IN THE

ARIZONA COURT OF APPEALS

DIVISION ONE

CHRIS BESS and MARY ANN BESS, husband and wife; ROGER MELE LIVING TRUST, UTD 7/14/2004, by ROGER MELE, its Trustee; BROWN FAMILY REVOCABLE TRUST DATED APRIL 11, 1996, by LARRY BROWN, its Trustee; TRAYERS FAMILY TRUST DATED DECEMBER 12, 1999, by CHARLES R. TRAYERS, its Trustee; MARINI FAMILY TRUST DATED 11-2-95, by TERRANCE MARINI, its Trustee; MATMA INVESTMENTS, L.L.C., an Arizona limited liability company; THE STEPHEN AND LOUISE RENNACKER FAMILY TRUST DATED MARCH 12, 2007, by STEPHEN E. RENNACKER and LOUISE A. RENNACKER, its Trustees; the MORRENZIN LIVING TRUST DATED MARCH 31, 2004, by MICHAEL E. MORRENZIN and VICKI E. MORRENZIN, its Trustees; PARPAC Retirement Plan, by DAVE PARNELL, its Trustee; FIRST AMERICAN BANK, as CUSTODIAN for the WILLIAM L. LUTZ SELF-DIRECTED IRA; NICK ESPOSITO, an individual; CASH FOR CONTRACTS, INC., a New Mexico corporation; MICHAEL HENNESSY TRUST, TRUST B, by MICHAEL HENNESSY, its Trustee; RUSSELL K. ULMER, an individual; C.C. BESS AND MARY ANN BESS LIVING TRUST DATED DECEMBER 23, 1998, by C.C. BESS AND MARY ANN BESS, its Trustees; JAMES C. PARKS and JACQUELYN L. PARKS REVOCABLE TRUST UAD 7/12/94, by JAMES C. PARKS and JACQUELINE L. PARKS, its Trustees; PARPAC, an Arizona general partnership; PARPAC Retirement Plan, by FRED PACE, its Trustee; FRED R. and OLGA K. PACE FAMILY TRUST DATED JUNE 25, 2002, by FRED R. PACE and OLGA K. PACE, its Trustees; JD L.L.C., an Arizona limited liability company; PARNELL IRREVOCABLE TRUST DATED MARCH 12, 2007 FBO CARSON CORD, by HEIDI PARNELL, its Trustee; JOHN A. KOZELISKI and JUDITH L. KOZELISKI, husband and wife; DAVID HOLT, an individual; RANDALL S. ULMER and TAMMY ULMER, husband and wife; DANIEL C. DARROCH and BARBARA L. DARROCH, husband and wife; TJ MARINI IRA HOLDINGS, L.L.C., an Arizona limited liability company; THOMAS B. FERGUSON, an individual; FIRST AMERICAN BANK, as Custodian for the LARRY BROWN self-directed IRA; FIRST AMERICAN BANK, as Custodian for the MICHAEL CLUTE self-directed IRA; BNC BANK, Custodian of the MARK G. CORD SEP IRA; CHAMBLISS FAMILY REVOCABLE TRUST DATED APRIL 29, 2006, by MAURICE K. CHAMBLISS and KELLIE D. CHAMBLISS, its Trustees; HAL

AND SUSAN MADSEN LIVING TRUST DATED OCTOBER 31, 2006, by HAL and SUSAN MADSEN, its Trustees; BH FARM L.L.C., a New Mexico limited liability company,
Petitioners

v.

THE HONORABLE THOMAS LECLAIRE, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of MARICOPA,
Respondent Judge,

MARK SPENO and RONDA LALONDA, husband and wife; HOME NATIONAL BANK, Custodian of the MARK A. SPENO SELF-DIRECTED IRA, and its successors in interest; SPENO INVESTMENTS, L.L.C., an Arizona limited liability company; RRL IRA HOLDINGS, L.L.C., an Arizona limited liability company; TRAWLER1 IRA HOLDINGS, an Arizona limited liability company,
Real Parties in Interest.

No. 1 CA-SA 15-0076
FILED 8-4-2015

Petition for Special Action from the Superior Court in Maricopa County
No. CV2013-052880
The Honorable Thomas L. LeClaire, Retired Judge

JURISDICTION ACCEPTED; RELIEF GRANTED

COUNSEL

Goldman & Zwillinger PLLC, Scottsdale
By Mark D. Goldman, Carolyn Goldman
Counsel for Petitioners

Buchalter Nemer, Scottsdale
By Glenn B. Hotchkiss
Counsel for Real Parties in Interest

DECISION ORDER

Judge Peter B. Swann delivered the decision of the court, in which Presiding Judge Kent E. Cattani and Judge Lawrence F. Winthrop joined.

