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IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

MICHAEL JOHN DUMIAK,)	Appeal from the Circuit Court
	)	of Du Page County.
Plaintiff,)	
)	
v.	)	No. 10-F-770
)	
MOLLY ANN KINZER-SOMERVILLE,	)	Honorable
	)	Linda E. Davenport,
Defendant.	)	Judge, Presiding.

<i>In re</i> CUSTODY OF ELLIOTT DUMIAK,	)	Appeal from the Circuit Court
a Minor	)	of Du Page County.
)	
	)	No. 11-D-248
)	
(Roman Dumiak and Ellen Deasy, Petitioners-)	
Appellants, v. Michael Dumiak, Respondent,	)	Honorable
and Molly Kinzer-Somerville, Respondent-	)	Linda E. Davenport,
Appellee).	)	Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices Burke and Hudson concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court's *sua sponte* dismissal of grandparents' custody petition for lack of standing was reversed where the record demonstrated that the parties raised factual

questions on which the court should have heard evidence. The cause was remanded for an evidentiary hearing on grandparents' standing to seek custody.

¶2 Petitioners, Roman Dumiak and Ellen Deasy, are the parents of respondent, Michael Dumiak. On January 26, 2007, Michael married respondent, Molly Kinzer-Somerville, who gave birth to their son, Elliott Dumiak, on February 6, 2007. For about the first year of their marriage, Michael and Molly lived together, at least sporadically, with Elliott. Thereafter, Michael and Molly lived separately. Elliott resided with Molly until August 11, 2008, when he began living with Roman and Ellen (collectively, grandparents). On October 30, 2010, Molly picked up Elliott from grandparents and took him to live with her again. On December 6, 2010, Michael filed a petition for visitation. On February 4, 2011, grandparents filed a petition seeking custody of Elliott. On March 8, 2011, the trial court entered an agreed order setting visitation with grandparents and Michael (under grandparents' supervision). The case proceeded to trial on grandparents' custody petition. During the first witness's testimony, the trial court *sua sponte* dismissed the petition for lack of standing. Grandparents appeal. For the following reasons, we reverse the dismissal of grandparents' custody petition, and remand for further proceedings.

¶3 **BACKGROUND**

¶4 Molly was 17 years old and a ward of the state when she became pregnant by Michael. Due to the pregnancy, Molly was unable to complete high school. Molly and Michael were married on January 26, 2007, and Elliott was born on February 6, 2007. In her deposition, Molly indicated that she was still married to Michael but intended to divorce him as soon as she could afford it. Molly and Michael lived together sporadically with Elliott for about a year. According to the report of the guardian *ad litem* (GAL), Michael's living arrangement apparently then fluctuated between living with a girlfriend and staying in a homeless shelter. Elliott remained with Molly. She provided for

Elliott with her social security disability benefits (for anxiety) and “room and board checks” from the Department of Children and Family Services (DCFS), which was still Molly’s care provider.

¶ 5 According to Ellen’s testimony, Elliott came to live with her and Roman on August 11, 2008. The GAL’s report included an interview with grandparents, who stated that Molly brought Elliott to the Elgin police department on August 11, 2008 and that DCFS placed Elliott with grandparents in their Long Grove, Illinois, home. Grandparents also told the GAL that Molly picked up Elliott on October 30, 2010, for her scheduled Halloween weekend visitation but called them on November 3 to inform them that she had decided that Elliott would live with her and her boyfriend.

¶ 6 According to Molly’s deposition testimony, she took Elliott to the Elgin police department in August 2008 because she was concerned about Elliott’s safety in light of Michael’s stalking her in violation of an order of protection. Before going to the police department, Molly attempted to contact Ellen, as she had on similar occasions in the past, but was unsuccessful. Molly stated that she was about to “emancipate out of” DCFS and that she “could not keep Michael from breaking into apartments.” She explained that the stalking had elevated, and she was “calling Ellen in the middle of the night” because she did not know what to do. Molly elaborated, “I was a young mother. And if you’re in your apartment and you’re getting things broken into and you’re discovering broken windows, you can’t throw the order of protection at the offender and successfully defend a baby.”

