2017 IL App (1st) 170737-U

No. 1-17-0737

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FIFTH DIVISION
August 14, 2017

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN RE THE GUARDIANSHIP OF E.S., a Minor,	)	Appeal from the
	)	Circuit Court of
(Kia W.,	)	Cook County.
	)	
Petitioner-Appellant,	)	
	)	
v.	)	No. 17 P 1090
	)	
H.M., and T.S.,	)	Honorable
	)	Susan Kennedy Sullivan,
Respondents).	)	Judge Presiding.

JUSTICE LAMPKIN delivered the judgment of the court.
Justice Reyes concurred in the judgment.
Presiding Justice Gordon specially concurred.

O R D E R

¶ 1 *Held*: The nonparent petitioner filed a petition to be appointed the guardian of a minor child who was born and is located in a foreign country and whose parents are incarcerated in that foreign country. The circuit court properly dismissed the petition for lack of jurisdiction because (1) petitioner's allegations, taken as true, would not meet the standing requirement to rebut the

statutory presumption that the parents were willing and able to make and carry out day-to-day child care decisions concerning the minor, and (2) the minor is not present within Illinois.

¶2 Petitioner Kia W, the paternal grandmother of E.S., a minor, appeals the dismissal of her petition for temporary and permanent guardianship of E.S, who was born and is located in Indonesia and whose parents are incarcerated in Indonesia.

¶3 On appeal, petitioner first argues that the Circuit Court of Cook County had personal jurisdiction based on petitioner's service of the notice of hearing and petition on the parents in care of the superintendent of the Indonesian jail in which the parents are incarcerated. Second, petitioner argues, in the alternative, that the circuit court could have proceeded *ex parte* on the guardianship petition as an emergency because no previous child custody determination had been made and no child custody proceeding had been commenced in a court of a state having jurisdiction. Third, petitioner argues that Illinois had subject matter jurisdiction because E.S. was a citizen of the United States, no Indonesian court had adjudicated any issues concerning E.S., her parents were from the Chicago area and her closest relatives were located in the Chicago area, and E.S.'s mother had claims to real property located in Illinois and was involved in litigation in the circuit court concerning the estate of E.S.'s deceased maternal grandmother.

¶4 For the reasons that follow, we affirm the judgment of the circuit court, which dismissed the guardianship petition based on lack of personal jurisdiction.

¶5 I. BACKGROUND

¶6 In February 2017, petitioner filed a petition in the circuit court for temporary and permanent guardianship of E.S., pursuant to the Juvenile Court Act of 1987 (705 ILCS 405 (West 2016)), and section 11 of the Probate Act of 1975 (Probate Act) (755 ILCS 5/11 (West

2016)). Petitioner also asked for an order to allow her to retrieve E.S. from the Indonesian prison. No proof of service was attached to the petition.

¶7 Petitioner alleged that E.S. was born in March 2015 in Bali, Indonesia, where her mother H.M. and father T.S. were incarcerated for their roles in the murder of E.S.'s maternal grandmother. The mother, father and maternal grandmother were Illinois residents and had been on vacation in Indonesia at the time of the murder in 2014. The mother and father were arrested in Indonesia in 2014 and found guilty by an Indonesian court. In 2015, the Indonesian court sentenced the father to an 18-year prison term and the mother to a 10-year prison term. Since her birth, E.S. resided with her mother in Kerobokan prison in Bali, Indonesia.

¶8 Petitioner alleged the mother and father are both United States citizens and E.S. was a citizen of the United States pursuant to section 1401(c) of the Immigration and Nationality Act, 8 U.S.C. § 1401(c) (a person is a citizen of the United States when such person is born outside of the United States of parents both of whom are citizens of the United States and one of whom has had a residence in the United States prior to the birth of such person). E.S. has a United States passport issued in July 2015 and signed by her mother. According to petitioner, E.S. is not automatically an Indonesian citizen under the law of the Republic of Indonesia because neither of her parents was an Indonesian citizen.

