2014 IL App (2d) 140493-U
No. 2-14-0493
Order filed October 7, 2014



IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

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| *In re* Parentage of J.A.M., a Minor | ) | Appeal from the Circuit Court |
| | ) | of De Kalb County. |
| | ) | |
| | ) | No. 12-F-169 |
| | ) | |
| | ) | Honorable |
| (Patricia Echols, Petitioner-Appellant v. | ) | Marcy L. Buick and |
| Dora Welch, Respondent, and Anthony | ) | Stephen L. Krentz, |
| McClain, Respondent-Appellee). | ) | Judges, Presiding. |

JUSTICE SPENCE delivered the judgment of the court.
Justices Schostok and Hudson concurred in the judgment.

**ORDER**

¶ 1 *Held*: Contrary to Echols's argument on appeal, the trial court did not deny her petition for custody of J.A.M. on the basis of a lack of standing. Even if it did, *arguendo*, the trial court alternatively denied her petition on the grounds that it was currently not in J.A.M.'s best interest to remove him from his father's custody. Because Echols did not address this finding on appeal, she forfeited it for review. Further, the trial court did not abuse its discretion by declining to consider the merits of Echols's successive posttrial motions, and the doctrine of invited error also applied. Therefore, we affirmed.

¶ 2 Petitioner, Patricia Echols, appeals the trial court's order denying her motion for custody of her grandson, J.A.M. The trial court ruled that J.A.M.'s custody should remain with his father, respondent Anthony McClain. Echols argues that that the trial court erred in: (1) ruling

that she did not have standing to seek custody of J.A.M. under section 601(b)(4)(B) of the Illinois Marriage and Dissolution of Marriage Act (Marriage Act) (750 ILCS 5/601(b)(4)(B) (West 2012)), and (2) declining to consider her successive postjudgment motions. We affirm.

¶ 3 I. BACKGROUND

¶ 4 On September 27, 2012, Echols filed a petition seeking, among other things, a determination of J.A.M.'s parentage, visitation rights with him, and custody. Echols alleged that: J.A.M. was six years old; his mother, Echols's daughter Erica Dikesha Holley, died on January 29, 2012; and McClain was imprisoned on the date of Holley's death and also on the date of the petition's filing. Echols argued that she had standing to seek custody of J.A.M. under section 601(b)(4).

¶ 5 In addition to filing suit against McClain, Echols listed and served J.A.M.'s paternal grandmother, Dora Welch. However, because McClain was released from custody on October 5, 2012, Welch was dismissed as a respondent on November 14, 2012.

¶ 6 The trial court entered a temporary order on November 21, 2012, appointing James Buck as J.A.M.'s guardian *ad litem* and granting Echols visitation with J.A.M.

¶ 7 In December 2012, McClain filed a response to Echols's petition in which he admitted that Echols was J.A.M.'s maternal grandmother, that Holley died on January 29, 2012, and that he was incarcerated at the time Holley died.

¶ 8 In February 2013, McClain filed a motion to strike Echols's petition on the basis that Echols lacked standing. The trial court, through Judge Steven Krentz, issued a memorandum order regarding the motion to strike on May 21, 2013, stating as follows. McClain admitted parentage of J.A.M. Echols did not claim that she was now, or ever had been, in possession of J.A.M. to the exclusion of either of the child's parents. Rather, she alleged that she had regularly

