2017 IL App (3d) 150391-U

Order filed May 12, 2017

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2017

FILOMENA ROTANTE,	)	Appeal from the Circuit Court
	)	of the 12th Judicial Circuit,
Petitioner-Appellee,	)	Will County, Illinois,
Cross-Appellant,	)	
	)	
v.	)	Appeal No. 3-15-0391
	)	Circuit No. 14-F-407
BERNARD MORGANO,	)	
	)	Honorable
Respondent-Appellant,	)	Marilee Viola,
Cross-Appellee.	)	Judge, Presiding.

PRESIDING JUSTICE HOLDRIDGE delivered the judgment of the court.
Justices Carter and O'Brien concurred in the judgment.

ORDER

¶ 1 *Held*: (1) The trial court's decision granting grandmother's petition for grandparent visitation with her minor granddaughters was not against the manifest weight of the evidence; (2) the trial court did not abuse its discretion in dismissing father's counter-petition in grandparent visitation action under section 2-619(a)(3) of the Code of Civil Procedure where issues raised in the counter-petition were substantially similar to claims that were being adjudicated in a pending probate court matter; (3) trial court did not abuse its discretion in limiting grandparent visits to summertime visits and in denying out-of-state visits.

¶ 2 Filomena Rotante (Rotante), the maternal grandmother of two minor children and the trustee of a trust established for the children, filed a petition for grandparent visitation pursuant to section 607(a-5) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/607(a-5) (West 2014) in the circuit court of Will County.

¶ 3 Respondent Bernard Morgano (Morgano), the children's father and custodial parent, filed a five-count counter-petition against Rotante. In his counter-petition, Morgano alleged that Rotante had breached her fiduciary duty by withholding trust income and assets and by refusing to provide any financial support to the trust beneficiaries. Morgano also alleged, on information and belief, that Rotante had converted trust property and assets to her own personal use without legal authority and contrary to the terms of the trust. Morgano sought an Order removing Rotante as trustee and directing her to return all wrongfully converted property and assets of the trust and to provide a complete accounting of all funds in the trust. Morgano also sought injunctive relief and the appointment of a receiver or successor trustee.

¶ 4 Rotante filed a motion to dismiss Morgano's counter-petition. After conducting a hearing on that motion and on Rotante's petition for visitation, the trial court granted Rotante's petition and her motion to dismiss Morgano's counter-petition. However, the trial court denied Rotante's requests for visitation with the children in Chicago during the school year and for visitation with the children in Connecticut (where Rotante resided) during the children's summer vacation.

¶ 5 Morgano appeals the trial court's orders granting Rotante visitation and dismissing Morgano's counter-petition. Rotante cross-appeals the trial court's denial of her requests for visitation in Chicago during the school year and for and out-of-state visitation during the summer.

¶ 6 FACTS

¶ 7 Morgano married DonnaMarie Rotante (DonnaMarie), Rotante's daughter, in 2001. DonnaMarie and Morgano had two daughters, Giovanna and Isabella. At the time Rotante's petition was filed in 2014, Giovanna was 11 years old and Isabella was 10 years old. During DonnaMarie and Morgano's marriage, Rotante visited Giovanna and Isabella at least eight times per year, including each of the girls' birthdays and every holiday. Rotante often took care of the girls. For example, Rotante and her husband, Paul, once flew from Connecticut to Chicago to take care of the girls while DonnaMarie and Morgano celebrated their anniversary in Wisconsin. When Rotante visited her granddaughters during the early years of DonnaMarie and Morgano's marriage, she usually stayed with them for two weeks. Rotante testified that she had a good relationship with Morgano while DonnaMarie and Morgano were married. Rotante stated that Morgano once asked her to move to Chicago to be closer to Giovanna and Isabella.

¶ 8 In 2003, DonnaMarie created the DonnaMarie Morgano Trust, which designated Giovanna and Isabella and the sole beneficiaries and appointed Rotante as Trustee.

¶ 9 DonnaMarie was diagnosed with cancer in 2005. Thereafter, Rotante began spending more time with Giovanna and Isabella. DonnaMarie took the girls to visit Rotante and Paul in Connecticut.[1] Moreover, because of DonnaMarie's illness, Rotante began staying with the girls in Chicago for longer periods of time. She stayed with them for periods of two months, three months, and six months. The last time Rotante stayed with the girls in Chicago, she lived with them for eight months. Rotante and the girls became very close when they lived together. When Rotante visited the girls, they would bake together, play games, watch television, go to the park,

[1] DonnaMarie took Giovanna to visit her grandparents in Connecticut on two occasions, once before Isabella was born, and once afterwards.

go to museums, and go out to eat. Rotante attended the girls' school plays and taught them how to weave pot holders.

¶ 10 DonnaMarie and Morgano divorced in 2012. At the time of the divorce, Giovanna was eight and Isabella was six. DonnaMarie retained custody of the girls and remained in Chicago. Rotante and Paul still resided in Connecticut. However, Rotante visited DonnaMarie and the girls so often after the divorce that she began spending more time in Chicago than Connecticut.

