STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of the Estate of JAMES GLYNN, SR., Deceased.

JAMES GLYNN, JR., and HAROLD DRAPER,

Respondents/Cross-Petitioners/Appellants,

v

JOHN T. GLYNN, CITIZENS COMMERCIAL & SAVINGS BANK, and the Estate of JAMES GLYNN, SR., Deceased,

Petitioners/Cross-Respondents/Appellees.

UNPUBLISHED
August 18, 1998

Nos. 199059; 199060
Genesee Probate Court
LC No. 91-136349 SE

Before: Bandstra, P.J., and Griffin and Young, Jr., JJ.

PER CURIAM.

Appellants James Glynn, Jr. (Glynn Junior), and Harold A. Draper (Draper), respondents/cross-petitioners in this probate action, appeal as of right the October 18, 1996, order of the Genesee Probate Court granting summary disposition pursuant to MCR 2.116(C)(10) in favor of appellee the Estate of James Glynn, Sr. (Estate). This order also required appellee Citizens Commercial & Savings Bank (Citizens) to turn over to the Estate certain principal funds and interest attributable to James Glynn, Sr.'s one-third interest in a certificate of deposit. Respondent Draper also appeals the probate court's October 18, 1996, orders granted pursuant to MCR 2.114, which obligated him to pay sanctions to Citizens and the Estate in the amounts of $1,268.75 and $1,400, respectively.[1] Finally, respondents appeal the probate court's October 18, 1996, order denying their motion for summary disposition brought pursuant to MCR 2.116(C)(1), (C)(4), (C)(6), and (C)(10). We affirm.

I

The facts of this case involve multiple lower court actions, as well as proceedings in this Court. At the heart of the controversy is a certificate of deposit (CD) issued on August 12, 1983, by Citizens, in the principal amount of $40,225.99 to James Glynn, Sr. (Glynn Senior), Stacia A. Glynn, who was the wife of Glynn Senior, and Glynn Junior. The face of this instrument provided that the CD was "NON-NEGOTIABLE," "NON-ASSIGNABLE," and "NON-TRANSFERABLE," and further stated that three signatures were required. The CD was issued for a ninety-four-day, automatically renewing term. The back side of the CD bore the ostensible signature of Glynn Senior, as well as the signatures of two witnesses. Glynn Senior died on February 28, 1986, and was survived by Stacia Glynn, John Thomas Glynn, his son, and Glynn Junior.

Pertinent to this appeal, the Estate filed a motion for summary disposition pursuant to MCR 2.116(C)(10), alleging that Glynn Senior's one-third interest in the CD was an asset of the Estate. Producing various affidavits, respondents argued, *inter alia*, that a genuine issue of material fact existed as to whether Glynn Senior intended to make an intervivos gift to Glynn Junior of his one-third interest in the CD. Respondents also motioned the probate court for summary disposition pursuant to MCR 2.116(C)(1), (4), (6), and (10).[2] The probate court denied respondents' motion and granted the Estate's motion for summary disposition, concluding that Glynn Senior could not unilaterally transfer his one-third interest in the CD assets to Glynn Junior. The court further ordered Citizens to turn over to the Estate an amount equal to Glynn Senior's one-third interest in the CD.

II

On appeal, respondents argue that the probate court lacked subject-matter jurisdiction to determine the parties' interests in Glynn Senior's portion of the CD assets. We disagree.

Respondents argue that the Estate's failure to label its July 30, 1996, petition to turn over property as a "civil action," in accordance with MCR 5.101(C)(1)[3], means that the probate court did not have subject-matter jurisdiction to determine the parties' rights to the CD. This argument is without merit. The court rule in question does not purport to have any effect on the subject-matter jurisdiction of the probate court. Nor does it, as respondents argue, direct that the complaint be filed in the circuit court. The statutes that actually delineate the probate court's exclusive and concurrent subject-matter jurisdiction, *In re Wirsing*, 456 Mich 467, 472; 573 NW2d 51 (1998), clearly confer subject-matter jurisdiction on the probate court to determine the parties' rights in the CD at the center of this controversy. MCL 700.21(a)(ii) and (iii); MSA 27.5021(a)(ii) and (iii). See also, MCL 700.22(1)(a); MSA 27.5022(1)(a).

Respondents' related argument that the probate court did not have subject-matter jurisdiction to decide this dispute because there was no "estate," as defined in MCL 700.4(6); MSA 27.5004(6), is likewise meritless.

III

Respondents next argue that the probate court erred in granting the Estate's motion for summary disposition because a factual dispute existed as to whether Glynn Senior intended to make an intervivos gift of his portion of the CD assets to Glynn Junior.[4] We disagree.

