

No. 1-11-0380

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> MARRIAGE OF)	APPEAL FROM THE
)	CIRCUIT COURT
WAYNE KIRK,)	OF COOK COUNTY
)	
Petitioner-Appellant,)	
)	No. 99 D 12232
and)	
)	
EVE G. KIRK,)	HONORABLE
)	VERONICA B. MATHEIN,
Respondent-Appellee.)	JUDGE PRESIDING.

PRESIDING JUSTICE STEELE delivered the judgment of the court.
Justices Neville and Murphy concurred in the judgment.

ORDER

- ¶ 1 *Held:* The trial court had jurisdiction to hear a petition normally filed pursuant to section 2-1401 of the Illinois Code of Civil Procedure (735 ILCS 5/2-1401 (West 2010)) that was substantively a motion to enforce a judgment for dissolution of marriage.
- ¶ 2 This is an appeal of the circuit court's dismissal of a motion for modification of judgment for lack of jurisdiction. A former husband filed a petition pursuant to section 2-1401 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-1401 (West 2010)) that was characterized

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as one seeking to modify or reform the judgment for dissolution of marriage. The petition alleged that the former husband's military pension was intended by the parties to be equally divided from the date of marriage to the date of dissolution of marriage. Alleging a mutual mistake of fact, the former husband requested that the marital settlement agreement (MSA) be reformed to allow for an equal division of the pension as of the date the judgment for dissolution of marriage was entered. The circuit court dismissed the petition for lack of jurisdiction. After the motion was denied, the former husband appealed. For the following reasons, we reverse and remand the cause to the circuit court for proceedings consistent with this order.

¶ 3

BACKGROUND

¶ 4 Petitioner Wayne Kirk and respondent Eve G. Kirk were married on December 29, 1973, in Chicago, Illinois. The marriage was registered in Cook County, Illinois. They have three children, all of whom are now emancipated: Katherine Lee, born January 31, 1977; Genevieve Lauren, born May 12, 1979; and Abigail Rose, born March 11, 1982. No children were adopted by the parties during their marriage.

¶ 5 During the marriage, Eve worked as a housewife and minister's wife. Wayne worked as a clergyman and served in the United States Army Reserves. At the time of divorce, he had not yet vested in his military pension. Wayne continued to serve in the military approximately eight years after the dissolution of the parties' marriage. The Kirks separated in 1998. On July 27, 1999, Wayne filed a petition for dissolution of marriage.

¶ 6 The parties were awarded a judgment for dissolution of marriage on August 5, 2002. The judgment incorporated a MSA, which was signed on August 5, 2002. The MSA provides the

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following, in pertinent part:

"It is the parties' intention to divide these accounts so that each party receives an equal amount. *** With respect to the U.S. Army Pension, the parties acknowledge that WAYNE joined the Army Reserves in 1985 and further agree that the pension shall be divided equally between the parties."

¶ 7 On the same day the parties appeared in court for a prove-up, where they were both represented by counsel. At the hearing, Wayne was questioned by his attorney, Mr. Badesch, as follows:

"Q. The two of you have equalized your retirement benefits. Is that a fair statement?

A. Yes.

Q. And to do that, you have agreed to pay \$9,000 of which \$5,000 is being paid today, and we'll acknowledge a receipt of that, and \$4,000 to be paid within nine months; is that correct?

A. That's correct.

Q. Your Army pension will also be QUADROed [*sic*] so that the marital portion will be equally divided between you and Eve. Is that a fair statement?

A. Correct."

At the hearing Eve was questioned by her attorney, Ms. Schick:

"Q. And you have just heard all the questions that Mr. Badesch has asked of your husband, correct?

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A. Yes, I have.

Q. And you heard the answers he gave?

A. Yes.

Q. And if I were [to] ask you the same questions, would your answers be essentially the same?

A. Yes."

¶ 8 On August 25, 2010, Wayne filed a petition pursuant to section 2-1401 of the Code seeking to modify the judgment for dissolution of marriage. In his petition, Wayne alleged, "WAYNE has retired and his former spouse, EVE, the respondent herein has been pre-approved for 50% of WAYNE's [military] retirement pay due to the language in the Judgment which indicates that the 'pension will be divided equally between the parties.' "

¶ 9 On October 22, 2010, Eve filed a motion to strike and dismiss Wayne's petition, asserting his motion failed to state a sufficient claim for relief under section 2-1401 of the Code. Following a hearing on January 12, 2011, the circuit court dismissed Wayne's motion for lack of jurisdiction with prejudice.

