

NOTICE

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2014 IL App (4th) 140098-U

NO. 4-14-0098

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

FILED

June 25, 2014

Carla Bender

4th District Appellate

Court, IL

In re: T.S., a Minor,)	Appeal from
FREDA LEE HOSHAUER,)	Circuit Court of
Petitioner-Appellee,)	Champaign County
v.)	No. 04P389
HEATHER LYNN TAYLOR,)	
Respondent-Appellant.)	Honorable
)	Holly F. Clemons,
)	Judge Presiding.

JUSTICE TURNER delivered the judgment of the court.

Presiding Justice Appleton and Justice Steigmann concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court had subject-matter jurisdiction and personal jurisdiction over respondent when it entered the guardianship order relating to respondent's son.

¶ 2 In January 2005, the Champaign County circuit court appointed petitioner, Freda Lee Hoshauer, as guardian of T.S., born in 2003 and the son of respondent, Heather Lynn Taylor, and Christopher Smith, Hoshauer's son. In a July 2013 motion to dismiss the guardianship case, respondent sought to vacate the January 2005 order, asserting it was void due to a lack of jurisdiction. After an October 2013 hearing on respondent's motion, the court took the matter under advisement. In January 2014, the court entered a written order denying respondent's motion.

¶ 3 Respondent appeals, essentially arguing the trial court lacked (1) subject-matter jurisdiction over the guardianship petition and (2) personal jurisdiction over Smith and herself.

We affirm.

¶ 4

I. BACKGROUND

¶ 5 On December 8, 2004, petitioner filed a *pro se* petition for temporary custody and legal guardianship of T.S. The petition did not list Smith as a party. Along with the petition, petitioner filed respondent's entry of appearance, waiving service and submitting to the trial court's jurisdiction. The respondent's entry of appearance was dated November 27, 2004, signed by respondent, and notarized. On December 15, 2004, a guardian *ad litem* entered her appearance on T.S.'s behalf.

¶ 6

On January 5, 2005, the trial court held a hearing on the guardianship petition. Petitioner and the guardian *ad litem* were the only ones present at the hearing. The guardian *ad litem* stated she had made several attempts to talk to respondent but was never able to actually speak with her. However, respondent did leave her a voicemail message saying she agreed with everything in the petition that was filed. Due to Smith's imprisonment, the guardian *ad litem* was unable to talk to him. Petitioner informed the court Smith had seven more years of imprisonment for an armed-robbery conviction. The guardian *ad litem* also explained, based on information from petitioner, that respondent was 20 years old, lacked a job and a permanent residence, and was not in school. Petitioner tried to provide respondent a place to live three times, but respondent would stay out very late and not provide a proper place for the baby to sleep. The court found both respondent and Smith consented to the guardianship. The court also noted it had an entry and appearance for Smith. However, the record on appeal lacks that document. At the conclusion of the hearing, the court entered a written guardianship order appointing petitioner as T.S.'s guardian. Attached to the court's order was respondent's

November 27, 2004, guardianship agreement and Smith's December 7, 2004, guardianship agreement. Both agreements were signed and notarized.

¶ 7 On July 19, 2013, respondent filed a motion to dismiss under section 2-301 of the Code of Civil Procedure (735 ILCS 5/2-301 (West 2012) (objections to jurisdiction over the person)), asserting the court lacked jurisdiction because (1) she was never served with a summons or provided a copy of the guardianship petition, (2) she signed her entry of appearance before the petition was filed and without seeing a copy of the petition, (3) the petition failed to name Smith as a party, (4) Smith was never served with a summons or a copy of the petition, and (5) neither Smith nor respondent received notice of the January 2005 hearing. On October 24, 2013, the trial court held a hearing on respondent's motion, and petitioner appeared *pro se*. Petitioner gave the following testimony. Petitioner did provide respondent notice of the proceedings on the guardianship petition. At the time of those proceedings, respondent lived with petitioner, and they talked repeatedly about the case. When petitioner informed respondent of the court date, respondent stated she did not want to go to court. Additionally, petitioner provided respondent with a copy of everything petitioner filed. Petitioner also told Smith about the proceedings. Besides petitioner's testimony, no other evidence was presented.

¶ 8 At a November 18, 2013, hearing, the trial court announced it was denying respondent's motion to dismiss and noted a written order would follow. On January 10, 2014, the court entered its written order, finding the court had subject-matter jurisdiction because respondent and Smith consented to the appointment of petitioner as guardian and the lack of service of the summons and any failure to give notice of the January 2005 hearing were not jurisdictional. The court further found no reason to delay enforcement or appeal. On February 7, 2014, respondent filed a timely notice of appeal in compliance with Illinois Supreme Court

Rule 303 (eff. May 30, 2008). Accordingly, this court has jurisdiction of this appeal under Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010).