¶ 11 During the last eight months of DonnaMarie's life, Rotante lived with her and the girls. Paul came to Chicago and lived with them during the final four months. Rotante testified that it was very hard during that period. As DonnaMarie's illness progressed, she became unable to take care of Giovanna and Isabella. Accordingly, Rotante took care of them. She went to see the girls' schools plays and went with the girls for instructions on their first Holy Communion. Rotante, Giovanna, and Isabella baked and sewed together, did puzzles, played cards, and colored together. Rotante stated that she was Giovanna and Isabella's "second mom" because DonnaMarie was not able to do those things anymore. Rotante testified that Rotante was the girls' "mother," "father," and "grandma."

¶ 12 DonnaMarie died in January 2013. Rotante claimed that, after the funeral, Morgano promised her that she would "always have a relationship with the girls" and would always be able to see them and speak with them. However, Rotante only saw the girls on two occasions after their mother died; once during DonnaMarie's funeral and once during a breakfast approximately two weeks later. Rotante tried to communicate with Giovanna and Isabella afterwards, but Morgano had moved the girls and removed them from the school they had been attending and Rotante did not have their telephone number. Morgano's attorneys subsequently told Rotante that Morgano did not want Rotante to call the girls. Rotante testified that she tried

to work out a visitation schedule with Morgano before she filed her petition, but Morgano did not allow Rotante to have any kind of further contact with the girls.

¶ 13 On June 11, 2014, Rotante filed her petition for grandparent visitation in the circuit court of Will County.[2] After Rotante filed her petition, Morgano called Rotante and asked her to talk to Giovanna and Isabella about DonnaMarie. Morgano told Rotante that the girls thought that DonnaMarie was living with Rotante in Connecticut. The following day, Rotante spoke with Giovanna and told her that DonnaMarie was not in Connecticut and was no longer alive. Rotante told Giovanna that "mommy's with you in heart and spirit." Rotante asked Giovanna if she understood, and Giovanna said that she did.

¶ 14 Rotante called Giovanna again four or five days later. According to Rotante, Giovanna seemed much sadder than she did during the previous phone call with Rotante. Rotante spoke with Giovanna one more time approximately three weeks before Halloween in 2014. She told Giovanna that she would be sending a popcorn tin for Halloween. Rotante subsequently sent the girls a popcorn tin and asked that they let her know when it arrived. However, Rotante never received a response. Rotante did not speak to either of the girls again. She sent the girls Christmas and birthday presents but she did not know whether they received the presents.

¶ 15 In her petition, Rotante asked for "reasonable" visitation and contact with Giovanna and Isabella, including: (1) weekly telephone calls; (2) visits in Chicago during the girls' school vacation time; and (3) visits in Connecticut during the girls' summer vacation. Rotante asserted that she was seeking visitation because she had spent a great deal of time with the girls since they

[2] Rotante alleged that she had filed suit in the appropriate venue under the Act because, at the time she filed her petition, the girls were residing in Will County. See 750 ILCS 5/607(a-3) (West 2014) ("A petition for visitation with a child by a person other than a parent must be filed in the county in which the child resides"). Morgano did not contest this allegation or move for a change of venue. Nor has Morgano argued on appeal that the action was not filed in the proper venue.

were born and was the girls' "second mom" during the last eight months of their mother's life. Rotante alleged that the girls were currently "missing out on" Rotante's love, affection, and teaching. She also alleged that she was missing the girls' affection. Rotante filed the petition on her own behalf and on behalf of Giovanna and Isabella.

¶ 16 Morgano filed a five-count counter-petition against Rotante. In his counter-petition, Morgano noted that the DonnaMarie Morgano Trust provided that Rotante, as trustee, "shall pay to or use for the benefit of [Giovanna and Isabella] so much of the net income and principal of the trust estate as the Trustee from time to time deems to be necessary or advisable for their respective education, health, maintenance, and support." Morgano alleged that, despite his repeated requests, Rotante had refused to provide an accounting of the trust assets or to distribute any trust income for the children's education, health, maintenance, and support. Morgano claimed that Rotante had breached her fiduciary duty by withholding trust income and assets and by refusing to provide any financial support to the children. He also alleged, on information and belief, that Rotante had converted trust property and assets to her own personal use without legal authority and contrary to the terms of the trust. Morgano sought an Order removing Rotante as trustee and directing her to return all wrongfully converted property and assets of the trust and to provide a complete accounting of all funds in the trust. Morgano also sought injunctive relief, the appointment of a receiver or successor trustee, and attorney fees. In addition, Morgano sought an Order directing Rotante, "as administrator of DonnaMarie's estate and as trustee of the Trust," to: (1) pay Morgano child support in an amount necessary to cover the children's needs and maintenance; and (2) set aside a portion of DonnaMarie's estate in trust, pursuant to section 503(g) of the Act (750 ILCS 5/503(g) (West 2014)), a sum equal to the cost of four years of state college for each child, to be administered by Morgano.

