STATE OF MICHIGAN

COURT OF APPEALS

In re DECEMBER 23, 2002 RESTATEMENT OF THE VIVIAN STOLARUK LIVING TRUST

A. SULLIVAN and S. STOLARUK,

Appellants,

v

JULIUS H. GIARMARCO, Trustee of the STEVE STOLARUK LIVING TRUST, and SAINT JOSEPH MERCY OAKLAND,

Appellees.

UNPUBLISHED
April 22, 2021

No. 352064
Oakland Probate Court
LC No. 2019-387099-TV

Before: BECKERING, P.J., and FORT HOOD and RIORDAN, JJ.

PER CURIAM.

At issue in this appeal is whether laches or the residual six-year statute of limitations provided for by MCL 600.5813 bars a 2019 petition for reformation of a trust that became irrevocable after the settlor's death in 2003. Petitioners Marc Stolaruk and Ann Marie Sullivan are the only children of Vivian and Steve Stolaruk. In 2002, respondent and attorney Julius H. Giarmarco drafted restatements of Vivian's and Steve's living trusts. Each trust contained provisions giving the surviving spouse limited powers of appointment over certain assets of the deceased spouse's trust. Steve survived Vivian, and approximately three months before he died, he exercised his powers of appointment to appoint all the money over which he had such power to interested party St. Joseph Mercy Oakland (SJMO). This exercise of the limited powers of appointment effectively disinherited petitioners from Vivian's assets, contrary to what petitioners believed had been her intent. Petitioners discovered their disinheritance after Steve's death and filed a petition asking the probate court to, among other things, correct the alleged drafting error in the Vivian Stolaruk Living Trust (VSLT) that had allowed Steve to disinherit them from Vivian's assets in favor of SJMO. Petitioners now appeal as of right from the probate court's order granting summary disposition to Giarmarco, as trustee of Steve's trust, on the basis of laches, and

to SJMO on the basis of application of the six-year statute of limitations. For the reasons stated herein, we reverse the trial court's order and remand for further proceedings.

I. PERTINENT FACTS AND PROCEEDINGS

On December 23, 2002, Vivian signed a restatement of the Vivian Stolaruk Living Trust, UAD May 9, 1989 (VSLT), Steve signed a restatement of the Steve Stolaruk Living Trust, UAD February 15, 1989 ("Steve's trust"), and both signed documents establishing the Vivian Stolaruk and Steve Stolaruk Irrevocable Trust.[1] Giarmarco drafted all of the estate planning documents signed that day. Vivian remained the sole trustee of the VSLT until her death in March 2003, at which time Steve became the successor trustee. As trustee, Steve was to divide the trust property into two separate subtrusts: a Marital Trust and a Family Trust. Steve was entitled to as much of the income and principal of the marital trust as required to meet his "education, health, maintenance, and support" needs, and could withdraw up to 5% of the marital trust's principal each year. Vivian's descendants were entitled to as much of the principal of the family trust as necessary to meet their "education, health, maintenance, and support" needs. Steve could also make distributions from the family trust to the Vivian Stolaruk and Steve Stolaruk Irrevocable Trust.

The VSLT provided for the establishment and operation of the marital and family trusts in Article 9 and Article 10, respectively. Article 9, § 4, and Article 10, § 3, provided limited powers of appointment (LPAs), MCL 556.112(c), to the surviving spouse over the assets in the respective trusts. The pertinent language in each section is identical and states:

> My spouse shall have the limited testamentary power to appoint to or for the benefit of my descendants, persons who at any time were married to a descendant of mine, *and/or to religious, scientific, charitable, or educational organizations described in IRC Section 501(c)(3), as amended,* either by a valid last will and testament or by a valid living trust agreement executed by my spouse, all or any portion of the principal and any accrued and undistributed net income of the [Marital Trust/Family Trust][2] as it exists at my spouse's death. [Emphasis added.]

At issue here is the language in the LPAs authorizing the surviving spouse to exercise the LPAs in favor of 501(c)(3) religious, scientific, charitable, or education organizations. Article XII of the VSLT provided that property not previously distributed was to be distributed, as follows: $150,000 each to three named grandchildren; $4 million to Marc; $1.5 million to Ann Marie; and the residue to the Steve and Vivian Stolaruk Foundation.

As an aid to understanding how the VSLT, Steve's trust, and the irrevocable trust worked together, Giarmarco provided a document entitled "Stolaruk Family Estate Plan Flowchart"

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[1] There are references in the record to a number of entities bearing both Vivian and Steve's name. Whether these are the same or separate entities is not clear, but it has no bearing on our analysis.

