2018 IL App (2d) 180352-U
No. 2-18-0352
Order filed September 24, 2018

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF LORELLE L. KELLYBUTTEL,	)	Appeal from the Circuit Court of Jo Daviess County.
Petitioner-Appellee,	)	
and	)	No. 13-D-51
JUSTICE W. KELLY,	)	Honorable William A. Kelly,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Presiding Justice Hudson and Justice Burke concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court properly dismissed respondent father's petition to modify the allocation of parenting responsibilities because respondent did not allege a substantial change in circumstances not contemplated in the parties' joint parenting agreement and did not allege or argue that modification would conform the joint parenting agreement to the actual parenting-time arrangements of the parties.

¶ 2 In this postdecree action, *pro se* respondent, Justice W. Kelly, appeals the judgment of the circuit court of Jo Daviess County dismissing in part his petition to modify the allocation of parenting responsibilities. The trial court determined, pursuant to section 610.5 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/610.5 (West 2016)), that

respondent had not alleged in his petition any cognizable substantial change in circumstances. We agree and affirm.

¶ 3 I. BACKGROUND

¶ 4 We summarize the pertinent facts appearing in the record.[1] On October 3, 2009, the parties were married. In 2011, one child, A.K., was born to the marriage. On February 18, 2015, the trial court entered a judgment of dissolution of marriage, incorporating the parties' marital settlement agreement and the parties' joint parenting agreement (agreement).

¶ 5 Respondent is self-employed as a handyman and receives disability income as a result of an injury incurred in 2006. Petitioner is employed as a bartender at a restaurant and is "sort of" self-employed, pursuing various side-jobs. She resides in Galena, Illinois; respondent resides in Platteville, Wisconsin.

¶ 6 Respondent mentioned, during the hearing on his petition to modify, that he has children from a previous marriage who reside out of state; mention of A.K.'s step-siblings occurs almost inferentially in respondent's written petition to modify.[2] In the agreement, respondent

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[1] Petitioner, Lorelle L. Kellybuttel, requests that we strike certain paragraphs from respondent's statement of facts as being irrelevant to the issues on appeal. We decline to do so, but we note that the record is small and easily comprehended, and the purported irrelevancies in respondent's statement of facts do not hinder our ability to evaluate this appeal. To the extent that petitioner is alleging a violation of Illinois Supreme Court Rule 341(h)(6) (eff. Nov. 1, 2017), we will disregard any noncompliant or irrelevant portions of petitioner's statement of facts.

[2] In his statement of facts, respondent identifies his children from his previous marriage,

referenced semi-monthly or monthly trips to Minnesota. While not supported in the record, respondent asserts in his statement of facts that he travels to his mother's home in Minnesota or a "family cabin" in Hayward, Wisconsin, when he has custody of A.K. and his children from a previous marriage. Thus, the agreement appears to contemplate frequent and extensive traveling with A.K. The agreement splits parenting time relatively equally between the parties and provides a detailed schedule for holidays and school breaks, and provides for vacation planning with the child between the parties.

¶ 7 In May 2015, respondent sought an order of protection against petitioner as well as a hearing to enforce his rights to visitation under the agreement. In the motion, respondent alleged that petitioner had leveled false allegations of abuse against him and had refused to allow him to exercise his visitation rights. The issue appears to have been resolved by the entry of an agreed order in which respondent agreed to have his order of protection dismissed and withdrew his request for a hearing.

¶ 8 On September 8, 2017, petitioner filed a petition to modify respondent's child support obligation. Both parties submitted financial documentation, but the petition does not appear to have been advanced to a hearing on the merits or otherwise resolved by the trial court. Specifically, no order regarding petitioner's petition to modify respondent's child support obligation appears in the record. We therefore deem petitioner's petition to modify child support abandoned for purposes of this appeal.

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but, because they are not so identified in the record, we cannot take cognizance of this portion of his statement of facts. Likewise, details about the divorce decree from his previous marriage do not appear in the record, and we must disregard these statements as well.