¶ 17 Rotante filed a motion to dismiss Morgano's counter-petition pursuant to section 2-619(a)(3) of the Code of Civil Procedure (Code) (735 ILCS 5/2-619(a)(3) (West 2014). Rotante argued that that Morgano's counter-petition should be dismissed because there was a pending action in the circuit court of Cook County between the same parties "for the same cause" (*i.e.*, a pending action in which relief was sought "on substantially the same set of facts" as alleged in Morgano's counter-petition). Specifically, Rotante noted that Morgano had filed a Petition for Children's Awards in the pending probate proceeding involving DonnaMarie's estate. In that petition, Morgano alleged, *inter alia*, that: (1) "the beneficiary designations on at least two large assets owned by [DonnaMarie] at the time of her death *** were changed from the children or [DonnaMarie's] Trust, of which the children are beneficiaries, to [DonnaMarie's] parents; (2) [a]s a result "it is possible that there will be little or no other funds left for the care and support of [DonnaMarie's] minor daughters as the Executor of [DonnaMarie's] estate [Rotante], who is also the trustee, hates [Morgano]; (3) [d]espite the passage of 6 months, little or no information has been tendered by the Executor *** to counsel for the children; and (4) "[n]o money for support has been provided for the benefit of the children from their Mother's estate or trust to this date." Rotante argued that the gravamen of [Morgano's] claims in both actions was that Rotante had absconded with monies belonging to her daughter's trust, failed to support Giovanna and Isabella from assets belonging to the trust and the estate, and converted assets that were to be held for the benefit of the children. The court in the probate proceeding had granted Morgano's petition for children's awards. However, it found that there were currently insufficient funds to pay the awards, and Rotante alleged that issues relating to Morgano's conversion allegations remained pending in the probate proceeding. Rotante argued that Morgano's counter-petition in the case at

bar unnecessarily multiplied the proceedings and asked the trial court not to resolve issues that should be resolved by the court in the probate proceeding.

¶ 18 The trial court conducted a hearing on Rotante's visitation petition and Rotante's motion to dismiss Morgano's counter-petition. Rotante testified in support of her petition. After Rotante rested her case, Morgano moved for a directed verdict. Morgano argued that Rotante had not met her burden of showing that Morgano's actions and decisions regarding grandparent visitation harmed the girls' mental, physical, or emotional health. Morgano noted that, without making such a showing, Rotante could not overcome the statutory presumption that a fit parent's decisions on these matters caused no such harm to the children.

¶ 19 Although the trial court acknowledged that this was a "close case," it denied Morgano's motion for a directed verdict. The court stated:

> "The only testimony that we have regarding harm to the children in the denial [of visitation] is regarding the telephone call that [Morgano] made to [Rotante] asking her to *** talk to the girls about their mother. And the concern that I have and the reason I'm finding that [the] presumption has been *** overcome *** as to harm is this idea that somehow the girls believed that their mother was in Connecticut. And it is not having a relationship with their grandmother, not *** seeing their grandmother *** somehow [led] them to believe that their mother was being kept from them in Connecticut. I mean that's the only way I can weigh this testimony, which I believe is harmful to the child. So the motion for directed finding is denied."

Morgano did not introduce any evidence at trial.

¶ 20 After hearing closing arguments, the trial court issued a ruling based upon the factors outlined in section 607 of the Act. With regard to the issue of harm to the children, the trial court found that the loss of the relationship between Rotante and the children was "likely to harm the [children's] mental, physical, and emotional health" given that Rotante had resided with the children for "at least six consecutive months" and had "actually helped raise these children while their mother was ill." The trial court found that this was "a very important factor here" and was "the center of [the court's] concern."

¶ 21 The trial court also reiterated its concern regarding Morgano's phoning Rotante and asking her to explain to the children that their mother was not living in Connecticut. The court noted that it "had some concern about the emotional health of the children as it comes to the understanding of the death of their mother, of the grieving process." The court stated that this was the "one piece of testimony here that seems to stand out and concern this Court regarding the mental health of the child."

¶ 22 After considering all of the statutory factors, including the fact that Rotante was the girls' primary caretaker for an eight-month period while their mother was ill, the trial court found that granting grandparent visitation was appropriate. However, the trial court denied Rotante's request for visitation in Chicago during the school year and for visitation in Connecticut during the girls' summer vacation. The court stated that it was not going to allow the children to go out of state and travel to Connecticut because that "really open[ed] up some cans of worms, some concerns" for the court. Regarding visitation in Chicago during the school year, the court noted that it "[did] not want to get into Christmas and spring break because the father may be taking trips, they may be traveling and those types of things, and I think we can run into a lot of trouble."

