2013 IL App (2d) 121348-U
No. 2-12-1348
Order filed May 16, 2013

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re ESTATE OF WINIFRED CAROL WYMAN, a Disabled Person,	)	Appeal from the Circuit Court of Winnebago County.
	)	No. 09-P-197
(Powell Wyman, Guardian of the Estate, Petitioner-Appellee v. John Wyman, Successor Guardian of the Person, Cross-Petitioner-Appellant, and William Wyman, Appellant.)	)	Honorable Lisa R. Fabiano, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Hutchinson and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: Where adult son appeared and actively participated in guardianship proceedings in which his mother was adjudicated a disabled person and appointed a guardian, he forfeited any objection to lack of notice by failing to raise the issue until more than three years after the hearing at which guardian was appointed.

¶ 2 Petitioner, Powell Wyman, filed a petition for temporary and permanent guardianship of his wife, Winifred Carol Wyman, whom Powell alleged had become disabled by virtue of her vascular dementia. The trial court adjudicated Winifred a disabled person and appointed Powell plenary guardian of the estate and person. Several months later, Powell agreed to resign as guardian of the

person, and John Wyman, an adult son of Winifred, was appointed successor guardian of the person. More than two years later, John filed a *pro se* "Emergency Motion to Dismiss/Non Suit [*sic*] for Lack of Soldini [*sic*] Jurisdiction/Lack of Proper Notice of Hearing on Petition for Guardianship" (motion to dismiss), alleging that he never received notice of the hearing on Powell's original guardianship petition, as required by section 11a-10(f) of the Illinois Probate Act of 1975 (Act) (755 ILCS 5/11a-10(f) (West 2008)). Relying upon *In re Sodini*, 172 Ill. App. 3d 1055 (1988), John contended that the lack of notice was a jurisdictional defect that required the court to vacate the appointment of Powell as guardian. The trial court denied John's motion, and he appealed. We affirm.

¶ 3 BACKGROUND

¶ 4 On May 14, 2009, Powell filed his petition for temporary and permanent guardianship of Winifred, who then resided in a nursing home in Rockford, Illinois. As required under section 11a-8(e) of the Act (755 ILCS 5/11a-8(e) (West2008)), the petition listed the names and addresses of Winifred's husband, Powell Wyman; her adult daughter, Elizabeth Allspaugh; and her three adult sons, John Wyman, William Wyman, and David Wyman. The petition did not list any adult brothers or sisters of Winifred's. The petition alleged that Winifred suffered from vascular dementia, required 24-hour care, and was unable to manage her person and estate. The trial court appointed a guardian *ad litem* for Winifred and set the matter for hearing on the issue of temporary guardianship.

¶ 5 On May 18, 2009, the trial court appointed Powell the temporary guardian of Winifred's estate and person. In its written order, the court noted that an attorney was present for John at the hearing. The court further noted that the appointment order was entered over the objection of John's

attorney and granted John 30 days to file responsive pleadings. The court set the matter for hearing on the issue of plenary guardianship on July 9, 2009.

¶ 6 On May 29, 2009, Powell's attorney filed a notice of the July 9, 2009, hearing. The notice contained a notarized certificate of service, which stated that Powell's attorney served the notice upon John by serving his attorney, as well as upon Powell, Elizabeth, William, and David, by depositing the notice in the mail on May 28, 2009.

¶ 7 On June 2, 2009, the court entered an order resolving five actions for orders of protection filed on Winifred's behalf. Although the actions for orders of protection were separate from the guardianship proceeding, the order was captioned under the case number for the guardianship proceeding. The order notes that John was present at the hearing with his attorney and that another attorney was present on behalf of William and several other individuals. The order enjoined John, William, and others from communicating with, harassing, or visiting with Winifred and from entering the nursing home in which she resided. The conclusion of the order stated that the case remained set for hearing on the issue of plenary guardianship on July 9, 2009.