¶9 Petitioner alleged that E.S. became two years old in March 2017 and a guardian must be appointed for her because Indonesian custom allows a minor child to reside with an incarcerated parent only for the first two years of the child's life. Petitioner has regular contact with the father and has visited him prison, and he told her that he wanted petitioner to raise E.S. in petitioner's Chicago area home. Petitioner is an Illinois resident, of sound mind, qualified and willing to act, and never has been convicted of a felony. Petitioner stayed with E.S. in Indonesia for three

weeks after her birth. Petitioner has had as much contact with E.S. as possible and has "video chats" with her. Both of E.S.'s maternal grandparents are deceased, and petitioner was not aware of any other claim for guardianship or custody of E.S.

¶10 Petitioner alleged the circuit court was the most appropriate court to exercise jurisdiction pursuant to section 201(a)(1) and (2) of the Uniform Child-Custody Jurisdiction and Enforcement Act (Child Custody Act) (750 ILCS 36/201(a)(1), (2) (West 2016)), because the mother, father, and nearly all of the living relatives of E.S. have significant connections with Illinois. Also, petitioner alleged the appointment of a guardian was in the best interests of E.S. and the incarcerations of her mother and father rendered them unable to make or carry out day-to-day childcare decisions concerning E.S.

¶11 On February 28, 2017, petitioner moved the court to appoint her temporary guardian of E.S. Although the motion alleged that copies of the petition for temporary and permanent guardianship "were served on Kerobokan prison on February 27, 2017," no proof of service was attached to the motion. Petitioner alleged the mother made no arrangements for E.S. despite the Indonesian custom that does not allow a two-year-old child to continue to reside with an incarcerated parent. Petitioner also alleged the United States Consulate's Office in Bali acknowledged in a letter to petitioner that a consulate agent was told by the father that he wanted E.S. returned to the Chicago area to be raised by petitioner.

¶12 On March 2, 2017, petitioner filed an emergency motion for temporary guardianship. The proof of service by petitioner's counsel stated that the mother and father were served by sending a copy of the emergency motion and all exhibits "by means of electronic messaging and by priority Fed Ex this day of March 2, 2017 before 5 p.m." According to the emergency motion, the exhibits included copies of the guardianship petition, a certificate acknowledging E.S.'s

acquired United States citizenship, E.S.'s United States passport, and an email message from Robert Romanowski to petitioner regarding a consular agent's prison visit with the father. According to Romanowski, the father had asked the consulate to convey to petitioner "that he concurs that [petitioner] should have custody of [E.S.]"

¶ 13 On March 3, 2017, petitioner supplemented her petition to add a list of the names and addresses of E.S.'s relatives and the information that any "approximate value of" E.S.'s personal estate, real estate or anticipated gross income and other receipts was zero. The circuit court dismissed petitioner's motion for temporary guardianship with prejudice, finding no authority in the Probate Act for the requested relief. Also, the court dismissed without prejudice petitioner's motion for permanent guardianship, finding that the notice to the mother and father was insufficient, no background check of petitioner had been conducted, and petitioner failed to show the court had jurisdiction.

¶ 14 On March 13, 2017, petitioner filed a memorandum in support of awarding guardianship, alleging the mother and father were both served with the petition and notice of the March 14, 2017 hearing "by means of Federal Expressing copies of the [petition and notice] to the Superintendent of the Prison." Petitioner alleged that service upon an inmate of a prison may be accomplished by service upon the correctional institution, in accordance with section 2-203.2 of the Code of Civil Procedure (Code) (735 ILCS 5/2-203.2 (West 2016)), and service on an individual outside of the State may be had in a like manner to service within the State, in accordance with section 2-208 of the Code (735 ILCS 5/2-208 (West 2016)). Furthermore, petitioner alleged that electronic copies of the petition and notice of hearing also were sent to the mother and father "as electronic messages, which they are allowed to receive in the prison in Bali." Petitioner alleged the court had jurisdiction over the mother and father because they were

United States Citizens, lived in Illinois their entire lives, and conceived E.S. while residing in Chicago. Furthermore, the mother has claims to real property, a trust, and other assets and property in Illinois, which were currently being litigated in the circuit court. A proof of service attached to petitioner's memorandum stated the mother and father were served via electronic mail at the address: "c/o Superintendent, Keroboken Jail-Jin Tangkuban Parah, Keroboken, Denpasar 80361 ID."