¶ 23 The trial court also granted Rotante's motion to dismiss Morgano's counter-petition. The trial court ruled that it had no jurisdiction to hear the issues raised in Morgano's counter-petition. The court also noted that it was not going to "get into" the issues raised in Morgano's counter-petition "when there [was] an ongoing probate matter [pending] in Cook County."

¶ 24 This appeal followed.

¶ 25 ANALYSIS

¶ 26 1. The Trial Court's Granting of Rotante's Visitation Petition

¶ 27 On appeal, Morgano argues that the trial court erred in granting Rotante grandparent visitation. This issue is controlled by former section 607 of the Act.[3] In pertinent part, section 607 authorizes a grandparent to file a petition with the circuit court for visitation rights to a minor child if: (1) there has been an "unreasonable" denial of grandparent visitation by the child's parent; and (2) the child's other parent is deceased. 750 ILCS 5/607(a–5) (1) (West 2014). The statute further provides that, "[i]n making a determination under this subsection (a–5), there is a rebuttable presumption that a fit parent's actions and decisions regarding grandparent *** visitation are not harmful to the child's mental, physical, or emotional health." The burden is on the party filing the petition under section 607 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 2014). 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

[3] Section 607(a-5) of the Act was repealed by Public Act 99-90, § 5-20 (eff. Jan. 1, 2016), and was subsequently recodified, as amended, at 750 ILCS 5/602.9 (West 2016). In deciding this appeal, we will apply the version of the Act in existence at the time Rotante filed her petition.

(2007); see also *In re Anaya R.*, 2012 IL App (1st) 121101, ¶ 49. Harm sufficient to rebut the presumption may not be presumed from the loss of a grandparent/grandchild relationship. *Flynn*, 227 Ill. 2d at 184. "Neither 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.*[4]

¶ 28 A trial court's determination that a fit parent's decision regarding grandparent visitation is or is not harmful to the child's mental, physical, or emotional health will not be disturbed on review unless it is contrary to the manifest weight of the evidence. *Flynn*, 227 Ill. 2d at 181. In determining whether a judgment is contrary to the manifest weight of the evidence, the reviewing court views the evidence in the light most favorable to the appellee. *In re Marriage of Bates*, 212 Ill. 2d 489, 516 (2004). Where the evidence permits multiple reasonable inferences, the reviewing court will accept those that support the trial court's order. *Id.* Accordingly, we will find that a trial court's decision is against the manifest weight of the evidence only "where a review of the record clearly demonstrates that the result opposite to [the one] reached by the trial court was the proper result." *Anaya R.*, 2012 IL App (1st) 121101, ¶ 50 (quoting *In re Stephen K.*, 373 Ill. App. 3d 7, 25 (2007)); see also *Best v. Best*, 223 Ill. 2d 342, 350 (2006) (ruling that a finding is against the manifest weight of the evidence only if it is unreasonable, arbitrary and not based on the evidence presented).

[4] Moreover, it is presumed that "a fit parent's decision to deny or limit [grandparent] visitation is in the child's best interest." *Wickham v. Byrne*, 199 Ill. 2d 309, 318 (2002). A generalized assertion that grandparent visitation is beneficial to a child is not sufficient to rebut this presumption. *Lulay v. Lulay*, 193 Ill. 2d 455, 478 (2000).

¶ 29 In addition to providing a presumption in favor of a fit parent's decision concerning visitation, the statute gives guidance to a trial court in determining whether to grant a petition for visitation, providing:

> "In determining whether to grant visitation, the court shall consider the following:
>
> (A) the preference of the child if the child is determined to be of sufficient maturity to express a preference;
>
> (B) the mental and physical health of the child;
>
> (C) the mental and physical health of the grandparent, great- grandparent, or sibling;
>
> (D) the length and quality of the prior relationship between the child and the grandparent, great-grandparent, or sibling;
>
> (E) the good faith of the party in filing the petition;
>
> (F) the good faith of the person denying visitation;
>
> (G) the quantity of the visitation time requested and the potential adverse impact that visitation would have on the child's customary activities;
>
> (H) whether the child resided with the petitioner for at least 6 consecutive months with or without the current custodian present;
>
> (I) whether the petitioner had frequent or regular contact or visitation with the child for at least 12 consecutive months;
>
> (J) any other fact that establishes that the loss of the relationship between the petitioner and the child is likely to harm the child's mental, physical, or emotional health; and
>
> (K) whether the grandparent, great-grandparent, or sibling was a primary caretaker of the child for a period of not less than 6 consecutive months." 750 ILCS 5/607(a-5)(4) (West 2014)"