¶ 8 Although the hearing on plenary guardianship was set for July 9, 2009, the order appointing Powell plenary guardian of Winifred's estate and person was entered on July 6, 2009. The record contains no explanation for why the hearing was rescheduled; however, John stated in his motion to dismiss that "for some reason, attorneys for the parties met and changed the date of the hearing to three (3) days earlier." We do not have a transcript of the July 6 hearing, but the appointment order states that John's attorney was present along with Powell's attorney and the guardian *ad litem*. The court found that Winifred was a disabled person and that a plenary guardian was necessary to protect her estate and person. The court stated that the appointment of Powell as plenary guardian

was made over the objection of John's attorney and was without prejudice to Winifred and "other parties," who "retain[ed] the right to hearing as permitted by statute." The court set the case for status on July 27, 2009.

¶ 9 At the conclusion of the status hearing on July 27, 2009, the court granted John's attorney 21 days to file responsive pleadings. Following the hearing, John's attorney filed a motion to withdraw, which the trial court granted. John informed the court that he would proceed *pro se* but filed no responsive pleadings.

¶ 10 On November 30, 2009, the trial court granted John an additional 14 days to file responsive pleadings. The next day, on December 1, 2009, John filed his own petition for temporary and permanent guardianship of Winifred's estate and person. John's handwritten *pro se* petition mirrored the allegations of Powell's petition but alleged that Winifred was now residing with John at his home in Snowmass, Colorado. The record does not disclose how Winifred got from her nursing home in Rockford, Illinois, to John's home in Snowmass; however, the record contains references to Winifred "escaping" the nursing home and traveling alone to Colorado. In his petition, John sought to be appointed guardian of the estate and person.

¶ 11 On March 26, 2010, in light of Winifred's placement in Colorado, the court granted Powell leave to withdraw as guardian of Winifred's person and appointed John successor guardian of the person. The court authorized John to maintain Winifred's placement at his home in Colorado.

¶ 12 On August 29, 2011, the court granted Powell authority to list for sale Powell and Winifred's marital home. Shortly thereafter, on November 29, 2011, John filed a *pro se* motion to have Powell removed as guardian of the estate and to have William appointed successor guardian of the estate. On January 9, 2012, the court denied John's motion.

¶ 13 On August 28, 2012, John filed his *pro se* motion to dismiss. John alleged that the hearing on Powell's petition for guardianship originally had been set for July 9, 2009, and that "for some reason, the attorneys for the parties met and changed the hearing date to three (3) days earlier." John further alleged that he "did not receive any notice" of the rescheduled hearing. He cited *Sodini*, which he explained held that the 14-day notice requirement contained in section 11a-10(f) of the Act was a jurisdictional requirement in a guardianship proceeding. John further alleged that neither his brother William nor Winifred's sister, Marilyn Cook, had received notice of the guardianship hearing. John's motion was not verified or supported by affidavit. Attached to the motion were two unnotarized documents signed by William and Marilyn, each entitled "Declaration of Non Receipt of Written Notice of Time, Date and Place of Hearing for Guardianship." Three days after John filed the *pro se* motion, an attorney filed an appearance on John's behalf.

¶ 14 The court held a hearing on John's motion on September 28, 2012. William appeared at the hearing and John's attorney represented to the court that William was joining in the motion. The court heard argument and denied the motion. Although the court announced its decision at the conclusion of the hearing, the court did not enter a written order until December 17, 2012, when the court entered a memorandum opinion and order denying the motion to dismiss. The court found that John had been present either personally or through his attorney at all pertinent hearings in the guardianship proceeding, that the court had given John a number of opportunities to file pleadings responsive to Powell's guardianship petition, and that John himself had petitioned to be appointed guardian and in fact had been appointed successor guardian of Winifred's person. In light of these considerations, the court found that John had adequate notice of the guardianship proceedings and that his motion to dismiss was frivolous and subject to sanctions pursuant to Illinois Supreme Court

Rule 137 (eff. Feb. 1, 1994). The court further found that William had notice of the proceedings because he had appeared in court on a number of occasions and had never contested the guardianship despite having ample opportunity to do so. John timely appealed.[1]

¶ 15 ANALYSIS

¶ 16 Initially, we must address our jurisdiction over the appeal. A reviewing court has 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). John appeals the denial of his motion to dismiss and contends that we have jurisdiction under Illinois Supreme Court Rule 304(b)(1) (eff. Feb. 26, 2010). That rule permits a party to appeal, without a finding pursuant to Illinois Supreme Court Rule 304(a) (eff. Feb. 26, 2010), from a final judgment that does not dispose of an entire proceeding, where the order appealed 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). The Committee Comments to the rule provide as an example an order "appointing or removing an executor." Ill. S. Ct. R. 304, Committee Comments (revised Feb. 26, 2010).

