2023 IL App (5th) 220685-U

NO. 5-22-0685

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

In re K.B., a Minor	)	Appeal from the
	)	Circuit Court of
(Crystal Buchanan,	)	Marion County.
	)	
Petitioner-Appellant,	)	
	)	
v.	)	No. 22-FA-34
	)	
Daleena Miller,	)	Honorable
	)	Martin W. Siemer,
Respondent-Appellee).	)	Judge, presiding.

PRESIDING JUSTICE BOIE delivered the judgment of the court.
Justice Barberis concurred in the judgment.
Justice Cates specially concurred.

ORDER

¶ 1 *Held*: We affirm the circuit court's judgment of dismissal where the petitioner failed to satisfy the threshold statutory requirement under 750 ILCS 5/601.2(b)(3) that the minor child was not in the physical custody of a parent.

¶ 2 On April 8, 2022, the petitioner, Crystal Buchanan, filed a complaint against the respondent, Daleena Miller, to establish parental responsibilities and parenting time regarding the minor child, K.B. In response, on June 3, 2022, the respondent filed a motion to dismiss the complaint pursuant to section 2-615 of the Code of Civil Procedure (Code) (735 ILCS 5/2-615 (West 2020)). On September 22, 2022, the circuit court of Marion County granted the respondent's motion to dismiss finding that the petitioner lacked standing to bring the action pursuant to section 602.9 and section 601.2 of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS

5/602.9, 601.2 (West 2020)) and dismissed the matter. The petitioner filed a timely notice of appeal. On appeal, the petitioner argues that the circuit court erred in granting the respondent's motion to dismiss based on a lack of standing pursuant to the Act. For the following reasons, we affirm the judgment of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 The petitioner and the respondent began a romantic relationship in November 2017 and began cohabitating in February 2018. In early 2018, the petitioner and the respondent agreed to raise a child together and, through an at-home procedure, the respondent was artificially inseminated.[1] In January 2019, the minor child, K.B., was born. The petitioner and the respondent were never married, and the petitioner never adopted K.B.

¶ 5 The petitioner and the respondent continued to reside together and raise K.B. until September 2020, when they separated. After separating, the petitioner and the respondent began an agreed parenting time schedule (parenting agreement)[2] whereby each party had equal physical custody of K.B. The parenting agreement continued until approximately March 26, 2022, when the petitioner was to have K.B. in her physical custody, but the respondent refused. Thereafter, on April 8, 2022, the petitioner filed a complaint in the circuit court of Marion County to establish parental responsibilities and parenting time (complaint).

¶ 6 On June 3, 2022, the respondent filed a motion to dismiss the complaint pursuant to section 2-615 of the Code, alleging that the petitioner lacked standing to bring the action under section 602.9 of the Act. On September 2, 2022, the circuit court conducted a hearing on the respondent's motion to dismiss. At the conclusion of the hearing, the circuit court stated as follows:

[1]The natural father is identified in the pleading, and his parental rights, if any, are not at issue in this appeal.

[2]There is nothing in the record to indicate that the parenting agreement was set forth in writing, and consequently, it appears that it was an oral agreement between the parties.

"THE COURT: Thank you. Just a moment. I have reviewed the record. I have considered the testimony that's been presented here today. I've considered the arguments presented as well and I have had an opportunity to review the statutes involved, and that includes 602.9 and 601.2, and based on all of that, I am going to grant the motion to dismiss.

While I certainly understand the concerns and the issues raised by the petitioner, the language of the relevant statute is pretty clear and the definitions are clear as well, and this petitioner does not fall within any of those definitions. An argument could be made that [the] statutes should be updated, but they have not been."

¶ 7 The circuit court entered a written order the same day reflecting its finding that the petitioner lacked standing to bring the action under sections 602.9 and 601.2 of the Act and dismissed the matter. The petitioner now appeals the circuit court's judgment of dismissal raising the sole issue of whether the circuit court erred in granting the motion to dismiss based upon a lack of standing.

