

2013 IL App (2d) 130365-U  
No. 2-13-0365  
Order filed November 4, 2013

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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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BRIAN D. McCLURE,	)	Appeal from the Circuit Court
	)	of Du Page County.
Petitioner-Appellant,	)	
	)	
v.	)	No. 09-F-525
	)	
ALIX P. HAISHA,	)	Honorable
	)	Linda E. Davenport,
Respondent-Appellee.	)	Judge, Presiding.

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JUSTICE SCHOSTOK delivered the judgment of the court.  
Presiding Justice Burke and Justice McLaren concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The trial court erred in granting respondent's motion to dismiss pursuant to section 2-619(a)(9) of the Code of Civil Procedure (735 ILCS 5/2-619(a)(9) (West 2012)) where respondent did not include affirmative matter in support of her motion.
- ¶ 2 Less than one year after the trial court entered judgment awarding custody of the parties' daughter to the respondent, Alix Haisha, the petitioner, Brian McClure, filed a petition seeking to modify the custody order. On April 2, 2013, the trial court dismissed Brian's petition for not complying with section 610(a) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750

ILCS 5/610(a) (West 2012)). Brian appeals from the trial court's order. We reverse and remand for additional proceedings.

¶ 3

### BACKGROUND

¶ 4 Alix gave birth to the parties' daughter, Jessica, on July 8, 2007. The parties lived together at that time and until July 18, 2009. On that day, Alix took Jessica with her to visit Alix's mother in Escondido, California. Alix and Jessica did not immediately return.<sup>1</sup> On September 22, 2009, Brian filed a motion seeking joint legal custody and to establish a parenting schedule. On September 21, 2010, the trial court entered an order titled "Agreed Order Custody." The order provided that Alix would have custody of Jessica. The order did not set a visitation schedule or address child support. On December 9, 2010, Alix filed a petition to set final child support and expenses.

¶ 5 On February 22, 2012, the trial court entered a custody judgment. The order provided that Alix would have sole legal custody, and set a visitation schedule for Brian. In a separate order, also entered on February 22, 2012, the trial court entered an agreed order as to various financial issues between the parties. This order provided, among other things, that Brian would pay Alix \$5,000 per month in child support.

¶ 6 On February 7, 2013, Brian filed a two-count petition to modify custody and/or visitation. Count I sought to modify custody. Count II addressed visitation. Brian sought to be awarded primary physical custody or, at least, more visitation. Brian's petition acknowledged that less than two years had passed since the trial court had entered its custody judgment. However, he suggested that the trial court's initial child custody order (which was over two years' old) was tantamount to a custody finding as well. Thus, his petition was timely. Alternatively, he argued that Alix's

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<sup>1</sup>Alix filed a petition for removal, which the trial court denied on November 30, 2010.

“alienating conduct,” her failure to pay Jessica’s foot doctor so that Jessica could get new orthotics, and her repeated failure to ensure that Jessica arrived at school on time “provides reason to believe [that Jessica’s] present environment may endanger seriously [her] emotional health.” Thus, Brian argued that, pursuant to section 5/610(a) of the Act (750 ILCS 5/610(a) (West 2012)), the trial court could grant his petition to modify custody.

¶ 7 On March 14, 2013, Alix filed a motion to dismiss count I of Brian’s petition pursuant to section 2-619(a)(9) (735 ILCS 5/2-619(a)(9) (West 2012)) of the Code of Civil Procedure (Code) and count II pursuant to section 2-615 (735 ILCS 5/2-615 (West 2012)) of the Code. Alix argued that count I of Brian’s petition should be dismissed because it was premature pursuant to section 610(a) of the Act. She argued that count II of the petition should be stricken because many of the allegations were based on incidents that occurred before the trial court’s February 22, 2012, judgment. Further, she argued that the allegations as to actions occurring after February 22, 2012, were insufficient to warrant modification of visitation.

¶ 8 On April 2, 2013, following a hearing on the motion to dismiss, the trial court dismissed Brian’s petition. The trial court found that Brian’s petition did not comply with section 610(a) because it had been filed less than two years since the prior custody order had been entered. The trial court further found that Brian’s allegations did not “rise[] to the level of serious endangerment.” Following the trial court’s ruling, Brian filed a timely notice of appeal.

¶ 9 ANALYSIS

¶ 10 On appeal, Brian first argues that the trial court erred in determining that his petition to modify custody was subject to the two-year bar in section 610(a) of the Act. Brian notes that the trial court’s initial order awarding custody to Alix was entered on September 21, 2010. He argues that

the trial court's subsequent custody order on February 22, 2012, merely maintained the status quo. As the order that he really seeks to modify is the one that was entered on September 21, 2010, Brian insists that his petition was timely.

¶ 11 Section 610(a) of the Act governs a party's right to seek the modification of a custody judgment. That section provides:

“Unless by stipulation of the parties \*\*\*, no motion to modify a custody judgment may be made earlier than 2 years after its date, unless the court permits it to be made on the basis of affidavits that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral or emotional health.” 750 ILCS 5/610(a) (West 2012).

