You've Got an Amicus Curiae in Me (or Two)

The Importance of *In re Cates*

BY LINDSAY J. OBERT

This article discusses Colorado's race-notice statute in the context of In re Cates.

This article explores Colorado's race-notice statute, CRS § 38-35-109, by following *Walters v. Cates (In re Cates)*[1] as it traveled over the course of six years from the US Bankruptcy Court for the District of Colorado to the Tenth Circuit Court of Appeals. From a real estate perspective, the *Cates* facts present a fascinating look at the importance of the timing, recordation, and execution of documents affecting real property, and the resulting significant impact on a variety of bankruptcy rights if this importance is overlooked.

Practitioners recognized early on that the potential implications of *Cates* on Colorado real estate transactions were far-reaching. Accordingly, two amicus curiae sought involvement in the appeal and requested permission to file briefs with the Tenth Circuit: Land Title Association of Colorado and the Colorado Bar Association Real Estate Section. Both amici had concerns about the case's potential impact on Colorado laws regarding conveyancing, security of title, marketability of title, and the accuracy and completeness of real property records. Ultimately, the Tenth Circuit reversed the bankruptcy court's initial holding, thus preserving and protecting the race-notice statute as urged by the trustee of the subject bankruptcy estate (Trustee) and both amici.

> "From a real estate perspective, the *Cates* facts present a fascinating look at the importance of the timing, recordation, and execution of documents affecting real property, and the resulting significant impact on a variety of bankruptcy rights if this importance is overlooked."

The Bankruptcy Case: Is There a Homestead Exemption?

When Diann Marie Cates filed for Chapter 7 bankruptcy protection in 2015 she likely had no idea what an uproar her financial situation would cause in both the real estate and bankruptcy realms. At first, her potential homestead exemption (valued at $52,000) for a condominium in Durango (the property) appeared straightforward, but it soon became complicated. On her Schedule D, identifying "Creditors Holding Secured Claims," Cates noted the existence of a $135,000 deed of trust recorded against the property.[2] The holders of this secured claim were Cates's father L. Edmund Cates and sister Jann Redele Cates (collectively, Cateses).[3] Cates estimated that her condominium was valued at approximately $187,000,[4] which was the exact amount of the deed of trust plus the $52,000 homestead exemption available to debtors under CRS §§ 38-41-201(1)(a), -201.6, and -202. The Trustee objected, alleging that Cates's "misconduct warrants the denial of her homestead exemption" because she had "[used] the exemption to further her scheme of defrauding creditors by impermissibly shielding assets."[5] The Trustee cited the following facts in support of his objection:

- Cates filed her bankruptcy case on August 11, 2015.
- On August 1, 2012, Cates executed a promissory note (note) in the original principal amount of $135,000 payable to her father and sister.
- The note was secured by a deed of trust dated August 1, 2012, but not recorded in the real property records of La Plata County until March 4, 2013.
- Before recording the deed of trust, Cates transferred her interest in the property to the "Diann M. Cates Family Trust," a revocable one-party living trust (Trust), by quitclaim deed executed on February 4, 2013.
- The quitclaim deed was recorded the same day as the Trust.
- The Trust was self-settled: Cates was the settlor, trustee, and beneficiary.
- On August 3, 2015, eight days before she filed her bankruptcy case, the Trust (by Cates) conveyed the property back to Cates, individually, by quitclaim deed executed and recorded the same day.[6]

These facts remained uncontested through to the final appeal.