participated in J.A.M.'s welfare by traveling from Chicago to De Kalb to participate in numerous family events, including Christmas and other major holidays, and had a close and continuing relationship with J.A.M. Echols alleged that McClain was unfit because he: had not expressed a willingness and ability to interact daily with J.A.M.; had failed to maintain a reasonable degree of interest, concern, or responsibility as to J.A.M.'s welfare; had failed to act in J.A.M.'s best interest; and had applied for disability benefits alleging that he was mentally disabled. However, Echols had failed to plead sufficient facts to support these allegations. Before Holley's death, McClain, through his actions, consented to a de facto custodial arrangement in which Holley acted as J.A.M.'s residential custodian. McClain alleged in his pleadings that J.A.M. now lived with him, and Echols did not deny this allegation. While Echols alleged that McClain voluntarily and indefinitely relinquished custody of J.A.M. through his conduct over the last six years, she did not allege that he relinquished custody to her. McClain was incarcerated when Holley died, but he was released at some point thereafter. McClain alleged that he provided primary residential care for J.A.M. between the time that Holley died and the time Echols filed her petition. The pleadings showed that McClain was in prison for 23 days, ending eight days after Echols filed the petition. On the date of filing, J.A.M. was living with Welch. Echols did not allege that McClain intended, through his words or actions, for this placement to be permanent. Accordingly, Echols had failed to plead sufficient facts to demonstrate that McClain had voluntarily relinquished physical custody to her. McClain did have a significant criminal record, but Echols's attachments to her pleadings did not fully reveal his actual dates of incarceration. She credibly alleged that he received a three-year sentence for attempted residential burglary on February 17, 2011; McClain denied the allegation was true. Still, the facts currently pled by Echols were insufficient to demonstrate that McClain's history of

intermittent incarceration, "to the extent it took place," actually precluded him from being willing and able to make day-to-day child care decisions.

¶ 9 The trial court further found as follows. Echols's request for visitation would be allowed to proceed because McClain's counsel represented to the court that McClain no longer desired to strike that portion of the petition. Echols did not have standing to seek guardianship of J.A.M. under section 11-5(a) of the Probate Act of 1975 (755 ILCS 5/11-5(a) (West 2012)) because Echols failed to allege sufficient facts to demonstrate that McClain had voluntarily relinquished custody, as required under that statute. She similarly lacked standing to seek custody under section 601(b)(2) of the Marriage Act. Echols also sought custody under section 601(b)(4)(B), which provided that a child custody proceeding could be commenced by a grandparent who is the parent of a child's deceased parent if, among other things, the surviving parent was in State or federal custody "at the time of the parent's death." 750 ILCS 5/601(b)(4)(B) (West 2012). It was undisputed that Echols was the parent of J.A.M.'s deceased mother, Holley, and that McClain was incarcerated on the date of Holley's death. It was also undisputed that although J.A.M. was in McClain's care after Holley's death, McClain was again in prison on the day Echols filed her petition. There was no case law interpreting the meaning of "at the time of the parent's death," but whether the trial court applied the plain meaning, based on the date of Holley's death, or looked at the circumstances at the time Echols filed her petition, McClain was incarcerated at both of those times. Therefore, Echols had standing to bring her action for custody under section 601(b)(4)(B).

¶ 10 A trial took place on April 2, 2014. A different judge, Judge Marcy Buick, presided over the trial. Notice had been sent to McClain but he was not present either in person or through an attorney. Buck testified as follows. Buck had met with the parties and various family members

and had examined records, including McClain's criminal records. Echols had an appropriate home for J.A.M. in Chicago, where Echols lived with her husband, and J.A.M. would have his own room there. Both Echols and her husband were employed and appeared stable. J.A.M., who was currently 7 years old, told Buck that he did not want to live with Echols but could not articulate any "good reasons." J.A.M. said that Echols did not yell at him but sometimes told him not to run around the house, which Buck thought was typical for a parent to tell a child. J.A.M. also said that he did not like to sleep in the bed at Echols's house, and Buck found out later that J.A.M. sometimes wet the bed and did not want to wet Echols's bed. Echols planned to enroll J.A.M. in Children of Peace school, which was a private school that appeared to be very nice.