MCR 2.116(C)(10) permits summary disposition of a claim where "[e]xcept as to the amount of damages, there is no genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law." A motion for summary disposition brought pursuant to this court rule tests the factual support of a plaintiff's claim for relief. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The court considers the affidavits, pleadings, depositions, admissions, and other documentary evidence submitted or filed in the action to determine whether a genuine issue of any material fact exists to warrant a trial. *Id.* This Court reviews a trial court's decision whether to grant summary disposition de novo. *Id.*

Resolution of the issue at hand also requires interpretation of the contractual provisions of the CD. Interpretation of unambiguous and unequivocal contracts is a question of law that this Court reviews de novo on appeal. *Massachusetts Indemnity & Life Ins Co v Thomas*, 206 Mich App 265, 268; 520 NW2d 708 (1994).

The Uniform Commercial Code (UCC) defines a certificate of deposit as "an instrument containing an acknowledgment by a bank that a sum of money has been received by the bank and a promise by the bank to repay the sum of money." MCL 440.3104(10); MSA 19.2104(10). Pursuant to the UCC, such an instrument is negotiable if it: (1) contains an unconditional promise to pay a sum certain in money and no other promise, order, obligation, or power given by the maker or drawer except as authorized by the UCC; (2) is payable on demand or at a definite time; and (3) is payable to the order on demand or at a definite time or is payable to order or bearer. MCL 440.3104(1); MSA 19.3104(1). The certificate of deposit in the instant case bears the requisite hallmarks of a negotiable instrument, but for the significant notations "non-negotiable," "non-assignable," and "non-transferable."

Neither the UCC nor existing Michigan jurisprudence address the present circumstances, where language expressly prohibiting transferability or negotiability has been added to an otherwise negotiable instrument. The UCC does provide that "the effect of provisions of this act may be varied by agreement." MCL 440.1102(3); MSA 19.1102(3). Based on the premise that nothing in the UCC forbids the parties to a contract from altering its provisions, "every court [in other jurisdictions] which has been confronted with the issue has held that express limitations on negotiability or transferability are to be given effect, generally reasoning that holders are put on notice by an unambiguous statement of the nonnegotiability of an instrument." Anno: *Effect on negotiability of instrument, under terms of UCC, Section 3-104(1) of statements expressly eliminating negotiability or transferability*, 58 ALR4th 632, 635 (1988).

For instance, in *Amarillo Nat'l Bank v Dilday*, 693 SW2d 38, 41 (Tex App, 1985), the court held that a CD, clearly marked as nonnegotiable and nontransferable, was indeed a nonnegotiable

instrument, notwithstanding the fact that the certificate otherwise conformed to the UCC. The *Amarillo* court reasoned, *supra* at 41:

> We find nothing in the [Uniform Commercial] Code which would forbid an agreement between the parties as to the nonnegotiability of an instrument, nor do we find that such an agreement, if clearly and distinctly shown on the instrument itself, would be manifestly unreasonable. . . .
>
> * * *
>
> . . . We also note the well-established principle in Texas that the rules of construction governing contracts are applicable to bills and notes, and a bill or note must be construed as a whole so as to give effect, if possible, to every part of such instrument. . . . Moreover, memoranda on a bill or note placed thereon contemporaneously with the intention that they become a part of the instrument become a substantive part thereof.
>
> * * *
>
> We conclude that an agreement between the parties that a certificate of deposit be non-negotiable, when clearly and unambiguously shown on the instrument, is valid and effective. The certificate of deposit here in question is clearly marked in two places as non-negotiable. We hold this sufficient to make the certificate, by its terms, non-negotiable.

See also *Henry v Cobb Bank & Trust Co*, 261 SE2d 459 (Ga App, 1979), rev'd on other grounds, 274 SE2d 804 (1979).

We find the principles enunciated in *Amarillo, supra*, to be readily applicable to the present circumstances. As explained in *Johnston Brothers, Inc v Village of Coopersville*, 261 Mich 26, 28-29; 246 NW 551 (1932),

> A memorandum on a written contract qualifying or restraining its operation forms part of it. Thus, a memorandum on a bill or note indorsed thereon contemporaneously with the execution of the instrument forms a part of the contract and binds the parties to the same extent as if it had been embodied in the instrument.

Because the CD in the instant case unambiguously and unequivocally specifies that it is non-negotiable, non-assignable, and non-transferable, an intervivos gift of Glynn Senior's one-third interest to Glynn Junior was precluded by contract. Accordingly, we conclude that the probate court did not err in granting the Estate's motion for summary disposition.