¶ 7 Molly further testified in her deposition that she was not unable to care for Elliott, but made a “calculated decision” to put together a “care plan” with family members so that she could “acquire time to become a better parent.” Molly also wanted to achieve a “higher standard” for herself and Elliott. Molly explained that a big part of improving herself was pursuing her GED. She said that the care plan “allowed for [Elliott] to be able to be taken care of, for [Molly] to simultaneously keep

[her] rights for a specific period while protecting [her] from being accused of abandonment, protected [her] rights, [and] elevated Elliott's need to be taken care of." Elliott remained on Molly's insurance, and she mailed grandparents his monthly medical cards. While Elliott lived with his grandparents, Molly saw him "quite a bit," but did not visit as often as she would have liked because she wanted to be respectful and not treat grandparents as if they were "just babysitters." She saw him more than once a month but not every week. Molly testified in her deposition that it was clear that the arrangement was temporary. She stated, "Every document we put together says this [wa]s for the sole purposes [*sic*] of temporary custody and temporary custody only." She took the "decision very seriously" and that was why she "put it on paper." Although she and Ellen had disagreements, Molly believed that grandparents took good care of Elliott and that they were all doing the best they could. Molly wanted Elliott to continue his relationship with grandparents and Michael.

¶ 8 Molly further testified in her deposition that, after she obtained her GED, she made plans to establish a home with a bedroom for Elliott. She arranged to live in Manteno, Illinois, with her boyfriend in his mobile home, for which Molly paid the rent on the lot. Molly painted and decorated Elliott's bedroom and "obtained all the necessary items to properly raise him." Molly informed grandparents of her intent about two weeks before she took Elliott to her new home in October 2010.

¶ 9 On December 6, 2010, Michael filed a *pro se* petition for visitation, which was docketed as a parentage case under number 10-F-770. On February 4, 2011, grandparents filed a petition for custody under section 601 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/601 (West 2010)), which was docketed as number 11-D-248. Grandparents subsequently moved

to consolidate the two cases. On February 9, 2011, the trial court entered an order setting the matter to March 8 for a hearing on visitation and for status on the motion to consolidate.

¶ 10 The March 8, 2011, report of proceedings reveals that neither Molly nor Michael was represented by counsel at that time. Grandparents were represented by counsel who told the court, Judge Mary E. O'Connor, that the case was there on the motion to consolidate.¹ Counsel further informed the court that she had spoken with all of the parties in the hall and that they had “painstakingly negotiated” an agreed order as to “temporary visitation during the consolidation.” Counsel told the court that the visitation would continue until further court order and that grandparents had “interceded effectively.” The court asked grandparents’ counsel whether all of the parties had signed the order and whether they were going to continue mediation. Counsel responded to both queries in the affirmative. The preamble to the two-page, agreed written order entered on March 8, 2011, included the following language: “proper notice having been served on all parties and standing issues having been waived, by agreement of the parties, IT IS ORDERED:”. The order stated that the two cases were consolidated on grandparents’ motion. The order also set visitation between grandparents and Elliott for every other weekend, delineating the times and location for pick-up and drop-off. The order further provided for Michael to have visitation on grandparents’ Saturdays from noon until 4 p.m. at their residence and only while they were present. Finally, the

¹Counsel also noted that grandparents filed an emergency motion because Molly had taken Elliott to Wisconsin. However, counsel informed the court that Molly had returned with Elliott and that it was a “[b]ig misunderstanding apparently.” The March 8, 2011, order prohibited Molly from removing Elliott from the state without prior court order.

order entered and continued the pending petitions and set the matter for status on May 3, 2011.

Michael's, Molly's, and Ellen's signatures appear on the second page of the order.