¶ 11 Buck had originally recommended that J.A.M. remain with McClain. At that time, J.A.M. was living with McClain, who said that he was going to Alcoholics Anonymous and doing things to improve himself. However, Buck was now very concerned because McClain stopped coming to court proceedings, had violated his probation, and had new criminal charges against him, so he may no longer be capable of taking care of J.A.M. Buck also did not know exactly where J.A.M. was currently living. J.A.M.'s school records showed that he was consistently attending school but that his grades had decreased from the previous year. Buck now recommended that J.A.M. live with Echols because he would have a stable environment, though it would be an adjustment because J.A.M. liked attending his present school and had friends there.

¶ 12 Echols provided the following testimony, in relevant part. She was 51 years old and worked as a medium assembler for Xylem in Morton Grove; she had been with that company for 20 years. Her house had six rooms, and if J.A.M. came to live with her, he would have his own

room. He would attend Children of Peace school, which had small class sizes, sports, and music. Echols had raised five children, who were now all adults. Echols had been involved in J.A.M.'s life since his birth. Echols had visitation with J.A.M. every other weekend and on Wednesdays, and he attended church with Echols and her husband.

¶ 13 When Holley died, Echols wanted McClain to raise J.A.M. because he was J.A.M.'s dad. Later, however, McClain took J.A.M. out of school and with him to Wisconsin because McClain was fleeing arrest warrants. After Echols learned that McClain was back in jail, she talked to Welch and went to pick up J.A.M. in Kenosha. He was staying in a cold lake house that was dirty and had many alcohol bottles around. J.A.M. had a gash or sore on the side of his head, and he did not have a shirt or shoes on. Echols visited McClain in jail and he initially agreed to sign papers allowing J.A.M. to stay with her, but then Welch arrived, and McClain said that J.A.M. should go with Welch. Welch subsequently did not allow Echols to see J.A.M. Echols decided that because McClain went back to jail, it was a sign that he could not provide J.A.M. with a stable home, so she should try to seek custody.

¶ 14 Even though Echols had visitation with J.A.M., she and her family had been instructed to return him to many different places, including gas stations and grocery stores, and she did not even know where he was currently living. J.A.M. arrived at visitation lacking proper clothing, including a coat in the winter, and Echols and her family had to buy him clothing. J.A.M. had asthma, but McClain, Welch, and many other people around them smoked, and J.A.M. was always coughing. J.A.M also had eczema that was not being treated.

¶ 15 McClain currently had an arrest warrant for a felony theft case and for probation violations in a domestic battery case. He was also wanted on a parole violation. The domestic battery conviction was a result of McClain punching his sister in the mouth and knocking out her

teeth. Echols had seen McClain driving J.A.M. even though she believed that McClain's driver's license was revoked. Echols read a letter from McClain to Holley dated December 10, 2009, in which he admitted punching and choking her. Echols attorney also introduced defendant's criminal records into evidence.

¶ 16 The trial court, through Judge Buick, issued a ruling on April 11, 2014, stating as follows. Based on McClain's failure to appear and his previous acknowledgement that he had no objection to Echols visiting J.A.M, the temporary visitation order entered on November 21, 2012, was now permanent, with slight modification (as detailed by the trial court). Echols sought custody of J.A.M. under section 601(b)(4)(B), and the trial court considered that provision. At the time Echols filed her petition, McClain was incarcerated, but there was no evidence that he was in custody during the trial proceedings, and the trial court could not find that he had relinquished custody of J.A.M. by virtue of being incarcerated. In contrast, in most of the cases it reviewed, the parents could not be the child's custodian by virtue of the length of their prison sentences. "And again, on this issue, [McClain] did not appear in court, he is in default on that issue." As to J.A.M.'s best interest, it could not find that removing the 7-year-old from the custody of his only surviving parent was in J.A.M.'s best interest. The guardian *ad litem* testified that J.A.M. did not want to live full-time with Echols; school records showed that he attended school regularly; and J.A.M. was presented for court-ordered visitation with Echols. There were no allegations that J.A.M. did not go to school or that McClain neglected or abused J.A.M.

