2013 IL App (1st) 123420-U

SIXTH DIVISION
March 29, 2013

No. 1-12-3420

In re MATTER OF GRANDPARENT VISITATION	)	Appeal from the
	)	Circuit Court
(Robert S. and Judith S.,	)	of Cook County
Petitioners-Appellants,	)	
	)	No. 11 D3 30371
v.	)	
	)	Honorable
Charles H.,	)	Marya T. Nega,
Respondent-Appellee).	)	Judge Presiding.

JUSTICE REYES delivered the judgment of the court.
Presiding Justice Lampkin and Justice Gordon concurred in the judgment.

ORDER

¶ 1 Held: The circuit court of Cook County did not err in dismissing petitioners' second amended petition for grandparent visitation where the petition failed to allege specific facts supporting the allegation denying visitation would harm the children. The circuit court also did not abuse its discretion in dismissing the second amended petition with prejudice.

¶ 2 Petitioners Robert S. and Judith S. filed a petition seeking visitation with their grandchildren pursuant to section 607(a-5) of the Illinois Marriage and Dissolution of Marriage Act (Act), commonly referred to as the grandparent visitation statute (750 ILCS 5/ 607(a-5) (West 2010)). Respondent Charles H. is the father of the children at issue. The circuit court of

Cook County granted respondent's combined motion to dismiss the petition pursuant to section 2-619.1 of the Illinois Code of Civil Procedure (Code) (735 ILCS 5/2-619.1 (West 2010)), ruling the petition failed to state a claim for which relief may be granted. Petitioners now appeal. For the following reasons, we affirm.

¶ 3 BACKGROUND

¶ 4 On April 8, 2011, petitioners filed their initial petition for grandparent visitation, alleging the following facts. Petitioners are the maternal grandparents of Colton H., born on August 1, 2007, and Hudson H., born on August 30, 2009. On August 19, 2010, Julie H., the mother of these children, died of natural causes. Petitioners allegedly had a strong and positive emotional bond with their grandchildren. For reasons unknown to petitioners, they have been refused visitation by respondent since November 3, 2010. Petitioners allege that due to the strong bond they enjoyed with their grandchildren, it is likely their grandchildren's emotional health could be affected by the loss of the relationship with petitioners. They also allege it would be in the grandchildren's best interest to maintain the relationship with them.

¶ 5 On or about May 2, 2011, petitioners filed a petition for temporary visitation with the grandchildren. On July 18, 2011, the circuit court granted one hour of supervised visitation monthly and appointed Ms. Barbara Palmer to conduct an evaluation of the parties and the children, pursuant to section 604(b) of the Act (750 ILCS 5/604(b) (West 2010)).

¶ 6 On November 16, 2011, respondent filed a combined motion to dismiss the petition pursuant to section 2-619.1 of the Code. Respondent argued petitioners failed to plead his decision was harmful to the children's emotional health. Respondent also argued the statute

under which the petition was filed is unconstitutional on its face, violating his fundamental parental rights under the fourteenth amendment to the United States Constitution (U.S. Const., amend XIV), as interpreted by the United States Supreme Court in *Troxel v. Granville*, 530 U.S. 57 (2000). On the same date, respondent also filed a petition to terminate visitation.

¶ 7 On February 29, 2012, after petitioners filed a response to the motion to dismiss and answered the petition to terminate visitation, the circuit court entered an order granting the motion to dismiss, but granting petitioners leave to replead. On March 6, 2012, petitioners filed an amended petition for grandparent visitation. On March 20, 2012, respondent filed another combined motion to dismiss the petition pursuant to section 2-619.1 of the Code, raising arguments substantially similar to those in the first motion to dismiss.

¶ 8 On April 4, 2012, the circuit court entered an order granting respondent's petition to terminate visitation without prejudice. On the same date, the circuit court set respondent's motion to dismiss for hearing on April 24, 2012.