¶ 11 On April 19, 2011, Molly, represented by counsel, filed a motion under section 2-619 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619 (West 2010)) to dismiss grandparents' custody petition on the basis that they lacked standing under section 601(b)(2) of the Act (750 ILCS 5/601(b)(2) (West 2010)). In the motion, Molly alleged that Elliott was "presently *** and at the time of the filing of this action *** in the physical custody" of Molly. Grandparents filed a motion to strike and dismiss Molly's motion. On July 5, 2011, all parties were represented by counsel and appeared for a hearing on the motions. Grandparents argued that Molly had waived the issue of standing in the March 8, 2011, agreed order. Michael argued that he too had waived standing in that order, that he continued to waive standing, and that he wanted Elliott to live with grandparents. Michael further asserted that grandparents had standing because Molly had previously relinquished Elliott to them and that she could not defeat their standing by "just swoop[ing] away the child improperly." Molly argued that standing was not subject to waiver and could be raised by the court at any time. Molly further contended that grandparents' lack of statutory standing was apparent from the face of their petition. The court took the matter under advisement.

¶ 12 On July 26, 2011, grandparents and Molly appeared with counsel for the court's ruling on Molly's motion to dismiss grandparents' custody petition. In its remarks, the court focused on the issue of waiver of standing and the effect of the March 8, 2011, agreed order.² The court asked Molly's counsel if he had anything to add with respect to the order's effect. Counsel reminded the

²The court mistakenly and repeatedly referred to the May 3, 2011, order. However, it is clear from the context that the court was actually referencing the March 8, 2011, order.

court that he had not been involved in the case at that time and reiterated his belief that, even if the order operated as a waiver by Molly, the court was still required to make a threshold determination of standing. The court replied that, if standing had been waived, the court would proceed to an analysis of the best interests of the child, stating, “So I think it does make a big difference as to whether there was a knowing waiver in this case.” The court stated that the March 8, 2011, agreed order was “the crux of the issue” and entered an order granting Molly leave to file a motion regarding the agreed order and allowing grandparents time to respond to what Molly filed.

¶ 13 On August 15, 2011, Molly filed a “Motion for Leave to File Affirmative Defense, or Alternatively to Vacate Order of March 8, 2011.” Attached to the motion was Molly’s affidavit in which she averred that she had appeared in court on March 8, 2011. She stated that, outside the courtroom, she negotiated a visitation schedule with grandparents’ attorney, who prepared the order. Molly indicated that she “read and signed” the order but did not reenter the courtroom when it was presented to the court. Molly averred that “[a]t no time was a waiver of standing discussed.” She did not notice the waiver language in the preamble. Instead, she paid attention to the body of the order that set forth the negotiated visitation terms. Molly alleged that, had she been aware of the preamble’s language, she would have objected. Grandparents filed a motion to strike and dismiss Molly’s motion. They attached no counteraffidavit.

¶ 14 On September 6, 2011, all of the parties appeared with counsel for a hearing on Molly’s motion for leave to file affirmative defense or to vacate the March 8, 2011, order. After hearing argument, the court (Judge O’Connor) indicated that it was “taking it as basically a motion to vacate the order that was entered on March 8th.” Stating that the agreed order was “akin to a contract,” the court found that, because, in her affidavit, Molly did not allege any fraud, duress, lack of capacity,

or mutual mistake of fact, there was no basis upon which to vacate the agreed order. The court entered a written order denying Molly's motion to vacate or file an affirmative defense. The order stated that "the order of March 8, 2011 remains."

¶ 15 Thereafter, the parties engaged in further motion practice, and the court appointed a GAL. Molly never filed an answer. The case was ultimately assigned to Judge Linda E. Davenport and proceeded to trial on May 22, 2012. The court commenced the proceedings by confirming that Michael's attorney had previously withdrawn and that Michael never filed a *pro se* appearance, that Molly and Michael were still married and that no petition for dissolution had been filed, and that the previous judge had denied two motions to dismiss. Grandparents made an oral motion to exclude witnesses, which the court granted. Grandparents then raised a written motion *in limine*, at which point the court asked when counsel had noticed it up. Counsel responded that he had not done so. The court replied, "It's denied. No notice. You want me to file the original? I'll file the original. Call your first witness."

¶ 16 Grandparents' counsel called Ellen (grandmother), who provided some background information about the family. As Ellen began testifying about the circumstances surrounding Molly's pregnancy, the court interrupted and asked grandparents' counsel on what date the custody petition had been filed. He responded, "February 4, 2011." The court then asked where Elliott had been living on that date. Counsel replied, "Elliott was living with Molly." The court took a five-minute recess.