¶ 17 The trial court continued that:

> "what [it was] hoping [was] that by providing court-ordered visitation to [Echols], that [Echols] will continue to watch over [J.A.M.] and to alert the authorities if she believes

> that [J.A.M.] is being neglected or abused, and that they would then take action to investigate those issues."

However, for purposes of the current action, it was unable to find in Echols's favor. Therefore, Echols's request to be designated J.A.M.'s custodian to McClain's exclusion was denied.

¶ 18 The trial court's written order of April 11, 2014, drafted by Echols's attorney, stated that Echols's request was denied because she had failed to show that, under section 601, McClain had relinquished custody. The order also listed visitation terms.

¶ 19 On April 18, 2014, Echols filed a motion to reconsider. She argued that the trial court incorrectly ruled that she lacked standing and that it was in J.A.M.'s best interest to remain with his father. The trial court denied the motion on April 25, 2014. It stated that if McClain received a lengthy prison sentence, there might be a future basis for Echols to seek custody of J.A.M., but at the current time it was letting its ruling stand.

¶ 20 On May 5, 2014, Echols filed a "SECOND PETITION FOR CHANGE OF CUSTODY, OR, IN THE ALTERNATIVE, TO RECONSIDER CUSTODY JUDGMENTS OF APRIL 11, 2014 REAFFIRMED ON APRIL 25, 2014," alleging as follows. On May 1, 2014, McClain was unexpectedly taken into police custody and charged with attempting to deliver heroin within 1,000 feet of a school. His bond was set at $510,000. A newspaper article, a copy of which was attached, also stated that the police were investigating McClain's potential criminal role in a death. Echols did not know where J.A.M. was currently residing and believed that Welch had moved. Echols argued that McClain's high bail amount and possible sentences from the unanticipated charges constituted a substantial change in circumstances meriting a temporary or permanent change of custody under section 610 of the Marriage Act (750 ILCS 5/610 (West 2014)). She cited *Naylor v. Kindred*, 250 Ill. App. 3d 997 (1993), for the proposition that an

incarcerated custodial parent does not have physical custody of a child and is no longer entitled to a presumption in favor of retaining custody, and that such incarceration can justify a change in custody without showing that the child faces serious endangerment.

¶ 21 On May 12, 2014, Echols filed an amended motion to reconsider the custody judgment, which largely contained the same allegations.

¶ 22 The trial court held a hearing on the posttrial motions on May 16, 2014. McClain was present, without counsel. The trial court stated that it had denied Echols's motion to reconsider and that there was "no such thing as a second motion to reconsider" under Illinois Supreme Court Rule 274 (eff. Jan. 1, 2006). Echols's attorney said that the motion[1] was filed within 30 days of the trial court's original ruling, so it was still jurisdictionally within the time limits. The attorney argued that whereas the first motion to reconsider was based on standing, the current motion was based on facts that were unknown and unavailable at the time of trial. The trial court stated that it could not consider a new motion to reconsider. Echols's attorney stated that she could file an amended petition to change custody if the trial court thought that a motion to reconsider was inappropriate. The trial court stated that McClain was at a distinct procedural disadvantage because he did not have an attorney, and the trial court wanted to make sure that what happened was "not with prejudice" to him. It said that it would review the filings and the parties could come back on May 30, 2014, and that they would also address the petition for guardian *ad litem* fees on that date.

¶ 23 Echols filed a notice of appeal on May 21, 2014. At the May 30 hearing, Echols's attorney stated that the court had ruled that McClain had custody of J.A.M. and that further

[1] The posttrial motions were often referred to in the singular during the hearing, though Echols's attorney did clarify that she filed two distinct documents.

requests for reconsideration were inappropriate. The trial court ordered that the parties were jointly and severally responsible for $1,610 in guardian *ad litem* fees.