¶ 15 At the March 14, 2017 hearing, counsel for petitioner presented the court with a Federal Express receipt to show that notice was received on March 7, 2017 by the jail where both parents were incarcerated. The receipt, however, indicated merely that the mailing was delivered to Denpasar, Indonesia; it did not state an address. This receipt is not included in the record on appeal. Counsel argued that this was an *ex parte* guardianship proceeding under incredibly unique circumstances, petitioner did not need to serve the parents for the court to exercise emergency jurisdiction over the child and the case, and Illinois was a proper venue.

¶ 16 The court denied the petition for guardianship based on lack of personal jurisdiction and closed the estate. The trial court stated that petitioner never asked for permission to serve the parents by substitute service and there was no evidence that either parent consented to the petition. The court found that it did not have jurisdiction over the child, who was not in Illinois, and petitioner's proof of service or notice to the parents—*i.e.*, a Federal Express printout of a mailing to Denpasar, Indonesia, and counsel's signed March 3, 2017 notice of hearing to the parents in care of the superintendent of the jail—was not sufficient to show the court had jurisdiction over the parents. The court also rejected petitioner's assertion that the Child Custody Act provided a basis for "home state" rule in Illinois.

¶ 17 Petitioner timely appealed.

¶18 II. ANALYSIS

¶19 On appeal, petitioner first argues that the circuit court had personal jurisdiction pursuant to the provisions of the Probate Act and section 2-203.2 of the Code (735 ILCS 5/2-203.2 (West 2016)), because petitioner's counsel executed notices and proofs of service that identified the address of the jail to which the petition, emergency notice motion, and notice of hearing were sent by Federal Express to the mother and father in care of the superintendent of the Indonesian jail. Second, petitioner argues, in the alternative, that the trial court could have proceeded on the guardianship petition *ex parte* as an emergency because section 204 of the Child Custody Act (750 ILCS 36/204 (2016)) provides for temporary emergency jurisdiction when no previous child custody determination has been made and no child custody proceeding has been commenced in a court of a state having jurisdiction. Third, petitioner argues that Illinois had subject matter jurisdiction because E.S. was a citizen of the United States and does not qualify as an Indonesian citizen, no Indonesian court had adjudicated any issues concerning her as of March 14, 2017, her parents were from the Chicago area and her closest relatives were located in the Chicago area, and E.S.'s mother had claims to real property located in Illinois and was involved in litigation in the circuit court concerning the estate of E.S.'s deceased maternal grandmother.

¶20 Because the respondents-parents have not filed responsive briefs and the issues before the trial court involved proof of service or notice of the guardianship petition and hearing, we review this case based on petitioner's brief and the record alone according to the principles of *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976) (if justice requires, a court of review may serve as an advocate for the appellee or search the record for the purpose of sustaining the judgment of the trial court).

¶21 Proper service is a prerequisite for a court to acquire personal jurisdiction over a party. *Jayko v. Fraczek*, 2012 IL App (1st) 103665, ¶ 3. A dispute over personal jurisdiction presents a question of law, and rulings as to questions of law are considered *de novo*. *Id.* If a party is not properly served with summons, the trial court has no personal jurisdiction over that party and any judgment entered against that party is void, even if the party is aware of the proceedings. *White v. Ratcliffe*, 285 Ill. App. 3d 758, 763-64 (1996). See also *In re Antwan L.*, 368 Ill. App. 3d 1119, 1128 (2006) (holding inadequate service of process divests the circuit court of personal jurisdiction).

