

STATE OF MICHIGAN
COURT OF APPEALS

RUTH E. HERRMANN,

Plaintiff-Appellee,

v

CHARLEN HERRMANN, as successor in interest
of GLENN E. HERRMANN,

Defendant-Appellant.

UNPUBLISHED
October 23, 2014

No. 317021
Ingham Circuit Court
LC No. 09-003521-DO

Before: SAAD, P.J., and O'CONNELL and MURRAY, JJ.

PER CURIAM.

Defendant appeals by leave granted the trial court's order setting aside a writ of garnishment and denying attorney fees. We reverse the order setting aside the writ of garnishment. We affirm the denial of attorney fees.

The facts underlying this appeal are stated in this Court's prior opinion, which resolved a spousal support dispute between Glenn Herrmann and his ex-wife, plaintiff Ruth Herrmann:

The parties entered into a consent judgment of divorce (JOD) on April 22, 2010. The consent judgment required defendant to pay monthly spousal support to plaintiff in the amount of \$625 for five years, beginning March 1, 2010. The judgment also provided that defendant's spousal support obligation would terminate upon plaintiff's death, or upon plaintiff's "cohabitation with an unrelated male."

The consent judgment of divorce was entered April 23, 2010. On April 29, 2010, plaintiff moved into the home of Ronald Cluley, a man to whom she is not related. After the initial payment on March 1, 2010, defendant did not make another payment for several months.

On May 3, 2011, defendant filed a motion to terminate spousal support, with a set of requests for admissions and interrogatories. Defendant argued that plaintiff had been cohabiting with Cluley since April 29, 2010, and the cohabitation terminated plaintiff's right to receive spousal support. [*Herrmann v Herrmann*, unpublished opinion per curiam of the Court of Appeals, issued October 16, 2012 (Docket No 306568), p 1].

In the prior appeal, this Court reversed the trial court's order and concluded that the totality of the circumstances plainly showed that plaintiff was cohabitating with an unrelated male. *Id.* at 7.

On remand, Glenn Herrmann (Glenn) moved for termination of spousal support consistent with this Court's decision, and for repayment of all support paid after the cohabitation started. In December 2012, the trial court terminated Glenn's obligation to pay spousal support and entered a money judgment against plaintiff totaling \$7,129.77.

In January 2013, Glenn obtained a writ of garnishment and served it on a company that he believed was plaintiff's employer. On March 4, 2013, Glenn died while domiciled in Wisconsin. After Glenn's death, but before his attorney was notified of the death, the attorney obtained a second writ of garnishment and served it on a different company. On March 15, 2013, plaintiff objected to the garnishment, asserting that the action could not proceed in Glenn's name.

After a hearing, the trial court set aside the garnishment order, apparently on the ground Glenn's attorney had no legal authority to obtain a writ of garnishment after Glenn's death. Subsequently, the attorney filed a motion for substitution of defendant Charlen Herrmann as successor in interest. Charlen Herrmann is Glenn's surviving spouse. The trial court granted the motion to substitute defendant as a party,¹ but declined to vacate the order that set aside the garnishment. The trial court denied defendant's request for attorney fees and costs of responding to plaintiff's motion.

Resolution of the garnishment issue turns on whether defendant's attorney could validly obtain a writ of garnishment after Glenn's death. This issue presents a question of law, which we review *de novo*. *Nat'l Waterworks, Inc v Int'l Fidelity & Surety, Ltd*, 275 Mich App 256, 258; 739 NW2d 121 (2007). Because an attorney is an agent for his or her clients, we look to agency law for guidance on the garnishment issue. See *Nelson v Consumers Power Co*, 198 Mich App 82, 87; 497 NW2d 205 (1993) (applying principles of agency law in the attorney-client context); see also *Kloian v Domino's Pizza, LLC*, 273 Mich App 449, 453; 733 NW2d 766 (2006).