¶ 12 In analyzing the above statute, our primary purpose is to determine and give effect to the legislature's intent, while presuming the legislature did not intend to create absurd, inconvenient, or unjust results. *In re B.L.S.*, 202 Ill. 2d 510, 514 (2002). The best indication of the legislature's intent is the language of the statute. *In re Marriage of Lindman*, 356 Ill. App. 3d 462, 466 (2005). If the language of the statute is clear, there is no need to resort to other aids of statutory construction. *Id.* When resolving an issue of statutory construction, our review is *de novo*. *Lucas v. Larkin*, 175 Ill. 2d 166, 171 (1997).

¶ 13 Brian's argument is flawed. The plain language of section 610(a) specifically refers to the modification of a “judgment.” A “judgment” is the final determination of a court upon matters submitted to it in an action or proceeding. *Tri-G, Inc., v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 256 (2006); see also *In re Marriage of Miller*, 170 Ill. App. 3d 1044, 1046 (1988) (custody judgment which is entitled to the statute's two-year protection from modification is the judgment which finally establishes custody with the parent opposing modification). The trial court's order of

September 21, 2010, did not constitute the trial court's judgment because it was not a final order. Nothing in the order indicates that either of the parties or the trial court intended the order to be the final judgment of the court. Rather, the trial court's order was only interlocutory in nature. As such, Brian could not attack that order pursuant to section 610(a). The trial court's order did not become final until it entered its February 22, 2012, judgment. Because Brian filed his petition to modify custody within one year of that judgment, he was required to sufficiently allege that there was "reason to believe that the child's present environment may endanger seriously [her] physical, mental, moral, or emotional health." 750 ILCS 5/610(a) (West 2012).

¶ 14 Brian's second contention on appeal is that the trial court applied the wrong standard in determining whether he had sufficiently alleged that there was "reason to believe" that the child was in danger due to her present environment. Rather than applying the "reason to believe" standard, Brian argues that the trial court erred in analyzing his petition on the basis of whether the child "was" at risk of serious endangerment.

¶ 15 Prior to considering Brian's specific argument, we must first address Alix's failure to comply with proper motion procedure. In seeking to dismiss Brian's petition, Alix filed a 2-619(a)(9) motion. Section 2-619(a)(9) of the Code provides that a defendant may file a motion for dismissal of the action on the grounds "the claim asserted against the defendant is barred by other affirmative matter avoiding the legal effect of or defeating the claim." 735 ILCS 5/2-619 (a)(9) (West 2012). Section 2-619(a)(9)'s purpose is to provide litigants with a method of disposing of issues of law and easily proved issues of fact—relating to the affirmative matter—early in the litigation. *Van Meter v. Darien Park District*, 207 Ill. 2d 359, 367 (2003).

¶ 16 A motion for involuntary dismissal under section 2-619(a)(9) of the Code admits the legal sufficiency of the complaint, admits all well-pleaded facts and all reasonable inferences therefrom, and asserts an affirmative matter outside the complaint bars or defeats the cause of action. *Kean v. Wal-Mart Stores, Inc.*, 235 Ill. 2d 351, 361 (2009). In a section 2-619(a) motion, the movant is essentially saying “Yes, the complaint was legally sufficient, but an affirmative matter exists that defeats the claim.” *Reynolds v. Jimmy John’s Enterprises, LLC*, 2013 IL App (4th) 120139, ¶ 31. When ruling on the section 2-619(a)(9) motion, the court construes the pleadings in the light most favorable to the nonmoving party, and should only grant the motion if the plaintiff can prove no set of facts that would support a cause of action. *Id.* A section 2-619(a)(9) motion is reviewed *de novo*. *Kean*, 235 Ill. 2d at 361.

¶ 17 Affirmative matter is a type of defense that either negates an alleged cause of action completely or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained in or inferred from the complaint. *Reynolds*, 2013 IL App (4th) 120139, ¶ 33. An affirmative matter does not include evidence upon which the defendant expects to contest an ultimate fact stated in the complaint. *Smith v. Waukegan Park District*, 231 Ill. 2d 111, 120 (2008).

¶ 18 As the movant of a motion for involuntary dismissal pursuant to section 2-619(a)(9) of the Code, the defendant has the burden of proof on the motion, and the concomitant burden going forward. *Reynolds*, 2013 IL App (4th) 120139, ¶ 37. It is well settled that the affirmative matter asserted by the defendant must be apparent on the face of the complaint; otherwise, the motion must be supported by affidavits or certain other evidentiary materials. *Id.*

¶ 19 Here, the only affirmative matter that Alix cited in support of her section 2-619(a)(9) motion as to why Brian's petition should be dismissed was that he had brought his petition too soon pursuant to section 610(a) of the Act. Although this affirmative matter addressed this first part of Brian's argument (that his petition was timely), it did not address the second part (that his petition could be considered before two years had elapsed since the prior custody judgment because there was reason to believe that Jessica's present environment may seriously endanger her emotional health). As Alix did not cite any affirmative matter in response to the second part of Brian's petition, the trial court erred in granting Alix's 2-619(a)(9) motion to dismiss. See *id.*, ¶ 42.