¶ 9 On November 27, 2017, respondent filed his petition to modify the allocation of parenting responsibilities. On December 20, 2017, the matter was on the trial court's call for another issue, and the parties entered a temporary agreed order dividing their respective visitation over the upcoming holiday and school-break period.

¶ 10 On February 15, 2018, respondent filed a petition seeking a temporary modification of parenting responsibilities to allow A.K. to be taken out of school for the purpose of attending a basketball tournament in which one of respondent's children from a previous marriage was participating. On the next day, February 16, 2018, pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2016)), petitioner filed a motion to dismiss respondent's November petition to modify parenting responsibilities. Also on that day, petitioner filed a motion to dismiss respondent's February petition seeking a temporary modification of parenting responsibilities. On February 22, 2018, the trial court denied respondent's February petition seeking a temporary modification of parenting responsibilities. Respondent does not appeal the trial court's judgment.

¶ 11 On April 5, 2018, the matter advanced to a hearing on the motion to dismiss respondent's November petition to modify, and, if necessary, on the petition itself. During the hearing, the trial court ascertained that the parties were in agreement regarding essentially scriveners' errors in the agreement, and granted in part respondent's petition to modify. Specifically, the parties agreed to modify the agreement to indicate that certain holidays, such as Labor Day and the like, were to include express reference to the entire holiday weekend, not solely the holiday itself.

¶ 12 The trial court then questioned defendant about the disputed remainder of his petition in light of petitioner's motion to dismiss. In the motion to dismiss, petitioner argued that respondent had not included any allegations indicating that there was a substantial change in

circumstances, and that any changes were contemplated by the terms of the agreement. Respondent attempted to address the substance of the allegations in his petition; the trial court instead tried to keep him focused on addressing petitioner's motion to dismiss before moving on to his substantive arguments. Ultimately, the trial court granted the motion to dismiss in the following colloquy:

> "THE COURT: ***
>
> The first thing we need to do is see if there's a substantial change in circumstances. I understand the point that you bring up and there's merit to those points but I'm not going to look at those points at this point in time because I do not believe that there's been a substantial change in circumstances that would warrant it.
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> There are changes as all of the kids get older, you know; all of your children. That's going to change all the time.
>
> Sometimes those kids are going to be happy and sometimes they're not going to be happy[,] but their happiness level without anything really objective, like one of them has had some problem that's permanent or something like that, would warrant—be a significant change in circumstances that would warrant some change at this point in time[,] and I think they have this gate to not go on beyond that [*sic*] otherwise what we'd be doing is we'd have a guardian *ad litem* appointed to interview all of the children of course up there and down here.
>
> These are important issues but time, effort and energy, we'd try to coordinate both places, the Court there and the Court here so we can have a smooth running machine and I don't see that because I don't see a substantial change in circumstances as contemplated by the law as it exists today to open the door for us to go through those things.

In other words, the problems that you have as a father, dealing with your kids; the problem you have with dealing with your children, their mothers and you are important to address and to deal with. This isn't the place. So from what I've heard here, I don't find there's been a substantial change in circumstances.

Now that being said, I would hope that, you know, people can be receptive to, if somebody says—you know, we deal with this stuff all the time, [respondent], I can tell you that. I mean I don't think a week goes by that I don't have to address some issues about trying to help people fine-tune how they are going to raise their kids.

I think you have your daughter's best interest in mind, I think her mom does too; it's just really a question of the two of you being able to try as best you can, it takes two people to do it, it's not just one but don't give up on that because you both want the same thing for your daughter.

You just want a daughter you can be proud of and you want a daughter who can feel comfortable being loved by her mom and dad and it's a complicated situation because—and you made some decisions now and you're financially able to do it apparently, to devote your time and attention to your children on a daily, weekly, hourly basis, right?

RESPONDENT: Absolutely.