¶ 10 On February 4, 2011, Wayne timely filed a notice of appeal with this court.

¶ 11 DISCUSSION

¶ 12 First, Eve argues Wayne's failure to provide a report of proceedings for the hearing on the motion is fatal to his appeal. In support of her argument, Eve erroneously cites Illinois Supreme Court Rule 223, asserting the rule requires an appellant to provide a report of proceedings. Rule 223 is a "reserved" section which does not provide rules for report of

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proceedings.

¶ 13 Illinois Supreme Court Rule 323(a) (eff. Sept. 23, 1996) states in pertinent part, "A report of proceedings may include evidence, oral rulings of the trial judge, a brief statement of the trial judge of the reasons for his decision, and any other proceedings that the party submitting it desires to have incorporated in the record on appeal." "An appellant has the burden to present a *sufficiently complete* record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." (Emphasis added.) *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). In fact, "[f]rom the very nature of an appeal it is evident that the court of review must have before it the record to review in order to determine whether there was the error claimed by the appellant." *Id.* at 391. Where the issue on appeal relates to the conduct of a hearing or proceeding, this issue is not subject to review absent a report or record of the proceeding. *Webster v. Hartman*, 195 Ill. 2d 426, 280 (2001).

¶ 14 Eve argues Wayne failed to present this court with any record of the trial court's proceedings while noting the record contains no transcript, bystander's report or agreed statement of facts for the hearing held on January 12, 2011. Eve states Wayne does not explain his failure to provide a report of proceedings before the trial court, but she cites no authority requiring an explanation for the omission. In the record presented to this court, Wayne included the court order dated January 12, 2011, on which this appeal is based; his petition for modification to include the language incorporated into the final judgment for dissolution of marriage; Eve's motion to strike Wayne's petition; the judgment for dissolution of marriage; the MSA; and a

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transcript of the August 5, 2002, prove-up hearing. The issue in this case revolves around the drafting of the MSA, the judgment of dissolution of marriage, and the transcript of the prove-up hearing, all of which are contained in the record on appeal. Other than the trial court's order dismissing Wayne's motion, which is also in the record, the conduct of the hearing on January 12, 2011, is not at issue. We therefore find Wayne provided a sufficiently complete record to present his claim of error for review and will address the merits of his appeal.

¶ 15 Wayne first contends the trial court erred in granting Eve's motion to dismiss his petition where the trial court had jurisdiction to modify the language incorporated into the judgment for dissolution of marriage. The trial court granted Eve's motion to dismiss his section 2-1401 petition pursuant to section 2-619 of the Code (735 ILCS 5/2-619 (West 2010)). This court's review of a judgment on a petition filed pursuant to section 2-1401, and a 2-619 motion to dismiss is *de novo*. *People v. Vincent*, 226 Ill. 2d 1, 18 (2007); *Parks v. Kownacki*, 193 Ill. 2d 164, 175 (2000). When ruling on a section 2-619 motion to dismiss, a court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party. *In re Chicago Flood Litigation*, 176 Ill. 2d 179, 189 (1997). The motion should be granted only if the plaintiff can prove no set of facts that would state a cause of action entitling him to relief. *Chicago Teachers Union, Local 1 v. Board of Education of the City of Chicago*, 189 Ill. 2d 200, 206 (2000). However, "[a] dismissal order may be affirmed 'if it is justified in the law for any reason or ground appearing in the record regardless of whether the particular reasons given by the trial court, or its specific findings, are correct or sound.'" *BDO Seidman, LLP v. Harris*, 379 Ill. App. 3d 918, 923 (2008) (quoting *Natural Gas Pipeline Co. of America v. Phillips Petroleum*

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Co., 163 Ill. App. 3d 136, 142 (1987)).