¶ 24 II. ANALYSIS

¶ 25 We initially note that McClain has not filed a brief in this case. In *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976), our supreme court provided three possible approaches to such a situation. First, we may serve as advocate for the appellee and search the record for purposes of sustaining the trial court's judgment if justice requires. Second, we should decide the merits of the appeal if the record is simple and the claimed errors are such that we can easily decide them without the aid of an appellee's brief. Third, if the appellant's brief demonstrates *prima facie* reversible error, as supported by the record, we may reverse the trial court's judgment. *Id.* Here, the second option applies, as the record is not lengthy and Echols raises only two issues on appeal.

¶ 26 Echols first argues that the trial court erred in its April 11, 2014, ruling by applying the requirements of section 601(b)(2) in addition to the requirements of section 601(b)(4) in determining whether she had standing. We review *de novo* a trial court's determination on a nonparent's standing to bring a child custody petition. See *In re Scarlett Z.-D.*, 2014 IL App (2d) 120266-B, ¶ 34; *Dumiak v. Kinzer-Somerville*, 2013 IL App (2d) 130336, ¶ 20. However, to the extent that a trial court made factual findings based on evidence, we review its findings under the manifest-weight-of-the-evidence standard. *Dumiak*, 2013 IL App (2d) 130336, ¶ 20. Echols's arguments on appeal also implicate questions of statutory interpretation. The cardinal rule of statutory construction is to ascertain and give effect to the legislature's intent, which is best indicated by the plain and ordinary meaning of the statute's language. *In re Marriage of Turk*, 2014 IL 116730, ¶ 15. Statutory construction presents a question of law, which we review

*de novo*. *Id.* ¶ 14. Finally, we note that we may affirm the trial court's judgment on any basis provided by the record, regardless of whether the trial court relied on that basis or whether the trial court's reasoning was correct. *Solargenix Energy, LLC v. Acciona, S.A.*, 2014 IL App (1st) 123403, ¶ 25.

¶ 27 Section 601(b)(2) states that a child custody proceeding can 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). Physical custody is not based on who has physical possession of the child when the petition was filed. *Dumiak*, 2013 IL App (2d) 130336, ¶ 20. Rather, the petitioner has the burden of showing that the parents voluntarily and indefinitely relinquished the child's custody. *Id.* Factors considered in making this determination are who was responsible for the child's care before custody proceedings were initiated; how the nonparent obtained physical possession of the child, and the nature and duration of the possession. *Id.*

¶ 28 Section 601(b)(4) states that a child custody proceeding may be commenced: "When one of the parents is deceased, by a grandparent who is a parent or stepparent of a deceased," if one or more of several factors "existed at the time of the parent's death." *Id.* One of the factors listed is that "the surviving parent was in State or federal custody." 750 ILCS 5/601(b)(4)(B) (West 2012).

¶ 29 Echols notes that although the trial court's April 11, 2014, order did not explicitly mention the word "custody," the trial court specifically stated in its oral ruling that Echols's request to be designated custodian to the exclusion of McClain was denied. Echols points out that if there is a conflict between a court oral pronouncement and its written order, the oral pronouncement controls. *In re William H.*, 407 Ill. App. 3d 858, 866 (2011). Echols argues that

in denying her petition, the trial court citied its conclusion that Echols had failed to establish that McClain had voluntarily and indefinitely relinquished custody under section 601(b)(2). According to Echols, the trial court also reasoned that under section 601(b)(4)(B), a third party only has legal standing if he or she could show that the parent was incarcerated at the time of trial.

¶ 30 Echols argues that the trial court's ruling that she lacked standing to seek custody of J.A.M. violated the law of the case doctrine because it reversed a previous decision of the same court, as Judge Krentz previously ruled that, although Echols lacked standing to seek custody under section 601(b)(2), she had standing under section 601(b)(4)(B). She also argues that the trial court's ruling is contrary to section 601(b)(4)(B)'s plain language, as she met all of its requirements, and those requirements are independent of those of section 601(b)(2). Finally, she argues that although the plain language of section 601(b)(4)(B) and the legislative debates demonstrate that the relevant date of incarceration is the date of a parent's death, which is satisfied here, the only other possibly relevant time under case law is whether McClain was in prison on the date of the filing of the petition, which is also satisfied here; Echols argues that the trial court's consideration of whether McClain was in prison on the date of trial was irrelevant for determining her standing.