The Trustee argued that Cates had "encumbered the Property with an insider loan, but conveyed the Property to the Trust before the Deed of Trust was recorded; thus, preventing the Deed of Trust from attaching to the Property."[7] The Trustee concluded that "[b]y conveying the Property to the Trust," Cates shielded the property from collection by other creditors.[8] Moreover, the Trustee argued, because Cates had "accumulated significant credit card debt," it was foreseeable that those creditors would seek judgments and lien the property—in fact, Cates disclosed an ongoing collection matter at the time of her filing.[9] In the days just before her filing, the Trust (by Cates) conveyed the property back to Cates, with the result that (1) the property had been "shielded" by the Trust, and "with an imminent bankruptcy filing" any judgments that would "attach" to the property would be eliminated as "avoidable preferences"; and (2) the transfer back to Cates would allow her to assert a homestead exemption not otherwise allowed for the Trust.[10]

In response, Cates first acknowledged that the parties agreed as to the documents at issue and the dates of recordation.[11] Cates then pointed out that "objections to exemption claims are governed by state law," and the facts of *In re Gardner*,[12] which the Trustee relied on, were distinguishable from Cates's case because "intentional and bad faith misconduct by financially sophisticated debtors" were present in *Gardner* but not in *Cates*.[13] Cates argued that the *Gardner* Court cited to well-established case law that stood for the "proposition that claiming the Colorado homestead exemption as to real estate is a *valid exemption*, even if that claim of exemption would have been a fraud against creditors if claimed with respect to *personal property*."[14]

Cates further argued that self-settled, revocable trusts are common estate-planning tools, and her Trust did not preclude creditors from accessing the Trust corpus.[15] For this reason, and with the understanding that the settlor of such a Trust "is considered the owner of the trust property until death," conveying the property into the Trust could not be said to be fraudulent because the property was not out of reach of creditors.[16] Further, Cates argued in her response to the Trustee's objection that a notice of the Trust was not recorded in the real property records pursuant to CRS § 38-30-108, which perhaps resulted in her taking title to the property (again), inadvertently, in her own name.[17] Thus, Cates argued, there were no "attachment" issues, and the lien created by the deed of trust was unaffected by the conveyance to the Trust.[18] And if Cates never lost ownership of the property, despite its transfer to the Trust, the homestead exemption was still intact and available to her.[19] The bankruptcy court entered an order discharging debtor on November 23, 2015, essentially finding in favor of Cates and rejecting the Trustee's objections.[20]

The Adversary Case: When did the "Transfer" Occur?

Undeterred, the Trustee filed an adversary proceeding against the Cateses on May 27, 2016, alleging that the conveyance of the property from the Trust back to Cates on August 3, 2015, was "preferential pursuant to 11 U.S.C. § 547(b)" because (1) it was made for or on account of an antecedent debt owed by Cates before August 3, 2015, (2) it occurred while Cates was insolvent, (3) it was made on or within 90 days before Cates's bankruptcy filing, and (4) the conveyance back to Cates allowed her family members to "receive more than they would have" had the transfer not occurred and they were instead forced to receive payment along with other creditors under the Bankruptcy Code.[21] The Trustee further argued that if the lien were avoided, the deed of trust would become property of Cates's bankruptcy estate, and the deed of trust should be assigned to the Trustee.[22]

The parties eventually submitted cross-motions for summary judgment. The Cateses asserted that they were entitled to judgment on the Trustee's first claim (avoidable transfer under 11 USC § 547(b)) because the "undisputed facts establish that the transfer of the [lien] interest to [the Cateses] occurred upon the execution of the Deed of Trust on August 1, 2012,"[23] and "[a]ctual notice of the transfer occurred on March 4, 2013 when the Deed of Trust was recorded in La Plata County."[24] The Cateses further argued that CRS § 38-35-109(1) does not require the recordation of an "instrument affecting title to real property" to be valid as to (1) the parties to the conveyance and (2) those who had notice of the unrecorded document before acquiring an interest.[25]

The Cateses maintained that the Trustee was incorrect in asserting that the deed of trust did not "attach" to the property until August 3, 2015.[26] Moreover, the fact that the Trust was the owner of the property at the time the deed of trust was recorded did not affect the validity of the lien or lien perfection[27] because the late recording of the deed of trust would "invalidate [Cates's] lien as to any person with rights who records their interest before March 3, 2013," and after that date, the lien was of public record and gave subsequent purchasers constructive notice.[28] The Cateses argued that *Bandell Investments, Ltd. v. Capitol Federal Savings and Loan Ass'n of Denver* and *Carmack v. Place* illustrated this concept in their favor.[29]