¶ 17 When the court returned it asked grandparents' counsel, "How do you get past the fact that there's no standing?" Counsel indicated his belief that grandparents had standing because Molly and Michael had waived the issue. The court responded, "No. And there were two specific motions to

dismiss that the Court heard. But on an issue of standing, it's a de novo legal issue I have to decide. So you tell me—regardless of what you think they've done or not done, what's the legal standing that [you] are basing your petition on?" Counsel replied that grandparents had standing because they had possession of Elliott until October 30, 2010, that Elliott was supposed to be returned to them, and that Molly just kept him. After a brief discussion with both attorneys, the court ruled: "Sua sponte I'm dismissing your petition. There is no standing."

¶ 18 Grandparents timely appeal.

¶ 19 ANALYSIS

¶ 20 Grandparents argue that the trial court erred in *sua sponte* dismissing their petition for lack of standing under the Act. Section 601(b)(2) of the Act provides that a custody proceeding may be commenced "by a person other than a parent *** but only if [the child] is not in the physical custody of one of his parents." 750 ILCS 5/601(b)(2) (West 2010); *In re Parentage of Scarlett Z.-D.*, 2012 IL App (2d) 120266, ¶ 18. Our supreme court has interpreted section 601(b)(2) as a standing requirement. *In re R.L.S.*, 218 Ill. 2d 428, 434-35 (2006). In enacting this standing requirement, our legislature incorporated the superior rights doctrine, which recognizes that a natural parent's right to the care, custody, and control of his or her child is superior to that of a nonparent. *Scarlett Z.-D.*, 2012 IL App (2d) 120266, ¶ 20; *In re Custody of M.C.C.*, 383 Ill. App. 3d 913, 917 (2008); see also *R.L.S.*, 218 Ill. 2d at 438 (stating that the natural parent's interest is " 'perhaps the oldest of the fundamental liberty interests' " (quoting *Troxel v. Granville*, 530 U.S. 57, 65 (2000))). We review *de novo* the issue of whether a nonparent has standing to pursue a custody petition under section 601(b)(2). *M.C.C.*, 383 Ill. App. 3d at 918.

¶ 21 Here, the trial on grandparents' custody petition commenced on May 22, 2012, with Judge Davenport presiding. Grandparents' counsel called Ellen to testify. Relevant to our analysis, Ellen testified about where Elliott had lived since his birth and who his caretakers had been. Counsel asked Ellen when Elliott had started living with Molly in Manteno. Ellen responded, "October 30, 2010," but explained that before then he had lived with grandparents for a large part of the time since his birth. The court clarified that grandparents did not have custody pursuant to any court order. As Ellen continued testifying, the court interrupted to ask the date on which the custody petition was filed and where Elliott was living on that date. The court took a five-minute recess, after which it asked grandparents' counsel, "How do you get past the fact that there's no standing?" Counsel replied that Molly had waived standing in an agreed order. The court noted that Judge O'Connor had heard "two specific motions to dismiss" but stated that, regardless of waiver, she (Judge Davenport) had to decide standing as a *de novo* legal issue. Grandparents' counsel asserted that their standing derived from their possession of Elliott until October 30, 2010, when Molly decided to keep Elliott instead of returning him as planned. Molly's counsel argued that grandparents lacked standing because Elliott was living with Molly when they filed their custody petition. The court ruled, "Sua sponte I'm dismissing your petition. There is no standing."

¶ 22 As an initial matter, Judge Davenport's conclusion that the court had to address *de novo* the issue of grandparents' standing under section 601(b)(2), regardless of whether Molly had waived the issue, was erroneous. It is true that the nonparent bears the burden of proving standing under section 601(b)(2). *In re Custody of Groff*, 332 Ill. App. 3d 1108, 1112 (2002). However, the lack of standing is an affirmative defense that is forfeited if not raised during the time for pleading. *In re Marriage of Houghton*, 301 Ill. App. 3d 775, 779 (1998) (citing *In re Marriage of Sechrest*, 202 Ill.