¶22 The administration of minor guardianships is not merely a creature of statute because minor guardianships are derived from the common law and, thus, a circuit court inherently is empowered to appoint a guardian independent of any authority given to the courts under the Probate Act. *In re Estate of Green*, 359 Ill. App. 3d 730, 734 (2005). The circuit court's broad discretion in determining whether to appoint a guardian is not unlimited and will be overturned if the reviewing court finds that the circuit court abused its discretion or if its decision is against the manifest weight of the evidence. *Id*. at 735. " 'A trial court's ruling is against the manifest weight of the evidence only if it is unreasonable, arbitrary and not based on the evidence, or when the opposite conclusion is clearly evident from the record.' " *In re Guardianship Estate of Tatyanna T.,* 2012 IL App (1st) 112957, ¶ 19 (quoting *In re Estate of Michalak.,* 404 Ill. App. 3d 75, 96 (2010)). The appointment must be made "in light of all the relevant facts" and the guiding standard is the best interest of the minor. *Stevenson v. Hawthorne Elementary School, East St. Louis School District No. 189*, 144 Ill. 2d 294, 302 (1991). The reviewing court may affirm on any basis appearing in the record, whether or not the trial court relied on that basis. *In re Guardianship Estate of Tatyanna T.,* 2012 IL App (1st) 112957, ¶ 19.

¶23 Here, petitioner initially sought guardianship of E.S. under section 11 of the Probate Act. 755 ILCS 5/11-1 through 11-18 (West 2016). Although service of process in a civil case generally may be accomplished by personal service by a sheriff's deputy, or a specially appointed process server, or with the court's approval for a combination of publication and mailing or in any manner consistent with due process (see 735 ILCS 5/2-201 *et seq*. (West 2016)), under the Probate Act any qualified person may file a petition to be appointed a minor's guardian and "the court may appoint a guardian as the court finds to be in the best interest of the minor" (755 ILCS 5/11-3, 11-5(a) (West 2016)). However, the court lacks jurisdiction under the Probate Act to proceed on the guardianship petition if the court finds that 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 (1) voluntarily relinquished physical custody of the minor, (2) fails to object to the appointment at the hearing on the petition after receiving notice of the hearing in accordance with section 11-10.1 of the Probate Act, or (3) consents to the appointment as evidenced by a written, notarized, and dated document or by a personal appearance and consent in open court. 755 ILCS 5/11-5(b) (West 2016). "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." *Id*. "Unless excused for good cause shown, it is the duty of the petitioner to give notice of the time and place of the hearing on the petition, in person or by mail, to the *** relatives *** of the minor whose names and addresses are stated in the petition, not less than 3 days before the hearing, but failure to give notice to any relative is not jurisdictional." 755 ILCS 5/11-10.1 (West 2016).

¶24 " '[T]he standing requirement contained in [section 11-5(b)] protects the superior rights of parents and ensures that guardianship proceedings pass constitutional muster.' " *In re Guardianship Estate of Tatyanna T.,* 2012 IL App (1st) 112957, ¶ 21 (quoting *In re Guardianship of A.G.G.,* 406 Ill. App. 3d 389, 394 (2011)). "By allowing a guardianship petition to proceed to a hearing on the merits over the wishes of a parent only when the parent has been established to be unwilling or unable to carry out day-to-day child-care decisions, the Probate Act respects the superior rights of parents while also insuring to protect the health, safety, and welfare of children." *In re R.L.S.,* 218 Ill. 2d 428, 441 (2006). Section 11-5(b) "establishes the threshold statutory requirement that a petitioner must meet before the court can proceed to a determination of the best interests of a child." *In re Guardianship Estate of Tatyanna T.,* 2012 IL App (1st) 112957, ¶ 21. If the petitioner fails to rebut the presumption, the petitioner lacks standing and the trial court lacks jurisdiction to proceed on the petition. See 755 ILCS 5/11–5(b) (West 2012); *In re R.L.S.,* 218 Ill. 2d at 448.

