the benefit of Mother.<sup>42</sup> Specifically, Trustee asserts that the standard of proof for the creation of the trust in this case is clear and convincing evidence, not the preponderance of the evidence standard applied by the bankruptcy court. To support his argument, Trustee urges that KSA § 58-2408 must be read “in conjunction with Section 407 of the Kansas Uniform Trust Code.”<sup>43</sup>

Kansas adopted its Uniform Trust Code in 2002. The section Trustee relies upon provides:

58a-407. Evidence of oral trust

Except as required by K.S.A. 59-606, and amendments thereto, with respect to testamentary trusts or K.S.A. 33-105, 33-106 and 58-2401, and amendments thereto, a trust need not be evidenced by a trust instrument, *but the creation of an oral trust and its terms may be established only by clear and convincing evidence.*<sup>44</sup>

KSA § 58a-102, which defines the scope of the Uniform Trust Code, provides that “[t]his code applies to *express trusts*, charitable or noncharitable, and trusts created pursuant to a statute, judgment, or decree that requires the trust to be administered in the manner of an express trust.”<sup>45</sup> As made clear by the drafters’ comments, “[t]he Uniform Trust Code, while comprehensive, applies only to express trusts. Excluded from the Code’s coverage are resulting and constructive trusts, which are not express trusts but remedial devices imposed by law.”<sup>46</sup>

In this case, the bankruptcy court found that Debtor held his interest in the Property in an implied trust for the benefit of Mother pursuant to KSA § 58-2408,

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<sup>42</sup> Trustee’s Opening Brief at 10-14.

<sup>43</sup> *Id.* at 11.

<sup>44</sup> Kan. Stat. Ann. § 58a-407 (emphasis added) (West 2013).

<sup>45</sup> Kan. Stat. Ann. § 58a-102 (emphasis added) (West 2013).

<sup>46</sup> *See id.* Uniform Trust Code Comments.

not that an express trust was created between the parties.<sup>47</sup> The Kansas Supreme Court has clearly indicated that the lesser, or ordinary, civil standard of proof is applicable for establishment of an implied trust under KSA § 58-2408. In *Blevins*, the appellants argued the standard was “clear and satisfactory evidence,” but the court determined that previous case law did not compel such a standard.<sup>48</sup> The court held that “[t]he standard of proof for establishing an agreement necessary to establish a resulting trust is the usual preponderance of the evidence test; ‘clear and convincing’ evidence is not the requirement.”<sup>49</sup> Therefore, Trustee’s argument that the bankruptcy court erred in applying the wrong evidentiary standard is without merit.

## V. CONCLUSION

Trustee has not demonstrated that the bankruptcy court committed error in finding Debtor held only bare legal title in the Property, with the equitable interest in an implied trust for Mother’s benefit. Since Debtor’s transfer of bare legal title to Sister is not one that can be avoided pursuant to § 548, we AFFIRM the bankruptcy court’s order denying Trustee’s complaint.

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<sup>47</sup> *First Memorandum Opinion* at 5-6, in Appellant’s App. at 176-77 and nn. 3-4.

<sup>48</sup> *University State Bank v. Blevins*, 605 P.2d 91, 94 (Kan. 1980) (internal quotation marks omitted).

<sup>49</sup> *Id.* at 92.