¶ 16 Section 2-1401 of the Code provides a statutory mechanism by which a final order or judgment may be vacated or modified more than 30 days after its entry. 735 ILCS 5/2-1401 (West 2010). A petition brought under this provision is not a continuation of the original proceeding, but a commencement of a new cause of action with the purpose of bringing to the attention of the circuit court facts not of record which, if known by the court at the time judgment was entered, would have prevented its entry. *In re Marriage of Streur*, 2011 IL App (1st) 082326 ¶30.

¶ 17 The purpose of the petition is to bring before the court facts which had they been known at trial would have prevented entry of the contested judgment. *In re Marriage of Johnson*, 237 Ill. App. 3d 381, 390 (1992) (citing *People v. Sanchez*, 131 Ill. 2d 417, 419 (1989)). A section 2-1401 petition invokes the equitable powers of the court as justice and fairness require. *Id.*

¶ 18 Although normally filed pursuant to section 2-1401 of the Code, Wayne's petition did not seek modification. Rather, the petition requests correction of a typographical error and to reform the agreement to accurately reflect the intent of all the parties involved. In *Johnson*, 237 Ill. App. 3d at 388, this court found the trial court had jurisdiction to hear a similar petition brought under section 2-1401 of the Code by the petitioner to correct a typographical error and reform the agreement to reflect the intent of both parties. The court stated, "the fact that the agreement stated something other than what the parties had agreed upon would be such as to prevent a court from entering a final order. Inasmuch as [petitioner's] petition alleged a typographical error, the petition was the proper method of seeking a modification of the judgment. Accordingly, the trial

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court had subject-matter jurisdiction to hear [the] petition." *Id.* at 390.

¶ 19 As the court found in *In re Marriage of Hall*, 404 Ill. App. 3d 160, 165 (2010), a motion's substance, not its title, determines the motion's character:

"Where the petitioner is seeking to enforce the judgment, the trial court had jurisdiction to enter an order enforcing the terms of the marital settlement agreement without first establishing a basis to vacate the judgment pursuant to section 2-1401 of the Code."

¶ 20 In the instant case, Wayne's petition is substantively a petition to enforce the judgment in accordance with the parties' intent, as reflected at the prove-up hearing. See *Id.* at 165. Eve argues that the petition was properly dismissed because Wayne seeks to change the judgment to reflect what he alone claimed to be the parties' intent, and therefore *Hall* is inapplicable. We disagree. This court has stated, "[a] judgment must conform to and be supported by the pleading and proof in the cause." *Fritzsche v. LaPlante*, 399 Ill. App. 3d 507, 522 (2010) (citing *Kohler v. Kohler* 325 Ill. App. 105, 108 (1945)). Here, the judgment incorporates the MSA, which is ambiguous on the division of the military pension. However, the intention of the parties in this case is reflected in the transcript of proceedings at the prove-up hearing and the MSA's treatment of other pension provisions. At the prove-up held on August 5, 2002, Wayne unambiguously testified he and Eve intended to equally divide the marital portion of his military pension, and Eve confirmed this intent in her testimony.

¶ 21 Here, only the marital portion of the other six pensions have been equally divided. We see no evidence of differing intent for the parties' division of the military pension, given the language in the MSA and the testimony of both Wayne and Eve at the prove-up hearing.

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Therefore, this court is unconvinced that Wayne alone intended to split only the marital portion. The equal division of the marital portion of the Army pension is consistent with the treatment of the other six listed pensions. Eve contends that Wayne's petition was insufficient on its face, arguing that the petition fails to allege Wayne's impossibility of learning the effect of the judgment until after he retired and that Wayne failed to show due diligence in presenting his claim. However, because Wayne is seeking to enforce the judgment, the trial court could enter an order enforcing the MSA without establishing a basis under section 2-1401 of the Code. *Hall*, 404 Ill. App. 3d at 166.

¶ 22

CONCLUSION

¶ 23 In sum, we find the trial court possessed jurisdiction to enforce the judgment between Wayne and Eve, which includes the MSA with an equal division of the marital portion of Wayne's Army pension during the period from the date of marriage through the date of dissolution. The judgment should conform to the intent of the parties as reflected in the testimony at the prove-up hearing. Accordingly, we reverse the judgment of the trial court and remand this matter for further proceedings consistent with this order.

¶ 24 Reversed and remanded.