S W A N N, Judge:

¶1 Petitioners seek special-action relief from the superior court's orders directing that real properties be partitioned by sale by a court-selected real estate commissioner under A.R.S. § 12-1218. We accept jurisdiction and grant relief. The issue of partition was never tried, and the record is insufficient to support the findings required for the partitions ordered by the court. Outside of the context of a partition action, the court lacked authority to force the properties' sale by a special master.

FACTS AND PROCEDURAL HISTORY

¶2 Petitioners and Respondents, in groups, executed Beneficiary Operating Agreements ("Agreements") under which they jointly funded eight loans secured by deeds of trust on eight properties. When the borrowers defaulted on the loans, Petitioners and Respondents foreclosed and purchased the properties at trustee's sales. Petitioners and Respondents thereafter disputed several aspects of the Agreements' application to their joint ownership. Among other things, they disputed whether the Agreements allowed a majority of owners to determine when the properties would be listed for sale. Petitioners (the majority) wished to wait to sell the properties based on their belief that market values would increase with the passage of time, whereas Respondents wished to sell the properties immediately to maximize the time-value of the investment and avoid the uncertainty of market speculation.

¶3 The parties filed competing claims in the superior court regarding whether the Agreements authorized Petitioners to delay the properties' sale. Respondents also asserted claims seeking partition by sale. The court ruled that though the Agreements were enforceable contracts, they did not address post-foreclosure disputes and the law governing tenancies in common therefore applied to such disputes. The court ruled that a majority could not manage the property inconsistent with the rights of a cotenant, or compel a cotenant to contribute to such efforts except as permitted for tenancies in common.

¶4 The court denied as waived Petitioners' subsequent request for an evidentiary hearing on partition, and directed the parties to "discuss the listing

of the properties and report back to the Court with what the parties agree to be contained in an order." But the parties were unable to agree. Respondents therefore moved for an order to show cause "why the Court should not require [Petitioners] to agree to list the eight real properties that are the subject of this action for sale," to "implement the declaratory ruling" under A.R.S. § 12-1832.

¶5 The court held an evidentiary hearing on Respondents' motion and a separate motion that Petitioners had filed. Neither party submitted evidence regarding partition. The court noted that fact. But, citing A.R.S. § 12-1218(B), the court concluded that the properties should be sold because the parties were unable to agree as to the terms and manner of sale. The court directed the parties to submit the names of proposed real estate commissioners to conduct the sales, and randomly selected and appointed a single commissioner. Rejecting Petitioners' contention that three commissioners were required under A.R.S. § 12-1215, the court held that "[t]hat statute applies only to partition, which the Court rejected." The court then ordered the commissioner, who had asked for direction regarding when the properties should be listed for sale, to "list the subject properties immediately or as soon as practicable." Petitioners later sought to disqualify the commissioner, arguing that he had breached fiduciary duties to disclose his research and his qualifications to sell the types of properties at issue. The court denied the motion and informed the parties that no sale could occur without the commissioner's participation.

¶6 Petitioners filed a notice of appeal from the court's order directing the commissioner to list the properties. Soon after, Petitioners filed this special action challenging the declaratory judgment, the sale orders, and the denial of the motion to disqualify the commissioner. We dismissed the appeal, concluding that the order identified in the notice was neither final nor appealable under A.R.S. § 12-2101(A). We accepted jurisdiction of the special action and granted Petitioners' request for a stay.

JURISDICTION

¶7 We accepted special-action jurisdiction because Petitioners face the loss of the properties through court-controlled sales, and therefore have no equally plain, speedy, and adequate remedy by appeal. *See* Ariz. R.P. Spec. Act. 1(a); *Steinberger v. McVey*, 234 Ariz. 125, 130-31, ¶ 17 (App. 2014). We emphasize, however, that our review is limited to the propriety of the sale orders. We do not review the declaratory judgment that preceded those orders. With respect to the declaratory judgment, Petitioners have an adequate remedy by appeal upon the entry of a final judgment.

¶8 We reject Respondents' contention that we are precluded from exercising special-action jurisdiction based on the availability of a direct appeal.

