

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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DAVID BURKACKI, Personal Representative of  
the Estate of EMILY L. BARR,

UNPUBLISHED  
June 15, 2006

Petitioner-Appellee/Cross-  
Appellant,

v

JAMES BARR, Trustee for the ALEXANDER M.  
BARR TRUST,

No. 266669  
Oakland Probate Court  
LC No. 04-293771-CZ

Respondent-Appellant/Cross-  
Appellee.

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Before: Smolenski, P.J., and Hoekstra and Murray, JJ.

PER CURIAM.

Respondent appeals as of right from the probate court's opinion and order granting summary disposition in favor of petitioner pursuant to MCR 2.116(C)(10). The court directed that assets from a Morgan Stanley Dean Witter (MSDW) brokerage account owned by Alexander and Emily Barr, as joint tenants with rights of survivorship, be returned to petitioner, the personal representative of Emily Barr's estate, because Emily survived Alexander and therefore acquired all rights to the assets upon Alexander's death. Petitioner cross appeals the trial court's denial of sanctions pursuant to MCR 2.114. We affirm.

Respondent, Trustee for the Alexander M. Barr Trust, argues that the trial court erred in determining that the brokerage account assets belonged to Emily Barr rather than Alexander Barr's trust.

As this Court stated in *O'Donnell v Garasic*, 259 Mich App 569, 572-573; 676 NW2d 213 (2003):

A trial court's grant or denial of summary disposition under MCR 2.116(C)(10) is reviewed de novo on appeal. A motion for summary disposition under MCR 2.116(C)(10) tests whether there is factual support for a claim. Affidavits, pleadings, depositions, admissions, and documentary evidence are considered in reviewing a motion for summary disposition pursuant to MCR 2.116(C)(10), and the evidence is viewed in the light most favorable to the party opposing the motion. Summary disposition is proper under MCR 2.116(C)(10) if

the documentary evidence shows that there is no genuine issue of material fact, and the moving party is entitled to judgment as a matter of law. [Internal quotations and citations omitted.]

In this case, Alexander and Emily Barr opened a brokerage account with MSDW pursuant to a “Joint Account Agreement with Right of Survivorship,” which provided:

It is the express intention of the undersigned to create an estate or account as joint tenants with rights of survivorship and not as tenants in common. In the event of death of either or any of the undersigned, the entire interest in the joint account shall be vested in the survivor or vested in the survivors on the same terms and conditions as theretofore held, without in any event releasing the decedent’s estate from the liability provide for in the next preceding paragraph.

Because this document is unambiguous, it must be enforced according to its terms. *Burkhardt v Bailey*, 260 Mich App 636, 656; 680 NW2d 453 (2004). The agreement expressly provides that Alexander and Emily Barr held the brokerage account as joint tenants with rights of survivorship. Thus, the account automatically passed to Emily, as the survivor, when Alexander died on March 14, 2002. Cf. *In re VanConett Estate*, 262 Mich App 660, 667-668; 687 NW2d 167 (2004), lv gtd 474 Mich 999 (2006); see also 1 Cameron, Michigan Real Property Law (2d ed), § 9.11, pp 306-307.

Respondent maintains, however, that the account assets were transferred to Alexander’s revocable trust before his death. Under the terms of the account agreement, either Emily or Alexander could authorize the transfer of assets out of the joint account. There is no evidence that Emily ever withdrew or authorized a transfer of assets from the account. Respondent argues that Alexander gifted the account assets to his revocable trust when the trust was established on November 20, 2001. We disagree.

In order for a gift to be valid, three elements must be satisfied: (1) the donor must possess the intent to transfer title gratuitously to the donee, (2) there must be actual or constructive delivery of the subject matter to the donee, unless it is already in the donee’s possession, and (3) the donee must accept the gift. Acceptance is presumed if the gift is beneficial to the donee. *In re Handelsman*, 266 Mich App 433, 437-438; 702 NW2d 641 (2005).

In this case, the evidence did not establish a basis for concluding that the account assets were delivered to the trust on either November 20, 2001, or at any time before Alexander’s death. Delivery must place the property within the dominion and control of the donee; a gift inter vivos must be fully consummated during the lifetime of the donor and must invest ownership in the donee beyond the power of recall by the donor. *Osius v Dingell*, 375 Mich 605, 611; 134 NW2d 657 (1965). Mere expressions of intent by the donor, unaccompanied by the requisite steps to effect a legal transfer, are insufficient to create a valid gift. *Loop v Des Autell*, 294 Mich 527, 531; 293 NW 738 (1940).

Here, respondent relies on a November 20, 2001, letter signed by Alexander asking that the joint account be “retitled” to his trust, and a declaration of trust signed by Alexander expressing his intent that his property be held for the benefit of his trust. While this evidence supports a conclusion that Alexander intended to make a gift to his trust on November 20, 2001,

it is insufficient to establish actual delivery of the joint account assets to the trust. MSDW's operations manager testified that Alexander's letter could not authorize a transfer of the assets from the joint account into the trust's account. Rather, this could only be accomplished with more specific instructions or with an "Authorization to Journal Securities or Funds." The appropriate paperwork to effectuate a transfer of the account assets to the trust was later completed, but not until after Alexander's death. Under the terms of the joint account agreement, however, the account assets automatically passed to Emily, as the survivor. In short, while Alexander may have expressed his intent that the trust receive the account assets, neither he nor anyone acting on his behalf took the requisite steps to complete a legal transfer of those assets before his death.

Contrary to what respondent argues, the trial court did not rely on MCL 557.151 to conclude that Emily Barr became the rightful owner of the trust assets. Rather, it relied on the language of the joint account agreement, which expressly provided that the account was held by Alexander and Emily as joint tenants with rights of survivorship.<sup>1</sup>

On cross appeal, petitioner asserts that the trial court erred in denying his request for sanctions under MCR 2.114(D) and (E). The trial court's decision regarding sanctions under MCR 2.114 is reviewed for clear error. *John J Fannon Co v Fannon Products, LLC*, 269 Mich App 162, 170; 712 NW2d 731 (2005).

MCR 2.114(E) provides that a court shall impose an appropriate sanction against a party or an attorney if a document is signed in violation of the court rule. Petitioner has never specified what document was signed in violation of the rule. In any event, while the joint account agreement clearly establishes that Emily was entitled to any account assets upon Alexander's death, it is not apparent that respondent's position that the account assets were transferred to Alexander's trust before Alexander's death was not well grounded in fact or unwarranted by existing law. Although the court ultimately rejected respondent's argument, that alone does not require sanctions. *Attorney Gen v Harkins*, 257 Mich App 564, 577; 669 NW2d 296 (2003).

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<sup>1</sup> We also reject respondent's contention that MCL 440.8502 bars petitioner's claim to the disputed assets. That statute only applies where a person "acquires a security entitlement under [MCL 440.8501] for value and without notice of the adverse claim." Here, respondent does not explain how the trust acquired a security entitlement "for value." Additionally, although petitioner's complaint asserted a claim for breach of fiduciary duty, the trial court did not rely on this theory as a basis for its decision. Therefore, we reject respondent's argument to the contrary.

Affirmed.

/s/ Michael P. Smolenski

/s/ Joel P. Hoekstra

/s/ Christopher M. Murray