¶25 An evidentiary hearing on whether the petitioner rebutted the presumption is not necessary if the allegations contained in the petition would not, if true, rebut such a presumption. *In re A.W.*, 2013 IL App (5th) 130104, ¶ 15. A circuit court's decision on standing without hearing evidence is reviewed *de novo*. *Id*. Here, where the circuit court dismissed the guardianship petition without hearing evidence, the court necessarily determined that the allegations contained in petitioner's petition, even if true, would not rebut the presumption that the mother or father was willing and able to make and carry out day-to-day child care decisions concerning E.S.

¶26 There is no dispute that E.S.'s mother and father are alive, that their parental rights have not been terminated, and that their whereabouts are known. Moreover, the parents have not

voluntarily relinquished physical custody of E.S. because, according to petitioner, Indonesian custom prevents the mother from keeping E.S. at the prison after her second birthday. In addition, neither parent consented to petitioner's appointment as evidenced by a written, notarized and dated document or personal appearance and consent in open court. Also, petitioner has not shown that the parents failed to object to her appointment as guardian at the hearing on her petition after receiving timely notice of the hearing in person or by mail. The trial court did not excuse for good cause shown petitioner's duty to give the parents notice and found that petitioner's Federal Express receipt failed to show even whether the Indonesian prison had received the petition and notice of hearing. Because petitioner has not included in the record on review the express mail receipt presented to the circuit court at the March 14, 2017 hearing, we must presume that the circuit court had an adequate factual basis to conclude that petitioner's proof of notice was inadequate. See *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984) (an appellant has the burden of presenting a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record, the reviewing court will presume that the order entered by the trial court was in conformity with the law and had a sufficient factual basis).

¶27 Furthermore, petitioner's allegation about the parent's continued incarceration for several more years fails to rebut the presumption that they are willing and able to make and carry out decisions about E.S.'s daily care. Petitioner's allegation that the father wants her to raise E.S. in the Chicago area essentially concedes that the parents have the ability to decide to place E.S. with a guardian. Petitioner's allegations also indicate that the mother is reluctant to give up physical custody of E.S. and, thus, likely would choose to place E.S. with a guardian located near Bali instead of Chicago so the mother could have as much contact as possible with E.S.

¶28 Finally, petitioner's allegations also establish that E.S. was born in and remains in Indonesia and, thus, the circuit court lacks jurisdiction because E.S. is not present in Illinois. When a minor is not present in Illinois and is neither domiciled nor a resident of Illinois, an estate or property in Illinois is essential to give the circuit court jurisdiction to appoint a guardian of the minor. *People ex rel. Noonan v. Wingate*, 376 Ill. 244, 250 (1941) (a state court's jurisdiction to regulate the custody of minors "found within its territory does not depend on the domicile of the child" but rather "arises out of the power that every sovereignty possesses as parens patriae to every child within its borders to determine its status and the custody that will best meet its needs and wants."); *People, to Use of Kaiser v. Medart*, 166 Ill. 348, (1896) (per curiam); *Barnsback v. Dewey*, 13 Ill. App. 581, 582 (1883). See also *In re Estate of Randell*, 12 Ill. App. 3d 640, 641 (1973) (Illinois court lacked jurisdiction to entertain petition or to appoint a guardian where the minor child was in her father's custody and living in Missouri because the minor was a nonresident of Illinois and had no estate in Illinois); *In re Guardianship of Smythe*, 65 Ill. App. 2d 431, 444-45 (1965) (when orphaned children were present in Illinois, the circuit court had the power to award custody even though the children may not have been domiciled in or legal residents of Illinois). Here, the allegations of the petition showed that E.S. was not present in Illinois and had never been in Illinois, E.S. did not have a personal estate, real estate, or anticipated gross income in Illinois, and any claims to her maternal grandmother's estate have not been adjudicated. Under such circumstances, the circuit court lacks jurisdiction to entertain a petition or appoint a guardian.