¶ 9 On April 11, 2012, however, petitioners sought leave to file a second amended petition. The circuit court granted petitioners leave to file a second amended petition on July 5, 2012. Although apparently attached as an exhibit to the motion for leave to file a second amended petition, petitioners filed the second amended petition on August 1, 2012. The second amended petition contains additional allegations of the opinions found in a report prepared by Palmer, the court-appointed expert in this matter. In the report, Palmer allegedly opined it was "essential" the relationship between the grandchildren and petitioners be encouraged to continue, as it gave the children "a sense of belonging, family identity and [petitioners] provide a significant amount of

affirmation to these children." Palmer also opined it would be in the children's best interest if the adults attempted to compromise.

¶ 10 On August 7, 2012, respondent again filed a combined motion to dismiss the petition pursuant to section 2-619.1 of the Code, raising arguments substantially similar to those in the first and second motions to dismiss. On October 18, 2012, following argument, the circuit court entered an order granting respondent's motion to dismiss the second amended petition with prejudice. On November 15, 2012, petitioners filed a timely notice of appeal to this court.

¶ 11 DISCUSSION

¶ 12 On appeal, petitioners contend the circuit court erred in dismissing their second amended petition pursuant to section 2-619.1 of the Code. A respondent may move to dismiss a complaint pursuant to section 2-619.1 of the Code, which allows a party to file a motion combining a section 2-615 motion to dismiss (see 735 ILCS 5/2-615 (West 2010)) with a section 2-619 motion to dismiss (see 735 ILCS 5/2-619 (West 2010)). 735 ILCS 5/2-619.1 (West 2010). A section 2-615 motion to dismiss tests the legal sufficiency of the complaint, claiming the complaint does not state a cause of action. 735 ILCS 5/2-615 (West 2010). By contrast, a section 2-619 motion to dismiss admits the legal sufficiency of the complaint, but asserts affirmative matter purportedly defeating the claim. 735 ILCS 5/2-619 (West 2010).

¶ 13 In the case at bar, the circuit court granted respondent's motion to dismiss based on respondent's section 2-615 argument that the petition failed to state a cause of action and the circuit court did not refer at all to respondent's section 2-619 argument that the statute was unconstitutional. Accordingly, it is undisputed that the circuit court's order was solely based on

the portion of the motion based on section 2-615, and we analyze the issue as such. "A cause of action should not be dismissed pursuant to a section 2-615 motion unless it is clearly apparent that no set of facts can be proved that would entitle the plaintiff to relief." *Pooh-Bah Enterprises, Inc. v. County of Cook*, 232 Ill. 2d 463, 473 (2009). The court accepts as true all well-pleaded facts and all reasonable inferences that may be drawn from those facts. *Id*. "However, a plaintiff may not rely on mere conclusions of law or fact unsupported by specific factual allegations." *Id*. Our review of a dismissal under section 2-615 (or section 2-619) is *de novo*. *Patrick Engineering v. City of Naperville*, 2012 IL 113148, ¶ 31. *De novo* consideration means we perform the same analysis a trial judge would perform. *Khan v. BDO Seidman, LLP*, 408 Ill. App. 3d 564, 578 (2011).

¶ 14 Under the grandparent visitation statute, a grandparent is permitted to file a petition for visitation "if there is an unreasonable denial of visitation by a parent" and at least one of a number of conditions exists. 750 ILCS 5/607(a-5)(1) (West 2010). In this case, the statute applies because the children's other parent is deceased. 750 ILCS 5/607(a-5)(1)(A-5) (West 2010). In determining whether to grant such a petition, the statute provides "a rebuttable presumption that a fit parent's actions and decisions regarding grandparent, great-grandparent, or sibling visitation are not harmful to the child's mental, physical, or emotional health. The burden is on the party filing a petition under this Section to prove that the parent's actions and decisions regarding visitation times are harmful to the child's mental, physical, or emotional health." 750 ILCS 5/607(a-5)(3) (West 2010). This presumption "is the embodiment of the fundamental right of parents to make decisions concerning the care, custody, and control of their children which is

protected by the fourteenth amendment." *Flynn v. Henkel*, 227 Ill.2d 176, 181 (2007). According to our supreme court, "[n]either denial of an opportunity for grandparent visitation ***, nor a child 'never knowing a grandparent who loved him and who did not undermine the child's relationship with his mother' ***, is 'harm' that will rebut the presumption stated in section 607(a-5)(3) that a fit parent's denial of a grandparent's visitation is not harmful to the child's mental, physical, or emotional health." *Id*. at 184.