¶ 8 II. ANALYSIS

¶ 9 Before we begin our analysis of the issue on appeal, we note that the issue is presented to us by way of the circuit court's dismissal of the petitioner's complaint pursuant to the respondent's motion to dismiss labeled as a motion brought under section 2-615 of the Code. Under section 2-615 of the Code, a complaint may be dismissed for the failure to state a cause of action because of factual or legal insufficiency. *In re Scarlett Z.-D.*, 2015 IL 117904, ¶ 20. The factual or legal insufficiency must be apparent on the face of the pleading and the allegations in the pleading are the only matters that the court is to consider in ruling on a section 2-615 motion. See *Lavite v. Dunstan*, 2016 IL App (5th) 150401, ¶ 36; *Hartmann Realtors v. Biffar*, 2014 IL App (5th) 130543, ¶ 14.

¶ 10 A motion to dismiss under section 2-619 of the Code (735 ILCS 5/2-619 (West 2020)), however, admits the legal sufficiency of the complaint, but asserts certain defects or defenses outside of the pleading that defeat the claim. *In re Scarlett Z.-D.*, 2015 IL 117904, ¶ 20. The respondent's motion to dismiss stated that the petitioner's complaint should be dismissed because the petitioner "has no legal standing in which she may bring this action." A lack of standing is an affirmative defense outside of the pleadings that would defeat the claim and, as such, is properly raised in a motion pursuant to section 2-619 of the Code. *Id*.

¶ 11 On review, we look at the substance of the motion to dismiss, not its label. *Landers-Scelfo v. Corporate Office Systems, Inc*., 356 Ill. App. 3d 1060, 1065 (2005). In this matter, the respondent's motion to dismiss was based solely on the affirmative defense of lack of standing. Although the motion to dismiss was incorrectly brought pursuant to section 2-615 of the Code, the petitioner was able to respond and address the issue of standing during the hearing before the circuit court. Therefore, petitioner was not prejudiced by the respondent's incorrect labeling of her motion to dismiss. Accordingly, we will review the substance of the respondent's motion to dismiss as one raising an affirmative matter pursuant to section 2-619(a)(9) of the Code (735 ILCS 5/2-619(a)(9) (West 2020)). We review *de novo* a disposition of a section 2-619 motion. *American Freedom Insurance Co. v. Garcia*, 2021 IL App (1st) 200231, ¶ 32. We further accept as true all well-pleaded facts and all reasonable inferences that may be drawn from them and construe the allegations in the complaint in the light most favorable to the claimant. *Id.*

¶ 12 On appeal, the petitioner does not argue that the circuit court erred in finding that the petitioner did not have standing under section 602.9 of the Act. Instead, the petitioner argues that she had standing to bring the action under section 601.2(b)[3] of the Act (750 ILCS 5/601.2(b) (West

[3]The respondent's motion to dismiss only alleged a lack of standing pursuant to section 602.9 of the Act; however, the issue of standing under section 601.2(b) of the Act was raised by the petitioner, and

2020)). Section 601.2(b) of the Act provides that a proceeding for the allocation of parental responsibilities may be commenced in the court as follows:

> "(3) by a person other than a parent, by filing a petition for allocation of parental responsibilities in the county in which the child is permanently resident or found, but only if he or she is not in the physical custody of one of his or her parents[.]" *Id.* § 601.2(b)(3).

¶ 13 The petitioner states that the issue of whether or not the child is in the physical custody of one of the parents pursuant to section 601.2(b)(3) of the Act "has come down to whether a parent has 'voluntarily and indefinitely relinquished custody of the child' " (citing *In re Custody of K.N.L.*, 2019 IL App (5th) 190082, ¶ 19). The petitioner argues that the respondent relinquished her full custody rights by entering into the parenting agreement, and then executing that agreement for 19 months. The petitioner further argues that it was anticipated that the parenting agreement would be for an indefinite period of time since there was no agreement between the parties regarding a termination date. As such, the petitioner argues that the parties shared physical custody of the minor child on an equal basis and that the respondent voluntarily relinquished custody of the child while the minor child was in the petitioner's care. The petitioner further argues that since the respondent had voluntarily and indefinitely relinquished full custody of the minor child by following the parenting agreement, the petitioner had standing to pursue her action for parental responsibilities under the Act.