¶ 30 Applying these standards, we cannot say that the trial court's decision granting Rotante's petition for grandparent visitation was against the manifest weight of the evidence. As an initial matter, the trial court could have reasonably found that both of the statutory preconditions for filing a petition for grandparent visitation were met in this case. First, it is undisputed that Giovanna and Isabella's mother is deceased. Second, based on the evidence presented, the trial court could have reasonably found that Morgano "unreasonably denied" grandparent visitation. Although Morgano has allowed sporadic contact between Rotante and her granddaughters, he has not allowed Rotante to visit the girls in Illinois since shortly after their mother's funeral in January 2013. Nor has he allowed Rotante to speak with the girls by telephone on a regular basis.[5] Moreover, we find it significant that Rotante resided with Giovanna and Isabella for long periods of time after DonnaMarie was diagnosed with cancer, particularly after DonnaMarie and Morgano were divorced and DonnaMarie was awarded custody of the children. As DonnaMarie's illness progressed during the last several months of her life, Rotante acted as the girls' primary caregiver because DonnaMarie was too sick to care for them. Rotante testified that, during that time, she acted as the girls' "mother, father, and grandma," and she developed a very close relationship with them. Given DonnaMarie's death and the intimate bond that the girls had developed with their grandmother, a bond which was forged during an extremely difficult time in their young lives, the trial court could have reasonably found that Morgano's abrupt denial of grandparent visitation immediately after DonnaMarie's death was unreasonable. See *Robinson v. Reif*, 2014 IL App (4th) 140244, ¶ 73 (holding that the record contained

[5] Rotante has spoken with Giovanna and Isabella by telephone only three times since DonnaMarie died. All three of those calls occurred after Rotante filed her petition in June 2014, which was approximately 18 months after DonnaMarie's funeral. The first of those conversations occurred at Morgano's request because the girls believed that their mother was alive and living with Rotante in Connecticut. Rotante testified that, at the time of trial, she had not spoken with the girls since October 2014. She did not know whether the girls had received the Halloween and Christmas presents she sent subsequently sent them.

sufficient evidence to support a finding that defendant father unreasonably denied grandparent visitation where defendant abruptly terminated all visitation after the grandparents had taken full parenting responsibilities for their grandchildren for 18 months following an accident that killed their mother and injured their father, especially given the children's loss of their mother and the "intimate relationship that must have existed between the children and [their grandparents] for 18 months"). Accordingly, the trial court's finding that Rotante was authorized to file a petition for grandparent visitation under section 607(a–5) (1) was not against the manifest weight of the evidence.[6]

¶ 31 Moreover, the evidence also supports a reasonable inference that the denial of grandparent visitation harmed the children emotionally. As noted above, Morgano's denial of visitation abruptly cut the girls off from the person who raised them, lived with them, and acted as their primary caregiver during the final eight months of their mother's life. Rotante testified that she developed a very close relationship with Giovanna and Isabella during that difficult period. She went to see the girls' schools plays and accompanied them as they prepared for their first Holy Communion. Rotante and the girls baked and sewed together, did puzzles, played cards, and colored together. Rotante stated that she was Giovanna and Isabella's "second mom" because DonnaMarie was not able to do those things anymore. She acted as the girls' "mother," "father," and "grandma." Given this evidence, it is reasonable to infer that the abrupt

[6] Morgano urges us to reverse the trial court's ruling because the court never explicitly found that there was an "unreasonable denial" of visitation. We hold that such a finding is implicit in the trial court's order. In any event, even if the trial court had not made the requisite finding of an unreasonable denial of visitation, we may affirm the trial court's judgment on any basis supported by the record. *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 97; *Kubicheck v. Traina*, 2013 IL App (3d) 110157, ¶ 28, n.3. Because the record in this case supports a finding that Morgano's denial of grandparent visitation was unreasonable, we may affirm regardless of the trial court's reasoning. *Leonardi*, 168 Ill. 2d at 97; *Kubicheck*, 2013 IL App (3d) 110157, ¶ 28, n.3.

termination of contact with their grandmother around the same time that their mother died would cause the girls emotional harm.

¶ 32 Other evidence further supports an inference of emotional harm. More than 18 months after DonnaMarie's death, Morgano called Rotante and asked her to talk to Giovanna and Isabella about DonnaMarie. Morgana told Rotante that the girls thought that DonnaMarie was living with Rotante in Connecticut. The following day, Rotante spoke with Giovanna and told her that DonnaMarie was not in Connecticut and was no longer alive. Rotante told Giovanna that "mommy's with you in heart and spirit." Rotante asked Giovanna if she understood, and Giovanna said that she did. Rotante testified that, when she called Giovanna again four or five days later, Giovanna seemed much sadder than she did during the previous phone call. This evidence, which Morgano does not dispute, suggests that the girls were still having difficulty accepting the fact that their mother had died 18 months after her death. During the 18 months following their mother's funeral, Morgano had not allowed visitation between Rotante and the girls. It was not unreasonable for the trial court to infer that the abrupt and total elimination of contact with Rotante shortly after their mother's death interfered with the girls' ability to properly grieve for their mother and helped foster their belief that their mother was alive and living with Rotante in Connecticut. Accordingly, the trial court's finding that Rotante had rebutted the statutory presumption that Morgano's denial of grandparent visitation did not harm Giovanna and Isabella was not against the manifest weight of the evidence.

