

## Cohabitation and Real Property Ownership: The Problems with Joint Ownership When the Relationship Fails

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Imagine that your live-in relationship goes South and the love of your life leaves. Imagine that the two of you have acquired a house together, and titled it jointly “with full rights of survivorship.” Imagine fifteen or twenty years go by, and you’ve made all of the mortgage, tax, maintenance, insurance, and other payments necessary to acquire the house. The house in which you and your former lover had a small – say \$20,000 – interest (one acquired with your money) is now free and clear of a mortgage. Property values have increased and the house is now worth \$250,000. Is it yours? Can you leave it to your children? Can you sell it free and clear? The answer to all of those questions if the property is in Michigan is “No.”

In a case of first impression, the Michigan Court of Appeals decided *Wengel v Wengel*, Docket No. 263657 (February 28, 2006) [For Publication] The specific issue involved is whether the doctrine of adverse possession can be extended to apply to real estate owned as a joint tenant with full rights of survivorship.

Sharon and James Wengel met in **1972** and became romantically involved; James moved into Sharon’s house. In **1974**, Sharon purchased a new home in her name only; she and James moved there. Sharon and James never married, but she took his name. James claims that he contributed financially to household expenses and also that he made improvements to the property. In **1981**, Sharon executed a deed titling the house to both parties as “joint tenants with full rights of survivorship.” Sharon claimed that James never contributed toward the mortgage, taxes, insurance, etc. James claimed that he did put a great deal of work into improvements.

In **1985**, the parties separated. Each had a different version of the facts. Sharon said that James left her for another woman and moved to Florida. James said that Sharon threw him out and “has exercised exclusive control and possession of the property.” James also said that Sharon wrongfully kept personal property belonging to him that he valued at over \$25,000. He also claimed that Sharon refused to give him the rental value of the real estate and refused to sell it. Sharon said that she told him to “have his name removed from the property.” James said he asked her for \$25,000 to release his interest and she refused to give it to him. Stalemate. It was undisputed that since 1985, Sharon made all of the mortgage payments, solely paid the taxes, and performed all of the maintenance with respect to the residence.

Now fast forward nineteen years to **2004**. Sharon filed an action to quiet title. She claimed that she was entitled to exclusive title to the property through adverse possession because she’d had possession of the property since 1985 and because her possession was actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the requisite 15-year statutory period. [See MCL 600.5801] As an alternative theory, Sharon claimed that she should be awarded possession of the property because the real estate was titled jointly in 1981 because of an agreement

between Sharon and James to live together and share all expenses, including the mortgage, taxes, insurance, and upkeep. Sharon claimed that the agreement failed for lack of consideration when James refused to contribute toward any of the expenses. James filed a counterclaim in which he alleged that he was entitled to partition and sale, that he was entitled to damages because of Sharon's conversion of his personal property, and that he was entitled to recover reasonable rental damages.

The Macomb County Circuit Court ruled in favor of James, and Sharon appealed. The primary argument on appeal centered around the issue of whether the doctrine of adverse possession can be applied as between cotenants in a situation where their property is jointly owned with rights of survivorship.

Michigan family practitioners have learned that in cohabitation relationships parties often acquire real property that they title as a joint tenancy with full rights of survivorship. Unfortunately, Michigan law provides that a joint tenancy with full rights of survivorship is comprised of a joint life estate with dual contingent remainders in fee simple. *Aibro v Allen*, 434 Mich 271, 275; 454 NW2d 85 (1990). Cohabitants who have acquired property as joint tenants with full rights of survivorship find that the person who leaves first cannot get his or her money out of the property because the courts will not allow partition, an act that would result in a destruction of the future interest – the dual contingent remainder. This usually works to the severe disadvantage of the person who leaves the relationship; because partition is not available, this person usually takes a low-ball estimate of the appraised value just to recover some of his or her investment in order to move on with his or her life.

Michigan's Court of Appeals decided *Wengel* by determining when a party's rights accrue – by examining how the statutory 15-year period in an adverse possession case is applied as to the life estate portion of the property interest and how the statutory 15-year period is applied with respect to the future interest.

## **I. Adverse Possession and the Life Estate**

The Court concluded that the doctrine of adverse possession is available to the occupying tenant to defeat the ousted cotenant's life estate interest held in the property because the clock started ticking the minute he was ousted.<sup>1</sup> In order to protect the life estate, the ousted cotenant must file a claim to recover the property prior to expiration of the statutory 15 years by which adverse possession is measured. The Court cautioned that a heightened level of proof is to be observed when addressing whether all of the elements of adverse possession have been met. The cotenant must intend to possess the premises to the exclusion of his or her cotenant, and the cotenant must have knowledge or notice of this intent as clearly evidenced by acts or declarations.