¶ 14 In the context of child custody under section 601.2(b)(3) of the Act, "standing" refers to a threshold statutory requirement that must be met before the court can proceed to a decision on the merits. *Young v. Herman*, 2018 IL App (4th) 170001, ¶ 47. The threshold statutory requirement of

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addressed by the circuit court, at the hearing on the respondent's motion to dismiss. As such, the issue of standing pursuant to section 601.2(b) is properly before this court. See *Huang v. Brenson*, 2014 IL App (1st) 123231, ¶ 22 (issues that could have been raised in the lower court but were not, are forfeited on appeal).

section 601.2(b)(3) is designed to safeguard the parents' superior right to the care, custody, and control of their children. See *In re Custody of T.W.*, 365 Ill. App. 3d 1075, 1084 (2006); *In re A.W.J.*, 197 Ill. 2d 492, 497 (2001). Under section 601.2(b)(3), the nonparent petitioner must demonstrate that the child is not in the physical custody of one of his or her parents. *Young*, 2018 IL App (4th) 170001, ¶ 48. The determination of "physical custody" does not rest on physical possession at the moment the petition is filed; rather, it requires a showing that the parent had voluntarily and indefinitely relinquished custody of the child on the date relief is sought by the nonparent. *In re Custody of K.N.L.*, 2019 IL App (5th) 190082, ¶ 19. Not every voluntary turnover of a child will deprive the parent of physical custody, and the court must consider such factors as (1) who was responsible for the care and welfare of the child prior to the initiation of custody proceedings, (2) the manner in which physical possession of the child was acquired, and (3) the nature and duration of the possession. *Id*. The determination regarding these factors is fact-dependent, and no one factor is controlling. *Dumiak v. Kinzer-Somerville*, 2013 IL App (2d) 130336, ¶ 20. We review *de novo* whether a nonparent has standing under section 601.2 of the Act. *Id*. ¶ 21. To the extent the circuit court heard evidence and made findings of fact, those findings are reviewed under a manifest-weight-of-the-evidence standard. *Id.*

¶ 15 In this matter, as to the first factor, both parties were equally responsible for the care and welfare of the minor child until approximately March 26, 2022, shortly before the initiation of the custody proceedings. As the petitioner admits, there was no agreed termination date regarding the parenting agreement. At the time the complaint was filed, the respondent had clearly terminated the parenting agreement and undertook continuous physical custody of the minor child, which the respondent was entitled to do as K.B.'s biological parent. See *Dumiak*, 2013 IL App (2d) 130336, ¶ 22 (parents have legal custody of their children by virtue of their status as biological parents, and only a court may grant, modify, or terminate legal custody). We further note that the respondent

never placed the minor child in the unlimited physical custody of the petitioner, nor was the minor child only cared for by the petitioner during the parenting agreement time, as the respondent provided equal care and welfare of the minor child.

¶ 16 Parents have the fundamental right to make decisions regarding the care, custody, and control of their children, and encompassed within that well-established fundamental right is the right to determine with whom their child should associate. *In re Scarlett Z.-D.*, 2015 IL 117904, ¶ 31. A parent is also permitted to obtain the assistance of others in raising a child without affecting their custody rights. See *In re Custody of Barokas*, 109 Ill. App. 3d 536, 543 (1982). For example, no one could legitimately suggest that the headmaster of a boarding school would have standing under section 601.2(b)(3) of Act although the child may be physically at the school for a significantly greater time than with a parent. See *Young*, 2018 IL App (4th) 170001, ¶ 53. The fact that the respondent allowed the petitioner to care for the minor child on an equal basis did not operate to relinquish her legal custody nor does it demonstrate an indefinite relinquishment of physical custody of the child. See generally *Dumiak*, 2013 IL App (2d) 130336, ¶ 22; see also *In re Custody of Barokas*, 109 Ill. App. 3d at 543.

¶ 17 As to the second factor, the manner in which the minor child was in the physical possession of the respondent at the time the complaint was filed, the complaint states that the petitioner voluntarily returned the minor child to the respondent's care. There are no allegations that the respondent abducted the child or forcibly removed the child from the petitioner's care. The respondent retained physical custody of the child by discontinuing the parenting agreement, and although the petitioner argues that "it was anticipated" that the agreement would be for an indefinite period time, there is nothing to indicate that the respondent was not free to terminate the parenting agreement at will.

