

No. 1-14-0080

NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

<i>IN RE</i> ESTATE OF LEONARD KOENEN, a Disabled Person)	Appeal from the
)	Circuit Court
(NANCY SIBRAVA KOENEN, Individually and as Agent)	of Cook County.
under a Power of Attorney for Health Care dated February 27,)	
2012,)	
)	
Third-Party-Appellant,)	
)	
v.)	No. 11 P 6642
)	
DAVID KOENEN, Guardian of the Estate of Leonard Koenen,)	
a Disabled Person,)	Honorable
)	Jane Louise Stuart,
Petitioner-Appellee).)	Judge Presiding.

PRESIDING JUSTICE DELORT delivered the judgment of the court.
Justices Cunningham and Harris concurred in the judgment.

ORDER

¶ 1 **Held:** The trial court’s order granting the petitioner’s petition for guardianship and revoking the ward’s designation of a power of attorney for property was not void for lack of personal jurisdiction over the agent. The trial court did not erroneously deny the agent’s motion for substitution of judge as of right. The judgment of the trial court is therefore affirmed.

¶ 2 Third-Party-Appellant Nancy Sibrava Koenen, individually and as agent on behalf of Leonard Koenen under a power of attorney for health care dated February 27, 2012, appeals

from orders of the circuit court of Cook County. Nancy and Leonard married in January 2012, and Leonard has three sons from his prior marriage: David (the petitioner-appellee), Chris, and John. Before this court, Nancy contends that the trial court's July 22, 2013, order appointing David as guardian of Leonard's estate and revoking Nancy's power of attorney for property was void for lack of personal jurisdiction over her, a "necessary party." She also appeals the trial court's December 9, 2013, order denying her motion for substitution of judge as of right. Specifically, she claims that the trial court erroneously found that she was an "interested person" but not an "interested party" in the proceedings. We affirm.

¶ 3

BACKGROUND

¶ 4 On November 15, 2011, petitioner-appellee David Koenen filed a "Petition for Appointment of Guardian for Disabled Person" for his father, Leonard Koenen, due to Leonard's poor memory, suspected dementia, and "manifestations of impaired judgment." The petition nominated (i) David as the guardian of Leonard's person and (ii) David and Christopher Koenen (David's brother) as coguardians of Leonard's estate. On November 29, 2011, the trial court appointed Dr. Mark Amdur to evaluate Leonard's ability to make personal and financial decisions.

¶ 5 On January 27, 2012, the law firm of Chuhak & Tecson, P.C. appeared on Leonard's behalf. Leonard filed an answer to the petition, denying its allegations and also noting that Nancy Sibrava was Leonard's wife and his agent for health care and property under separate powers of attorney for health care and property. David's reply denied Leonard's allegation that Leonard validly married Nancy at the time of the marriage, asserting that Leonard was incapable of making personal and financial decisions, including contracting to marry another person.

¶ 6 On September 4, 2012, David filed a motion for leave to amend the petition to remove Christopher as coguardian of Leonard's estate, leaving David as the sole guardian. The trial court granted that motion.

¶ 7 On April 17, 2013, David filed a petition to invalidate Leonard's February 27, 2012, delegation of powers of attorney for health care and property to Nancy. Leonard's counsel answered David's petition to invalidate.

¶ 8 A trial was held over the course of four days. David contended that the evidence showed that Leonard met Nancy in March 2011, they became engaged and cohabited beginning in August 2011, and they married in January 2012. Leonard's asserted that Nancy testified that Leonard was "self-sufficient and handles his own personal and financial affairs." Leonard testified that his understanding of his health care power of attorney was that, " 'if I have medical problems and cannot handle them, somebody is appointed to do that for me just to make sure that I get good healthcare [*sic*].' " Finally, as to his power of attorney for property, Leonard understood that he had designated an agent to handle his financial affairs if he could not.

¶ 9 On July 22, 2013, the trial court issued a written order denying David's petition for the appointment of a guardian of Leonard's person, and finding that the power of attorney for health care that Leonard signed in February 2012 naming Nancy as his agent "remains in effect." However, the trial court granted David's petition for the appointment of a guardian for Leonard's estate, and named David as the guardian. The trial court's order noted that its finding was based upon the evidence adduced at trial, as well as Dr. Amdur's report. The trial court appointed David Martin as the guardian *ad litem* for Leonard in August 2013.