Lastly, the Cateses addressed whether the Trustee's interest in the property had priority over the deed of trust, arguing that it did not because "[Cates] transferred a lien interest to [the Cateses] [in 2012]," and that interest was "perfected as to third parties" when the deed of trust was recorded on March 4, 2013.[30] They further argued that the Trustee "had constructive notice" of the deed of trust at the time Cates's bankruptcy case was filed, the "transfer of interest" from Cates to the Cateses occurred in 2012 when the deed of trust was executed, and the interest was "perfected" upon recordation in March 2013.[31] Thus, the recordation gave "actual notice" to the Trustee and others of the deed of trust well before the 90-day pre-filing "look back" period.[32]

The Trustee responded and filed a cross-motion for summary judgment,[33] asserting in his response that the Cateses' interpretation of Colorado's race-notice statute was erroneous and "ignores case law that has addressed scenarios similar to the one before the Court."[34] Focusing on the importance of recording documents, the Trustee argued that this procedure is essential to preserving and identifying interests affecting title:

> Recording an instrument is notice only to those persons claiming under the same

> chain of title, *i.e.* the actual owner signs the instrument . . . . [A]n instrument that is not signed by the owner of the property or lacks a reference to the non-chain of title party is not "properly recorded" [and therefore] the instrument is not a valid lien and . . . does not place parties on constructive notice.[35]

As applied to *Cates*, the Trustee argued that he did not have constructive notice of the deed of trust because it was executed by Cates individually, not by the Trust, which was the property owner at the time.[36] The Trustee further argued that the deed of trust did not contain any irregularities that would "tip off" third parties that an outside interest was affected—that is, the Trust[37]—because the deed of trust did not mention the Trust.[38]

The Trustee asserted in his cross-motion for summary judgment that he had met the elements of a preferential transfer under 11 USC § 547(b) because (1) there was no dispute that the deed of trust was a transfer of Cates's interest in the property, (2) the Cateses were Cates's creditors at the time of the transfer, and (3) the deed of trust was made on account of an "antecedent debt" owed by Cates to the Cateses before the transfer was made.[39] While the note and deed of trust were executed much earlier, the deed of trust was not a "transfer" until August 3, 2015—nearly three years after the Cateses loaned Cates the funds.[40] The Trustee then argued that at the time the deed of trust "attached" to the property on August 3, 2015, Cates was legally presumed to be (and actually was) insolvent.[41] Lastly, the Trustee argued that the transfer enabled the Cateses, as Cates's creditors, to receive more in the bankruptcy than they would have if the transfer had not taken place.[42]

In its order granting the Cateses' summary judgment motion,[43] the bankruptcy court identified only one major issue, the timing of the transfer under 11 USC § 547. While § 547(e) governs timing of the transfer for purposes of avoidance, the court had to follow Colorado state law to determine when the transfer was "perfected."[44] Under the Bankruptcy Code, a transfer is not made until the debtor has acquired rights in the property transferred, even if all steps have been taken to perfect the transfer.[45] Thus, the bankruptcy court reasoned that the timing under § 547(e)(3) depends on three points in time: (1) when the transfer takes effect, (2) when the transfer is perfected, and (3) when the debtor acquires rights in the transferred property.[46]

Initially, the bankruptcy court appeared to agree with the Trustee that the deed of trust "attached to the Property no later than August 3, 2015, when the Trust quitclaimed the Property to [Cates] and [this] quitclaim deed was recorded."[47] But the court further stated: "The most significant wrinkle in this case, however, concerns the self-settled revocable nature of the Trust, namely, did [Cates] retain sufficient rights in the Property despite title being held by the Trust for [the] Deed of Trust to have been perfected when it was recorded March 4, 2013?"[48] The Cateses argued that Cates's transfer of title to the Trust on February 4, 2013, *did not* divest Cates of ownership rights based on the Colorado case *Pandy v. Independent Bank*.[49] The bankruptcy court agreed and found significant factual similarities with *Pandy*.