[2] Article 9, § 4 references only the Marital Trust, and Article 10, § 3 references only the Family Trust.

("flowchart"). Marc, who was present when his parents signed the estate planning documents, attested that Giarmarco did not review the actual trust documents, but relied on the flowchart, which he said Giarmarco claimed represented the material terms of documents. Regarding both the Marital Trust and the Family Trust, the flowchart explains:

> 4. Surviving spouse has the testamentary power to appoint principal equally or unequally among children or grandchildren, in trust or outright distributions. In absence of exercise, trust property passes according to terms of Children's Trust.
>
> 5. At surviving spouse's death, the trust property passes according to the terms of the Children's Trust.

The "Children's Trust" box on the flowchart indicated that $4 million was to be placed in trust for Marc, $1.5 million for Ann Marie, and $300,000 for each grandchild, with the residue going to the Steve and Vivian Stolaruk Private Foundation. Neither the Marital Trust nor the Family Trust explanatory boxes indicated that the surviving spouse could exercise LPAs in favor of charity; in fact, the flowchart suggests that the LPAs could be exercised only in favor of the settlors' children or grandchildren.

Steve amended and restated his living trust multiples times after Vivian's death. The last amendment and restatement is dated November 14, 2017. Article 4, § 5, provides for the exercise of his LPAs as follows:

> Art 4, § 5 – Exercise of Limited Powers of Appointment
>
> Under Articles Nine and Ten of the **VIVIAN STOLARUK LIVING TRUST**, dated May 9, 1989, as amended, executed by Grantor's spouse, as Settlor and initial Trustee, of which the Grantor is now Trustee, separate trusts named the Marital Trust and Family Trust were created at Grantor's spouse's death. Under Article Nine, Section 4 of the Marital Trust, and Article Ten, Section 3 of the Family Trust, the Grantor was given a Testamentary Power of Appointment as to all property constituting the Marital Trust and Family Trust at the time of Settlor's death. The Grantor hereby exercises both powers by appointing all property over which the Grantor has a power of appointment under the aforesaid provisions to the then acting Trustee of this Trust to be distributed to **ST. JOSEPH MERCY OAKLAND** for the purpose set forth in Article Ten, Section 2, Paragraph (M) below. . . .[3]

[3] Among other things, ¶ M provides that the principal and net income from the marital and family trusts appointed to SJMO may be used as the hospital's governing body determines, if SJMO names its new patient tower after Steve and Vivian Stolaruk. If there is a compelling reason that the tower cannot be so named, the bequest can be used as part of SJMO's general fund.

By exercising his powers of appointment to distribute all of the property remaining in the Marital Trust and the Family Trust at the time of his death to SJMO, Steve left nothing in the trusts for distribution in accordance with Article XII of the VSLT.[4] Steve died in January, 2018. Shortly after Steve's burial, Giarmarco informed Marc that there were no assets remaining in the VSLT, and that he, his son, and Ann Marie had been "written" out of Steve's trust.

On January 25, 2019, petitioners filed a verified petition for limited supervision of the trust, modification and/or reformation of the VSLT, removal of the VSLT's trustee (Giarmarco) and for immediate ex parte suspension of all trustees and the appointment of a special fiduciary. Relevant to the instant appeal, petitioners alleged that Vivian never intended Giarmarco to draft the VSLT in a way that would provide Steve with the ability to disinherit her children as beneficiaries of her trust. They asked the court to determine that the LPA was "the product of a mistake of fact and/or law" and to reform the trust to conform to Vivian's intention. Attached to their petition was an affidavit from Steve's niece, Dianne Blomeke, which appeared to support petitioners' claim that Vivian intended to "take care of" them in her trust.

In February 2019, Giarmarco filed a motion and supporting brief for summary disposition under MCR 2.116(C)(7) and (C)(10), arguing that there was no genuine issue of fact that laches barred petitioners' claims. Giarmarco contended that both petitioners had copies of the VSLT for nearly a decade prior to Steve's death and that they knew Steve possessed LPAs over the marital and family trusts, that he intended to exercise them, and that he had exercised them. Giarmarco further contended that, had petitioners challenged the VSLT earlier, Steve would have made lifetime gifts to SJMO to ensure that it did not lose millions of dollars; as it is, reforming the VSLT after so many years of delay would prejudice SJMO by depriving it of a major donation. Giarmarco addressed the prejudice to Steve in a supplemental brief filed in May, contending that petitioners' intentional delay prejudiced Steve's long-held testamentary intent to disinherit them from his and Vivian's assets.[5] In another brief filed in July 2019, Giarmarco presented argument and evidence showing that Ann Marie had a copy of the VSLT by December 2009.