IV

Next, respondent Draper argues that the probate court's decision to impose sanctions against him for violation of MCR 2.114(D) is clearly erroneous and, further, that the trial court abused its discretion in awarding Citizens $1,268.75 in attorney fees pursuant to MCR 2.114(E). We disagree.

This Court will not reverse a court's determination that a party has violated MCR 2.114(D) unless it is clearly erroneous. *Szymanski v Brown*, 221 Mich App 423, 436; 562 NW2d 212 (1997). Moreover, a court's determination of the reasonableness of fees will not be reversed on appeal absent an abuse of discretion. *Jordan v Transnational Motors, Inc*, 212 Mich App 94, 97; 537 NW2d 471 (1995).

As previously discussed, the probate court's subject-matter jurisdiction to determine the instant claims is clearly and explicitly established by statute. Thus, the probate court did not err in determining that Draper's resurrected argument concerning the alleged lack of subject-matter jurisdiction, already addressed by the court, was not "warranted by existing law or a good-faith argument for the extension, modification, or reversal of existing law," MCR 2.114(D)(2), but was a frivolous defense interposed for purely dilatory reasons. MCR 2.114(D)(3).

In the same vein, we find no clear error in the trial court's determination that respondents misstated the truth by informing the trial court that "another action has been initiated between the same parties involving the same claim." The other lower court actions arising out of the death of Glynn Senior and the distribution of his estate addressed, respectively, Draper's and Citizens' rights to Glynn Junior's one-third interest in the CD assets and the contested will of Stacia Glynn. The Estate was not made a party to either of these actions, and moreover, the actions did not involve Glynn Senior's one-third interest in the CD. Therefore, the probate court did not clearly err in finding that respondents had misstated the truth regarding the existence of a previously filed action concerning the same claim. Because respondents violated MCR 2.114(D)(2)(3), sanctions were mandatory. MCR 2.114(E); *In re Forfeiture of Cash & Gambling Paraphernalia*, 203 Mich App 69, 73; 512 NW2d 49 (1993).

Finally, we do not find that the probate court abused its discretion by awarding Citizens $1,268.75 in fees, instead of $862 as originally requested. The discrepancy between these amounts is attributable to fees for services rendered by Citizens' attorney after the original fee request was heard and ruled upon by the court. The reasonableness of the hourly fee was acknowledged by respondents' attorney.

V

Respondents next contend that the doctrines of judicial estoppel, equitable estoppel, and laches apply in the instant case, thus rendering the trial court's grant of summary disposition in favor of the Estate inappropriate. However, respondents have failed to present argument supporting these conclusory assertions and therefore have abandoned these issues. *Froling v Carpenter*, 203 Mich App 368, 373; 512 NW2d 6 (1994).

Finally, respondents contend that the probate court was required to consider their "claim" to Glynn Senior's portion of the CD assets as allowable, because the personal representative did not send

them a timely notice of disallowance, or otherwise institute an action on their claim within sixty-three days after receiving it. See MCL 700.717(1); MSA 27.5717(1). This argument is specious because, pursuant to MCL 700.3(4); MSA 27.5003(4), a "claim," as the term is used in MCL 700.717(1); MSA 27.5717(1), does not include "disputes regarding title of a decedent . . . to specific assets alleged to be included in the estate." Respondents' argument is therefore without merit.

We conclude, for the reasons set forth above, that the probate court properly granted the Estate's motion for summary disposition and, correspondingly, appropriately denied respondents' motion for summary disposition.

Affirmed.

/s/ Richard A. Bandstra
/s/ Richard Allen Griffin
/s/ Robert P. Young, Jr.

[1] These orders also obligated Michael J. Kotarski, attorney for respondents, to pay sanctions to the Estate and Citizens. Kotarski has not joined in this appeal.

[2] Respondents argued in their motion that Glynn Senior's portion of the CD assets did not belong to the Estate, that the probate court lacked subject-matter jurisdiction to determine the parties' rights in the CD, and that another action had been initiated between the parties that involved the same claim.

[3] MCR 5.101(C)(1)(2) provides:

> (C) Civil Actions, Commencement, Governing Rules. The following actions, must be titled civil actions, commenced by filing a complaint and governed by the rules which are applicable to civil actions in circuit court:
>
> (1) Any action against another filed by a fiduciary or trustee, and
>
> (2) A petition filed by a claimant after notice that the claim has been disallowed.

[4] Affidavits submitted by respondents in opposition to the motion for summary disposition maintained that Glynn Senior signed the reverse side of the CD with the intention of giving his one-third share to Glynn Junior.