The Pandy *Problem . . .*

Taking a brief detour into the *Pandy* case, the court noted several similarities worth mentioning here. In *Pandy*, Joseph T. Pandy and Elizabeth Pandy were co-settlors of a revocable trust that held title to Colorado real property.[50] Defendant Independent Bank obtained two judgments against Joseph in Michigan and proceeded to domesticate and record those judgments in Colorado against the Pandy real property.[51] The bank initiated an action to quite title and for a decree of foreclosure.[52]

On appeal, the Colorado Supreme Court was faced with determining "whether property titled in the name of a judgment debtor's co-settled revocable trust is subject to a judgment lien against the debtor."[53] In light of the definition of a "revocable trust," which allows a settlor to terminate the trust and "recover trust property and any undistributed income," the Court noted that while legal title to trust assets may be held by a separate entity (i.e., the trust), Joseph (as settlor) retained the functional equivalent of "ownership of the trust assets."[54] Accordingly, the Court determined that the assets of the Pandys' revocable trust were properly subject to the claims of Joseph's personal creditors.[55]

. . . and What it Meant to Cates

Applying this same logic to Cates's case, the bankruptcy court determined that Cates "retained an ownership interest in the Property even though [title] was held in the name of the Trust when the Deed of Trust was recorded."[56] The same result would be reached under Arizona law, which applied to the Trust as well.[57] This resulted in the perfection of the deed of trust upon its recordation on March 4, 2013. The bankruptcy court rejected the Trustee's argument that *Pandy* was narrow in scope, applying only to judgment lien creditors.[58]

Thus, because Cates had an ownership interest in the property on March 4, 2013, under § 547(e)(2)(B) and (e)(3) the "transfer" took place on that date.[59] This March 4 date is well outside the preference period identified in § 527(b)(4), so the Trustee could not avoid the transaction.

Appealing to the BAP: What about the Timeline of Events?

On October 26, 2017, the Trustee filed its notice of appeal and statement of election to the Tenth Circuit's bankruptcy appellate panel (BAP). The issue was "when the transfer of an interest in the Deed of Trust occurred for preferential transfer purposes."[60] The BAP affirmed the bankruptcy court's findings but did not address what rights Cates had in the property as of the recordation date.[61] The BAP issued its opinion on August 24, 2018, just over three years after Cates filed her original bankruptcy petition.

The BAP started its analysis by applying § 547(e)(1) and (2), noting that the parties agreed that "the time of transfer is governed by § 547(e)(2)(B) and the transfer occurred when the transfer was perfected," but disagreed as to the date of perfection.[62] To determine this date of perfection, the BAP looked to Colorado law to decide when a bona fide purchaser (BFP) of the property (from Cates) could obtain an interest superior to that of the Cateses in the deed of trust.[63] The BAP cited first to CRS §§ 38-38-101 to -113 to find that "the properly executed but *unrecorded* Deed of Trust created a lien against

the Property," so the deed of trust became a lien on the date it was signed in 2012 because Cates owned the property at that time.[64]

The BAP then discussed Colorado's race-notice statute, finding that the purpose of such a statute is to protect purchasers "against the risk of prior secret conveyances" by a seller and to allow a purchaser to "rely on the condition of title as it appears of record."[65] Proper recordation of documents provides others with constructive notice of an interest affecting title, so BFPs who acquire an interest in property without notice of a prior unrecorded interest, deed, or encumbrance on the same property are protected.[66] The BAP also noted that purchasers of real property in Colorado are charged with searching the grantor/grantee indices to investigate documents that may affect the subject real property.[67] However, a purchaser is only required to search from the time the seller "actually acquired the title interest" through the date of recordation of the transaction that transferred the interest from the seller.[68] A conveyance that occurs outside of this timeframe "is not within the chain of title because a searcher has the right to assume that a party who has parted with record title will make no further conveyances of the property."[69] This would have resulted in a finding for the Trustee. However, the BAP did not end its inquiry there but further stated that "[d]ocuments outside the chain of title provide constructive notice of interests affecting real property if 'a possible irregularity appears in the record which indicates the existence of some outside interest by which the title may be affected.'"[70] In such case, a purchaser is "bound to investigate" and is charged with knowledge of the would-be fruits of this investigation.[71]