Petitioners argued in opposition to Giarmarco's summary disposition motion that possession of the VSLT was not evidence that they were aware of or understood the complexities of its provisions. Petitioners contended that they reasonably relied on Giarmarco's flowchart, which gave no indication that Steve could disinherit them in favor of a charitable organization of his choosing. The information in the flowchart suggested no reason to seek reformation of the VSLT. Petitioners asserted that, in light of these facts, there remains a question of fact about what they knew and when they knew it. They further argued that, until Steve died, they could not know whether a petition would be warranted since, as long as Steve was alive, it was possible that he would exercise the LPAs in accordance with Vivian's intentions. Under these circumstances, waiting to file a petition until after Steve's death did not show a lack of diligence or unreasonable

[4] In addition, Steve "intentionally, and with full knowledge, chose not to provide for" Marc, Ann Marie, or their issue, although he did provide $50,000 to grandchildren and great-grandchildren.

[5] Also in May 2019, the Attorney General, as an interested party, filed a brief in support of Giarmarco's laches argument.

delay. Petitioners asserted that SJMO's potential loss of a major gift did not result from any alleged delay, since SJMO did not appear as a contingent beneficiary in Steve's trust until 2015, and then only as a 50% beneficiary; if anything, SJMO benefited from any delay. They further asserted that Giarmarco's claim of prejudice to Steve was speculative. In addition to their response to Giarmarco's summary disposition motion, petitioners filed a first-amended petition, in pertinent part adding a request for "clarification and construction" on the basis of their assertion that Steve had never properly created or funded the marital and family trusts and, therefore, that his exercise of the LPAs failed because there was nothing for him to appoint.[6]

Appearing as an interested party, SJMO moved for summary disposition of petitioners' first-amended petition, framing the issue as a challenge to the validity of the VSLT potentially subject to two statutes of limitations: MCL 700.7604 (providing a two-year limitations period after the settlor's death to contest the validity of a trust revocable at the settlor's death)[7] and MCL 600.5813 (residual six-year limitations period). SJMO argued that the statutes of limitations were triggered upon execution of the VSLT or, at the latest, when Vivian's 2003 death rendered her trust irrevocable; thus, petitioners' request for reformation was at least 10 years too late. Responding to SJMO's motion for summary disposition, petitioners agreed that MCL 600.5813 applied, but argued that their claim did not accrue until Steve's death because that is when they suffered harm from his ultimate exercise of the LPAs.

Following a lengthy hearing on the motions for summary disposition, at which the parties' arguments were generally consistent with their briefs, the probate court ruled from the bench. Regarding Giarmarco's motion for summary disposition on the basis of laches, the court observed that Marc and Ann Marie had copies of the VSLT for years before Steve died and had the opportunity to inform themselves of the actual terms of the trust, and were aware that their relationship with Steve had "soured horribly" before his death, that he frequently amended his estate plan, and that such amendments involved exercising the LPAs. The court concluded that, under these circumstances, it was not reasonable for them to delay in informing themselves about the actual terms of the trust. The court found substantial and irreparable prejudice to Steve, noting that his entire estate plan would be overthrown. However, the court concluded that questions of fact remained regarding SJMO's claim of prejudice, such as whether expectancy damages could be included and whether actual damages could be compensated for out of the assets that would be transferred to Marc and Ann Marie if the gift was overturned. The court thus granted Giarmarco's motion for summary disposition based upon laches.

Regarding SJMO's summary disposition motion, the court concluded that MCL 600.5813 applied, and that petitioners could legally have brought a claim when Vivian died in 2003 and her trust became irrevocable. The court opined that, the flowchart notwithstanding, MCL 600.5813 placed a duty on petitioners to inform themselves of the actual terms of the trust. By 2009, both

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[6] Petitioners' theory rested in part on Giarmarco's statement at page 2 of his summary disposition brief, "The Marital and Family Trusts do not own assets or have any acting trustees." Petitioners interpreted this as an admission that they were never properly created. Petitioners appear to have abandoned this argument for purposes of this appeal.