¶ 17 Ordinarily, the denial of a motion to dismiss is not a final appealable order. *In re D.J.E.*, 319 Ill. App. 3d 489, 492 (2001). However, a court looks to the substance of a motion, rather than its

[1]Although John filed his notice of appeal prematurely on November 29, 2012, it became effective on December 17, 2012, the date the trial court entered the order denying John's motion. Ill. S. Ct. R. 303(a)(1) (eff. June 4, 2008) ("A notice of appeal filed after the court announces a decision, but before the entry of the judgment or order, is treated as filed on the date of and after the entry of the judgment or order.").

title, to determine its character. *Langone v. Schad, Diamond & Shedden, P.C.*, 406 Ill. App. 3d 820, 829 (2010). In substance, John's motion to dismiss sought to vacate the July 6, 2009, order appointing Powell plenary guardian of Winifred's estate and person on the basis that Powell had not complied with the Act's notice requirement when the court appointed Powell guardian. In *In re Estate of Neuf*, 85 Ill. App. 3d 468, 469 (1980), the court held that the denial of a motion to remove a conservator was a final appealable order under Rule 304(b)(1). *Neuf*, 85 Ill. App. 3d at 469 ("We believe that an order granting or denying removal of a conservator should be regarded as a final determination of a right or status within the meaning of Rule 304(b)(1). The trial court's order effectively denied the removal of respondents as conservators."). The same reasoning applies here, where the trial court denied John's motion that, in substance, sought to vacate the order appointing Powell guardian—the effect of an order granting John's motion would have been to remove Powell as guardian. See *In re Estate of Standford*, 221 Ill. App. 3d 154, 158-60 (1991) (affirming a trial court's decision to vacate all orders entered in a probate proceeding, including the letters of office issued to the executrix, where no notice was given to the heirs and legatees as required by statute). Therefore, we conclude that we have jurisdiction pursuant to Rule 304(b)(1).

¶ 18 Nevertheless, we must dismiss the appeal as to William. The only notice of appeal filed in this matter was John's notice of appeal from the denial of his *pro se* motion to dismiss. John's attorney (whom he retained shortly after filing his *pro se* motion) filed the notice of appeal on John's behalf only. The notice of appeal states that "Mr. John Howard Wyman *** herewith files his Notice of Appeal" and it refers to John as the "Appellant," singular. The notice of appeal is signed by the attorney for "Appellant John Howard Wyman." Although John's attorney subsequently filed an appearance on William's behalf in this court, that does not make William a proper party to the

appeal. "In a civil case, the *only* jurisdictional step in appealing a final judgment of a circuit court is the filing of the notice of appeal." (Emphasis in original.) *Nussbaum v. Kennedy*, 267 Ill. App. 3d 325, 329 (1994). Therefore, we lack jurisdiction over William and dismiss him from the appeal.

¶ 19 Before we turn to the merits, we are compelled to admonish John's attorney on the requirements for briefs filed in the appellate court. Illinois Supreme Court Rule 341 (eff. July 1, 2008) governs the content and format of briefs and its requirements are mandatory. *In re Marriage of Petrik*, 2012 IL App (2d) 110495, ¶ 38. Rule 341(g) mandates that citations in briefs be made as provided in Rule 6. Ill. S. Ct. R. 341(g) (eff. July 1, 2008). Rule 6, in turn, requires that citations be either to the Official Reports or to the public-domain citation, if available. Ill. S. Ct. R. 6 (eff. July 1, 2011). Of the six cases cited in John's brief, only two of those cases contain citations to a reporter, and even those two citations do not include pinpoint citations. Additionally, subparagraphs (h)(6) and (h)(7) of Rule 341 require an appellant to include citations to the record on appeal in the statement of facts and in the argument section, respectively. Ill. S. Ct. R. 341(h)(6), (h)(7) (eff. July 1, 2008). John's brief solely contains citations to pages of the appendix, rather than to pages of the record on appeal. "The appellate court is not a depository in which the appellant may dump the burden of argument and research." (Internal quotation marks omitted.) *Petrik*, 2012 IL App (2d) 110495, ¶ 38. We would be well within our authority to strike John's brief based upon these rule violations. However, because we are able easily to resolve the appeal despite the rule violations, we decline to exercise our authority to do so in this case.