With this reasoning in mind, the BAP concluded that if a purchaser buying from Cates after March 4, 2013, had searched the grantor/grantee index for the property under "Diann M. Cates," the purchaser would have found the quitclaim deed from Cates to the Trust,[72] even though the quitclaim deed was recorded *a month earlier* than the deed of trust.

The BAP noted the Trustee's argument that a purchaser of the property from the Trust would not discover the deed of trust because it was recorded after the Trust took title and was thus outside the chain of title.[73] The Trustee urged that construing the law in this manner—to require a purchaser to take title subject to an unknown lien—"would have a chilling effect on real estate lending in Colorado because it would effectively make it impossible to insure title."[74] The BAP centered its focus on the timing of the transfer for preferential analysis rather than the arguments under Colorado law.

> "The BAP then discussed Colorado's race-notice statute, finding that the purpose of such a statute is to protect purchasers 'against the risk of prior secret conveyances' by a seller and to allow a purchaser to 'rely on the condition of title as it appears of record.'"

In the end, the BAP concluded that the "transfer" took place on March 4, 2013, outside of the preference period, and it affirmed the bankruptcy court. The BAP did not address the Trustee's arguments under *Pandy* or whether a different outcome was inescapable due to the application of Arizona law, and it did not find the Trustee's arguments under *In re Bryan*[75] to be persuasive.

Six Years Later: The Tenth Circuit's Final Decision

On September 6, 2018, the Trustee sought his final appeal to the Tenth Circuit. The Trustee presented two issues for review: (1) whether the bankruptcy court erred in finding that the transfer took place on March 4, 2013, rather than August 3, 2015; and (2) if it so erred, whether the Tenth Circuit could grant the Trustee's cross-motion for summary judgment.[76] As to the first argument, the Trustee argued that "[i]n applying [§ 547(e)(1)(A)], it is critical to carefully track the express language of the statute with the facts of the case because the statutory language dictates Colorado law applies."[77] Applying the statute, the Trustee demonstrated that:

> [the deed of trust] . . . is perfected [under Colorado law] when a bona fide purchaser of the [property] from [Cates], against whom [Colorado] law permits [the deed of trust] to be perfected cannot acquire an interest that is superior to the interest of the [Cateses].[78]

The Trustee argued that these elements were satisfied on August 3, 2015, based on the operation of Colorado real estate law:

> Colorado law provides that only the record owner of property may convey the property to a BFP. Colorado law provides that only transfers or conveyances within the chain of title are binding on BFPs. Consequently, Colorado law provides that a BFP's interest is superior to those interests not recorded in the chain of title prior to the BFP recording its interest.
>
> Therefore, under Colorado law as applied to 11 U.S.C. § 547(e)(1)(A), August 3, 2015 is the first date after the Deed of Trust was recorded that [Cates] could have transferred the Property to a BFP, the Deed of Trust could have been perfected against a BFP's interest, and a BFP could no longer acquire an interest superior to the Deed of Trust.[79]

Amici were permitted to file briefs, which supported reversal of the bankruptcy court's decision.[80] And once again, *Pandy* reappeared in the analysis.

The Cateses argued in their answer brief that the bankruptcy court and the BAP were each correct in their ultimate conclusions that the date of transfer was March 4, 2013, because Cates retained an interest in the property despite the transfer of title to the Trust.[81] The case proceeded to oral argument on September 25, 2019.