THE COURT: And that's what you want to do and that's fine and good luck in doing that; I would encourage you to do that if that's what you wish to do but at this point in time I'm not going to open the door on it but I—there again, by saying that, I'm not suggesting that this is etched in stone and neither one of you should ever address some of these things. They're going to change all the time. You're going to have—there'll be

extracurricular activities, there's going to be kids graduating from school, there'll be kids getting married; there'll be all kinds of stuff and those things should be addressed as two mature, thoughtful people that want to make sure that their child (children) have the best opportunity to have events take place in their life that are positive.

Every once in a while we have situations where the worst thing that ever happens to an eight year old or a nine year old is Christmas. It's the worst day they ever have because the parents fight and what should be probably the best day of the year is the worst.

I can't do anything about that when people are that way but you hope people will see that and then not jump to the bait and fight all the time and so forth and the two of you have—you're intelligent people who are motivated to do the best thing for your daughter and to the extent that you can work it out, work it out[,] but I'm not going to open the door on that, all right?

[Petitioner's Attorney]: All right.

RESPONDENT: So I'm—so to advance this to appeal, do I need to stop now and request that leave to go to appeal or . . . [*sic*]?

THE COURT: I am denying your Petition for Parental Allocation that you filed in November on the basis that there was not a substantial change in circumstances that would warrant me to do it. So it's been denied; you can appeal it; you file an appeal and appeal it.

RESPONDENT: Okay and that is on the—that is on Number 5, the ones that are not related to Number 6?

THE COURT: And it's the Petition in its entirety, there is an agreement there,

because what I'm saying is what you're seeking here to alter, change or amend the parental allocation, we're not going to address that because I'm making a finding that the substantial change in circumstances hasn't taken place to the point that it would then go into that so that's—that's (clearing throat), excuse me, the part of the petition I'm denying.

RESPONDENT: Okay.

THE COURT: And I—was there another part to that Petition as I recall?

[Petitioner's Attorney]: I think that's it.

RESPONDENT: There was the substantial change for some of the items and then the minor change was what some of the words that were missing and then the actual arrangements and placement that we followed for the—the way the statute reads is that it says for the previous six months and then the previous year.

THE COURT: Okay, I'm looking at Page 2 of your particular pleading and I think that sets forth what you're saying. What your—what you contend is a substantial change and then later said a minor change and it's all set forth. What I'm saying is we've taken some sworn testimony here and some arguments of Counsel and I'm denying the request to go any further because I'm suggesting—I'm stating, I'm not suggesting that there hasn't been a substantial change in circumstances that would warrant us going onto the next phase.

So you are in a posture right now, and that's a final order, so you can appeal that order, all right?"

¶ 13 The trial court's written order incorporated the addition of "weekend" to the sections of the agreement pertaining to three-day holidays and the like on which the parties had reached

agreement. The order then granted the motion to dismiss with regard to the remainder of respondent's petition to modify the allocation of parenting responsibilities: "Petitioner's motion to dismiss is granted with respect to the rest of respondent's [petition] because no substantial change of circumstance warranting modification have been shown by respondent."

¶ 14 Respondent timely appeals.

¶ 15 II. ANALYSIS

¶ 16 On appeal, respondent argues that the trial court erred by granting the motion to dismiss on the grounds that there was not a substantial change in circumstances and in not addressing the merits of the petition to modify. Respondent also contends that the trial court erred in interpreting section 610.5(c) of the Act. We consider the arguments in turn.

¶ 17 A. Preliminary Matters

¶ 18 Respondent appears *pro se* in this appeal. A *pro se* appellant is expected to comply with the same rules a litigant represented by an attorney and courts will not treat the *pro se* litigant's submissions more leniently. *Holzrichter v. Yorath*, 2013 IL App (1st) 110287, ¶ 78. Respondent's brief in this matter is deeply problematic. The statement of facts is littered with irrelevant facts, facts outside of the record, and is lacking citations to the record in places. Ill. S. Ct. R. 341(e)(6) (eff. Nov. 1, 2017). More troubling still is respondent's apparent plagiarism of unattributed language from *Wilson v. Wilson*, 2017 IL App (5th) 160378-U, *In re Marriage of Holzman*, 2017 IL App (3d) 160595-U, *In re Marriage of Adams*, 2017 IL App (3d) 170472, and *In re Marriage of Stimson*, 2018 IL App (4th) 170731-U. In respondent's favor, the noted cases correctly state the law. On the other hand, the points presented, in some instances, were not relevant to the issues raised by respondent. Likewise, respondent mined several unreported cases for his legal principles. This is an allowable tactic. Quoting them without attribution and

presenting the legal principles as one's own work, however, is not. Finally, the substantive use of unreported cases is prohibited. Ill. S. Ct. R. 23(e) (eff. eff. Apr. 1, 2018).