App. 3d 865, 874 (1990)). Forfeiture is the “failure to make the timely assertion of [a] right,” as opposed to waiver, which is the “intentional relinquishment of a known right.” *Gallagher v. Lenart*, 226 Ill. 2d 208, 229 (2007). It is axiomatic that if a right can be forfeited on a procedural technicality, it can be intentionally waived. See *In re Marriage of Kolessar and Signore*, 2012 IL App (1st) 102448, ¶ 20 (stating that statutory and constitutional rights can be waived if done so knowingly, voluntarily, and intentionally). Thus, had the record shown that Molly knowingly, voluntarily, and intentionally waived her superior right to Elliott’s custody as protected in section 601(b)(2)’s standing requirement, grandparents would not have had to prove standing. Accordingly, the trial court’s dismissal of the petition for lack of standing, without addressing whether the March 8, 2011, agreed order operated as Molly’s knowing, voluntary, and intentional waiver of grandparents’ standing to seek custody, was erroneous.

¶23 Also erroneous was Judge Davenport’s dismissal without hearing evidence on grandparents’ standing under section 601(b)(2) of the Act. Section 601(b)(2) provides that a nonparent may file a custody petition “only if [the child] is not in the physical custody of one of his parents.” 750 ILCS 5/601(b)(2) (West 2010). Physical custody is not determined based on who had physical possession at the time the petition was filed because that would “encourage abductions of minors in order to satisfy the literal terms of the standing requirement and would, in reality, defeat the statutory intendment.” *In re Custody of Peterson*, 112 Ill. 2d 48, 53-54 (1986); see also *M.C.C.*, 383 Ill. App. 3d at 917 (same). To establish that the child was not in the physical custody of one of his parents within the meaning of section 601(b)(2), the nonparent must show that he or she has custody of the child because the parent “ ‘voluntarily and indefinitely relinquished custody of the child.’ ” *M.C.C.*, 383 Ill. App. 3d at 917 (quoting *In re Custody of Ayala*, 344 Ill. App. 3d 574, 588 (2003)). To

determine whether a parent voluntarily and indefinitely relinquished custody, the court should consider who was responsible for the child's care prior to the initiation of the custody proceedings, how the nonparent obtained physical possession, and the nature and duration of the possession. *M.C.C.*, 383 Ill. App. 3d at 917. The determination is highly fact dependent as no one factor is controlling. *M.C.C.*, 383 Ill. App. 3d at 917-18.

¶ 24 In the instant case, Judge Davenport found that Elliott was living with Molly on the date that grandparents filed their custody petition. However, that finding alone was insufficient to establish grandparents' lack of standing under section 601(b)(2). See *Peterson*, 112 Ill. 2d at 53-54 (holding that section 601(b)(2) standing does not turn on who has physical possession at the moment the petition is filed). Even the limited testimony and brief argument that Judge Davenport heard should have alerted her to the existence of fact questions regarding the nature and duration of grandparents' possession of Elliott as well as the circumstances of Elliott's return to Molly. Ellen testified that Elliott had lived with grandparents for a large part of his life until October 30, 2010. Grandparents' counsel told the court that grandparents had standing because they had physical custody of Elliott until Molly refused to return him after a visitation. Grandparents had only just begun their case in chief and Molly had no opportunity to present evidence. In light of the highly fact-dependent nature of the question of whether a parent voluntarily relinquished custody of her child (*M.C.C.*, 383 Ill. App. 3d at 917-18), Judge Davenport erred in dismissing grandparents' custody petition without hearing evidence on the issue of their standing.

¶ 25 Although we review *de novo* a nonparent's standing to pursue a custody petition under section 601(b)(2) (*M.C.C.*, 383 Ill. App. 3d at 918), Judge Davenport's *sua sponte*, premature dismissal prevented the development of the record. Thus, there are no factual findings (beyond the

fact that Elliott was living with Molly on the date that grandparents filed their custody petition) for us to review. Accordingly, we must remand for an evidentiary hearing on grandparents' standing under section 601(b)(2).