¶ 10 On September 19, 2013, David filed a notice of a hearing (to take place the following day) regarding an inventory and petition to implement budget and disburse funds with respect to his guardianship. David's notice included Nancy.

¶ 11 Also on September 19, Nancy filed an appearance both individually and as agent under Leonard's health care power of attorney. The next day, Nancy filed a motion for substitution of judge as of right. Leonard's guardian *ad litem* and David each filed responses to Nancy's motion for substitution, arguing in part that Nancy was present and participated in the four-day hearing. David further argued that Nancy's motion was untimely, and she failed to file a petition to intervene. In reply, Nancy did not challenge the guardian *ad litem*'s or David's statements that Nancy participated at the hearing, but she did confirm that "[a]ll parties agree that Nancy was not a party to [the] determination of disability of Leonard." As to David's untimeliness claim, Nancy replied, "during the proceedings and until Leonard was declared disabled, Nancy had no basis for participating" in the proceedings.

¶ 12 On October 4, 2013, Leonard's privately-retained counsel filed an amended motion to reconsider the trial court's July 2013 order adjudicating Leonard to be a disabled person. In that motion, Leonard argued that David failed to provide Nancy with proper notice of David's petition to invalidate Leonard's delegation of Nancy as the holder of his power of attorney for property.

¶ 13 On December 9, 2013, the trial court denied Nancy's motion for substitution of judge as of right, finding that Nancy was an interested person but not a party to the action, and that she did not have standing to challenge the actions of the guardian of Leonard's estate.

¶ 14 This appeal followed.

¶ 15

ANALYSIS

¶ 16

Appellant's Brief and the Record on Appeal

¶ 17 Before turning to the merits, we must address issues with respect to Nancy's briefs and the record on appeal filed with this court. Although various orders (as well as David's brief) refer to a trial spanning four days, the record on appeal only contains a copy of the transcript for one day, in violation of Supreme Court Rules 321 and 323. See Ill. S. Ct. R. 321 (eff. Feb. 1, 1994), Ill. S. Ct. R. 323 (eff. Dec. 13, 2005). Nor has she filed an acceptable substitute, such as bystander's report or an agreed statement of facts, as provided for in Rule 323(c) or (d). The appellant (here, Nancy) has the burden of providing a sufficient record of the trial proceedings to support her claims of error. *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). In the absence of such a record, we must presume the trial court acted in conformity with the law and with a sufficient factual basis for its findings. *Id.* Furthermore, any doubts arising from an incomplete record will be resolved against the appellant. *Id.*

¶ 18 In addition, although required by Supreme Court Rules 341(h)(9) and 342(a), Nancy has failed to include a complete table of contents to the record on appeal, omitting any reference to the transcripts that she did include in the record. Ill. S. Ct. R. 341(h)(9) (eff. Feb. 6, 2013), 342(a) (eff. Jan. 1, 2005). Supreme court rules are not mere suggestions; they are rules that must be followed. *In re Marriage of Hluska*, 2011 IL App (1st) 092636, ¶ 57. "Where an appellant's brief fails to comply with supreme court rules, this court has the inherent authority to dismiss the appeal." *Epstein v. Galuska*, 362 Ill. App. 3d 36, 42 (2005). In addition, this court may strike an appellant's brief for noncompliance with Rule 341. See *People v. Thomas*, 364 Ill. App. 3d 91, 97 (2006). We note, however, that striking a brief or dismissing an appeal for failure to comply with supreme court rules is a harsh sanction. *In re Detention of Powell*, 217 Ill. 2d 123, 132

(2005). Here, the record is not voluminous and the issues Nancy raises are easily disposed of. Accordingly, and with these limitations in mind, we will consider the merits of this appeal. See *Thomas*, 364 Ill. App. 3d at 97.

¶ 19

The July 22, 2013, Order

¶ 20 On appeal, Nancy first contends that the trial court erred in granting David’s petition for a guardianship of the estate of Leonard and revoking her power of attorney for property. She notes that she never received notice of David’s petition and the “termination of her Power of Attorney for Property without being before the Court without proper summons or notice can only be characterized as a denial of due process.” She concludes that the trial court’s order was void for lack of personal jurisdiction over her, a “necessary party.”