Respondents argue that if we accept Petitioners' argument that the superior court acted under the partition statutes, we cannot exercise special-action jurisdiction because interlocutory partition judgments are directly appealable under A.R.S. § 12-2101(A)(7) and Petitioners did not timely appeal from the relevant order. In at least some circumstances, our jurisdiction to review an appealable interlocutory order is limited to the direct appeal, such that we may not review it in a later appeal from the final judgment. *Wells v. Tanner Bros. Contracting Co.*, 103 Ariz. 217, 220 (1968); *Sato v. First Nat'l Bank of Ariz.*, 12 Ariz. App. 263, 265-66 (1970). And when an appeal is jurisdictionally barred, a special action may not be used as a substitute. *State ex rel. Neely v. Rodriguez*, 165 Ariz. 74, 78 (1990). But here, even assuming that the court entered orders that were substantively appealable under § 12-2101(A)(7), none of the orders was procedurally appealable. No judgment or order is appealable under § 12-2101 unless signed by a judge or commissioner in accordance with Ariz. R. Civ. P. 58(a), *State v. Birmingham*, 96 Ariz. 109, 112 (1964), and none of the court's orders were signed. Accordingly, contrary to Respondents' contention, no right to appeal has vested. *Cf. Rancho Pescado, Inc. v. Nw. Mutual Life Ins. Co.*, 140 Ariz. 174, 181-83 (App. 1984) (holding that in context of arbitration process only, party may waive right to appellate review of unsigned order denying arbitration by failing to request that order be placed in appealable form for direct appeal and electing to proceed with trial). Petitioners' failure to appeal from the court's initial post-hearing orders therefore has no bearing on our ability to accept special-action jurisdiction.

¶9 We also reject Respondents' contention that special-action jurisdiction is precluded by laches. The doctrine of laches provides the only restriction on the time for filing a petition for special action. *State ex rel. McDougall v. Tvedt*, 163 Ariz. 281, 283 (App. 1989). Laches may bar a special action when there is an unreasonable delay that results in prejudice to the opposing party. *Sotomayor v. Burns*, 199 Ariz. 81, 83, ¶ 6 (2000). Here, Petitioners sought special action relief seven months after the initial post-hearing order concluding that the properties should be sold and six months after the order appointing the commissioner, but only one month after the order directing the commissioner to immediately list the properties, and less than one month after the order denying the motion to disqualify the commissioner. In view of the progressive nature of the orders, we cannot say that Petitioners unreasonably delayed in filing their petition. Further, Respondents have identified no prejudice caused by the delay.

DISCUSSION

¶10 The superior court has the authority to give meaning and effect to a declaratory judgment by granting supplemental relief under A.R.S. § 12-1838. This is what Respondents sought. But the court did not rely on § 12-1838. Instead, it ordered that the properties should be sold under § 12-1218, which, despite the court's indication to the contrary, is a partition statute.

¶11 Partition is a statutory procedure by which the court may divide cotenants' interests in real property. *McCready v. McCready*, 168 Ariz. 1, 3 (App. 1991). To order partition, the court must comply with the statutory scheme. *Owens v. M.E. Schepp Ltd. P'ship*, 218 Ariz. 222, 230, ¶ 35 (2008). At issue here is an order for a partition by sale -- an order that contemplates the division of property-sale proceeds rather than division of the property itself. *See* 59A Am. Jur. 2d Partition § 117. Under § 12-1218(A), the court may order a partition by sale when a panel of commissioners appointed to effect a partition in kind determines that such partition would not be feasible. Further, under § 12-1218(B), the court may order a partition by sale if, "on the trial of the action, it appears to the court that fair partition of the property cannot be made without depreciating the value thereof, or that for any reason a sale is more beneficial to the parties or any of them."

¶12 Here, the court purported to act under § 12-1218(B) and its implementing statute, § 12-1218(C), which authorizes it to appoint and direct a commissioner to conduct a partition by sale. Petitioners contend that this was improper because the partition procedures described in §§ 12-1213, -1215, and -1216 were not followed; Respondents contend that these statutes do not apply to a partition by sale under § 12-1218(B). We need not resolve that issue, because there is a more fundamental problem: the action was not presented as one for partition. Though each of the parties had previously requested partition, the matter was not tried as a partition action. As the court itself noted, the parties presented no evidence regarding partition. Moreover, our review reveals no evidence that would allow the court to make the findings required by § 12-1218(B). The parties presented no evidence regarding how a partition in kind might affect the properties' values, or why a sale would otherwise be more beneficial than a partition in kind. They presented conflicting testimony regarding the relative benefits of selling the properties versus holding them, but they did not present any evidence regarding the relative benefits of selling the properties versus partitioning them in kind. *Cf. Arnold v. Cesare*, 137 Ariz. 48, 52-53 (App. 1983) (holding that evidence supported partition by sale under § 12-1218(B) where court heard testimony regarding how partition in kind might depreciate property's value in view of a pending zoning application). On this record, the court abused its discretion and exceeded its authority by directing a partition by sale under § 12-1218(C).

¶13 The record might have supported entry of an injunctive judgment under A.R.S. § 12-1838 directing the *parties* to sell the properties. But this is not what the court did. Instead, the court erroneously purported to exercise *in rem* jurisdiction over real property outside of the context of a partition action. On this record, we must grant Petitioners relief from the post-hearing sale orders. In view of our holding, we need not and do not address whether the court correctly denied Petitioners' motion to disqualify the commissioner appointed to effect the sales.

CONCLUSION

¶14 We accept jurisdiction and grant relief as set forth above.