

STATE OF MICHIGAN
COURT OF APPEALS

ROBIN E. ALLEN and LAURIE MOORE,

Plaintiffs-Appellees,

v

DAVID C. BLUE, Individually and as Personal
Representative of the Estates of BEULAH ANN
BLUE, deceased, and ROBERT VIVIAN BLUE,
deceased,

Defendant-Appellant.

UNPUBLISHED

August 31, 1999

No. 206891

Macomb Probate Court

LC No. 96-148474 CK

Before: Doctoroff, P.J., and Markman and J.B. Sullivan*, JJ.

PER CURIAM.

This is an appeal from the final order in an action brought in Macomb Probate Court seeking to quiet title and determine the parties' respective rights with regard to certain real property on Harsen's Island in St. Clair County. The probate court determined that the disputed property was owned by a tenancy in common, with plaintiffs owning one-half of such tenancy as "joint tenants with full rights of survivorship" and the remaining one-half being owned by defendant and his brother as tenants in common. Thereafter, the probate court granted plaintiff's motion for summary disposition based on the court's lack of subject matter jurisdiction over the unresolved issues of litigation. Defendant now appeals as of right. We affirm in part, reverse in part, and remand.

Robert and Winifred Blue were married in 1949 and had two daughters (plaintiffs) by that union. In 1960, when plaintiffs were seven and nine years old, Robert and Winifred entered into a land contract to purchase cottage property on Harsen's Island. On December 13, 1962, in contemplation of divorce, Robert and Winifred entered into a property settlement agreement which, among other things, conveyed Winifred's interest in the cottage to Robert, to be held "in trust for the minor children of the parties" (plaintiffs). The next month, Robert and Winifred were divorced by a judgment that incorporated the property settlement agreement by reference. Later that year, Robert married Beulah

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

Ann, who had a daughter of her own by a previous marriage. Subsequently, Robert and Beulah had two sons together – defendant and Bryan.

On December 30, 1974, after having paid off the land contract, Robert Blue received from the vendors a warranty deed conveying the cottage property to “Robert V. Blue and Winifred Blue, husband and wife.” On December 9, 1975, Robert recorded the warranty deed, the property settlement agreement, the judgment of divorce, and a quitclaim deed purporting to convey the cottage property from himself to “Robert V. Blue and Beulah A. Blue, husband and wife.” Robert died intestate on July 21, 1983, but his estate was not probated at that time. On February 20, 1984, Beulah executed a quitclaim deed purporting to convey the cottage from herself to “Beulah A. Blue, Bryan V. Blue, and David C. Blue as joint tenants with right of survivorship.” Beulah died on May 27, 1995, leaving a will that attempted to devise the cottage property to defendant. Defendant was appointed the personal representative of both his parents’ estates.

Plaintiffs filed suit in Macomb Probate Court, where the estates were still open, seeking to quiet title to the cottage in themselves as sole owners and to recover mesne profits from defendant, as well as several other forms of relief with regard to the estates of Robert and Beulah Blue. Thereafter, plaintiffs moved for partial summary disposition, pursuant to MCR 2.116(C)(10), regarding the quiet title count in their complaint. Plaintiff’s argued that: (1) Robert’s quitclaim conveyance of the property was null and void because it was in derogation of his duties as a trustee; and (2) plaintiff’s held their beneficial interest in the property as joint tenants with Robert’s interest, and upon his death they came into complete ownership by virtue of survivorship. Defendant opposed plaintiff’s motion and countered with his own motion for partial summary disposition, pursuant to MCR 2.116(C)(10) and MCR 2.116(I)(2), arguing that plaintiff’s claims to the property were barred by both the statute of limitations and by laches.

At a subsequent hearing, the probate court ruled that a one-half interest in the property had been placed in trust for plaintiffs and that Robert’s quitclaim conveyance to himself and Beulah only transferred the one-half interest that he held individually. The court indicated that plaintiffs could look to recover rental if they were allowed it, and that defendant was entitled to pursue compensation for expenses incurred in preserving plaintiff’s one-half interest. The written order, prepared by plaintiff’s counsel, stated that the property was owned by a tenancy in common, with plaintiff’s owning one-half such tenancy as “joint tenants with full rights of survivorship” and with the other one-half owned by David Blue and Bryan Blue “as tenants in common.” The order also stated that the quitclaim conveyances of the property executed by Robert Blue and Beulah Blue respectively, were null and void.