¶ 21

Initially, we must address our jurisdiction over the appeal from this order. We have an independent duty to consider its jurisdiction and to dismiss an appeal if jurisdiction is lacking. *Palmolive Tower Condominiums, LLC v. Simon*, 409 Ill. App. 3d 539, 542 (2011). Nancy appeals the trial court’s granting of David’s petition for the appointment of a guardian for Leonard (in July 2013) and its denial of her motion for substitution of judge as of right (in December 2013). Illinois Supreme Court Rule 304(b) allows a party to appeal from a final judgment that does not dispose of an entire proceeding if the order appealed from was “entered in the administration of an estate, guardianship, or similar proceeding” and “finally determines the right or status of a party.” Ill. S. Ct. R. 304(b)(1) (eff. Feb. 26, 2010).

¶ 22

Rule 303(a)(2) provides that a notice of appeal filed before the entry of the order disposing of a timely filed postjudgment motion becomes effective when the order disposing of the motion is entered, and if the postjudgment motion is denied, the notice of appeal includes an appeal from the denial of the postjudgment motion. Ill. S. Ct. R. 303(a)(2) (eff. June 4, 2008).

¶ 23 Here, the record reveals that Leonard’s privately-retained counsel filed an amended motion to reconsider the trial court’s July 2013 order, which remained outstanding in January 2014, when Nancy filed her appeal in this case. The record in this case contains no order disposing of the amended motion to reconsider. Through his private counsel, however, Leonard has filed his own appeal of the July 2013 order, the record of which includes a copy of the trial court’s denial (on April 14, 2014) of the amended motion to reconsider. See *In re Estate of Leonard Koenen*, No. 1-14-1182 (notice of appeal filed April 30, 2014). We take judicial notice of the trial court’s denial of the postjudgment motion directed at the July 2013 order. *People v. Davis*, 65 Ill. 2d 157, 161 (1976). Therefore, since the postjudgment motion was denied, Nancy’s appeal from the July 2013 order includes the April 2014 denial, and we have jurisdiction to consider her appeal. Ill. S. Ct. R. 303(a)(2) (eff. June 4, 2008).

¶ 24 We hold, however, that Nancy forfeited any claim of error because she invited this error. “‘It is fundamental to our adversarial process that a party waives his right to complain of an error where to do so is inconsistent with the position taken by the party in an earlier court proceeding.’” *McMath v. Katholi*, 191 Ill. 2d 251, 255 (2000) (quoting *Auton v. Logan Landfill, Inc.*, 105 Ill. 2d 537, 543 (1984)). The rationale of this rule is that it would be unfair to allow one party (here, Nancy) a second bite at the apple based upon the error she injected into the proceedings. *Id.* When she filed her reply to David’s response (that objected to Nancy’s motion for substitution of judge), Nancy argued in the trial court that she agreed that she was not a party to—and had no basis for participating in—the guardianship proceedings. This directly contradicts her claim in this court that she was entitled to notice and a summons to appear at the guardianship proceedings. Since her position before us is at least “inconsistent” with that before the trial court, we are compelled to hold that she has waived any claim of error. See *id.*

¶ 25 In addition, the partial record before us reveals that Nancy was present at and testified during the hearing as to the petition for the guardianship of Leonard. In response to her motion for substitution of judge, both David and Leonard’s guardian *ad litem* referred to her participation in the guardianship hearing, but Nancy’s reply to their responses did not challenge those statements. Nor did she challenge similar statements made by her husband’s privately retained counsel. Therefore, in light of her active participation in the guardianship proceedings, beginning in April 2012, and before the court appointed David the guardian of Leonard’s estate, we conclude that Nancy has forfeited her objection to the alleged lack of notice on this basis, as well. Even if Nancy was not given proper notice, she was given ample opportunity to raise this objection. Instead, she did nothing, even after filing her appearance in September 2012, until the passage of nearly two years after David’s appointment as Leonard’s guardian. Consequently, she has forfeited any objection to the allegedly deficient notice.