¶ 19 What is to be done? This is an accelerated case dealing with child custody, and this militates in favor of just resolving the merits presented. On the other hand, we have the discretion to strike respondent's brief or even to dismiss the appeal. *McCann v. Dart*, 2015 IL App (1st) 141291, ¶ 12. Respondent's errors are sufficiently grave to warrant dismissal, and we view this as an alternate basis for our decision. However, in light of the interests at stake, we address respondent's arguments, insofar as necessary.

¶ 20 B. Motion to Dismiss

¶ 21 Respondent argues that the trial court erred in granting petitioner's section 2-615 motion to dismiss. A section 2-615 motion tests the legal sufficiency of the pleading based on defects apparent on its face. *Blevins v. Marcheschi*, 2018 IL App (2d) 170340, ¶ 26. The issue in such a motion is whether the allegations in the pleading, viewed in the light most favorable to the nonmoving party, are sufficient to state a claim upon which relief may be granted. *Id.* We review *de novo* a section 2-615 motion to dismiss. *Id.*

¶ 22 Respondent contends that the trial court erred in determining no substantial change in circumstances had occurred. This argument misstates the trial court's holding in the context of its ruling. The trial court was considering petitioner's section 2-615 motion to dismiss respondent's petition to modify. Thus, the trial court was examining the issue of whether respondent's petition to modify stated a claim on which relief could be granted. *Id.* While some of respondent's arguments are addressed to the merits of his contentions in the petition, respondent appears to make the overarching claim that his petition to modify was sufficient so the trial court should not have dismissed it. We examine that claim first.

¶ 23 Section 610.5 of the Act (750 ILCS 5/610.5 (West 2016)) deals with the modification of the allocation of parental responsibilities. Specifically, section 610.5(c) pertinently provides:

> "Except [in certain circumstances not relevant here], the court shall modify a parenting plan or allocation judgment when necessary to serve the child's best interest if the court finds, by a preponderance of the evidence, that on the basis of facts that have arisen since the entry of the existing parenting plan or allocation judgment or were not anticipated therein, a substantial change has occurred in the circumstances of the child or of either parent and that a modification is necessary to serve the child's best interests." 750 ILCS 5/610.5(c) (West 2016).

The elements, then, of a modification claim based on a substantial change in circumstances are: (1) new facts that have arisen since the entry of the existing parenting plan or allocation judgment; (2) the new facts were not anticipated in the existing parenting plan or allocation judgment; (3) a substantial change in circumstances of: (a) the child; or (b) either parent; and (4) the modification is necessary to serve the child's best interests. *Id.* Petitioner's 2-615 motion to dismiss respondent's petition to modify, then, asserted that respondent had not sufficiently alleged a claim for a modification of the parenting responsibilities. We agree.

¶ 24 Respondent's petition to modify contained six numbered paragraphs. The first two paragraphs contained identifying information about the parties. The third paragraph stated that respondent was "asking the court to modify the allocation of parental responsibilities of [A.K.]." The fourth paragraph provided information about the agreement, whether mediation had been undertaken and that no mediated agreement had been reached. The fifth paragraph stated, pertinently:

"Modification is in the best interests of the child [A.K.] and there has been the occurrence of the following

a. Substantial change—It has been at least two years since the current [agreement] was entered. There has been a substantial change in the circumstances of the child and/or either parent since the current [agreement] was entered, specifically[:]

i. The minor child [A.K.] has a substantial change in the days and hours in which she is enrolled in the Galena government [*sic*] school.

ii. The minor child [A.K.] has developed an extremely close bond to her older siblings who the Father has placement with. (750 ILCS 5/602.7; (b)(2), (5) [(West 2016)).]

iii. The current placement for Christmas/Winter Break holiday and summer placement requires multiple trips for the Minor child [A.K] and excessive expense and time on the road and interferes with her relationships with siblings and paternal family members (750 ILCS 5/602.7; (b)(9) [(West 2016)).]