¶ 26 As discussed above, however, before the trial court can consider grandparents' section 601(b)(2) standing, the issue of whether the March 8, 2011, agreed order constituted Molly's waiver of grandparents' standing to seek custody must be resolved. In contrast to the highly fact-dependent question of whether grandparents had section 601(b)(2) standing, the construction of the agreed order is a question of law. See *Carr v. Gateway, Inc.*, 241 Ill. 2d 15, 20 (2011) (stating that the construction of a contract presents a question of law); *Elliott v. LRSL Enterprises, Inc.*, 226 Ill. App. 3d 724, 728 (1992) ("An agreed order is considered a contract between the parties to the litigation."). Therefore, given that the record is sufficient to permit construction of the agreed order, we will decide the issue now. See *Aasonn, LLC v. Delaney*, 2011 IL App (2d) 101125, ¶ 27 (addressing a question of law likely to recur on remand in the interest of judicial economy).

¶ 27 Our primary goal in construing a contract is to effectuate the intent of the parties by examining the contract as a whole. *Joyce v. DLA Piper Rudnick Gray Cary LLP*, 382 Ill. App. 3d 632, 636-37 (2008). We look to the language of the contract itself and view each provision in light of the other provisions. *Thompson v. Gordon*, 241 Ill. 2d 428, 441 (2011). Clear and unambiguous language must be given its plain, ordinary, and popular meaning. *Thompson*, 241 Ill. 2d at 441. Language is ambiguous if it is susceptible to more than one reasonable interpretation. *McHenry Savings Bank v. Autoworks of Wauconda, Inc.*, 399 Ill. App. 3d 104, 111 (2010). Whether a contract is ambiguous is a question of law. *McHenry Savings Bank*, 399 Ill. App. 3d at 111.

¶ 28 We determine that the March 8, 2011, agreed order was unambiguous because it was not reasonably susceptible to more than one interpretation. The waiver language was contained in the order’s preamble, stating, “standing issues having been waived.” We read the preamble in light of the provisions in the body of the order as found in its eight numbered paragraphs. See *Thompson*, 241 Ill. 2d at 441. Four of those paragraphs (paragraphs three through six) contain the substantive provisions of the order, explicitly delineating the terms of visitation for grandparents and Michael, including the frequency and duration of visits, the location for drop-off and pick-up of Elliott, and the additional limitations on Michael’s visitation. The remaining paragraphs operate to consolidate grandparents’ custody petition with Michael’s visitation petition (paragraph one), to enter and continue the pending petitions (paragraph seven), and to set a future status date (paragraph eight).³ Reference to grandparents’ custody petition was limited to these three paragraphs, which address what were essentially housekeeping matters. If anything, these paragraphs demonstrate the limited scope of Molly’s standing waiver because they make clear that the issue of custody was not yet being considered; rather, the custody petition was merely entered, consolidated, and continued. Thus, the standing waiver in the preamble of the agreed order must be construed as applying only to the subject of the order in which was contained—visitation.

¶ 29 Although the agreed order provided for both Michael’s and grandparents’ visitation, because Michael, as Elliott’s father and Molly’s husband, did not need to establish standing,⁴ the waiver must

³The second paragraph of the order prohibits Molly from removing Elliott from the state without court approval. This provision was the result of grandparents’ emergency motion, although their counsel later informed the court that it was a “[b]ig misunderstanding apparently.”

⁴Section 607(a) of the Act provides that a noncustodial parent is entitled to reasonable

be construed to apply to grandparents' standing to seek visitation. As noted, section 601(b)(2) of the Act provides a standing requirement for nonparents seeking custody. In section 607(a-5)(1), the Act provides different standing requirements for grandparents seeking visitation. 750 ILCS 5/607(a-5)(1) (West 2010) (providing that a grandparent may seek visitation when a parent has unreasonably denied visitation and at least one of several enumerated conditions exist such as that the other parent is deceased or has been missing for over three months, or a parent is legally incompetent or incarcerated). Because it appears that grandparents did not meet the standing requirements for visitation, Molly necessarily had to waive their standing in the agreed order providing visitation for them. We note that grandparents never expressly requested visitation; nonetheless, all of the parties, including Michael, apparently believed that it would be best for his visitation with Elliott to take place with grandparents present. The agreed order, granting Michael limited visitation during grandparents' visitation, and only while they were present, reflected this belief. Accordingly, the only reasonable construction of the March 8, 2011, agreed order is that it contained Molly's waiver of grandparents' standing to seek visitation.