¶ 26 Finally, Nancy’s claim is unavailing for reasons other than forfeiture. First, when David filed his initial petition for the guardianship of his father, Nancy was not his wife. She was therefore not entitled to notice of the petition at that time. See 755 ILCS 5/11a-8, 11a-10(f) (West 2012). Leonard’s private retained counsel—who had filed an answer to David’s initial petition—received proper notice of the amended petition. As noted above, Leonard, through counsel, is appealing the trial court’s July order. *Estate of Koenen*, No. 1-14-1182 (notice of appeal filed Apr. 30, 2014). Although Leonard named Nancy as his agent under his health care power of attorney, the scope of her agency is limited “solely to matters involving the principal’s [here, Leonard’s] health care.” *In re Estate of Stahling*, 2013 IL App (4th) 120271, ¶ 26. There is nothing under the Illinois Power of Attorney Act requiring that an agent be provided notice of a petition to invalidate the agency. See 755 ILCS 45/4-6 (West 2012) (providing that health care

agencies may be revoked by the principal at any time without regard to the principal's mental or physical condition). Nancy's claim is therefore meritless.

¶ 27 The December 9, 2013, Order

¶ 28 With respect to the trial court's December 9, 2013, order, Nancy makes three contentions of error. First, she contends that the trial court improperly denied her motion for substitution of judge, arguing that, as the agent under Leonard's power of attorney for health care, she had standing because she is "effected [*sic*] by all orders of the court and has standing to act in her own behalf or Leonard's behalf during the proceedings." Nancy's second contention is that the trial court's denial of her motion for substitution of judge must be reversed because, as the agent under the health care power of attorney, she has a fiduciary duty to Leonard "to secure all the things necessary for the health and welfare of Leonard." Finally, Nancy claims that she has standing to challenge the actions of David, the guardian of Leonard's estate, also because "the far reaching consequences of a budget [for Leonard that to be filed by David] and its proposed disbursement have a direct effect as to Leonard and Nancy's ability to provide for themselves and Nancy's duties relating to the healthcare [*sic*] of Leonard."

¶ 29 Civil litigants in Illinois are entitled to one substitution of judge without cause as a matter of right. 735 ILCS 5/2-1001(a)(2)(i) (West 2012). The trial court must grant a party's motion for substitution of judge as of right if the motion "is presented before trial or hearing begins and before the judge to whom it is presented has ruled on any substantial issue in the case." 735 ILCS 5/2-1001(a)(2)(ii) (West 2012). A substantial issue is one relating directly to the merits of the case. *Rodisch v. Commacho-Esparza*, 309 Ill. App. 3d 346, 350-51 (1999). We review *de novo* both the trial court's decision with respect to a motion for substitution of judge and the

question of standing. *Schnepf v. Schnepf*, 996 N.E.2d 1131, 1135-36 (2013) (motion for substitution of judge); *Wexler v. Wirtz Corp.*, 211 Ill. 2d 18, 23 (2004) (standing).

¶ 30 Here, the court held a four-day trial as to the petition for guardianship in April 2013, and it rendered its decision on July 22, 2013, appointing David the guardian of Leonard's estate and upholding Leonard's designation of Nancy as his agent under a power of attorney for health care. Clearly, the trial court's July 2013 order was a substantial issue relating directly to the merits of the case. 735 ILCS 5/2-1001(a)(2)(ii) (West 2012); *Rodisch*, 309 Ill. App. 3d at 350-51. Nancy's motion, filed September 2013, was neither presented before the trial began nor before the judge ruled on any substantial issue. To the contrary, the judge had ruled on *the* substantial issue in this case two months earlier. Under these circumstances, Nancy's motion was untimely, and the trial court did not err in rejecting her request.

¶ 31 Nancy, however, argues that she only became an interested party in this case at the time she received notice of David's filing of a budget and request to disburse funds from Leonard's estate, which was shortly before she entered her appearance and one day before she filed her motion seeking a substitution of judge as of right. In this respect, she intertwines this claim with her other two contentions regarding her fiduciary duty regarding Leonard's health care and her standing to object to the actions of David, the guardian of Leonard's estate. Nancy's argument, however, is meritless.

¶ 32 At the outset, we find Nancy lacks standing to challenge the decisions of the guardian with respect to the budget and request to disburse funds. In *Struck v. Cook County Public Guardian*, 387 Ill. App. 3d 867 (2008), *appeal denied*, 232 Ill. 2d 597 (2009), *cert. dismissed*, 558 U.S. 1009 (2009), this court rejected the plaintiff's contention that he had a right to challenge the defendant-guardian's restriction of his visitation with the ward, his mother. *Id.* at

876-77. The court observed that, although article 11a of the Probate Act of 1975 (which concerns disabled adults) allowed for the plaintiff to challenge the trial court's finding of disability, the article did not contain any provision providing that relatives could "challenge the guardian's individual decisions regarding visitation *or other matters concerning the ward.*" (Emphasis added.) *Id.* at 877. We agree that article 11a does not allow for Nancy to challenge David's decisions with respect to the budget. See 755 ILCS 5/11a-1 through 11a-22 (West 2012). Nor does Nancy have standing to appeal the trial court's decision on behalf of the ward. *Id.* (citing *In re Guardianship of Austin*, 245 Ill. App. 3d 1042, 1047 (1993)). Therefore, Nancy lacks standing to appeal the trial court's orders regarding the guardian's proposed budget or request for disbursement of funds.