¶ 31 We agree with Echols that she had standing under section 601(b)(4)(B) because she met the requirements under the statute's plain meaning, in that J.A.M.'s mother (Holley) was deceased, Echols is a parent of Holley, and the surviving parent, McClain, was incarcerated at the time of Holley's death. We also agree with Echols that section 601(b)(4)(B) is an independent basis to obtain standing, and therefore Echols did not have to satisfy the requirements of section 601(b)(2). That is, sections 601(b)(1) (750 ILCS 5/601(b)(1) (West

2012)) and 601(b)(2) contain an "or" at the end of them, indicating that they are disjunctive (see *People v. Tousignant*, 2014 IL 115329, ¶ 11 ("or" is generally disjunctive)), and section 601(b)(3) (750 ILCS 5/601(b)(3) (West 2012)) relates to stepparents, so the plain language of the statute clearly shows that section 601(b)(4) is an independent basis to obtain standing to commence a child custody proceeding. Therefore, Echols did *not* have to show that McClain voluntarily and indefinitely relinquished custody of J.A.M., as would be required for petitioners proceeding under section 601(b)(2). See 750 ILCS 5/601(b)(2) (West 2012); *Dumiak*, 2013 IL App (2d) 130336, ¶ 20.

¶ 32 We recognize that the trial court found that McClain had not relinquished physical custody of J.A.M. by virtue of his incarceration because even though he was in prison at the time Echols filed her petition, McClain was not incarcerated at the time of trial and did not have a lengthy sentence that would prevent him from acting as J.A.M.'s custodian. This finding was irrelevant to the issue of Echols's standing under section 601(b)(4)(B) because the statute looks at the incarceration status at the time of the other parent's death and not the time of the petition's filing or the time of trial. See 750 ILCS 5/601(b)(4)(B) (West 2012). Further, the length of the prison sentence is not a consideration under section 601(b)(4)(B), nor is, as discussed, the issue of physical custody.

¶ 33 However, we note that immediately after making this finding, the trial court stated, "And again, on this issue, [McClain] did not appear in court, he is in default on that issue." In this manner, the trial court indicated that it would treat Echols as if she did have standing to pursue custody. This is supported by the fact that the trial court went on to consider J.A.M.'s best interest, as the best interest of the child is considered only after the trial court determines that a nonparent has standing. See *In re Marriage of Groff*, 332 Ill. App. 3d 1108, 1112 (2002) ("Upon

determining that the nonparent has standing, the trial court then must determine custody utilizing the 'best interest of the child' standard."). The trial court found that it was not in J.A.M.'s best interest to remove him from McClain's custody because: McClain was J.A.M.'s only surviving parent; Buck testified that J.A.M. did not want to live full-time with Echols; J.A.M. attended school regularly; J.A.M. was presented for court-ordered visitation with Echols; and there were no allegations that McClain abused or neglected J.A.M.

¶ 34 It is true that the trial court's written order stated that it was denying Echols's request (for custody) because she failed to show that McClain had relinquished custody. The order makes it appear that the trial court was denying Echols's request because Echols lacked standing. However, the order was drafted by Echols's attorney, and as stated, if a court's oral pronouncement and written order conflict, the oral pronouncement controls. *In re William H.*, 407 Ill. App. 3d at 866. Here, the trial court's oral statements indicate that it was treating Echols as if she had standing. Even if, *arguendo*, the trial court's oral ruling could be interpreted as finding that Echols lacked standing, at the very least the trial court alternatively denied Echols's petition on the basis that a consideration of J.A.M.'s best interest also required allowing McClain to retain custody. Echols does not address the trial court's finding regarding J.A.M.'s best interest, thereby forfeiting the issue for review (see Ill. S. Ct. R. 341(h)(7) (eff. Feb. 6, 2013) (points not argued in an appellant's brief are forfeited)) and providing us with no basis on which to potentially reverse the trial court's decision.[2]

[2] We note that the trial court did not directly address the standing issue Echols raised in her motion to reconsider. Had it taken a few minutes to do so, the record would have been much clearer for both Echols and this court.