¶ 20 Turning to the merits, John argues that the trial court lacked jurisdiction to determine the issue of plenary guardianship of Winifred because Powell failed to provide the required 14-day notice to all persons named in his guardianship petition, as required by section 11a-10(f) of the Act.

We review *de novo* the issue of whether a trial court had jurisdiction to enter an order. *In re Estate of Pellico*, 394 Ill. App. 3d 1052, 1066 (2009).

¶ 21 Section 11a-10(f) of the Act provides:

> "Notice of the time and place of the hearing [on a guardianship petition] shall be given by the petitioner by mail or in person to those persons, including the proposed guardian, whose names and addresses appear in the petition and who do not waive notice, not less than 14 days before the hearing." 755 ILCS 5/11a-10(f) (West 2008).

Section 11a-8(e) of the Act, in turn, requires that a guardianship petition include the names and addresses of "the nearest relatives of the respondent in the following order: (1) the spouse and adult children, parents and adult brothers and sisters, if any; if none, (2) nearest adult kindred known to the petitioner." 755 ILCS 5/11a-8(e) (West 2008).

¶ 22 In *Sodini*, the court held that a failure to comply with section 11a-10(f)'s 14-day notice requirement was a "jurisdictional defect" that required vacating an order appointing a guardian of Sodini's estate and person. *Sodini*, 172 Ill. App. 3d at 1058, 1060. Sodini's niece had listed Sodini's adult sisters in her petition to have him adjudicated a disabled person and to be appointed guardian. *Sodini*, 172 Ill. App. 3d at 1057. However, the niece failed to provide any notice to the sisters. *Sodini*, 172 Ill. App. 3d at 1057. More than two months after the court adjudicated Sodini a disabled person and appointed the niece guardian, one of Sodini's sisters filed a motion to vacate the appointment order, alleging that she never received notice. *Sodini*, 172 Ill. App. 3d at 1057. Although the trial court denied her motion, the appellate court reversed. *Sodini*, 172 Ill. App. 3d at 1057, 1060. The court concluded that the legislature, in enacting section 11a-10(f) of the Act,

"desired to make service upon those relatives listed in the petition a requirement for obtaining proper jurisdiction."[2] *Sodini*, 172 Ill. App. 3d at 1059.

¶ 23 *Sodini* is readily distinguishable. The court in *Sodini* stated that "[t]he record indicates no notice of the hearing was given to the sisters" and further noted that the sisters were not present at the guardianship hearing, either personally or through an attorney. *Sodini*, 172 Ill. App. 3d at 1057. Once one of the sisters became aware of the guardianship proceedings, her first filing was a motion to vacate the appointment order, based on the lack of notice. *Sodini*, 172 Ill. App. 3d at 1057. Thus, not only was the sister in *Sodini* not given notice of the guardianship hearing and not represented by an attorney at the hearing, but also she did not answer or respond to the guardianship petition prior to raising her objection concerning the lack of notice.

¶ 24 Here, by contrast, John was represented by an attorney as early as the hearing on temporary guardianship. At that hearing, the court appointed Powell temporary guardian of Winifred's estate

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[2] *Sodini* was decided 14 years prior to *Belleville Toyota, Inc. v. Toyota Motor Sales, U.S.A.*, 199 Ill. 2d 325 (2002), in which our supreme court held that, "[w]ith the exception of the circuit court's power to review administrative action, which is conferred by statute, a circuit court's subject matter jurisdiction is conferred entirely by our state constitution." *Belleville Toyota*, 199 Ill. 2d at 334. Thus, if *Sodini* remains precedential following *Belleville Toyota*, its use of the word "jurisdictional" must refer to personal jurisdiction, rather than to subject matter jurisdiction. Unlike an objection to lack of subject matter jurisdiction, an objection to lack of personal jurisdiction can be forfeited by failing to timely raise it. See *Pellico*, 394 Ill. App. 3d at 1067 (holding that a party who filed a responsive pleading to a guardianship petition prior to objecting to personal jurisdiction waived any objection to personal jurisdiction).