¶ 30 Additional support for our conclusion is found elsewhere in the record as well. See *Elliott*, 226 Ill. App. 3d at 729 (stating that, when construing an agreed order, the court should consider the "pleadings and motions from which [the agreed order] emanates"). The February 9, 2011, trial court

visitation rights. 750 ILCS 5/607(a) (West 2010). Under the very unusual procedural history of this case, Michael's visitation petition was filed as a parentage action, despite the facts that his paternity was not at issue, that he and Molly were married, and that neither had filed a petition for dissolution. As Judge Davenport noted, Michael "doesn't need a visitation order. It's his child. They're married."

order set Michael's petition to March 8 for a hearing on visitation and for status on grandparents' motion to consolidate their custody petition with Michael's visitation petition. The March 8, 2011, report of proceedings reveals that grandparents' counsel informed the court that she had spoken with all of the parties in the hall and that they had "painstakingly negotiated" an agreed order as to "temporary visitation during the consolidation." These documents further demonstrate that the only substantive issue considered on March 8 was visitation. Construing the waiver language in the March 8 agreed order as applying to anything other than visitation would not be reasonable.

¶ 31 Even assuming, without deciding, that Molly's waiver of grandparents' standing as to visitation was knowing, voluntary, and intentional, it could not constitute a knowing, voluntary, and intentional waiver of grandparents' standing to seek custody because it did not pertain to custody. See *Kolessar and Signore*, 2012 IL App (1st) 102448, ¶ 20 (stating that the agreed order must reflect an "intentional relinquishment" of the right being waived (Internal quotations omitted.)). Given that section 601(b)(2)'s standing requirement functioned to protect Molly's superior right to Elliott's custody, we decline to easily dispense with section 601(b)(2)'s standing requirement that protects this fundamental liberty interest by reading anything into the unambiguous agreed order. See *Troxel*, 530 U.S. at 65 (describing the natural parent's interest as "perhaps the oldest of the fundamental liberty interests"); *Village of Bellwood v. American National Bank and Trust Co. of Chicago*, 2011 IL App (1st) 093115, ¶ 25 (holding that the Village did not intentionally relinquish its statutory right to abandon eminent domain proceedings in the agreed orders it entered with the defendants because the orders did not mention the statutory right to abandon or that the Village specifically waived that right). Because we have determined that Molly did not waive grandparents' standing to seek custody, the issue of waiver need not be addressed on remand.

¶ 32 We briefly address a few of the parties' arguments that will likely recur on remand.

¶ 33 Grandparents contend that, because Molly and Michael remain married, Michael's waiver of grandparents' standing to seek custody "confers waiver upon Molly." Grandparents cite *Messerly v. State Farm Mutual Insurance Automobile Insurance Co.*, 277 Ill. App. 3d 1065 (1996), where the court held that an insurance code provision requiring an insurer to offer additional uninsured motorist coverage to a policy's named insureds was satisfied by the company's offer to the husband alone where the wife was also a named insured. In rejecting the wife's argument that the court's holding allowing husbands to waive their wives' statutory rights was a return to "the dark ages," the court noted that her argument was "not strong given the context in which it [wa]s brought, namely, the procurement of insurance policies." *Messerly*, 277 Ill. App. 3d at 1070. In the context of a mother's right to the care, custody, and control of her child, to suggest that her husband may unilaterally waive her right is wrong. See *In re Marriage of Houghton*, 301 Ill. App. 3d 775, 781 (1998) (declining to impute to the father the mother's voluntary relinquishment of her right to the care, custody, and control of their child).