¶ 35 Echols next argues that the trial court erred when it made an oral ruling on May 16, 2014, that Rule 274 barred its consideration of Echols's second request to reconsider the custody ruling. Echols maintains that even assuming that there is a conflict between Rule 274 and sections 601 and 610 (750 ILCS 5/601, 610 (West 2014)) of the Marriage Act and section 16 of the Illinois Parentage Act of 1984 (Parentage Act) (750 ILCS 45/16 (West 2014)), the statutes should govern because they are more in the nature of public policy rather than ministerial attempts to control court room access and procedure.

¶ 36 This court will not disturb a trial court's decision to grant or deny a motion to reconsider unless the trial court abused its discretion. *In re Marriage of Epting*, 2012 IL App (1st) 113727, ¶ 24. Echols's argument also involves the interpretation of statutes, which, as stated, we review *de novo*. *In re Marriage of Turk*, 2014 IL 116730, ¶ 15. We construe supreme court rules in the same manner as statutes, and we also review them *de novo*. *Armagan v. Pesha*, 2014 IL App (1st) 121840, ¶ 14.

¶ 37 Rule 274 states in relevant part:

> "A party may make only one postjudgment motion directed at a judgment order that is otherwise final. If a final judgment order is modified pursuant to a postjudgment motion, or if a different final judgment or order is subsequently entered, any party affected by the order may make one postjudgment motion directed at the superseding judgment or order. Until disposed, each timely postjudgment motion shall toll the finality and appealability of the judgment or order at which it is directed." Ill. S. Ct. R. 274 (eff. Jan. 1, 2006).

Here, the trial court did not modify its ruling in response to Echols's first motion to reconsider, so pursuant to Rule 274's language, she was not permitted to file a second postjudgment motion directed against the same final judgment. See *id.*

¶ 38 In *Sears v. Sears*, 85 Ill. 2d 253, 259 (1981), our supreme court stated:

> "There is no provision in the Civil Practice Act or the supreme court rules which permits a losing litigant to return to the trial court indefinitely, hoping for a change of heart or more sympathetic judge. *** There must be finality, a time when the case in the trial court is really over and the loser must appeal or give up. Successive post-judgment motions interfere with that policy."

However, the *Sears* holding was expressly limited to second postjudgment motions filed more than 30 days after the judgment (*id.*), whereas Echols filed her subsequent motions to reconsider within 30 days of the trial court's original final judgment. Also, Echols relied on facts not knowable to her at the time she filed her first motion to reconsider.

¶ 39 The facts in *Benet Realty Corp. v. Lisle Savings & Loan Ass'n*, 175 Ill. App. 3d 227, 230, 233(1988), are slightly more akin to those here, in that the second postjudgment motion was filed after the denial of the first motion and within 30 days of the trial court's final judgment. The appellate court held that the second postjudgment motion, which raised only arguments that could have been raised in the first motion, would still not be a timely posttrial motion and would not serve to extend the time for filing a notice of appeal. *Id.* at 231-32. Still, however, *Benet Realty Corp.* is distinguishable in that the second motion did not raise new facts that did not previously exist.