and person over the objection of John's attorney and granted John 30 days to file responsive pleadings. Regarding the hearing on plenary guardianship, the record contains a notice of the hearing signed by Powell's attorney. The notice includes a notarized certificate of service stating that Powell's attorney served the notice upon John in care of his attorney by depositing it in the mail on May 28, 2009, which was 42 days before the hearing was scheduled. Although, as John conceded in his motion to dismiss, the attorneys for the parties met and agreed to reschedule the hearing from July 9 to July 6, 2009, John's attorney was present at the July 6 hearing representing John's interests. The order appointing Powell plenary guardian of Winifred's estate and person again indicates that John's attorney was present and that the appointment was made over the objection of John's attorney.

¶ 25 Not only was John represented by an attorney at the hearings on temporary and plenary guardianship, he appeared personally with his attorney at the July 27, 2009, status hearing. On that date, the court again granted John 21 days to file responsive pleadings, which he failed to do. After his attorney withdrew, John received an additional 14 days to file responsive pleadings following a hearing on November 30, 2009. The next day, John filed a *pro se* petition for guardianship, which the trial court granted in part by appointing John successor guardian of Winifred's person.

¶ 26 In light of John's active participation in the guardianship proceedings, beginning in May 2009, which was well before the court appointed Powell plenary guardian, we conclude that John has forfeited his objection to the alleged lack of notice. Even if John or others were not given proper notice pursuant to section 11a-10(f) of the Act, John was given ample opportunity to raise this objection. The court granted John leave to file responsive pleadings on at least three occasions, and John was present either personally or through his attorney at nearly every hearing held in the

guardianship proceedings. Yet, John failed to raise the notice issue until August 28, 2012, more than three years after Powell was appointed plenary guardian of Winifred's estate and person. Moreover, he filed his own guardianship petition, which was partly successful. Consequently, he has forfeited his objection to the allegedly deficient notice. See *Pellico*, 394 Ill. App. 3d at 1067 (holding that a party who filed a responsive pleading to a guardianship petition prior to objecting to personal jurisdiction waived any objection to personal jurisdiction).

¶ 27 Furthermore, although John alleged in his motion to dismiss that he never received notice of the rescheduled hearing date, John's motion was unverified and was not supported by affidavit. The only evidence of notice we have is the notarized certificate of service stating that notice of the hearing was mailed to John in care of his attorney on May 28, 2009. We also have the July 6, 2009, order indicating that John's attorney was present at the hearing. Thus, the record contains no admissible evidence—such as testimony or an affidavit—that John did not receive notice.

¶ 28 As a final matter, after John filed his opening appellant's brief but before briefing was completed, we received correspondence from John's attorney addressed to the clerk of this court. John's attorney advised in an unnotarized "Declaration" that she had lost an official portion of the record on appeal that had been ordered sealed by the trial court. Attached to her letter and declaration was a sealed envelope purporting to contain a copy of the lost portion of the record. We admonish John's attorney that Illinois Supreme Court Rule 329 (eff. Jan. 1, 2006) governs the procedures for amending, correcting, or supplementing the record on appeal. The rule provides that, when a supplemental record is required, "[t]he clerk of the circuit court shall prepare a bound and certified supplemental record which shall be filed in the reviewing court upon order issued pursuant to motion." Ill. S. Ct. R. 329 (eff. Jan. 1, 2006). Furthermore, when a party to an appeal seeks any

order or other relief from the reviewing court, the application shall be by motion. Ill. S. Ct. R. 361(a) (eff. Dec. 29, 2009). A motion must be filed with a proof of service, and, if the motion is based on facts that do not appear of record, it must be supported by affidavit. Ill. S. Ct. R. 361(a), (b) (eff. Dec. 29, 2009). Because John's attorney has not complied with these provisions, we decline to supplement the record with the sealed envelope she has provided. However, the absence of the envelope from the record does not affect our resolution of the appeal, as neither John nor Powell references the sealed document in his brief.

¶ 29 CONCLUSION

¶ 30 Based on the foregoing, we dismiss the appeal as to William Wyman and affirm the judgment of the circuit court of Winnebago County as to John Wyman.

¶ 31 Appeal dismissed as to William Wyman.

¶ 32 Affirmed as to John Wyman.