Prior to a scheduled trial, the parties reached a settlement as to all issues except for those relating to the cottage property as between the parties in their individual capacities. An order dismissing the parties in their representative capacities¹ and allowing amendment of the pleadings to state claims relevant to the cottage property was entered June 14, 1997. After defendant filed a counterclaim seeking an equitable lien against the cottage property and/or contribution from plaintiffs for expenditures in maintaining and improving it, plaintiffs moved to dismiss the remaining action based on the court’s lack of subject matter jurisdiction. After a hearing held August 20, 1997, the probate court agreed that it lacked subject matter jurisdiction over the unresolved issues.

On appeal, defendant first argues that the probate court should not have, by summary disposition, granted a one-half interest in the property to plaintiffs, because the statute of limitations and the doctrine of laches should have entitled him, by summary disposition, to sole ownership of the property. We review decisions on motions for summary disposition de novo. *Spiek v Transportation Dep't*, 456 Mich 331, 337; 572 NW2d 201 (1998). When considering a motion brought under MCR 2.116(C)(10), “[t]he court considers the affidavits, pleadings, depositions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists to warrant a trial.” *Id.*

Defendant’s contention that the statute of limitations on an action for the recovery of land, MCL 600.5801; MSA 27A.5801, had run, is merely another way of claiming that plaintiffs’ ownership interest in the cottage had been extinguished by his adverse possession. Establishing adverse possession of real estate requires “clear and cogent evidence that the possession has been actual, visible, open, notorious, exclusive, continuous and uninterrupted for the statutory period of fifteen years, hostile and under a claim of right.” *Walters v Snyder*, 225 Mich App 219, 223-224; 570 NW2d 301 (1997). An adverse claimant may “tack” to his own period of possession those periods of possession by his predecessors in interest provided he can show privity of estate with those predecessors such as by mention of, or reference to, the disputed property at the time of conveyance. *Connelly v Buckingham*, 136 Mich App 462, 474; 357 NW2d 70 (1984).

Because the probate court construed Robert Blue’s quitclaim conveyance as only passing a one-half interest along defendant’s chain of title, held as a tenancy in common with the one-half interest held by plaintiffs, subsequent periods of possession must be examined for the elements of adversity in light of the rights and duties of cotenants. Cotenants in real property are each entitled to possess and enjoy the whole of the property. *Quinlan Investment Co v The Meehan Cos, Inc*, 171 Mich App 635, 639; 430 NW2d 805 (1988). “[A]cts of possession by a cotenant will be presumed to be done consistently with the title of the other cotenant[s] rather than adversely.” *Mackinac Island Dev Co v Burton Abstract & Title Co*, 132 Mich App 504, 513; 349 NW2d 191 (1984).

Admittedly, plaintiffs used the cottage every year from 1980 to 1996, although defendant contends that this was only by his permission. It is clear that the probate court did not err in denying defendant’s motion for summary disposition based on adverse possession because defendant “simply failed to make out a prima facie case of clear title.” *Ingle v Musgrave*, 159 Mich App 356, 362; 406 NW2d 492 (1987). Common courtesy among cotenants (i.e. the asking and granting of permission to use the cottage) and plaintiffs’ failure to contribute money for expenses do not represent clear and cogent evidence of hostility. Thus, because no genuine issue of material fact existed with respect to defendant’s failure to demonstrate the elements of adverse possession, the trial court properly concluded that defendant was not entitled to summary disposition on the basis of adverse possession.

Defendant also contends that the probate court should have granted his motion for summary disposition on a laches theory because he expended a great deal of time and money preserving the property. “Laches is an equitable defense to a claim that may be invoked when the delay in bringing a claim prejudices the other party.” *Great Lakes Gas Transmission Co v MacDonald*, 193 Mich App 571, 577; 485 NW2d 129 (1992). In this case, laches is inapplicable for two reasons. First, the failure

of plaintiffs to bring a quiet title action sooner cannot appropriately be termed a delay because, until the estates of Robert and Beulah Blue went into probate, the property was apparently being possessed, used, and enjoyed consistently with the rights of all the cotenants, and plaintiffs had no reason to bring an action. Second, defendant cannot show prejudice. Defendant asserts that he was prejudiced because he spent a great deal of time and money preserving the property. However, a cotenant may, as the court pointed out, seek an equitable partition of the property, during which the court may take into consideration “the value of the use of the premises by a party or the benefits which a party has conferred upon the premises.” MCL 600.3336; MSA 27A.3336. Thus, we conclude that the probate court properly denied defendant's motion for summary disposition on the basis of a laches theory.