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<sup>1</sup> In fact, the law is well-established in Michigan that a life estate may be lost to a claim of adverse possession. However, Michigan Courts have never examined a claim of adverse possession as to the dual contingent remainder – the survivorship interest.

## Special Proof Problems

The trial court identified the issue of whether the doctrine of adverse possession can be applied as between cotenants in a joint tenancy with full rights of survivorship, and required the parties to submit briefs on the issue. At the hearing, the trial court ruled that because the parties were joint tenants with rights of survivorship, Sharon could not establish the element of *hostility* necessary to prove adverse possession. The trial court stated

Generally, hostile means that the use is inconsistent with the right of the owner, without permission asked or given, and would entitle the owner to a cause of action against the intruder. . . . In the present action, the parties are joint tenants with the right of survivorship, therefore, plaintiffs sole possession was not hostile. That's my finding. And the court cannot find that the theory of adverse possession would be applied to these circumstances.

The appellate court held that the trial court's finding that Sharon could not establish adverse possession for lack of hostility as to the life estate portion of the property interest was erroneous. Essentially, the error made by the trial court was in not treating the two distinctly different property elements separately.

Practitioners will find the elements of adverse possession in MCL 600.5801. The 15-year period in the statute begins to run from the first moment in time the party *claiming adverse possession began to make exclusive use of the property*. The Wengel Court quoted *Kipka v Fountain*, 198 Mich App 435, 438 (1993). The *Kipka* panel, addressing the principles of adverse possession, stated:

A claim of adverse possession requires clear and cogent proof that possession has been actual, visible, open, notorious, exclusive, continuous, and uninterrupted for the statutory period of fifteen years. These are not arbitrary requirements, but the logical consequence of someone claiming by adverse possession having the burden of proving that the statute of limitations has expired. To claim by adverse possession, one must show that the property owner of record has had a cause of action for recovery of the land for more than the statutory period. A cause of action does not accrue until the property owner of record has been disseised of the land. MCL 600.5829. Disseisin occurs when the true owner is deprived of possession or displaced by someone exercising the powers and privileges of ownership. [*Kipksupra* at 439 (citations omitted).]

The concept of occupancy that is hostile and "under cover of right" was explored by the *Wengel* Court, and you may wish to read the entire decision for the details. Generally, "[t]he term 'hostile' as employed in the law of adverse possession is a term of art and does not imply ill will[;]" rather, hostile use is that which is "inconsistent with the right of the owner, without permission asked or given," and which use "would entitle the owner to a cause of action against the intruder."

The *Wengel* Court noted the difficulty in establishing the element of hostility in a situation where both parties have a coexistent right of occupancy. Since the possession is rightful, it doesn't imply adverse possession as would occur with a stranger. Thus, to prevail, the party must overcome the presumption of possession as a matter of right through proof of acts and declarations that are clearly inconsistent and clearly communicated to the cotenant. In further describing how to establish hostility, the *Wengel* Court cited an 1897 case where an uncle occupied a farm in which a boy had an interest inherited from his grandfather. In that case, the court held that mere occupancy was insufficient to establish hostility. The uncle had to prove that he had distinctly notified the boy that he (the uncle) was claiming to own the land absolutely. In such a case, the 15 years would begin to run from the date the boy was notified. [There was no discussion whether the date the statute began to run would be tolled if the boy were not of the age of majority.]

Thus to succeed in an adverse possession case against a co-tenant, one must prove three things: (1) the intent to occupy adversely; (2) the adverse possession in fact; and (3) the knowledge or notice of the co-tenant.

The Court of Appeals noted that through the following, Sharon had met the heightened level of scrutiny required to establish adverse possession:

1. Sharon's complaint referenced all of the elements of adverse possession and alleged that she had satisfied the elements.
2. James did not respond directly to those allegations.
3. James stated in his counterclaim that Sharon "ejected [him] from the premises and exercised exclusive control and possession to the subject property." He also asserted that Sharon "has refused the sale of the described property and has had the full and unfettered possession of the entire property."
4. James claimed that Sharon refused to give him the reasonable rental value of his interest in the property for which he sought compensation dating back to 1985.
5. James contended that Sharon exercised dominion and control over his personal property
6. In James' trial brief, he stated that Sharon made him leave the home in 1985.
7. In James' appellate response brief, he made no claim that, factually, the elements of adverse possession were not established, but rather he focused solely on the legal argument that adverse possession is

inapplicable where there exists a joint tenancy with full rights of survivorship.

The above record led to the Court of Appeals' conclusion that, as a matter of law, Sharon adversely possessed James' life estate. This was made possible because James' effectively conceded in his pleadings that the elements of adverse possession were satisfied, and he did not dispute Sharon's argument that factually adverse possession was established for the statutory period.