On September 28, 2021, more than six years after Cates originally filed her bankruptcy petition, the Tenth Circuit issued its opinion finding that the Trustee met the requirements of § 547(b)(4) and reversed and remanded the matter to the bankruptcy court.[82]

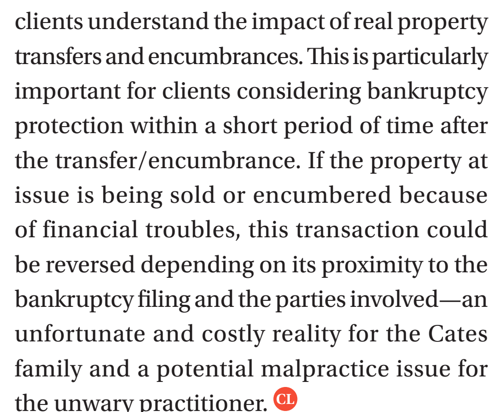
The Tenth Circuit also focused on the timing of events, concluding that "when" a transfer of real property is made depends on the application of "the state law where the property is located," which in this case was Colorado.[83] Delving into the language of Colorado's race-notice statute and the importance of the grantor/grantee index system, the Tenth Circuit found that when the first quitclaim deed was recorded, and up until at least when the Trust conveyed the property back to Cates, the deed of trust was outside the chain of title.[84]

Of note, the Tenth Circuit did not address amici's argument that the deed of trust was still outside the chain of title even after Cates recorded the second quitclaim deed.[85] It also rejected the "irregularity" argument that would have otherwise put a purchaser on notice of an interest, notably because "a quitclaim deed in and of itself is not an irregularity that prompts further inquiry under Colorado law."[86] Therefore, the Tenth Circuit rejected the Cateses' argument that the deed of trust was perfected on March 4, 2013, because a BFP would have been on notice of the lien.

The Tenth Circuit next turned to the arguments regarding *Pandy*, specifically finding that whether Cates retained an interest in the property was irrelevant to the lien priority scheme under Colorado law and did not alter the language of § 547(e)(1) and (2) as to the *timing* of the transfer.[87] It concluded that the "deed of trust was unperfected between the time it was recorded and the time the debtor recorded the second quitclaim deed on August 3, 2015," and therefore occurred within the preference period.[88]

The Takeaway

The journey of *In re Cates* through the courts did not ultimately alter real property law in Colorado, the race-notice statute, or the operation of the grantor/grantee index system. But *Cates* illustrates how important it is to promptly record real estate documents and to make sure



clients understand the impact of real property transfers and encumbrances. This is particularly important for clients considering bankruptcy protection within a short period of time after the transfer/encumbrance. If the property at issue is being sold or encumbered because of financial troubles, this transaction could be reversed depending on its proximity to the bankruptcy filing and the parties involved—an unfortunate and costly reality for the Cates family and a potential malpractice issue for the unwary practitioner. CL

Lindsay J. Obert (fka Miller) is a senior litigation associate with Folkestad Fazekas Barrick & Patoile, P.C. in Castle Rock. She specializes in real estate litigation with an emphasis in construction defect, purchase/sale disputes, and landlord/tenant matters—obert@ffcolorado.com. Obert, along with Andrew Toft and Daniel Sweetser, co-authored the amicus brief filed in *In re Cates* on behalf of the CBA's Real Estate Law Section.

Coordinating Editors: Christopher Bryan, cbryan@garfieldhecht.com; Adam Aldrich, adam@aldrichlegal.com; Reagan Larkin, rlarkin@messner.com; Eric Snyder, e.snyder@wsmtlw.com; Amy Brimah, amy@brimahlaw.com