¶ 33 Further, several of the factors listed in section 607(a-5)(4) of the Act (750 ILCS 5/607(a-5)(4) (West 2014)) support the granting of Rotante's visitation petition. For example, the evidence suggests that Rotante had a close relationship with the children for a long period of time prior to the denial of visitation, and she resided with them and acted as their "primary

caretaker for a period of not less than 6 consecutive months." Also, the June 2014 telephone call from Morgano to Rotante suggests that the girls were emotionally harmed by the denial of visitation with Rotante, and there is no evidence that Rotante filed her petition in bad faith.

¶ 34 Morgano argues that the trial court erroneously presumed harm to the girls from the mere loss of a relationship with a grandparent, which our supreme court disallowed in *Flynn*. We disagree. As shown above, the evidence in this case supports a reasonable inference of emotional harm to the children. At the time grandparent visitation was terminated abruptly after their mother's death, Giovanna and Isabella had already developed an extremely close bond with Rotante, who had lived with them and served as their primary caretaker for eight months while their mother was dying. Giovanna and Isabella were 9 and 7 years old, respectively, at that time. Moreover, Morgano's June 2014 telephone request to Morgano suggests that the girls were having difficulty accepting their mother's death during the 18 months that the girls were prevented from contacting Rotante, and that they believed their mother was living with Rotante in Connecticut. These facts distinguish the instant case from *Flynn*, where the child at issue was only two years old, and there was no evidence of any harm to the child resulting from the denial of grandparent visitation aside from the abstract loss of an opportunity to develop a relationship with a loving grandparent.[7] *Flynn*, 227 Ill. 2d at 184-85. Here, by contrast, the evidence presented amply supports a reasonable inference of concrete emotional harm resulting from the denial of grandparent visitation.

[7] Morgano also relies on *Anaya R*, in which our appellate court affirmed the denial of a petition for grandparent visitation, but that case is also distinguishable. Although the grandmother petitioner in *Anaya R.* presented evidence that she was "heavily involved" in the child's life, there was evidence in the record disputing her claim that she had "essentially acted as a parent" to the child, and there was also evidence that she had "interfered with the child's relationship with her mother by attempting to poison the child's mind." *Anaya R.*, 2012 IL App (1st) 121101, ¶ 58. Here, Morgano presented no evidence refuting Rotante's claim that she acted as Giovanna and Isabella's parent during the final months of DonnaMarie's life. Nor is there any evidence that Rotante has interfered with the girls' relationship with their father.

¶ 35 Morgano also argues that the trial court's judgment should be reversed because Rotante failed to plead harm to Giovanna or Isabella in her petition and failed to present any expert opinion testimony from a psychologist or other mental health professional supporting a claim of mental or emotional harm. We do not find these arguments to be persuasive. Morgano waived any arguments based on a pleading deficiency by filing an answer to Rotante's petition rather than a motion to dismiss and by allowing the case to proceed to trial and verdict. *Adcock v. Brakegate, Ltd.*, 164 Ill. 2d 54, 60-61 (1994); *Fox v. Heimann*, 375 Ill. App. 3d 35, 41 (2007). Moreover, the Act does not require a party petitioning for grandparent visitation to present expert testimony in order to establish harm to the children. Morgano does not cite any case law imposing such a requirement. Nor have we found any.[8] As noted above, Rotante presented evidence supporting a reasonable inference that Morgano's actions and decisions regarding grandparent visitation times were harmful to Giovanna's and Isabella's emotional health. Accordingly, we must draw that inference and affirm the trial court's judgment granting Rotante's petition. *Marriage of Bates*, 212 Ill. 2d 489, 516 (2004) (under manifest weight review, where the evidence permits multiple reasonable inferences, the reviewing court will accept those that support the trial court's order).[9]

¶ 36 2. The Trial Court's Dismissal of Morgano's Counter-Petition

¶ 37 Morgano also argues that the trial court erred in dismissing his counter-petition against Rotante under section 2-619(a)(3) of the Code.

[8] In *Reif*, our appellate court affirmed the trial court's granting of a petition for grandparent visitation under the Act where, *inter alia*, the petitioner presented expert testimony that the father's denial of such visitation harmed the children. *Reif*, However, *Reif* did not hold or imply expert testimony was *required* in order to prove such harm.

[9] For the same reasons, we hold that the trial court properly denied Morgano's motion for directed verdict.