## **II. Adverse Possession and the Indestructible Dual Contingent Remainders**

In keeping with the Michigan Supreme Court's decision in *Albro v Allen* and also with Michigan statutes, however, the Court of Appeals held that even though a cotenant might obtain the right to occupy the real estate exclusively during the life time of the ousted cotenant, the ousted life tenant's contingent remainder cannot be destroyed through adverse possession by the occupying life tenant. The rationale of the Court's conclusion was that the statutory period to file an action to recover that element of the property right (the joint contingent remainder) cannot begin to run, at a minimum, until the contingency occurs. In other words, the claim accrues at the death of the occupying life tenant, here Sharon, which would mark the expiration of the precedent estate. [Note, as discussed below, if Sharon survived James, she would then own the property in fee simple.]

The *Wengel* Court discussed the *Albro* decision at length, particularly the distinction between ordinary joint tenancies and joint tenancies that specifically grant rights of survivorship. A mere joint tenancy may be severed through the act of one cotenant and is subject to partition. A cotenant in a mere joint tenancy may mortgage, sell, or create a lien against that cotenant's share. Any one of these acts severs the joint tenancy, which then becomes a tenancy in common.

But the crux of the matter here is that a contingent remainderman does not have a present right of possession that "would entitle him to a cause of action against an intruder." Thus, the 15-year statute would not begin to run until the remainderman has a present right to occupy the land. This will not occur until the life estate has ceased. In the *Wengel* case, that will occur at Sharon's death. Should Sharon's heirs occupy the real estate, they will need to occupy it openly, adversely, and so forth for 15 years – all the while holding their breath that James or his heirs (or a person to whom he has transferred his contingent remainder) will not file an action for ejectment.

### **Practice Pointers**

Between 1960 and 2000, cohabitation by unmarried couples has increased 1,247%! [Note: That percentage is not a typographical error.] According to the U.S. Bureau of the Census, in 1960 439,000 couples lived together without benefit of marriage, and in the 2000 decennial census, 5,475,768 couples lived together. This

trend is unlikely to decline. Couples tend to acquire real estate and other property. Unfortunately, Michigan Courts have not been receptive to equitable claims for division of jointly acquired property by unmarried couples. The result is that if real property is not jointly titled to the parties, the non-titled person is likely to be denied a fair share of the value at separation. And where, as in *Wengel*, real property is titled jointly with rights of survivorship, then the party who manages to remain in possession can avoid making a fair settlement of property at separation by refusing to sell.

Michigan family law practitioners dealing with property issues for unmarried joint cotenants will need to be very wary indeed when faced with an instrument that creates a joint tenancy with full rights of survivorship. In fact, the concept of indestructible dual contingent remainders was the norm at common law. Michigan is not the only state where the result reached by the *Wengel* Court will operate. Alabama,<sup>2</sup> South Carolina,<sup>3</sup> Mississippi,<sup>4</sup> and New Jersey<sup>5</sup> are others. See also 59A Am.Jur.2d, Partition 27 (1987). When a cohabitation relationship fails, in the absence of a written agreement about how the partners are going to deal with their property interests, one of the partners –the one who is forced to leave the property – will be at a decided disadvantage.

Thus the family lawyer should first of all avoid his or her client getting into such an arrangement without having first executed a cohabitation agreement (a contract in the nature of a prenuptial or postnuptial agreement). Cohabitation agreements are upheld by a majority of the States, and can avoid the harsh results that are the norm in states where cohabitants have no equitable rights. [Now there's a topic for another day!]

The sad reality is that our clients don't often realize the dangers until they've already taken the plunge. Then they come to us seeking a way to handle the complex property issues that have arisen.

So practitioners must learn to recognize the nature of the property interest in order to properly counsel a client about his or her options. A joint tenancy that creates indestructible contingent remainders is created by express language in the deed directly referencing words of survivorship. This type of co-tenancy comprises both a joint life estate and also dual contingent remainders. A contingent remainder is in fee simple. To identify such a property interest, look for language in the deed such as: "and to the survivor of them," "to them and the survivor of them," "or survivor of them," "with right of survivorship," or "with full rights of survivorship."

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<sup>2</sup> *Bernhard v. Bernhard*, 278 Ala. 240, 177 So. 2d 565 (1965); *Durant v Hamrick*, 409 So. 2d 731 (Alabama 1981).