[7] 2009 PA 46, effective April 1, 2010.

petitioners had a copy of the VSLT and could have informed themselves of its content, with legal assistance if necessary, but they did nothing until after Steve died. The court further noted that petitioners knew about Steve's practice of amending his estate plan and exercising the LPAs and were aware that their relationship with Steve had soured long before he passed away. Under these circumstances, petitioners could not rely solely on the flowchart. The court thus granted SJMO's motion for summary disposition based upon MCL 600.5813. The court entered a corresponding order, from which petitioners now appeal.

II. DISCUSSION

Petitioners contend that the probate court erred by granting summary disposition to Giarmarco on the basis of laches because questions of fact exist as to whether petitioners unreasonably and inexcusably delayed in bringing their petition for reformation and whether granting their petition would result in prejudice to Steve Stolaruk and the overthrow of his entire estate plan. Petitioners further contend that the trial court erred in granting SJMO's motion for summary disposition based on the statute of limitations set forth in MCL 600.5813. We agree with the former argument, and because SJMO's entitlement to assets is derivative in nature, we need not address the latter issue.

A. STANDARD OF REVIEW

This Court reviews de novo a probate court's decision whether to grant a motion for summary disposition, *Barnard Mfg Co v Gates Performance Engineering, Inc*, 285 Mich App 362, 369; 775 NW2d 618 (2009), including whether the trial court properly selected, interpreted, and applied the court rules applicable to the motion for summary disposition, see *Brecht v Hendry*, 297 Mich App 732, 736; 825 NW2d 110 (2012). Giarmarco moved for summary disposition under MCR 2.116(C)(7) and (C)(10). The probate court did not specify the subrule under which it granted summary disposition and it considered materials outside the pleadings. Therefore, we review the decision as though made under MCR 2.116(C)(10). *Cuddington v United Health Servs, Inc*, 298 Mich App 264, 270; 826 NW2d 519 (2012).

In determining a motion for summary disposition, the court must consider the pleadings, affidavits, depositions, admissions and other documentary evidence submitted in the light most favorable to the nonmoving party. See MCR 2.116(G)(5); *Joseph v Auto Club Ins Ass'n*, 491 Mich 200, 206; 815 NW2d 412 (2012). It must draw all reasonable inferences in favor of the nonmoving party. See *Dextrom v Wexford Co*, 287 Mich App 406, 415-416; 789 NW2d 211 (2010). A motion for summary disposition under MCR 2.116(C)(10) is properly granted if there is "no genuine issue as to any material fact, and the moving party" is "entitled to judgment . . . as a matter of law." "A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ." *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Speculation and conjecture are insufficient to create a question of fact. *Skinner v Square D Co*, 445 Mich 153, 172-173; 516 NW2d 475 (1994).

B. LACHES

The doctrine of laches is the equitable counterpart to the statute of limitations, and it will not normally apply if a statute of limitations will bar a claim. *Tenneco Inc v Amerisure Mut Ins Co*, 281 Mich App 429, 456; 761 NW2d 846 (2008). It is an equitable affirmative defense primarily based on circumstances that render inequitable the granting of relief to a dilatory plaintiff. *Attorney General v Powerpick Players' Club of Mich, LLC*, 287 Mich App 13, 51; 783 NW2d 515 (2010). Three elements are required for laches to apply: (1) the passage of time; (2) a lack of due diligence; and (3) resulting prejudice. See *Knight v Northpoint Bank*, 300 Mich App 109, 114; 832 NW2d 439 (2013). "Prejudice" involves a "a change in condition that would make it inequitable to enforce the claim against the defendant." *Yankee Springs Twp v Fox*, 264 Mich App 604, 612; 692 NW2d 728, 734 (2004). "It is the effect, rather than the fact, of the passage of time that may trigger the defense of laches." *City of Troy v Papadelis* (*On Remand*), 226 Mich App 90, 97; 572 NW2d 246 (1997). The defendant bears the burden of proving a lack of due diligence on the part of the plaintiff and resultant prejudice *Yankee Springs Twp*, 264 Mich App at 612. Each case must be determined on its own particular facts. *Id*. When laches appears, the court merely leaves the parties where it finds them. *Knight*, 300 Mich App at 114.

It is undisputed that petitioners did not have actual knowledge of the alleged drafting error in the VSLT. The question is whether they showed a lack of due diligence by failing to inform themselves of the terms of the VSLT and, thereby, failing to discover the alleged drafting error earlier. The court reasoned that both petitioners had a copy of the VSLT by 2009, Marc knew Steve intended to exercise the LPAs and that he had already done so at least once, and petitioners' relationship with Steve had deteriorated. On the basis of these facts, the probate court concluded that due diligence and the protection of their rights under the VSLT called for them to inform themselves about the terms of the trust, and that it was inexcusable for petitioners not to do so sooner.