¶ 38 Under section 2-619(a)(3), a defendant may seek dismissal on the ground that "there is another action pending between the same parties for the same cause." *Id.* Section 2-619(a)(3) is designed to avoid duplicative litigation and is to be applied to carry out that purpose. *Kellerman v. MCI Communications Corp.*, 112 Ill. 2d 428, 447 (1986). For purposes of section 2-619(a)(3), two actions are "for the same cause" where "relief is requested on substantially the same state of facts." *Terracom Development Group, Inc. v. Village of Westhaven*, 209 Ill. App. 3d 758, 762 (1991), quoting *Skolnick v. Martin*, 32 Ill. 2d 55, 57 (1964). "[T]he crucial inquiry is whether the two actions arise out of the same transaction or occurrence ***, not whether the legal theory, issues, burden of proof or relief sought materially differ between the two actions." *Terracom Development Group*, 209 Ill. App. 3d at 762, quoting *Tambone v. Simpson*, 91 Ill. App. 3d 865, 867 (1980). The purpose of the two actions need not be identical, rather there need only be a "substantial similarity of issues" between them. *Terracom Development Group*, 209 Ill. App. 3d at 762. The factors that a court should consider in deciding whether a stay under section 2-619(a)(3) is warranted include: comity; the prevention of multiplicity, vexation, and harassment; the likelihood of obtaining complete relief in the foreign jurisdiction; and the *res judicata* effect of a foreign judgment in the local forum. *Kellerman*, 112 Ill. 2d at 447-48. The trial court in its discretion decides whether to grant the motion, and we will not disturb the trial court's decision absent an abuse of discretion. *Id.*; *Terracom Development Group*, 209 Ill. App. 3d at 762.

¶ 39 Under the facts presented in this case, the trial court did not abuse its discretion in dismissing Morgano's counter-petition pursuant to section 2-619(a)(3). The counter-petition that Morgano filed in the instant action alleged that Rotante had breached her fiduciary duty as trustee of DonnaMarie's trust and violated the requirements of the trust by refusing to distribute trust assets for the care and support of Giovanna and Isabella and by converting trust assets for

her personal use and benefit. Morgano sought damages for breach of fiduciary duty and conversion plus an accounting, injunctive relief, the appointment of a receiver or successor trustee, and an order of child support, including the establishment of a section 503(g) trust for the children's benefit. At the time Morgano filed his counter-petition, there was a probate proceeding pending in Cook County addressing issues that were substantially similar to the issues raised in Morgano's counter-petition. In the probate proceeding, Morgano had filed a claim for children's awards against Rotante in her capacity as executor of DonnaMarie's estate. In support of that claim, Morgano alleged, *inter alia*, that: (1) "the beneficiary designations on at least two large assets owned by [DonnaMarie] at the time of her death *** were changed from the children or [DonnaMarie's] Trust, of which the children are beneficiaries, to [DonnaMarie's] parents; (2) [a]s a result "it is possible that there will be little or no other funds left for the care and support of [DonnaMarie's] minor daughters as the Executor of [DonnaMarie's] estate [Rotante], who is also the trustee, hates [Morgano]; (3) [d]espite the passage of 6 months, little or no information has been tendered by the Executor *** to counsel for the children; and (4) "[n]o money for support has been provided for the benefit of the children from their Mother's estate or trust to this date." Moreover, in the probate proceeding, Rotate filed a petition to declare her successor trustee of DonnaMarie's trust. In opposition to Rotante's petition, Morgano asserted as an affirmative defense that Rotante had breached her fiduciary duty to the children.

¶ 40 The claims being adjudicated in the probate proceeding were "substantially similar" to those raised in Morgano's counter-petition. In both cases, Morgano claimed that Rotante had diverted funds belonging to DonnaMarie's trust to herself, failed to support Giovanna and Isabella from assets belonging to the trust and the estate, and converted assets that were to be held for the benefit of the children. Moreover, in the probate proceeding, Rotante asked to be

named successor trustee of DonnaMarie's Trust, thereby subjecting herself to the probate court's jurisdiction in her capacity as trustee, and bringing before the probate court issues relating to her duties as trustee and her execution of those duties. At the time Morgano filed his counter-petition in the instant action, the probate proceeding had been pending for more than a year, and the probate court had already made findings of fact relevant to issues raised in Morgano's counter-petition. The probate court's determination of these factual issues, and its resolution of Morgano's allegation that Rotante had breached her fiduciary duty, would likely have preclusive effect in the instant action. Accordingly, the dismissal of Morgano's counter-petition was appropriate because it would avoid duplicative litigation. *Kellerman*, 112 Ill. 2d at 447.

¶ 41 Morgano argues that the trial court erred in dismissing his counter-petition for several reasons, none of which has merit. First, Morgano argues that the probate court does not have jurisdiction to hear issues relating to DonnaMarie's trust because a probate proceeding addresses only matters relating to an estate, and "the funds held in [DonnaMarie's] Trust are outside the Estate." Contrary to Morgano's suggestion, however, circuit courts presiding over probate matters are not courts of limited jurisdiction. "With the exception of the circuit court's power to review administrative action, which is conferred by statute, a circuit court's subject matter jurisdiction is conferred entirely by our state constitution." *Belleville Toyota, Inc. v. Toyota USA Sales, Inc.*, 199 Ill. 2d 325, 334 (2002). In 1964, the judicial article of the Illinois Constitution was amended, eliminating the prior system of courts with limited statutory jurisdiction and instituting a single, integrated system of courts of general jurisdiction. *Id.* at 337. Thus, subject matter jurisdiction now exists as a matter of law if the matter brought before the court by the plaintiff or petitioner is justiciable, *i.e.*, if it presents a definite and concrete controversy touching upon the legal relations of parties having adverse legal interests. *In re M.W.*, 232 Ill. 2d 408, 424