<sup>3</sup> *Smith v. Cutler*, 623 S.E.2d 644, 366 S.C. 546 (S.C. 12/19/2005)

<sup>4</sup> *Estate of Clidress*, 588 So. 2d 192 (Miss.09/18/1991)

<sup>5</sup> *Freda v. Commercial Trust Co.*, 570 A.2d 409, 118 N.J. 36 (N.J. 02/21/1990)

## **What happens to the property when the cotenant who occupies it dies?**

The *Albro* Court reached the following conclusion:

The interest which was conveyed by the deed to Carol Allen and Helen Albro “as joint tenants with full rights of survivorship” was a joint life estate with dual contingent remainders. The contingent remainder of either cotenant may not be destroyed by any act of the other. Thus, we hold that either cotenant may transfer her interest in the joint life estate and such a transfer has no effect on the contingent remainders. Upon the death of either of the original cotenants, the other cotenant, or any person to whom she has transferred her contingent remainder, takes the whole estate. We further hold that the joint life estate may be partitioned without affecting the contingent remainders. [*Id.* at 287.]

The *Albro* Court’s ruling reflected a change in the law in that the Court reconsidered the rule against partition of a joint life estate with dual contingent remainders, concluding “that the ‘joint life estate’ element may be partitioned without doing violence to the contingent remainders.” As a practical matter, however, a life estate is not very marketable.

The reason the life estate can be treated differently is that a life estate, while it is a freehold estate, is not an estate of inheritance. There is no future interest, in other words. As the *Albro* Court had earlier stated: “‘Estates in lands are divided into estates of inheritance, estates for life, estates for years, and estates at will and by sufferance.’” But, of course, the right of survivorship – the dual contingent remainder is the fee simple aspect of the title – is one that is an estate of inheritance.

### **Applying the Rule of Law to Sharon and James’ Case**

Applying the court’s reasoning to Sharon and James Wengel, here are the ramifications when these unmarried cohabitants titled real estate as joint tenants with full rights of survivorship:

Sharon’s 1981 conveyance of the property to herself and James as “joint tenants with full rights of survivorship” gave each of them a possessory, freehold estate with an immediate right to occupy the property.

Sharon’s occupancy for more than 15 years satisfied the requirements of adverse possession and she has destroyed James’ life estate. She has the right to occupy the property during her lifetime. Thus, Sharon’s nearly 20 years of payments and any subsequent payments applied to the real estate may be enjoyed by her during her lifetime.

The joint life estates will cease upon the death of either party. If James dies first, then Sharon will own the property in fee simple. However, if Sharon predeceases

James, then the property will pass to James or to his heirs through the contingent remainder in fee simple. There is nothing that Sharon can do to destroy James' contingent remainder. In fact, by statute, this contingent remainder is indestructible.<sup>6</sup>

Thus, if Sharon predeceases James, all of her monies spent to acquire and maintain the property will, in fact, represent a windfall to James or to James' heirs. They will have a present interest to occupy the property. If Sharon's heirs continue to occupy the property, the 15-year statutory period will begin running against James or his heirs at Sharon's death. James or his heirs will have to file a suit to recover possession within that 15-year period or they will lose their interest through adverse possession.

Since the life estate is not an estate of inheritance, Sharon was able to prevail in her adverse possession claim against James when she established that she had occupied the real estate actually, visibly, openly, notoriously, exclusively, continuously, and uninterruptedly for the requisite 15-year statutory period. As a result, there isn't anything that James can do to force her to sell the property, to pay him a fair rental value for her exclusive use, or to partition the property to give him the value of his presumptive half interest. Adverse possession relative to the remaindermen's rights does not commence to run until their right of entry and possession accrues, which occurs at the death of Sharon.

In conclusion, the Court of Appeals, recognizing the hardship and unfairness for persons in Sharon's position who bear the expense of down payment, purchase mortgage payments, taxes, insurance and maintenance without contribution from one who may end up with the farm, expressed regret at the result reached:

"Although we are hesitant to reach this conclusion because, absent some agreement between the parties, it will hinder plaintiff's ability to convey or alienate the property should she wish to sell the home in the future, our holding is necessitated by the legal authorities discussed above."

The Court of Appeals could not abrogate the rule of law set forth in *Albro*, and could not ignore the plain language of MCL 600.5829(3) and MCL 554.32.

As a practice pointer, the Court of Appeals noted that "[f]rom a practical perspective, it would be reasonable for a disseised cotenant, being legally advised or having knowledge with regard to the meaning of "rights of survivorship," to decide to refrain from engaging in a costly legal battle or other confrontation with an occupying life tenant, deciding instead to hopefully take peaceful possession by invoking his or her rights upon the death of the life tenant predicated on the contingent remainder.

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<sup>6</sup> See MCL 554.32: No expectant estate can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent estate, nor by any destruction of such precedent estate by disseizin, forfeiture, surrender, merger, or otherwise.



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