¶ 34 Grandparents also argue that Molly forfeited the issue of their standing by failing to timely or properly plead it. Lack of standing under section 601(b)(2) is an affirmative defense that is forfeited if not raised in a timely motion to dismiss. *In re Custody of K.P.L.*, 304 Ill. App. 3d 481, 486 (1999). Generally, such an affirmative matter is properly raised under section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2010)) and must be filed within the time for pleading. *K.P.L.*, 304 Ill. App. 3d at 487. Here, grandparents filed their custody petition on February 4, 2011, and Molly filed her section 2-619 motion to dismiss on April 19, 2011. Even assuming without deciding that Molly's motion to dismiss was not filed within the time for pleading, the trial court had

discretion to allow its tardy filing. *In re M.K.*, 284 Ill. App. 3d 449, 455 (1996). Because grandparents do not argue that they were prejudiced, and because standing was clearly at issue and not a surprise, the trial court did not abuse its discretion in entertaining Molly's motion. See *In re Custody of McCarthy*, 157 Ill. App. 3d 377, 380-81 (1987) (stating that, absent prejudice, the trial court does not abuse its discretion in allowing a tardy motion to dismiss). Accordingly, Molly did not forfeit the issue of grandparents' standing to bring a custody petition.

¶ 35 Grandparents further maintain that the trial court's *sua sponte* raising the standing issue was error under *K.P.L.* Initially, we do not characterize Judge Davenport as having *sua sponte* raised standing. Judge Davenport questioned grandparents' statutory standing in response to Ellen's testimony that Elliott was living with Molly when the custody petition was filed. Although the trial had commenced and there were no pending pleadings or motions regarding standing, Judge Davenport was new to the case. Her questions in response to Ellen's testimony merely reflect her clarifying the background of the case, as she had prior to Ellen being called as grandparents' first witness. Moreover, the court in *K.P.L.* did not hold that trial courts are prohibited from raising standing *sua sponte*, it merely noted the absence of statutory language requiring courts to do so. *K.P.L.*, 304 Ill. App. 3d at 487 (based on case law treating section 601(b)(2) as an affirmative defense that is forfeited if not timely raised, holding that the legislature did not intend to place the burden of proving standing solely upon the nonparent). Furthermore, the issue of grandparents' standing under section 601(b)(2), though repeatedly raised by Molly, was never addressed by the trial court, and Ellen's testimony put the issue squarely in front of Judge Davenport.

¶ 36 In light of our holding, we need not address grandparents' argument that, even if they lacked standing, they should have been permitted to offer evidence of Molly's unfitness, or their related

arguments that, due to her failure to file an answer to their petition, Molly should be deemed to have admitted their allegations that she was unfit and that it was in Elliott's best interests that they have custody.⁵ Suffice it to say that neither fitness nor best interests were at issue. See *Sechrest*, 202 Ill. App. 3d at 870 (absent section 601 standing, a nonparent must seek custody under either the Juvenile Court Act of 1987 (705 ILCS 405/1-1 *et seq.* (West 1990)) or the Adoption Act (750 ILCS 50/0.01 *et seq.* (West 2010)), which impose the higher burden of pleading and proving the parent's unfitness); *Scarlett Z.-D.*, 2012 IL App (2d) 120266, ¶ 20 (standing must be established as a threshold issue before the court can proceed to a best-interests determination).

¶ 37 For the foregoing reasons, we reverse the judgment of the circuit court of Du Page County dismissing grandparents' custody petition and remand for an evidentiary hearing on grandparents' standing under section 601(b)(2). At that hearing, the court should entertain evidence as to whether grandparents can meet their burden under section 601(b)(2) of the Act, which requires them to show that Elliott was not in Molly's physical custody when they filed their petition on February 4, 2011. To establish that Elliott was not in Molly's physical custody within the meaning of section 601(b)(2), grandparents must show that they had custody of Elliott because Molly voluntarily and indefinitely relinquished custody. See *M.C.C.*, 383 Ill. App. 3d at 917. The court should consider such factors as: who was responsible for Elliott's care prior to the initiation of the custody proceedings, how grandparents obtained physical possession, and the nature and duration of the possession. See *M.C.C.*, 383 Ill. App. 3d at 917. If the court finds that grandparents have standing, it should proceed to a hearing on Elliott's best interests. If it finds that grandparents lack standing, the court should

⁵Grandparents also made this argument in their motion *in limine*, which the trial court denied, but which is not part of the record on appeal.

dismiss grandparents' custody petition.

¶ 38 Reversed and remanded with directions.