STATE OF MICHIGAN

COURT OF APPEALS

SAMUEL GAMBINO,

Plaintiff/Appellant/
Cross-Appellee,

v

BRIAN A. GAMBINO, TERRENCE P. GAMBINO, MARY JO PALAZZOLO, a/k/a MARY JO PAPAZZOLA and HOPE E. HAND,

Defendants/Appellees/
Cross-Appellants.

UNPUBLISHED
May 30, 1997

No. 190953
Wayne Circuit Court
LC No. 95-501296

Before: Taylor, P.J., and Gribbs and R. D. Gotham,* JJ.

PER CURIAM.

Plaintiff appeals as of right[1] from the trial court's order granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff argues that there is a genuine issue of material fact regarding his donative intent with respect to Detroit Edison stock and mutual funds and that the transactions at issue resulted in incomplete gifts. We disagree.

Upon a thorough review of the record, and granting the benefit of reasonable doubt in favor of plaintiff, we conclude that no record might be developed that would leave open an issue upon which reasonable minds might differ. *Radtke v Everett*, 442 Mich 368, 374; 501 NW2d 155 (1993); *Pickney Schools v Continental Casualty Co*, 213 Mich App 521, 525; 540 NW2d 748 (1995).

A plaintiff who attacks the validity of a gift has the burden of proving that no gift was made. *Vander Honing v Taylor*, 344 Mich 24, 29-30; 73 NW2d 458 (1955). Three elements must be shown to establish a valid gift inter vivos: (1) the donor must have intended to pass title to the donee;

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

(2) there must have been actual or constructive delivery; and, (3) the donee must have accepted the gift. *In re Mesingger Estate*, 201 Mich App 290, 291; 506 NW2d 238 (1993). With the intent to avoid probate upon the deaths of plaintiff and his wife, plaintiff took all of the steps necessary to create joint tenancies with full rights of survivorship in the stocks and mutual funds. Unfortunately, plaintiff was under the mistaken belief that defendants would not have an ownership interest in the securities until both plaintiff and his wife passed away. Nevertheless, a "[m]istake as to the legal effect of a written instrument, deliberately executed and adopted, constitutes no ground for relief in equity." *Schmalzriedt v Titsworth*, 305 Mich 109, 119; 9 NW2d 24 (1943), quoting *Crane v Smith*, 243 Mich 447, 450; 220 NW 750 (1928).

Moreover, plaintiff conveyed the stock, by transfer through a registered securities dealer, to himself, his wife, and defendants as joint tenants with full rights of survivorship; therefore, delivery to plaintiff in his capacity as a joint tenant is presumed to be delivery to defendants. *Serkaian v Ozar*, 49 Mich App 20, 28; 211 NW2d 237 (1973). Also, there was constructive delivery of the mutual funds to defendants because plaintiff had defendants sign a joint account agreement, which expressly provided defendants with a present interest, as well as control of the mutual fund accounts as joint tenants. Finally, because this gift was beneficial to defendants, the donees, acceptance is presumed. *Osius v Dingell*, 375 Mich 605, 611; 134 NW2d 657 (1965).[2] Accordingly, we conclude that there was a valid gift inter vivos and that the trial court did not err in granting summary disposition in favor of defendants.

Affirmed. Plaintiff, being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ Clifford W. Taylor
/s/ Roy D. Gotham

[1] Defendants withdrew their cross appeal at oral argument.

[2] The dissents reliance on *Osius* is misplaced. In *Osius* the donee's right to recall was specifically reserved. In the case at bar, however, there is no evidence of a reservation. Absent such evidence, it is impossible to find, as the Supreme Court did in *Osius*, a parol trust.