However, the probate court's conclusion that petitioners did not exercise due diligence rests on a view of the evidence in the light least favorable to petitioners, contrary to the standards for deciding motions for summary disposition. See *Joseph*, 491 Mich at 206. The court's ruling implied that reasonable minds could not differ regarding whether petitioners should have exercised reasonable diligence and informed themselves about the terms of the VSLT. Yet, this position seems to assess the situation from hindsight, starting from Steve's ultimate exercise of the LPAs and identifying when petitioners should have "seen this coming," as it were. Viewing the facts in the light most favorable to petitioners, reasonable minds could disagree regarding whether petitioners were dilatory by failing to scrutinize the VSLT and to discover the alleged drafting error.

Petitioners contend they had no reason to inform themselves about the actual terms of the VSLT in light of Giarmarco's flowchart and Steve's conforming exercise of the LPAs in 2004. In an affidavit attached to petitioners' response to Giarmarco's summary disposition motion, Marc attested that he attended the December 23, 2002 signing conference at which Giarmarco used the flowchart to explain the terms of the restated living trusts to Vivian and Steve, and that he relied on the flowchart for his understanding of the terms of the trust. Marc further attested that "[t]he focus of the discussion with me in the presence of both my parents was that the children are going

to be taken care of," and that there was never any discussion about Steve having the authority to disinherit Vivian's children and grandchildren from her trust in favor of a charity.

In addition to the flowchart, Marc said he relied on subsequent communications with Giarmarco that confirmed Vivian's intention to provide for petitioners and their children. Attached to Marc's affidavit are two letters. The first is an August 18, 2003 letter from Giarmarco to Marc confirming that, "[a]s presently drafted, upon Steve's death, the assets in Steve and Vivian's Living Trusts would be divided as follows": Marc, $4 million; Ann Marie $1.5 million; Grandchildren, $300,000 each; Private Foundation, residue. Accompanying the letter was another copy of the flowchart. The second letter, dated August 23, 2004, and addressed to Steve, was in reference to the 2004 amendment of Steve's trust. It repeated the aforementioned distributions and noted Giarmarco's belief that Steve now wanted to divide his and Vivian's living trusts as follows: Grandchildren, G[eneration] S[kipping] T[ax] exemption; Mark, 53.3% of residue; Ann Marie, 13.3% of residue; The Steve and Vivian Stolaruk Foundation, 33.4% of residue. Marc stated that, given Giarmarco's explanation of the flowchart as a fair representation of how Vivian's and Steve's living trusts worked and his subsequent communications reemphasizing Vivian's intent to take care of her children and grandchildren, he had no reason to challenge Steve's potential exercise of the LPAs.

To be sure, the flowchart is not a legal, binding document. Nevertheless, viewed in the light most favorable to petitioners, *Joseph*, 491 Mich at 206, Giarmarco's repeated use of the flowchart to represent how the estate plan operated, and the fact that nothing on the flowchart indicated that the surviving spouse could exercise his or her testamentary LPAs to appoint all the principal and undistributed net income from the marital and family trusts to a charitable organization of that spouse's choosing, such facts could reasonably support the conclusion that, at least in 2003, due diligence did not call for petitioners to scrutinize the actual terms of the VSLT.

As to the 2004 restatement of Steve's living trust, petitioners contend that his exercise of the LPAs was consistent with the flowchart. Steve exercised his LPAs to direct that the assets of the marital and family trusts "be held, administered, and distributed in accordance with the provisions of [his] Living Trust," and then provided that all trust property not previously distributed under the terms of his trust should be divided as follows: Marc 45%; Ann Marie 12%; the Vivian Vivio Stolaruk and Steve Stolaruk Foundation, 43%. Although Steve decided to leave nothing to the grandchildren, doing so appears consistent with his authority to make distributions unequally, as indicated on the flowchart. That a 43% share went to the foundation is essentially the residue after Marc and Ann Marie received their percentages.

Giarmarco states on appeal that Marc "encouraged and aided his father's exercise of the powers of appointment—including in favor of charity." However, there is no record evidence of how Marc "encouraged" Steve in the exercise of the LPAs. As to aiding, the evidence indicates that Marc aided Steve by attending meetings with him, receiving and reviewing[8] the drafts of the

[8] In his February 27, 2019 e-mail to Marc, Giarmarco asks Marc and Steve to review the new documents and schedule a signing conference. There is no record evidence regarding what Marc and Steve's review of the documents entailed.

newly prepared 2004 estate planning documents, and getting Steve to schedule and attend a signing conference. As to exercising the LPAs in favor of charity, providing that a 43% share of the undistributed property would go to the foundation could be seen as an appointment to a charitable organization. However, viewed in the light most favorable to petitioners, *Joseph*, 491 Mich at 206, it could also reasonably be seen as conforming to the flowchart's indication that property not distributed to petitioners or their children would pass to the foundation. Thus, reasonable minds might differ regarding whether Steve's 2004 restatement of his living trust triggered a due-diligence requirement to examine the VSLT.