Next, defendant argues that, absent the application of the statute of limitations or laches, there were many unresolved issues of material fact concerning construction of the trust instrument, which should have precluded the granting of plaintiffs’ motion for summary disposition pursuant to MCR 2.116(C)(10). Generally, where the terms of a contract, or in this case the terms of a trust within a contract, are “subject to two reasonable interpretations, factual development is necessary to determine the intent of the parties and summary disposition is therefore inappropriate.” *Meagher v Wayne State University*, 222 Mich App 700, 721-722; 565 NW2d 401 (1997). However, where the language is clear and unambiguous, construction of the terms is a question of law for the court. *Id.* See also *In re Maloney Trust*, 423 Mich 632, 639; 377 NW2d 791 (1985)(Cavanagh, J).

We agree that the terms of the trust were subject to more than one reasonable interpretation and, therefore, ordinarily, summary disposition would not be appropriate. *Meagher, supra* at 721-722. However, the probate court had access to all of the evidence there was, and reasonably ever was going to be, regarding the terms of the trust. Essentially, when the court construed the trust, it tried the issue. The proceeding differed from an actual trial only in name, formality, and notice to the parties. While the combination of summary disposition and trial procedures when addressing a summary disposition motion is error, the error can be harmless. *Whitcraft v Wolfe*, 148 Mich App 40, 49; 384 NW2d 400 (1985); *Sanchez v Lagoudakis (On Remand)*, 217 Mich App 535, 554-555; 552 NW2d 472 (1996) rev’d on other grounds 458 Mich 704 (1998).

The probate court interpreted the relevant portion of the property settlement agreement as placing in trust a one-half undivided interest in the cottage. Essentially, the court held that Robert Blue’s obligation to continue making payments on the land contract did not diminish the percentage of ownership held in trust for plaintiffs. The probate court’s interpretation was reasonable. If this had been a proper bench trial,² it could not be said that the court’s findings were clearly erroneous. Thus, we conclude that the probate court did not err in resolving the interpretation of the trust instrument in the context of plaintiffs’ motion for summary disposition.

However, our examination of the January 22, 1997, order quieting title reveals that, in part, the law was incorrectly applied to the court’s reasonable construction of the trust instrument. Since the presumption of tenancy in common does not apply to grants in trust, MCL 554.45; MSA 26.45, and both plaintiffs took identical interests by the same instrument at the same time with the same rights of possession, it then follows that plaintiffs held equitable title to a one-half undivided interest in the cottage as joint tenants. *In re Ledwidge Estate*, 136 Mich App 603, 605; 358 NW2d 18 (1984). To the

extent that the written order described plaintiffs' interest as "joint tenants with full rights of survivorship," the order erroneously converted a joint tenancy (which by definition has survivorship rights) into joint life estates with dual indestructible contingent remainders. *Albro v Allen*, 434 Mich 271, 275-276; 454 NW2d 85 (1990); *Snover v Snover*, 199 Mich App 627, 629-630; 502 NW2d 370 (1993).

Moreover, the court did not find on the record that Robert and Beulah's quitclaim conveyances were "null and void" as expressed in the written order, and such a finding would be irreconcilable with the finding that defendant and Bryan Blue held a one-half interest in the property. On the record, the court correctly concluded that the conveyance from Robert Blue to himself and Beulah Blue only "succeeded as to the one half of the undivided interest that he retained in ownership." Since it is presumed that such a conveyance creates a tenancy by the entirety, which carries with it a right of survivorship, it follows that upon Robert's death, the one-half undivided interest passed in fee to Beulah Blue without becoming part of Robert's estate. Beulah Blue's subsequent quitclaim conveyance then effectively passed this same interest to "Beulah A. Blue, Bryan V. Blue, and David C. Blue as joint tenants with right of survivorship." As mentioned above, this language does not create an ordinary joint tenancy, but rather creates joint life estates with indestructible contingent remainders. *Albro, supra* at 275-276; *Snover, supra* at 629-630. A quiet title action which construes this language differently "however reasonable under certain family circumstances" requires reversal because it would "create chaos among property rights." *Snover, supra* at 630. Thus, the probate court's order quieting title is erroneous to the extent that it states that the one-half interest is owned by defendant and Bryan as tenants in common.

In sum, with respect to the court's grant of partial summary disposition, we hold: (1) the combination of trial procedures and summary disposition was harmless error under the circumstances of this case; (2) plaintiffs hold their interest as "joint tenants" and not as "joint tenants with full rights of survivorship"; (3) Bryan Blue and defendant hold their interest as "joint tenants with full rights of survivorship" and not as tenants in common; and (4) the quitclaim deed executed by Robert Blue and Beulah Blue are not "null and void," but are deemed to have not transferred the one-half interest placed in trust for plaintiffs.