NOTES

1. *Walters v. Cates*, No. 18-1355 (10th Cir. 2021).
2. *In re Cates*, No. 15-18969-MER, Doc #1, Chapter 7 Voluntary petition at 25 (Bank.D.Colo. Aug. 11, 2015).
3. *In re Cates*, No. 15-18969-MER, Doc #14, Trustee's Objection to Debtor's Claim of Exemption at 1 (Bankr.D.Colo. Oct. 19, 2015).
4. *In re Cates*, No. 15-18969-MER, Doc #1 at 25.
5. *In re Cates*, No. 15-18969-MER, Doc #14 at 2.
6. *Id.* at 1–2.
7. *Id.* at 2.
8. *Id.*
9. *Id.*
10. *Id.*
11. *In re Cates*, Case No. 15-18969-MER, Doc #18, Debtor's Response to Trustee's Objection to Debtor's Claim of Exemption, Request for Summary Disposition as a Matter of Law, and in the Alternative for Hearing at 1 (Bankr.D.Colo. Oct. 28, 2015).
12. *In re Gardner*, No. 12-12485 HRT, 2013 WL 3804594 (Bankr.D.Colo. 2013).
13. *In re Cates*, No. 15-18969-MER, Doc #18 at 1–2.
14. *Id.* at 2 (emphasis added).
15. *Id.* at 4.
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.* at 4–5.
20. *In re Cates*, No. 15-18969-MER, Doc #22, Order Discharging Debtor (Bankr.D.Colo. Nov. 23, 2015).
21. *Walters v. Cates (In re Cates)*, No. 16-01202-MER, Doc. #1, Complaint (Bankr.D.Colo. May 27, 2015).
22. *Id.* at 3–4. A third claim was also asserted but was later dismissed by the Trustee.
23. *Walters v. Cates (In re Cates)*, Case No. 16-01202-MER, Doc. #18, Defendant's Motion for Summary Judgment and Memorandum Brief in Support at 5 (Bankr.D.Colo. Mar. 29, 2015).
24. *Id.*
25. *Id.* at 5–6. *See also Ranch O, LLC v. Colo. Cattleman's Agric. Land Tr.*, 361 P.3d 1063 (Colo.App.

2015).

26. *Walters v. Cates (In re Cates)*, Case No. 16-01202-MER, Doc. #18 at 5.

27. *Id.* at 6.

28. *Id.* at 6–7.

29. *Id.*; *Bandell Invs., Ltd. v. Capitol Fed. Sav. and Loan Ass'n of Denver*, 88 B.R. 210 (D.Colo. 1987) (trustee precluded from exercising "strong arm" powers because the late recorded encumbrance had been properly recorded, providing constructive notice under CRS § 38-35-109(1)); *Carmack v. Place*, 535 P.2d 197 (Colo.App. 1975) (deed severing joint tenancy was valid even though it was executed four years before grantor's death, but not recorded until six days after death).

30. *Walters v. Cates (In re Cates)*, Case No. 16-01202-MER, Doc. #18 at 7–8.

31. *Id.* at 8.

32. *Id.* The Cateses also requested summary judgment in their favor as to all remaining claims, which depended on the success of the first claim.

33. *Walters v. Cates (In re Cates)*, No. 16-01202-MER, Doc. #19, Plaintiff's Response to Defendants' Motion for Summary Judgment and Plaintiff's Cross-Motion for Summary Judgment and Memorandum of Law in Support Thereof (Bankr.D.Colo. Apr. 12, 2017).

34. *Id.* at 5. *See also In re Moreno*, 293 B.R. 777 (Bankr.D.Colo. 2003); *Nile Valley Fed. Sav. and Loan Ass'n v. Sec. Title Guar. Corp. of Baltimore*, 813 P.2d 849 (Colo.App. 1991).

35. *Walters v. Cates (In re Cates)*, No. 16-01202-MER, Doc. #19 at 5.

36. *Id.* at 7.

37. *Id.*

38. *Id.* at 7–8.

39. *Id.* at 12.

40. *Id.* at 13.

41. *Id.*

42. *Id.* at 14.

43. Before entry of this order, the parties engaged in supplemental briefing on (1) whether § 547(e) controls the timing of the transfer; (2) what effect the revocable nature of the Trust had on the timing of the transfer; and (3) the effect of Arizona law on the timing of the transfer, because the Trust agreement stated that Arizona law applied.