¶ 18 The fact that the petitioner always returned the child to the respondent's care also affects the third factor regarding the nature and duration of the possession. The respondent did not allow the minor child out of her physical custody for months or years, but allowed the petitioner a limited, although equal, time with the minor child with the understanding that the minor child would be returned to respondent's physical custody after a specific, agreed upon, amount of time.

¶ 19 The petitioner argues that the respondent voluntarily and indefinitely relinquished "full" custody by participating in the parenting agreement, but the petitioner fails to cite any precedent where a court has found such an agreement, or the participation in such an agreement, to be a voluntary and indefinite relinquishment of physical custody under section 601.2(b)(3) of the Act. Further, section 601.2(b)(3) of the Act does not state "full" physical custody, but only requires that the minor child be in the physical custody of a parent as discussed above.

¶ 20 Unlike a custody dispute between parents, a custody dispute between a parent and a nonparent does not start out on equal footing. *In re Custody of Barokas*, 109 Ill. App. 3d at 543. A nonparent must prove the threshold statutory requirement contained in section 601.2(b)(3) before proceeding in an action for the allocation of parental responsibilities. As such, after taking the above factors into consideration and construing the allegations in the complaint in the light most favorable to the petitioner, we find that the minor child was clearly in the physical custody of the respondent at the time the complaint was filed and there is no indication that the respondent had voluntarily and indefinitely relinquished physical custody of K.B. Therefore, we find that the circuit court did not err in determining that K.B. was in the physical custody of her biological parent and that the petitioner lacked standing to bring her complaint under section 601.2(b)(3) of the Act.

¶ 21 While we recognize that this is a very arduous situation, we note that in this matter, the petitioner sought only to establish parental responsibilities and parenting time under the Illinois

Marriage and Dissolution of Marriage Act. As such, our decision here is limited solely to the petitioner's standing under section 601.2(b)(3) of the Act.

¶ 22 III. CONCLUSION

¶ 23 For the foregoing reasons, we affirm the judgment of the circuit court of Marion County dismissing the petitioner's complaint where the petitioner failed to meet the threshold statutory requirement under section 601.2(b)(3) of the Act to bring the action as a nonparent as the minor child was in the physical custody of one of her parents at the time the complaint was filed.

¶ 24 Affirmed.

¶ 25 JUSTICE CATES, specially concurring:

¶ 26 I agree that the petitioner failed to meet the threshold statutory requirements to bring her action under section 601.2(b)(3) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/601.2(b)(3) (West 2020)), and concur in the majority's decision. I write separately to point out that "nonparents" have other means to establish standing to petition for parenting time and parenting responsibilities under Illinois law.

¶ 27 In this case, the petitioner sought to establish parental responsibilities and parenting time only under the Act (750 ILCS 5/600 *et seq.* (West 2020)). Neither the Illinois Parentage Act of 2015 (750 ILCS 46/101 *et seq*. (West 2020)), nor the common law, were invoked. The Illinois Parentage Act of 2015 specifically addresses the parentage of a child conceived through assisted reproduction and provides standing to a woman presumed or alleging herself to be the parent of the child. 750 ILCS 46/602, 703 (West 2020). Additionally, the common law has recognized actions for child custody and visitation where an unmarried couple agrees to conceive a child by artificial insemination and the couple subsequently begins raising the child as coequal parents. Those common law rights have not been barred by the Illinois legislature. See 750 ILCS 46/104 (West 2020); *In re T.P.S.*, 2012 IL App (5th) 120176, ¶ 20. Such actions are consistent with the

public policy in Illinois which recognizes "the right of every child to the physical, mental, emotional, and monetary support of his or her parents, regardless of the legal relationship of the parents." See 750 ILCS 46/102 (West 2020); *In re T.P.S.*, 2012 IL App (5th) 120176, ¶¶ 30-32. Today's decision, however, is limited solely to a determination that the petitioner lacked standing under section 601.2(b)(3) of the Act and does not preclude recourse under the Illinois Parentage Act or the common law.