¶ 33 The scope of a health care power of attorney is limited solely to matters involving the principal's health care, and the agent under such a power of attorney has no authority over the principal's property or financial matters. *Stahling*, 2013 IL App (4th) 120271, ¶ 26; see also 755 ILCS 45/4-1, 4-3 (West 2012). More importantly, however, the trial court has continuing jurisdiction over Leonard, even where, as here, a guardian has been appointed. See *Struck*, 387 Ill. App. 3d at 877 (citing *In re Mark W.*, 228 Ill. 2d 365, 375 (2008)). The trial court is thus duty-bound to "judicially interfere" and protect the ward from any harm that may befall him at the hands of the guardian, and the trial court's authority is not limited to express statutory terms. *Mark W.*, 228 Ill. 2d at 375. This includes the authority to appoint a guardian *ad litem* to protect the interests of a ward notwithstanding the fact that the ward already has a plenary guardian. *Id.*

¶ 34 Although Nancy lacks standing to challenge the guardian's decisions, her voice is not silenced: she may inform the trial court of potential harm to Leonard and ask the court to intervene. She may do this either by asking to modify the order of guardianship (see 755 ILCS

5/11a-8(e), 10(f) (West 2012))¹ or petitioning the trial court to either terminate the adjudication of disability, revoke the letters of guardianship, or modify the duties of the guardian (see 755 ILCS 5/11a-20 (West 2012)). Section 11-20 further provides that such a petition may be communicated to the court or judge “by any means, including but not limited to informal letter, telephone call or visit.” 755 ILCS 5/11a-20(b) (West 2012). At that point, the trial court may appoint a guardian *ad litem* “to investigate and report to the court concerning the allegations made in conjunction with said request, and if the ward wishes to terminate, revoke, or modify the guardianship order, to prepare the ward’s petition and to render such other services as the court directs.” 755 ILCS 5/11a-20(b) (West 2012). Therefore, although Nancy may alert the trial court to potential harm that may befall Leonard while his estate is under David’s guardianship, the trial court nonetheless did not err in denying her motion for substitution of judge or in finding that Nancy lacked standing to challenge the decisions of the guardian of Leonard’s estate.

¶ 35 Nonetheless, Nancy claims that *Struck* is distinguishable because the holding was predicated solely upon the plaintiff’s request for visitation. We disagree. We do not read *Struck* as having such a narrow holding. See, e.g., *Struck*, 387 Ill. App. 3d at 877 (holding that the plaintiff son lacked standing to challenge the guardian’s individual decisions regarding visitation “or other matters concerning the ward”).

¶ 36 Finally, even assuming, *arguendo*, that Nancy had standing, we would be compelled to dismiss her appeal from Judge Stuart’s order denying her motion for substitution of judge. We take judicial notice that Judge Stuart has since retired, and another judge has been assigned to Judge Stuart’s calendar. See *People v. Smith*, 326 Ill. App. 3d 831, 855 (2001) (“We take

¹ Nancy’s challenge to the trial court’s July 2013 order of guardianship only concerns whether the trial court had personal jurisdiction over her for failure to provide adequate notice.

judicial notice that the trial judge has retired from the bench, therefore, a different judge will consider this petition on remand.”). As a result, Nancy’s contention on appeal is now moot since she has received what she initially sought: another judge to be substituted in place of Judge Stuart. Therefore, on this alternative ground, Nancy’s claim of error is unavailing.

¶ 37

CONCLUSION

¶ 38 The trial court’s granting of David’s petition for guardianship and revoking Nancy’s power of attorney for property was not void for lack of personal jurisdiction over Nancy. In addition, the trial court did not erroneously deny Nancy’s motion for substitution of judge as of right. Nothing herein shall be construed as resolving any different issues presented in Leonard’s pending appeal.

¶ 39 Affirmed.