¶ 40 In *People v. Walker*, 395 Ill. App. 3d 860, 869 (2009), appeal allowed (236 Ill. 2d 542 (2010)), this court stated that the trial court has the jurisdiction and power to grant a successive

postjudgment motion, and the bar on successive postjudgment motions serves only as a limit on the time for appeal. Still, this does not equate to the trial court being required to address the successive petition's merits. In *City of Chicago v. Greene*, 47 Ill. 2d 30, 33 (1970), our supreme court stated that issues not raised in the defendant's original posttrial motion but raised in subsequent posttrial motions could have been treated as a supplement or amendment to his original posttrial motion, and that it was within the trial court's discretion to allow the defendant leave to file such subsequent motions. In this case, given that the trial court had already ruled on Echols's posttrial motion and that McClain was not represented by counsel, we cannot say that the trial court abused its discretion in not treating the successive motions as supplements to the original.

¶ 41 Echols's statutory citations do not change our result. Section 601 refers to the commencement of a new child custody proceeding rather than a modification of an existing child custody order. 750 ILCS 5/601(b)(4)(B) (West 2012). Section 16 provides that the trial court has continuing jurisdiction to modify an order for custody "entered under this Act," referring to the Parentage Act (750 ILCS 45/16 (West 2014)), but Echols was determined to have standing under the Marriage Act rather than the Parentage Act. Moreover, section 16 states that modifications of custody judgments shall be in accordance with factors under the Marriage Act. 750 ILCS 45/16 (West 2014).

¶ 42 Echols alternatively sought to have the successive motions treated as new motions to modify custody, in which case section 610 of the Marriage Act, the third statute cited by Echols, would control. That section states, in relevant part:

> "Unless by stipulation of the parties or except as provided in subsection (a-5) [relating to remarriage or residency with a sex offender], 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." (Emphasis added.) 750 ILCS 5/610 (West 2014).

Here, the successive postjudgment motions at issue did not include any affidavits alleging that J.A.M.'s present environment could seriously endanger his physical, mental, moral, or emotional health. Even though the affidavit requirement is not jurisdictional and can be waived by the opposing party (*In re Custody of Sexton*, 84 Ill. 2d 312, 320-21 (1981)), this does not equate to the trial court being required to allow such a petition to proceed absent the statutorily-required affidavit. Rather, the affidavit requirement is "mandatory" and "the consequence of noncompliance, that the child-custody modification motion be disallowed, is clearly provided in the Act." *Id.* at 319; see also *In re Marriage of Kading*, 150 Ill. App. 3d 623, 627 (1986) (section 610's affidavit requirement is mandatory, and the consequence of noncompliance is that a motion for modification of child custody may be dismissed). Therefore, we cannot say that the trial court erred in not allowing the motions to proceed under section 610.

¶ 43 We recognize that Echols's May 5, 2014, pleading was verified and that McClain did not affirmatively move to dismiss the successive pleadings on the basis that they lacked affidavits. However, even if the trial court should have otherwise allowed the motions to proceed under section 610, the doctrine of invited error applies here. This doctrine prohibits a party from complaining of an error on appeal which the party induced the trial court to make or to which the party consented. *Bruntjen v. Bethalto Pizza, LLC*, 2014 IL App (5th) 120245, ¶ 152. Here, although the trial court stated it would not reconsider the custody order, it ended the hearing by stating that "the right thing to do in the short-term [was] for [it] to review what [Echols] filed,"

and they would discuss the issue at the hearing on May 30. However, at the May 30 hearing, Echols's attorney stated that the trial court had ruled that McClain had custody of J.A.M. and that further requests for reconsideration were inappropriate. In this manner, she effectively ended discussion of the issue, and therefore she cannot now complain that the trial court erred by not allowing her successive motions to proceed.

¶ 44 As a final note, although we have affirmed the trial court's custody determination and its effective decision to not consider the merits of Echols's successive posttrial motions, our decision should not be construed as a bar to Echols filing a future motion to modify custody that follows proper statutory procedure.

¶ 45 III. CONCLUSION

¶ 46 For the reasons stated, we affirm the judgment of the De Kalb County circuit court.

¶ 47 Affirmed.