Lastly, petitioners argue that there is no record evidence to support the probate court's observation that their relationship with Steve deteriorated. This is not entirely true. Giarmarco submitted a 2007 restatement of Steve's living trust showing his disinheritance of petitioners at that time, and petitioners admitted at the summary disposition hearing that their relationship with Steve "kind of soured" after 2008. The probate court concluded that this was one of the reasons why petitioners should have protected their status under the VSLT by reviewing the actual terms of the document. However, it is not clear from the record that petitioners were aware of the 2007 restatement of Steve's living trust, and viewed in the light most favorable to petitioners, *id*., the alleged deterioration of their relationship with Steve might be grounds for concern about their status in *his* will and trust, but in light of the flowchart, Giarmarco's assurances that Vivian had taken care of them in her trust, and Steve's conforming exercise of the LPAs in 2004, one might reasonably conclude that petitioners' relationship with Steve did not trigger a due-diligence requirement to examine the actual terms of the VSLT.

We conclude that, viewed in the light most favorable to petitioners, *id*., and drawing all reasonable inferences in their favor, *Dextrom*, 287 Mich App at 415-416, the evidence upon which the probate court relied to grant Giarmarco's motion for summary disposition on the basis of laches creates genuine issues of material fact regarding whether and when due diligence required petitioners to examine the VSLT for themselves and what they knew about the scope of the LPAs. Generally, summary disposition is premature if granted before discovery on a disputed issue is complete. See *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009). Nevertheless, summary disposition may be appropriate where further discovery does not present a fair likelihood of uncovering factual support for the opposing party's position. See *Liparoto Constr Co, Inc v Gen Shale Brick*, *Inc*, 284 Mich App 25, 33-34; 772 NW2d 801 (2009). In the present case, the probate court granted summary disposition before discovery began, and the parties dispute whether there was a delay and whether that delay was undue. Discovery might further support petitioners' position that they had no indication of the alleged drafting error in the VSLT before Steve's death, and that the exercise of due diligence did not require examination of the terms of the VSLT. On the other hand, discovery may produce indisputable evidence that due diligence required petitioners to examine the terms of the VSLT and to seek relief reformation of the VSLT earlier, but they inexcusably bided their time to see how things would play out.

Likewise, we conclude that the record before us, viewed in the light most favorable to petitioners, is insufficient to conclude that a change in circumstances caused by petitioners' alleged delay would make it inequitable to reform the VSLT.

"Prejudice" involves "a change in condition that would make it inequitable to enforce the claim against the defendant." *Yankee Springs Twp*, 264 Mich App at 612. On one hand, by waiting until after Steve's death to file the petition requesting reformation of the VSLT, in addition to thwarting Steve's intent to disinherit petitioners from Vivian's assets, petitioners have also effectively deprived the surviving spouse (Steve) of one of his rights under the VSLT, i.e., the right to exercise the LPAs, and gone against the intention of the first-deceased spouse (Vivian) to grant the surviving spouse that right. On the other hand, Steve fulfilled his testamentary intent of disinheriting petitioners and their children from *his* assets, and it is at least debatable whether his intention to disinherit petitioners from Vivian's assets should take precedence over Vivian's intentions to the contrary, if that is what the evidence properly establishes. The Estates and Protected Individuals Code, MCL 700.1101 *et seq*., which includes the Michigan Trust Code, is to "be liberally construed and applied to promote its underlying purposes and policies, which include . . . [t]o discover and make effective a decedent's intent in distribution of the decedent's property." MCL 700.1201(b). Taking the position that it would be inequitable to reform the VSLT because Steve would be prevented from realizing his testamentary intention of disinheriting petitioners from Vivian's assets seems to dismiss Vivian's presumed intention regarding distribution of her assets. Thus, while potential reformation of the VSLT might frustrate Steve's control over Vivian's assets to achieve his testamentary intentions, it is not clear that such reformation would be inequitable if it would make effective Vivian's intent in distributing her property. This is not to foreclose the possibility that, if this case progresses to the point where the probate court hears evidence of Vivian's intention, the evidence will show that the language of the LPAs accurately reflects those intentions.