¶29 Because petitioner's allegations in her guardianship petition would not, if true, rebut the statutory presumption that the parents are willing and able to make and carry out decisions concerning E.S.'s daily care, the circuit court properly dismissed at the pleadings stage the

petition based on petitioner's lack of standing under the Probate Act and the circuit court's lack of jurisdiction under the Probate Act to proceed on her petition.

¶30 Petitioner also seems to invoke the circuit court's inherent power under the common law to appoint a guardian by arguing that the court had personal jurisdiction pursuant to section 2-203.2 of the Code (735 ILCS 5/2-203.2 (West 2016)), because petitioner's counsel executed notices and proofs of service that identified the address of the jail to which the petition and notice of hearing were sent by Federal Express to the mother and father in care of the superintendent of the Indonesian jail. We disagree.

¶31 As discussed above, E.S. is not present in Illinois and has no estate in Illinois. Furthermore, Section 2-203.2 of the Code provides a method of substitute service of process on an inmate when the process server is "refused entry into that correctional institution or facility or jail." 735 ILCS 5/2-203.2 (West 2016). Specifically, service on an inmate may be made by substitute service on a designated representative of the institution who accepts service from a licensed or registered private detective or agency for purposes of effectuating service upon the inmate in the custody of the institution. Here, petitioner did not ask the court to allow for substitute service and did not allege that any process server was refused entry to the Bali jail. In addition, as discussed above, petitioner has failed to show that the Bali jail even received the documents sent by Federal Express to the parents in care of the superintendent of the Bali jail.

¶32 Next, petitioner argues, in the alternative, that the circuit court could have proceeded on the guardianship petition *ex parte* as an emergency because section 204(b) of the Child Custody Act (750 ILCS 36/204(b) (2016)) provides for temporary emergency jurisdiction when no previous child custody determination has been made and no child custody proceeding has been commenced in a court of a state having jurisdiction. This argument lacks merit based on the plain

terms of section 204. *Relf v. Shatayeva*, 2013 IL 114925, ¶ 23 (In construing statutory language, words and phrases should not be considered in isolation; rather the language in each section of the statute must be examined in light of the statute as a whole.). Section 204(a) of the Child Custody Act states that "[a] court of this State has temporary emergency jurisdiction *if the child is present in this State* and the child has been abandoned or it is necessary in an emergency to protect the child because the child, or a sibling or parent of the child, is subjected to or threatened with mistreatment or abuse." (Emphasis added.) 750 ILCS 36/204 (West 2016). As discussed above, petitioner concedes that E.S. is not present in Illinois.

¶33 Because we affirm the circuit court's dismissal of the petition based on lack of personal jurisdiction, we need not address petitioner's remaining argument concerning subject matter jurisdiction.

¶34 III. CONCLUSION

¶35 For the foregoing reasons, we affirm the judgment of the circuit court to dismiss, without an evidentiary hearing, petitioner's petition for guardianship over E.S. based for lack of personal jurisdiction.

¶36 Affirmed.

¶37 PRESIDING JUSTICE GORDON, specially concurring:

¶38 I also would affirm the circuit court of Cook County, but I must write separately. The nonparent petitioner has filed a petition to be appointed the guardian of a minor born and located in Indonesia. The petition is based on hearsay and there is no proof of service on the incarcerated parents in Indonesia. If the parents are actually consenting to the guardianship, their written consent would need to be filed with the circuit court of Cook County for the petition to state a viable cause of action. It was not filed and there is no documentary evidence that they consent to

this process. There is no viable evidence to show where the minor is living, where the minor will live if required to leave the prison setting, or what will happen to the minor in the future. The circuit court of Cook County had no alternative but to dismiss the petition. There is a lack of personal jurisdiction, and the petition does not state a viable cause of action.