¶ 15 In this case, the second amended petition alleges respondent is an unfit parent. The only basis stated for this allegation, however, is that respondent's denial of visitation harms the children. The second amended petition alleges denying the grandparents visitation will deprive the children of a family identity, sense of belonging and affirmation. These allegations fall within the category the *Flynn* court ruled as a matter of law is not a type of "harm" sufficient to rebut the statutory presumption in favor of a fit parent's decisions regarding grandparent visitation.[1] *Id*. Following *Flynn*, we conclude the second amended petition fails to allege specific facts supporting the conclusory allegation that the denial of visitation is considered harmful to the children under the statute. Accordingly, petitioners' allegation of parental

[1] Petitioners' reply brief observes that *Flynn* was not decided on a motion to dismiss, but the *Flynn* court ruled the sort of "harm" alleged here does not rebut the statutory presumption.

unfitness also lacks support.[2] Thus, the circuit court did not err in dismissing the second amended petition. *Pooh-Bah Enterprises, Inc.*, 232 Ill. 2d at 473.

¶ 16 In the alternative, petitioners contend the circuit court erred in granting respondent's motion to dismiss with prejudice, denying petitioners an opportunity to file a third amended complaint. The question of whether to grant or deny leave to amend a complaint is within the trial court's discretion, and the trial court's decision will not be reversed absent an abuse of this discretion. *Sheffler v. Commonwealth Edison Co.*, 2011 IL 110166, ¶ 69. Leave to amend should generally be granted unless it is apparent that, even after the amendment, no cause of action can be stated. *Platinum Partners Value Arbitrage Fund, Ltd. Partnership v. Chicago Board Options Exchange*, 2012 IL App (1st) 112903, ¶ 13 (citing *Weidner v. Midcon Corp.*, 328 Ill. App. 3d 1056, 1059 (2002)). " 'The test to be applied in determining whether the trial court's discretion was properly exercised is whether the allowance of the amendment would further the ends of justice.' " *Platinum Partners Value Arbitrage Fund, Ltd. Partnership*, 2012 IL App (1st) 112903, ¶ 13 (quoting *Weidner*, 328 Ill. App. 3d at 1059). "Abuse of discretion will be found where no reasonable man could agree with the position of the lower court." *Platinum Partners*

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[2] The second amended petition further alleges that maintaining visitation would be in the best interests of the children, but granting grandparent visitation on that basis would unconstitutionally infringe on the fundamental right of a fit parent embodied in the statutory presumption. See *id*. at 181-82.

Value Arbitrage Fund, Ltd. Partnership, 2012 IL App (1st) 112903, ¶ 13 (citing *Matthews v. Avalon Petroleum Co.*, 375 Ill. App. 3d 1, 9 (2007)).

¶ 17 In this case, petitioners had several prior opportunities to amend to state a claim upon which relief could be granted, and the series of petitions presented did not substantially differ from one another. Petitioners also fail to identify in the record any proposed third amended petition to the circuit court, thereby preventing the court from deciding whether any amendment would cure the defects present in the earlier petitions. Based on this record, petitioners fail to show the circuit court abused its discretion. See *Weidner*, 328 Ill. App. 3d at 1061. Given petitioners' inability to state a cause of action, the allowance of further amendments would not further the ends of justice. *Id*.

¶ 18 CONCLUSION

¶ 19 In sum, we conclude the circuit court did not err in dismissing petitioners' second amended petition for grandparent visitation. We also conclude the circuit court did not abuse its discretion in dismissing the second amended petition with prejudice. For all of the aforementioned reasons, the order of the circuit court of Cook County is affirmed.

¶ 20 Affirmed.