

STATE OF MICHIGAN
COURT OF APPEALS

DOMINIC RIGGIO,

Plaintiff-Appellee,

v

SHARON RIGGIO,

Defendant-Appellee,

and

SUE E. RADULOVICH and SUE E.
RADULOVICH, P.C.,

Appellants.

UNPUBLISHED

October 14, 2010

No. 291998

Macomb Circuit Court

LC No. 2009-000698-DO

Before: FORT HOOD, P.J., and JANSEN and WHITBECK, JJ.

PER CURIAM.

Appellants, Sue E. Radulovich and Sue E. Radulovich, P.C., appeal by right an order discharging their retaining and charging liens for legal services previously provided to defendant in a divorce action between plaintiff and defendant. We reverse and remand to the trial court for further proceedings consistent with this opinion.

Appellants first argue that the trial court should have held a hearing to determine whether it had subject matter jurisdiction over the divorce proceedings. We agree. The determination whether a trial court had subject matter jurisdiction over a claim presents a question of law, which is reviewed de novo. *Ryan v Ryan*, 260 Mich App 315, 331; 677 NW2d 899 (2004).

“Jurisdiction is the power of a court to act and the authority of a court to hear and determine a case.” *In re AMB*, 248 Mich App 144, 166; 640 NW2d 262 (2001) (citation omitted). Subject matter jurisdiction describes the types of cases and claims which a court has the authority to address. *Id.* If a court does not have subject matter jurisdiction over a case, the only action it can take is to dismiss the case. *Bowie v Arder*, 441 Mich 23, 56; 490 NW2d 568 (1992).

Subject matter jurisdiction over a judicial proceeding is an absolute requirement, and it cannot be conferred by consent, conduct, waiver, or estoppel. *In re AMB*, 248 Mich App at 166.

In addition, a stipulation of the parties cannot establish a court's subject matter jurisdiction. *Redding v Redding*, 214 Mich App 639, 643; 543 NW2d 75 (1995). In fact, a court must take notice sua sponte of a lack of subject matter jurisdiction, regardless of whether the parties raise the issue. *In re AMB*, 248 Mich App at 166.

For the trial court to have subject matter jurisdiction over a divorce proceeding, the plaintiff or the defendant in the divorce action must have resided in the state 180 days prior to filing the complaint. MCL 552.9(1); *Smith v Smith*, 218 Mich App 727, 730; 555 NW2d 271 (1996). Without subject matter jurisdiction over the divorce proceeding, a trial court may not grant a judgment of divorce and must dismiss the case. *Id.*

In this case, the trial court should have held a hearing regarding whether it had jurisdiction over the case. Plaintiff asserted in the complaint that both he and defendant had resided in Michigan 180 days prior to commencing the divorce action. However, the prior divorce action between the parties and before the same trial judge was dismissed as a result of a controversy regarding whether the trial court had subject matter jurisdiction over the proceeding. Appellants informed the trial court in the previous case that plaintiff had filed a declaration of domicile in Florida less than 180 days before he filed his complaint and that defendant resided in Florida. No hearing was held regarding whether the trial court had jurisdiction because the parties agreed to a dismissal without prejudice. As this Court previously determined, the trial court's failure to hold a hearing in the initial divorce action was error. *Riggio v Riggio*, unpublished opinion per curiam of the Court of Appeals, issued May 25, 2010 (Docket No. 290221). This Court remanded the case to the trial court to hold a hearing regarding whether the trial court had subject matter jurisdiction. *Id.* There is no indication that any action was taken by the trial court on remand. Moreover, at the hearing on defendant's show-cause motion on March 9, 2009, Radulovich questioned whether the trial court had jurisdiction over the subsequent divorce action and over appellants' liens as a result of the issues in the previous case. Given the concerns regarding jurisdiction in the prior divorce action presided over by the same trial judge, and the fact that jurisdiction was raised again at the hearing, the trial court should have held a hearing to determine whether it had jurisdiction over the divorce action. The trial court's failure to hold a hearing was an error.

It is impossible for this Court to know based on the evidence in the record whether the trial court had jurisdiction over this divorce action. We conclude that the case should be remanded to the trial court to determine whether it had subject matter jurisdiction over this divorce. If the trial court lacked subject matter jurisdiction over the proceedings, the trial court's order of March 9, 2009, discharging the appellants' liens, must be vacated.

However, the trial court may determine on remand that it had subject matter jurisdiction over the divorce action. As a result, we will address appellants' other arguments on appeal.

Appellants argue that the trial court erred by discharging their retaining and charging liens. We agree. Whether the trial court had the authority to discharge a retaining lien and a charging lien is a question of law subject to de novo review. See *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 281; 761 NW2d 761 (2008).