44. *Walters v. Cates (In re Cates)*, No. 16-01202-MER, Doc. #42, Order at 6–7 (Bankr.D.Colo. Oct. 24, 2017).

45. *Id.* at 7.

46. *Id.* at 8.

47. *Id.* at 10.

48. *Id.* at 11.

49. *Id.* at 11; *Pandy v. Indep. Bank*, 2016 CO 49.

50. *Id.*

51. *Id.*

52. *Id.* at 12; *Pandy*, 2016 CO 49 at ¶ 6.

53. *Id.* at 12; *Pandy*, 2016 CO 49 at ¶ 13.

54. *Id.* at 12; *Pandy*, 2016 CO 49 at ¶ 16.

55. *Id.* at 13; *Pandy*, 2016 CO 49 at ¶¶ 18–21.

56. *Walters v. Cates (In re Cates)*, No. 16-01202-MER, Doc. #42 at 13.

57. *Id.* at 13. *See* Ariz. Rev. Stat. § 14-10505A.1.

58. *Walters v. Cates (In re Cates)*, No. 16-01202-MER, Doc. #42 at 14.

59. *Id.* at 15.

60. *Walters v. Cates (In re Cates)*, 588 B.R. 916, 921 (Bankr.D.Colo. 2018).

61. *Id.* at 922.

62. *Id.*

63. *Id.* at 923.

64. *Id.* (emphasis added).

65. *Id.*

66. *Id.* at 923–24.

67. *Id.* at 924.

68. *Id.*

69. *Id. See also* 5 Tiffany, *The Law of Real Property* § 1268 26 (Callaghan and Co. 1939).

70. *Cates*, 588 B.R. at 924.

71. *Id.*

72. *Id.* at 925.

73. *Id.*

74. *Id.* at 925–26.

75. *Id.* at 927–28; *Clark v. Peters (In re Bryan)*, 547 F. App'x 892 (10th Cir. 2013). In *Bryan*, the Tenth Circuit held that the recorded judgment lien did not attach to the debtor's equitable interest in the spendthrift trust's assets. Under Colorado law, judgment liens do not attach to real property until they are properly recorded, and they attach to all property owned at the time of or acquired after recording. The BAP here determined that because the deed of trust was a "consensual lien," and because Cates owned the property at the time she granted the deed of trust, the lien created thereby attached to the property when it was granted, even if it was perfected later (upon recordation).

76. *Walters v. Cates (In re Cates)*, No. 18-1355, Appellant Jared Walters' Opening Brief at 2.

77. *Id.* at 13.

78. *Id.* at 13–14.

79. *Id.* at 14.

80. *Walters v. Cates (In re Cates)*, No. 18-1355, Amicus Curiae Brief filed by Land Title Association of Colorado and Amicus Curiae Brief filed by Colorado Bar Association.

81. *Walters v. Cates (In re Cates)*, No. 18-1355, Appellee/Respondent's Brief filed by Jann Redele Cates and L. Edmond Cates.

82. *Walters v. Cates (In re Cates)*, No. 18-1355, Order and Judgment (B.A.P. 10th Cir. Sept. 28, 2021).

83. *Id.* at 6–7.

84. *Id.* at 8

85. *Id.* at 8, n.4: "While it may also be true that the deed of trust was also outside of the chain of title after the debtor recorded the second quitclaim deed, as the *amici* in this case argue, we decline to address that question. The trustee explicitly conceded that, at the point the second quitclaim deed was recorded, the deed of trust was 'perfected' for purposes of the preference provisions both below and in his opening brief to this court. Accordingly, we deem this argument waived. *See, e.g.*, *In re Motor Fuel Temperature Sales Practices Litig.*, 872 F.3d 1094, 1112 n.5 (10th Cir. 2017)."

86. *Id.* at 9. *See also Franklin Bank, N.A. v. Bowling*, 74 P.3d 308, 313 n.12 (Colo. 2003).

87. *Walters v. Cates (In re Cates)*, No. 18-1355, Order and Judgment at 10 (emphasis added).

88. *Id.* at 11–12.