As to whether undue delay in filing a petition would frustrate Steve's intent to make a major donation to SJMO and obtain naming rights to a new patient tower, there is no record evidence of the amount of the gift or the source(s) of the gift, or whether the gift might still be possible if the court granted petitioners' petition for reformation. None of this is to say that the passage of time and petitioners' alleged undue delay have not caused prejudice, just that the evidence before the Court must be augmented by speculation in order to reach this conclusion.

To summarize, we conclude that genuine issues of material fact exist regarding whether Giarmarco proved a lack of due diligence on the part of petitioners that resulted in prejudice. *Yankee Springs Twp v Fox*, 264 Mich App 612. Viewed in the light most favorable to petitioners, reasonable minds could conclude that the pre-discovery evidence regarding the circumstances preceding Steve's death did not trigger a due-diligence requirement to inform themselves earlier of the actual terms of the VSLT and his power to disinherit them from their mother's trust. In addition, it is questionable whether equity is served by privileging the surviving spouse's testamentary intent regarding the assets of the deceased spouse over the presumably contrary intent of the deceased spouse regarding those assets, and whether there is prejudice to Steve's intentions regarding SJMO.

We conclude that the probate court erred in granting summary disposition to Giarmarco on the basis of laches at this time. In light of our disposition of this issue, we need not consider SJMO's argument that petitioners' petition is time-barred by MCL 600.5813. SJMO derives its interest in this matter from being the recipient of the property in the VSLT over which Steve had a right of appointment, and the gift is contingent on the probate court's ultimate disposition of

petitioners' petition.[9] SJMO cannot properly claim a gift where it is not yet clear that Steve could properly give it. Accordingly, we reverse the probate court's order of December 9, 2019 granting summary disposition to Giarmarco, as trustee of the Steve Stolaruk Living Trust, and to SJMO, and remand for further proceedings.

Reversed and remanded. We do not retain jurisdiction.

/s/ Jane M. Beckering
/s/ Karen M. Fort Hood

[9] SJMO's position relative to Giarmarco is analogous to a spouse with a derivative claim for loss of consortium. The derivative claim "stands or falls with the primary claims in the complaint." See, *Mino v Clio Sch Dist*, 255 Mich App 60, 80; 661 NW2d 586 (2003) (quotation marks and citation omitted).

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RIORDAN, J. (*dissenting*).

I respectfully dissent. The trial court did not err by granting summary disposition in favor of appellees because, for the reasons explained below, they were entitled to summary disposition on the basis of laches.[1] Accordingly, I would affirm.

"The term 'laches' involves the idea of negligence,–a neglect or failure to do what ought to be done under the circumstances to protect the rights of the parties to whom it is imputed, or involving injury to the opposite party through such neglect to assert rights within a reasonable time." *Ripley v Seligman*, 88 Mich 177, 198; 50 NW 143 (1891). "If a plaintiff has not exercised reasonable diligence in vindicating his or her rights, a court sitting in equity may withhold relief on the ground that the plaintiff is chargeable with laches." *Knight v Northpointe Bank*, 300 Mich

[1] I acknowledge that the trial court granted summary disposition in favor of Saint Joseph Mercy Oakland (SJMO) on the basis of the statute of limitations. However, "[a] trial court's ruling may be upheld on appeal where the right result issued, albeit for the wrong reason." *Gleason v Dep't of Trans*, 256 Mich App 1, 3; 662 NW2d 822 (2003).

App 109, 114; 832 NW2d 439 (2013). "[W]hen considering whether a plaintiff is chargeable with laches, we must afford attention to prejudice occasioned by the delay." *Lothian v City of Detroit*, 414 Mich 160, 168; 324 NW2d 9 (1982). "The application of the doctrine of laches requires the passage of time combined with a change in condition that would make it inequitable to enforce the claim against the defendant." *Yankee Springs Twp v Fox*, 264 Mich App 604, 612; 692 NW2d 728 (2004).