¶ 9

II. ANALYSIS

¶ 10

A. Lack of Appellee Brief

¶ 11 We begin by noting petitioner has not filed a brief on appeal. A reviewing court is not compelled to serve as an advocate for the appellee and is not required to search the record for the purpose of sustaining the trial court's judgment. However, if the record is simple and the claimed errors are such that the court can easily decide them without the aid of an appellee's brief, the court should decide the merits of the appeal. On the other hand, if the appellant's brief demonstrates *prima facie* reversible error and the contentions in the brief find support in the record, the trial court's judgment may be reversed. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133, 345 N.E.2d 493, 495 (1976).

¶ 12

B. Standard of Review

¶ 13 At issue in this appeal is both subject-matter and personal jurisdiction. A judgment entered in a civil proceeding may be collaterally attacked as void when the trial court lacked subject-matter or personal jurisdiction. *In re Marriage of Mitchell*, 181 Ill. 2d 169, 174, 692 N.E.2d 281, 284 (1998). The issues of whether the trial court had subject-matter jurisdiction over the cause and personal jurisdiction over a particular party present questions of law that we review *de novo*. *Crossroads Ford Truck Sales, Inc. v. Sterling Truck Corp.*, 2011 IL 111611, ¶ 26, 959 N.E.2d 1133 (subject-matter jurisdiction); *Cameron v. Owens-Corning Fiberglas Corp.*, 296 Ill. App. 3d 978, 983, 695 N.E.2d 572, 576 (1998) (personal jurisdiction).

¶ 14

C. Subject-Matter Jurisdiction

¶ 15 "Subject matter jurisdiction refers to the court's power to hear and determine cases

of the general class to which the proceeding in question belongs." (Internal quotation marks omitted.) *Crossroads Ford Truck Sales, Inc*, 2011 IL 111611, ¶ 27, 959 N.E.2d 1133 (quoting *In re M.W.*, 232 Ill. 2d 408, 415, 905 N.E.2d 757, 763 (2009)). Generally, under section 11-5(a) of the Probate Act of 1975 (Probate Act) (755 ILCS 5/11-5(a) (West 2004)), once a petition for guardianship has been filed the trial court may appoint a guardian for a minor "as the court finds to be in the best interest of the minor." However, a court lacks subject-matter jurisdiction to hear a guardianship petition for a minor when:

"(i) the minor has a living parent *** whose parental rights have not been terminated, whose whereabouts are known, and who is willing and able to make and carry out day-to-day child care decisions concerning the minor, unless the parent or parents consent to the appointment or, after receiving notice of the hearing under Section 11-10.1, fail to object to the appointment at the hearing on the petition or (ii) there is a guardian for the minor appointed by a court of competent jurisdiction. There shall be a rebuttable presumption that a parent of a minor is willing and able to make and carry out day-to-day child care decisions concerning the minor, but the presumption may be rebutted by a preponderance of the evidence." 755 ILCS 5/11-5(b) (West 2004).

Likewise, section 11-5(b) provides the standing requirement a nonparent must meet to proceed with a guardianship petition of a minor child under the Probate Act. See *In re R.L.S.*, 218 Ill. 2d 428, 435-36, 844 N.E.2d 22, 27-28 (2006). Thus, in this setting, petitioner's standing and subject-matter jurisdiction of the cause are the same issue.

¶ 16 At the January 2005 hearing, the trial court found that respondent and Smith had consented to the appointment of a guardian. The guardian *ad litem* had stated respondent left a voicemail message stating she agreed with the guardianship petition. The court also had the two agreements, one executed by respondent and one executed by Smith, providing for petitioner to be the guardian of T.S.

¶ 17 For the first time on appeal, respondent challenges the agreements, contending they are not in compliance with section 11-5(a-1) of the Probate Act (755 ILCS 5/11-5(a-1) (West 2004)). Generally, issues not raised in the trial court cannot be raised for the first time on appeal. See *Haudrich v. Howmedica, Inc.*, 169 Ill. 2d 525, 536, 662 N.E.2d 1248, 1253 (1996) ("It is well settled that issues not raised in the trial court are deemed waived and may not be raised for the first time on appeal."). Respondent suggests compliance with section 11-5(a-1) was also a jurisdictional requirement. In support of her argument, respondent cites *In re Guardianship Estate of Tatyanna T.*, 2012 IL App (1st) 112957, ¶¶ 26-27, 976 N.E.2d 431, where the First District suggested a parent's consent to guardianship under section 11-5(b) of the Probate Act had to comply with section 11-5(a-1). However, the First District's language was *dicta* as the issue was not before the court since it could "see nothing in the record which would tend to support the conclusion that respondent 'consent[ed] to the appointment' of petitioners as Tatyanna's guardians." *Tatyanna T.*, 2012 IL App (1st) 112957, ¶ 25, 976 N.E.2d 431 (quoting 755 ILCS 5/11-5(b) (West 2004)). Looking at the language of the statute itself, the version of section 11-5(b) of the Probate Act (755 ILCS 5/11-5(b) (West 2004)) applicable to this case does not refer to section 11-5(a-1) (755 ILCS 5/11-5(a-1) (West 2004)) in providing for jurisdiction where the parents consent to the appointment of a guardian. In fact, unlike the current version of the statute (755 ILCS 5/11-5(b) (West 2012)), it does not specify how to prove a parent's