There are two kinds of attorney's liens: (1) a general, retaining, or possessory lien; and (2) a special, particular, or charging lien. *George v Sandor M Gelman, PC*, 201 Mich App 474,

476; 506 NW2d 583 (1993). The general or retaining lien is the right to retain possession of all documents, money, or other property of the client until the fee for services is paid. *Id.* A retaining lien is not lost by transferring possession to either the court or another person pursuant to a court order. *Kysor Industrial Corp v D M Liquidating Co*, 11 Mich App 438, 446; 161 NW2d 452 (1968).

A special or charging lien is an equitable right to have the fees and costs due for services secured out of the judgment or recovery in a particular suit. *George*, 201 Mich App at 476. The attorneys' charging lien creates a lien on a judgment, settlement, or other money recovered as a result of the attorney's services. *Id.* These liens exist as part of the court's inherent power to oversee the relationship of attorneys with their clients; they provide a means of securing the legitimate interest of the attorney in payment, but are subject to the control of the court for the protection of the client and third parties as well. *Kysor Industrial*, 11 Mich App at 445.

In this case, we conclude the trial court erred by discharging appellants' retaining and charging liens. First, appellants had a valid retaining lien. Appellants set up the Sharon Riggio Client Trust Account when they agreed to represent defendant in the initial divorce proceeding. Defendant put funds into that account. It was out of the proceeds of this account that the parties agreed to pay appellants in the original consent judgment. Although appellants claimed that they were to be paid \$150,000, there is no evidence of that in the record or in the consent judgment for the amount of fees. Once the relationship between appellants and defendant broke down, appellants still had retention of the account. Before transferring the proceeds from the account to plaintiff's counsel in the initial divorce action pursuant to an order from the trial court, appellants filed a notice of retaining lien with the trial court on January 30, 2009. Transferring funds pursuant to a court order does not discharge the lien. *Id.* at 446. Therefore, appellants had a valid retaining lien.

Appellants also had a valid charging lien. Appellants represented defendant in the initial divorce action and were entitled to the charging lien to secure payment for the services provided. Moreover, appellants provided notice of the charging lien in the initial divorce action and again in this proceeding.

It is true that these liens are an equitable remedy overseen by the court, which must also consider the rights of the clients and other third parties. *Id.* However, the trial court did not indicate why the liens were inequitable except to say that the amount of fees requested by appellants was unreasonable. Instead of indicating an amount it thought fair, the trial court held that the liens should be totally discharged based solely on concerns that the liens would hold up resolution of the divorce proceedings. The trial court completely disregarded the interests of appellants, indicating that they had alternative avenues for obtaining payment for services rendered. However, there is no requirement that attorneys seek other remedies before obtaining liens. In fact, the whole purpose of this equitable remedy is to allow attorneys to seek recovery in precisely this manner. Moreover, the trial judge appeared to retaliate against appellants for Radulovich's arguments about jurisdiction. When Radulovich made arguments questioning the trial court's jurisdiction to hold a hearing about appellants' attorneys fees, the trial court decided to discharge the liens completely instead of setting aside a portion to cover attorney fees. We find the trial court erred by discharging appellants' retaining and charging liens, thereby failing to protect appellants' interests.

Appellants also argue that the case should be reassigned to a different judge on remand. We disagree. Remand to a different judge is appropriate (1) when the original judge would have difficulty putting aside previously expressed views or findings, (2) when reassignment is advisable to preserve the appearance of justice, and (3) when reassignment will not entail excessive waste or duplication. *Bayati v Bayati*, 264 Mich App 595, 603; 691 NW2d 812 (2004). Reassignment is not warranted merely because a judge has reached the wrong legal conclusion. *Id.* Judges are presumed to act impartially. *VanBuren Twp v Garter Belt Inc*, 258 Mich App 594, 598; 673 NW2d 111 (2003). To overcome this presumption, a party must prove that “a judge harbors actual bias or prejudice for or against a party or attorney that is both personal and extrajudicial.” MCR 2.003(B)(1); *VanBuren*, 258 Mich App at 598.

While the trial judge may have erred legally in this case, appellants have not demonstrated that the trial judge had any actual bias or conflict of interest. Moreover, given that the previous case was already remanded to the trial court to determine whether it had subject matter jurisdiction, *Riggio*, slip op at 4, it would be wasteful to remand this case to a different judge. We conclude that the case should be remanded to the same judge.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Karen M. Fort Hood
/s/ Kathleen Jansen
/s/ William C. Whitbeck