Here, petitioners possessed copies of the Vivian Stolaruk Living Trust (VSLT), which was drafted in 2002, no later than 2009. Yet they did not initiate the instant action to reform the VSLT until 2019.[2] Such a delay of at least 10 years, in specific analogous contexts, would itself be dispositive of the action. See MCL 600.5807(9) (six-year statute of limitations for a breach of contract); MCL 700.7604(1)(a) (two-year statute of limitations to contest the validity of a trust after the settlor's death); MCL 700.7604(1)(b) (six-month statute of limitations to contest the validity of a trust after the trustee sends notice to the person challenging its validity). Thus, I question whether the majority properly disregards such statutes to rely exclusively on principles of equity. See *Lothian v Detroit*, 414 Mich 160, 170; 324 NW2d 9 (1982) ("[I]n equity cases in which corresponding relief is available at law, the existence of laches generally will be ascertained with reference to an analogous statute of limitations."). Arguably, these analogous statutes of limitations should apply here to the question of laches, given that petitioners ultimately seek monetary relief through reformation of the VSLT, which is indicative of an action at law. See *Wright v Genesee Co*, 504 Mich 410, 421; 934 NW2d 805 (2019) ("Claims of law included actions seeking a money judgment, such as for money had and received, money paid, quantum meruit, and quantum valebat.").

Regardless, even exclusively applying principles of equity, appellees were entitled to summary disposition on the basis of laches. The VSLT, as allegedly understood by petitioners since 2002, provided for a multimillion-dollar inheritance upon the death of their parents. In my view, "reasonable diligence" by petitioners for such an important matter would have included either reading the VSLT for themselves or hiring an attorney to read the VSLT at that time. Yet petitioners did not do so even after obtaining copies of the VSLT by 2009. Such disinterest by petitioners in their anticipated inheritance cannot be characterized as "reasonable diligence."[3]

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[2] An action to reform a trust is equitable in nature. See *Detroit v Detroit United Ry*, 226 Mich 354, 361; 197 NW 697 (1924) (noting that "equity has power to construe the instrument by which the trust is created [or] to reform the instrument in such a manner as to carry out the intentions of the settlor").

[3] It is well-recognized in Michigan that a person "is presumed to have knowledge of the terms of his [or her] contract . . . ." *Geraghty v Washtenaw Mut Fire Ins Co*, 145 Mich 635, 639; 108 NW 1102 (1906). Of course, the same principle does not necessarily apply to trusts because the beneficiary need not even be aware of the trust when it is created. *City of Marquette v Wilkinson*, 119 Mich 413, 418-419; 78 NW 474 (1899). Nonetheless, it is odd that, as the majority implicitly holds, a party would be presumed to be aware of the terms of a contract in his or her possession but not the terms of a trust in his or her possession.

The majority excuses this lack of diligence by reasoning that petitioners relied on a flowchart drafted by respondent Giarmarco in 2002 in which there was no explicit indication that they could be disinherited. But the flowchart only was a brief summary of the VSLT that could not reasonably be understood as encompassing all of its pertinent terms. Further, there is no indication that Giarmarco purported to be petitioners' attorney at the time, such that petitioners could reasonably believe that he was acting on their behalf to protect their anticipated inheritance. Additionally, there is no suggestion that he committed fraud by drafting the flowchart as a simple tool to explain how the trusts operated. In light of these facts, I find the flowchart almost irrelevant. It certainly does not excuse years of inaction by petitioners.

I also would conclude that Giarmarco and SJMO have shown prejudice. First, the individual who was likely best-situated to identify Vivian's intent with respect to the VLST—her husband, Steve Stolaruk—is now deceased. Had petitioners timely maintained their action to reform the VLST, he would have been alive and thus capable of providing evidence of her intent. But by delaying their action, petitioners are now able to avoid his evidence in that regard. See *German American Seminary v Kiefer*, 43 Mich 105, 111; 4 NW 636 (1880) ("[I]t would be the height of injustice to permit complainant, with full knowledge of the facts, to delay suit while the persons who were familiar with the facts were one by one passing away, and at last bring suit under circumstances which at the best must leave the court in doubt whether the remaining evidence does not disclose a partial, defective and misleading case."). Second, as the trial court explained, Steve's estate plan would be "overthrown" because, now that he is deceased, he is unable to at least diminish the inheritance provided to his children if the VSLT is reformed. For instance, if petitioners had timely maintained their action and the VSLT was reformed, Steve could have made lifetime gifts to SJMO from some of his trust's assets—which were, in turn, partially derived from the VSLT assets—that would have reduced the money available to petitioners following his death. Yet petitioners' ultimate inheritance may now be substantially *enhanced* because they failed to inform themselves of the terms of the VSLT and maintain a timely action for reformation. That is, petitioners may be affirmatively rewarded for their lack of diligence. Equity neither requires nor permits such a result.

Because the equitable defense of laches applies in this case, I would affirm the trial court.

/s/ Michael J. Riordan