Defendant next argues that even if it was proper to award plaintiffs a one-half interest in the cottage property, the probate court erred in failing to recognize plaintiffs' interest as still impressed with a trust, and that the court erred in denying his motion for relief from the order quieting title on this ground. This issue presents a mixed question of law and fact. We review the probate court's implicit finding that the written order comported with its ruling for clear error. MCR 2.613(C). Whether the court properly concluded on the basis of its finding that plaintiffs should take their one-half interest free from trust presents a question of law. We review questions of law de novo. *Yaldo v North Pointe Ins Co*, 217 Mich App 617, 623; 552 NW2d 657 (1996) *aff'd* 457 Mich 341 (1998).

Although the probate court did not elaborate regarding the specific trust purposes and the terms of the trust instrument, there are only a limited number of possibilities, each of which would properly result in plaintiffs taking their interest in the cottage free of trust. The trust instrument itself offers limited assistance in determining the settlor's trust purpose. It simply states that "[Robert Blue] agrees to hold such interest of [Winifred Blue] in trust for the minor children of [Robert and Winifred Blue]." With

regard to the trust purpose, there are four reasonable alternatives: (1) there was never a legitimate trust purpose in that the trustee had no duties to perform; (2) the trustee was to hold legal title until the beneficiaries (plaintiffs) were no longer minors; (3) the trustee was to hold legal title only so long as he lived; or (4) the trustee was to hold legal title until some other, now unascertainable but legitimate, trust purpose had been achieved.

If a potential trustee is not given any duties to perform in a trust intended to transfer possession of real property to the beneficiaries, it fails as a trust from the beginning and the beneficiaries are considered to be vested with the entire legal estate. MCL 555.3-.5; MSA 26.53-.55. If the purpose of the trust was for the trustee to hold legal title only during the period of plaintiffs' minority, then when the youngest plaintiff reached adulthood, the purpose for which this express trust was created ceased to exist, and the estate of the trustee also ceased to exist. MCL 555.23; MSA 26.73. Plaintiffs, as beneficiaries, would come into legal title with no necessity of reconveyance. *Detroit Trust Co v Stoepel*, 312 Mich 172, 185-186; 20 NW2d 148 (1945). Likewise, if the purpose of the trust was for the trustee to hold legal title only during his lifetime, then upon the death of Robert Blue, plaintiffs' interest in the estate would have automatically vested in them. Finally, if the purpose of the trust was for some other legitimate, but now unascertainable purpose, then when the trustee died, the trust interest did not pass to his heirs or estate, but rather, vested in the court to "be executed by some person appointed for that purpose, under the direction of the court." MCL 555.24; MSA 26.74. Under any of these scenarios, it would have been proper for the court to enter an order quieting title, in which plaintiffs' one-half interest was recognized to be free from trust.

Finally, defendant contends that the probate court erred in concluding that it did not have subject matter jurisdiction over defendant's counterclaim seeking an equitable lien against the property and/or contribution for amounts spent to maintain the Harsen's Island property. We agree. We review de novo a court's grant or denial of summary disposition under MCR 2.116(C)(4) for lack of subject matter jurisdiction. *Manning v Amerman*, 229 Mich App 608, 610; 582 NW2d 539 (1998).

The probate court "has exclusive legal and equitable jurisdiction [to] . . . [d]etermine any question arising in the . . . distribution of any trust, including questions of construction of . . . trusts" MCL 700.21; MSA 27.5021. Here, the partition and contribution claims clearly arose out of the distribution of the trust by the probate court. Consequently, the probate court erred in granting plaintiffs' motion for summary disposition pursuant to MCR 2.116(C)(4). See *Manning, supra*.

Accordingly, we affirm the probate court's grant of partial summary disposition in favor of plaintiffs pursuant to MCR 2.116(C)(10), but remand this case to the probate court for correction of the order quieting title consistent with this opinion. We reverse the probate court's order granting plaintiffs' motion for summary disposition pursuant to MCR 2.116(C)(4) and remand for

further proceedings regarding defendant's counterclaim. We do not retain jurisdiction.

/s/ Martin M. Doctoroff

/s/ Stephen J. Markman

/s/ Joseph B. Sullivan

¹ Plaintiffs had, for a time, been substituted as co-personal representatives for the Estate of Robert Blue.

² An action to quiet title is equitable in nature and, therefore, is tried without a jury. *In re Forfeiture of \$1,159,420*, 194 Mich App 134, 154-155; 486 NW2d 326 (1992); *Michigan National Bank & Trust Co v Morren*, 194 Mich App 407, 410; 487 NW2d 784 (1992).