The Restatement of Agency addresses the death of a principal: "The death of an individual principal terminates the agent's actual authority. The termination is effective only when the agent has notice of the principal's death." 3 Restatement of Agency, § 3.07(2). In this case, the record establishes that Glenn's attorney issued the second writ of garnishment before she had notice of Glenn's death. Given that an agent's authority continues until the agent has notice of the principal's death, we conclude that Glenn's attorney had actual authority to issue the writ. Accordingly, the trial court erred in setting aside the garnishment.

¹ Wisconsin law allows an heir to collect money due to a decedent if the heir provides an affidavit to establish a description and value of the money owed, and to establish that the value of the decedent's property subject to administration did not exceed \$50,000. Wisc Stat 867.03. In this case, defendant executed the requisite affidavit on May 6, 2013, and filed the affidavit in the trial court on May 14, 2013, with the motion to substitute parties.

Moreover, even if the attorney lacked actual authority to issue the writ, defendant subsequently ratified the attorney's actions. An agent's unauthorized acts may still bind the principal if the principal ratifies the acts. *Echelon Homes, LLC v Carter Lumber Co*, 261 Mich App 424, 431; 683 NW2d 171 (2004), rev'd in part on other grounds 472 Mich 192 (2005). Ratification occurs when, with knowledge of the material facts, the principal accepts the benefits of the unauthorized act. *Id.* at 432. This Court applied ratification principles in a similar situation and concluded that a deceased plaintiff's successor in interest could ratify the actions of the attorney who entered into a settlement agreement before he learned that the plaintiff had died. *Henritz v Gen Electric Co*, 182 Mich App 1, 8-9; 451 NW2d 558 (1990). In *Henritz*, the plaintiff's attorney entered a settlement agreement on the record at 10:59 a.m.; however, unbeknownst to him, the plaintiff had died at 9:15 a.m. *Id.* at 3-4. The plaintiff's sister was appointed administrator of the plaintiff's estate and "empowered" the plaintiff's attorney to proceed with plaintiff's claim against the defendant. *Id.* at 9. This Court held that the sister's affirmation of the settlement and ratification of the settlement agreement "relate[d] back to the time the act was done." *Id.* "In other words, the settlement [was] binding just as if [the plaintiff's attorney] had the authority to enter into the settlement" at the time that he entered the settlement. *Id.*

Like the attorney in *Henritz*, Glenn's attorney did not know that her client had died when she obtained a writ of garnishment on his behalf. Further, defendant empowered the attorney to continue efforts to pursue the garnishment, including attempts to prevent the trial court from setting aside the garnishment, and appealing the trial court's order setting aside the garnishment. Thus, the attorney's actions were ratified by defendant, and the ratification relates back to the date the attorney obtained the writ. Because the attorney's actions were authorized by the ratification, there were no grounds for the trial court to set aside the writ of garnishment.

In addition to challenging the trial court's order on the writ of garnishment, defendant challenges the trial court's denial of her motion for costs and attorney fees that she incurred in responding to plaintiff's motion to set aside the garnishment. We review for an abuse of discretion a trial court's decision on a motion for costs and attorney fees. *Keinz v Keinz*, 290 Mich App 137, 141; 799 NW2d 576 (2010).

In this case, the trial court was within its discretion to deny defendant's motion for costs and fees. We disagree with defendant's contention that she was entitled to sanctions pursuant to MCL 600.2591(1) or MCR 2.114(F). Those provisions allow a trial court to award costs and fees to a prevailing party under certain circumstances. Here, defendant was not the prevailing party in the trial court. Therefore, this Court cannot conclude that the court abused its discretion in denying defendant's motion for costs and fees.

The order setting aside the garnishment is reversed. The order denying attorney fees and costs is affirmed. The case is remanded. We do not retain jurisdiction. No taxable costs pursuant to MCR 7.219, neither party having prevailed in full.

/s/ Henry William Saad
/s/ Peter D. O'Connell
/s/ Christopher M. Murray