¶ 20 We note that Brian did not argue in the trial court or this court that Alix's failure to cite affirmative matter in support of her 2-619 motion was a basis for the trial court to deny her motion. However, his failure to do so is not a limitation on this court to ensure that a just result be reached. See *Jackson v. Board of Election Commissioners of the City of Chicago*, 2012 IL 111928, ¶ 33 (doctrines of waiver and forfeiture serve as admonitions to the parties rather than limitations on the court, and courts of review may sometimes override considerations of waiver or forfeiture in the interests of achieving a just result and maintaining a sound and uniform body of precedent).

¶ 21 We also reject Alix's argument that there is an alternate basis to affirm the trial court's decision, that being Brian failed to comply with section 610(a) of the Act because he did not file an affidavit supporting his allegations. A party requesting that the court modify a prior custody order within two years of its enactment must comply with the procedural requirements of section 610(a). *In re Marriage of Eleoupoulos*, 186 Ill. App. 3d 374, 381 (1989). The court must be informed by affidavit that there is reason to believe the child's present environment may endanger seriously his physical, mental, moral or emotional health. 750 ILCS 610(a) (West 2012). The affidavit

requirement will be relaxed, however, if the verified petition or other testimony provides the court and other party with the facts relied upon for a custody change. See *In re Custody of Sexton*, 84 Ill. 2d 312, 322 (1981) (affidavit requirement considered waived when the facts not sworn to in an affidavit were testified to in open court and the factor of endangerment was alleged in the petition by means of specific incidents or specific dates); *Eleoupoulos*, 186 Ill. App. 3d at 381 (when considered as a whole, the documents filed by the petitioner satisfied the spirit of the affidavit requirement). Here, as Brian's verified petition informed the trial court and Alix of the basis of his petition to modify custody, his failure to file an affidavit in support of his petition did not require dismissal of his petition. See *Eleoupoulos*, 186 Ill. App. 3d at 380-81.

¶ 22 Furthermore, even if we were not reversing based on Alix's failure to support her 2-619 motion with affirmative matter, we would reverse the trial court's decision based on its failure to apply the proper standard in analyzing Brian's petition. As set forth above, the trial court may consider a motion to modify custody within two years of the prior judgment if "there is reason to believe the child's present environment may endanger seriously" her health. 750 ILCS 5/610(a) (West 2012). In other terms, the trial court must consider whether the child's present environment "might be" or "is possibly" dangerous to her health. In considering the petitioner's motion, the trial court is not to base its decision on whether the petitioner has alleged that the child "is" actually in danger due to her present environment. However, that is essentially what the trial court did here when it found that the appropriate standard to consider was "whether or not what has been pled rises to the level of serious endangerment." Accordingly, on remand the trial court must consider whether the petitioners' allegations give "reason to believe" that Jessica's present environment is possibly dangerous to her health. See 750 ILCS 5/610(a) (West 2012).

¶ 23 In so ruling, we reject Alix’s argument that any error that the trial court committed in using the wrong standard to analyze Brian’s petition was invited by Brian. In his petition, Brian referred to the proper standard that the trial court was to use in considering his petition. At the hearing on Alix’s motion to dismiss his petition, Brian’s attorney asserted that he had “alleged facts that suggest that the child is at risk of serious endangerment.” Brian’s attorney later stated that the trial court was to consider whether “I allege facts that are proven; would you say, hey, this looks like it composes a serious endangerment.” Although the standard Brian’s attorney articulated at the hearing did not precisely match the language used in the statute, we believe that it was sufficiently close and therefore it cannot be considered to have invited the error that the trial court committed.

¶ 24 Finally, we reject Alix’s argument that this case is analogous to *In re Oehm*, 252 Ill. App. 3d 311, 316 (1993). In that case, the mother argued that the trial court used the wrong standard under 610(a) in allowing the father’s petition to go forward. Rather than using the “reason to believe” standard, the trial court considered whether there was a danger to the children if they remained with the mother. In affirming the trial court’s decision, the reviewing court held that the trial court’s finding that the children would be endangered necessarily also included a finding that there was “reason to believe” that the children “may” be seriously endangered if they remained in the custody of their mother. *Id.* at 317-18. In other terms, because the trial court allowed the 610(a) petition to go forward based on a higher standard than the statute required, it necessarily would have allowed the petition to go forward as well if it relied on the lower standard set forth in the statute. In the instant case, however, it does not follow that because the trial court dismissed Brian’s petition based on a higher standard than the statute required, it would have dismissed his petition on the lower standard set forth in section 610(a) as well. As such, *Oehm* is not applicable to this case.

¶ 25

CONCLUSION

¶ 26 For the foregoing reasons, the judgment of the circuit court of Du Page County is reversed and remanded for additional proceedings consistent with this decision.

¶ 27 Reversed and remanded.