consent. 755 ILCS 5/11-5(b) (West 2004). Further, section 11-5(a-1) (755 ILCS 5/11-5(a-1) (West 2004)) addresses how a parent can designate a person to be a guardian of a minor, including in a will, and does not state it applies to section 11-5(b). Accordingly, we find compliance with section 11-5(a-1) is not a jurisdictional requirement and respondent has forfeited any challenge to the guardianship agreements.

¶ 18 Here, the record contains unrefuted evidence respondent and Smith consented to the appointment of a guardian for T.S at the time the guardianship petition was filed. Thus, petitioner had standing to file her petition, and the trial court had subject-matter jurisdiction to address it. Since we have found subject-matter jurisdiction based on parental consent, we do not address respondent's arguments related to the other possible bases for subject-matter jurisdiction.

¶ 19 **D. Personal Jurisdiction**

¶ 20 Personal jurisdiction refers to whether a court has acquired the ability to apply its subject-matter jurisdiction to an individual. *In re Shawn B.*, 218 Ill. App. 3d 374, 378, 578 N.E.2d 269, 272 (1991). A respondent may consent to personal jurisdiction by his or her appearance, or the respondent may have personal jurisdiction imposed upon him or her by effective service of summons. *M.W.*, 232 Ill. 2d at 426, 905 N.E.2d at 770. Once the trial court acquires personal jurisdiction over a party, the court has the power to impose personal obligations on the party, and that jurisdiction continues until all issues of fact and law in the case are determined. *M.W.*, 232 Ill. 2d at 426, 905 N.E.2d at 770. Thus, a lack of personal jurisdiction does not deprive the court of jurisdiction over the subject matter of the case but, instead, deprives the court of the ability to impose judgment on parties over whom it lacks personal jurisdiction. *M.W.*, 232 Ill. 2d at 426-27, 905 N.E.2d at 770. A party may raise an objection to personal jurisdiction or improper service of process only on behalf of himself or

herself because the objection may be waived. *M.W.*, 232 Ill. 2d at 427, 905 N.E.2d at 770-71. Accordingly, respondent can only challenge the court's personal jurisdiction over herself.

¶ 21 In support of her argument, respondent cites *Reagan v. Reagan*, 22 Ill. App. 3d 211, 215, 317 N.E.2d 581, 584 (1974), where the Fifth District found the defendant's entry of appearance was void due to the long period of time (a year) between its execution and the filing of the action, which gave rise to uncertainties that could result in prejudice to the defendant and had public policy implications. In its analysis, it noted "courts have struggled to support waivers executed even a few days in advance of the filing of a complaint." *Reagan*, 22 Ill. App. 3d at 215, 317 N.E.2d at 584. The *Regan* court also noted an out-of-state case where "the court decided that in the case of only a 3-day lapse the waiver was effective but stated that one *** may waive service before the petition is filed, provided only that such waiver clearly identifies the suit to which it refers." (Internal quotation marks omitted.) *Reagan*, 22 Ill. App. 3d at 215, 317 N.E.2d at 584 (quoting *Jones v. Jones*, 209 Ga. 861, 862-63 (1953)).

¶ 22 In this case, the lapse of time between the signing of the entry of appearance and the filing of the petition was 11 days, not a year. Moreover, on the same day respondent signed her entry of appearance, she signed the agreement for T.S.'s guardianship. Thus, respondent was aware of the type of legal relief petitioner would be pursuing. Moreover, the record does not show any prejudice to respondent or any public policy implications. The statement of the guardian *ad litem* at the January 2005 hearing that respondent left a voicemail message for her stating she agreed with everything in the petition that was filed shows respondent was aware of the contents of the petition in this case. Last, petitioner testified at the hearing on respondent's motion to dismiss that she provided respondent with a copy of everything she filed. Petitioner also testified she informed respondent of the court date and respondent stated she did not want to

go to court.

¶ 23 Accordingly, on the facts of this case, ample evidence supported the validity of respondent's entry of appearance. Thus, the trial court had personal jurisdiction over respondent.

¶ 24 III. CONCLUSION

¶ 25 For the reasons stated, we affirm the Champaign County circuit court's judgment.

¶ 26 Affirmed.