***

c. The actual arrangements and placements that we have followed for at least the past six months and previous year's Holidays."

In the sixth paragraph, respondent then suggested specific language to be added to the agreement.

¶ 25 The allegations in paragraph 5, which purport to lay out the basis for respondent's claim, are wholly conclusory. Further, they reflect issues within the contemplation of the parties when the agreement was first entered. For example, subparagraphs i and ii suggest only that A.K. has grown older and has spent time with respondent's family. Respondent does not, for example,

allege that the change in A.K.'s hours spent in school actually deprive him of parenting time or the opportunity for parenting time. The allegation in subparagraph iii is even more strongly within the contemplation of the parties: the agreement provided that respondent would take A.K. to family property in northern Wisconsin and Minnesota, which would require significant driving. Thus, respondent has not alleged either anything new or anything that was not already contemplated by the parties at the time of the entry of the agreement.

¶ 26 On appeal, respondent appears not to have grasped that, during the hearing on petitioner's motion to dismiss, the issue was not the merits of his petition to modify, but whether his petition to modify stated a claim on its face. That was the threshold issue to be completed before the trial court would have moved to consideration of the substantive merits of respondent's petition to modify. If the trial court had determined that respondent's petition did state a claim, then it could have addressed the merits of respondent's petition.

¶ 27 Indeed, in reviewing the transcript of the hearing, the trial court asked respondent to flesh out what his contentions were. Respondent discussed the items listed in the fifth paragraph of his petition to modify. When respondent would attempt to discuss the evidence he believed supported the claim, the trial court would ask respondent to focus on what his allegations of the substantial changes in the circumstances were. For example, respondent discussed A.K.'s emotional difficulties in relating to her parents' divorce, and the trial court prompted respondent to continue to address petitioner's motion to dismiss:

> "[L]et's focus in and you think that's a substantial change in circumstances? People live where they live. The kids are still your kids. There aren't any new kids in there yet. No one has moved to change things. In other words, everyone lived next door and now somebody lives 200 miles away. That's a substantial change.

¶ 28 What you're saying is, is your perception of the relationships between the sibs and yourself has changed because of chronology and so forth, right?"

¶ 29 Throughout the hearing, the trial court kept returning to questioning respondent regarding "the bases [respondent thought constituted] a substantial change in circumstances that would warrant a change [in the agreement]." The first time the trial court asked that question, respondent attempted to illustrate the sibling bond between A.K. and her sibling with an anecdote from which respondent concluded that A.K. did not want "dad time," but wanted "sibling time" with her half-brother and half-sister. The trial court responded, stating, "I'm going to back up here and just focus on whether any of the things that you've raised would be a substantial change in circumstances." The trial court further emphasized to respondent that, until the court had resolved the motion to dismiss, it was not looking for evidence to support respondent's contentions.

¶ 30 Respondent's arguments on appeal are directed at how a court is required to weigh the evidence presented, and none of his arguments address the standards for setting out a claim for modification of parenting responsibilities. For example, respondent cites *In re Marriage of Debra N. & Michael S.*, 2013 IL App (1st) 122145, ¶ 49, for the proposition that, in making a best-interest determination, the trial court should place significant emphasis on the willingness of each parent to facilitate the child's relationship with the other parent. From this legal principle, respondent argues that petitioner is not facilitating A.K.'s relationship with respondent because she would not agree to the proposed changes outlined in his petition to modify, and particularly, she would not agree to respondent's request to take A.K. out of school to attend a basketball tournament in which her half-sister was participating. However, that argument is not addressed to whether there have been substantial changes, at least not as constituted. Rather, it is addressed

to a determination on the merits, which skips the necessary first step of determining, especially in light of the motion to dismiss, whether there has been a substantial change in circumstances. Only after the first step could the court have moved to consider the merits of respondent's claims. *Debra N.*, therefore, is inapposite to the issue presented here.

¶ 31 Respondent argues that the best-interest factors from section 602.7(b) of the Act (750 ILCS 5/602.7(b) (West 2016)) should "weigh heavily against [petitioner] in the finding of the circuit court to dismiss [respondent's] action." This argument is misplaced. The best-interest factors come into play only when the trial court considers the merits of the petition to modify. Before it may do that, it must first be satisfied that there has been a substantial change in circumstances to justify its consideration. 750 ILCS 610.5(c) (West 2016). Respondent's contention is simply inapposite to the issue presented here.

¶ 32 Accordingly, based on the facts that the allegations in respondent's petition to modify were insufficient and respondent's statements during the hearing were limited to amplifying those allegations and did not reveal any objective changes in circumstance that were not already contemplated by the agreement, we hold that the trial court properly dismissed respondent's petition to modify.

¶ 33 C. Actual Arrangements

¶ 34 On appeal, respondent argues that the trial court should have considered, pursuant to section 610.5(e)(1) (750 ILCS 5/610.5(e)(1) (West 2016)), that the trial court erred by not considering whether the agreement should be modified to conform to the actual parenting-time arrangements the parties were following. Section 610.5(e)(1) provides:

> "The court may modify a parenting plan or allocation judgment without a showing of changed circumstances if (i) the modification is in the child's best interests; and (ii) any of the following are proven as to the modification:
>
> > (1) the modification reflects the actual arrangement under which the child has been receiving care, without parental objection, for the 6 months preceding the filing of the petition for modification, provided that the arrangement is not the result of a parent's acquiescence resulting from circumstances that negated the parent's ability to give meaningful consent." 750 ILCS 5/610.5(e)(1) (West 2016).

¶ 35 Respondent argues that the trial court erroneously considered his claim that the proposed modifications would have conformed the agreement to the reality of how the parties were apportioning parenting time and responsibilities under the significant-change-in-circumstances standard when the terms of section 610.5(e)(1) manifestly dispense with that standard. We disagree.

¶ 36 We reiterate that the matter, at the time of the hearing, was before the trial court on petitioner's section 2-615 motion to dismiss. A section 2-615 motion to dismiss raises the issue of whether the allegations in the pleading are sufficient to state a claim upon which relief may be granted. *Blevins*, 2018 IL App (2d) 170340, ¶ 26.

¶ 37 In order to succeed on a claim that a modification is necessary to conform a parenting agreement to the actual arrangement between the parties, a moving party would have to allege, at the very least, facts demonstrating the specifics of the actual arrangements. In addition, the moving party would need to allege facts demonstrating that the nonmoving parent did not object to the actual arrangement, and the modification was in the child's best interests. 750 ILCS

5/610.5(e)(1) (West 2018). In his petition to modify, respondent included only the statement that modification was desired to reflect "[t]he actual arrangements and placements that we have followed for at least the past six months and previous year's Holidays." Respondent did not allege what those actual arrangements were. Respondent also did not allege that petitioner agreed (moreover, petitioner does not appear to have agreed). On its face, then, there are no sufficient allegations in the petition to modify to support a claim under section 610(e)(1).

¶ 38 In any event, during the hearing on the motion to dismiss, the trial court repeatedly asked respondent what his claims regarding modification were. Respondent could have raised the actual-arrangements issue, but did not do so. Thus, the record does not support respondent's contention on appeal. Accordingly, in light of respondent's failure to flesh out his claim during the hearing and the patently insufficient nature of the claim in his petition to modify, we hold that the trial court correctly dismissed this portion of respondent's petition to modify.

¶ 39 III. CONCLUSION

¶ 40 For the foregoing reasons, we affirm the judgment of the circuit court of Jo Daviess County.

¶ 41 Affirmed.