(2009); see also *Belleville Toyota*, 199 Ill. 2d at 335. Prior to the 1964 constitutional amendments, probate courts had limited jurisdiction. Ill. Const. 1870, art. VI, sec. 20; *Matter of Tarr's Estate*, 37 Ill. App. 3d 915, 917 (1976). However, the amended judicial article abolished probate courts, removing the restrictions on the jurisdiction of court sitting in probate proceedings. *People ex rel. Dahm v. Corcoran*, 39 Ill. 2d 233, 234 (1968); *Tarr's Estate*, 37 Ill. App. 3d at 917. Thus, contrary to Morgano's claim, the probate court would have subject matter jurisdiction over all justiciable controversies raised in the probate proceeding. Moreover, by petitioning the probate court to appoint her as successor trustee of DonnaMarie's trust, Rotante subjected herself to the jurisdiction of the probate court in her capacity as trustee. Accordingly, the probate court would have jurisdiction to adjudicate the claims raised in Morgano's counter-petition, including claims relating to the trust, trust accounting, and Rotante's duties as trustee. See, *e.g.*, *Corcoran*, 39 Ill. 2d 233; *Eiseman v. Lerner*, 64 Ill. App. 3d 185 (1978); *In re Estate of Burmeister*, 2013 IL App (1st) 121776.

¶ 42 Morgano also argues that the trial court erred in dismissing his counter-petition because certain claims raised in that petition, such as claims for child support and damages for breach of fiduciary duty, were not raised in the probate proceeding. However, for purposes of section 2-619(a)(3), the question is "not whether the legal theory, issues, *** or relief sought materially differ between the two actions." *Terracom Development Group*, 209 Ill. App. 3d at 762. Rather, the question is "whether relief is sought on substantially the same set of facts" (*Terracom Development Group*, 209 Ill. App. 3d at 762) and whether the litigants' interests in each the two proceedings are sufficiently similar such that the dismissal of one of the actions would avoid duplicative litigation (*Kellerman*, 112 Ill. 2d at 447; *Katherine M. v. Ryder*, 254 Ill. App. 3d 479, 487 (1993)). Here, issues relating to the trust, to Rotante's alleged breach of fiduciary duty, and

to Rotante's alleged conversion and failure to support Giovanna and Isabella from assets belonging to the trust and the estate were all raised in in the pending probate proceedings. Accordingly, the trial court's dismissal of similar claims in the instant action avoided duplicative litigation. Moreover, the probate court's resolution of these issues would likely have preclusive effect on Morgano's counterclaim in this action. Thus, dismissal of Morgano's counterclaim under section 2-619(a)(3) was not an abuse of discretion.[10]

¶ 43 Morgano correctly notes that, in dismissing his counter-petition, the trial court erroneously suggested that it lacked jurisdiction to decide the issues raised in the counter-petition. However, we review the trial court's judgment, not its rationale, and we may affirm on any basis that the record supports, regardless of whether the lower court's reasoning was correct. *Leonardi*, 168 Ill. 2d at 97; *Kubicheck*, 2013 IL App (3d) 110157, ¶ 28, n.3. Accordingly, if it would not have been an abuse of discretion for the trial court to dismiss Morgano's counter-petition under section 2-619(a)(3), we may affirm the court's judgment despite any errors in the trial court's reasoning. See *Kubicheck*, 2013 IL App (3d) 110157, ¶ 28, n.3; *People v. Smith*, 406 Ill. App. 3d 747, 752 (2010). For the reasons set forth above, we hold that the trial court acted within its discretion in dismissing the counter-petition.

[10] Morgano also asserts, without citation to authority, that only the trial court in the instant matter "has jurisdiction to hear child support and college issues under the [Act]." We disagree. As noted above, probate courts are courts of general jurisdiction. Moreover, our appellate court has held that probate courts have the authority under certain circumstances to modify existing child support awards against a deceased spouse under the Act. See *In re Estate of Hudson*, 385 Ill. App. 3d 1112, 1116-17 (2008). Section 510(d) of the Act "contemplates child support operating in tandem with other claims against the estate according to principles of equity." *Estate of Hudson*, 385 Ill. App. 3d at 1116. "An existing obligation to pay for support * * * is not terminated by the death of a parent." 750 ILCS 5/510(d) (West 2014). "When a parent obligated to pay support or educational expenses, or both, dies, the amount of support or educational expenses, or both, may be enforced, modified, revoked or commuted to a lump sum payment, as equity may require, and that determination may be provided for at the time of the dissolution of the marriage or thereafter." *Id.* Although it does not specifically mention the Probate Act, section 510(d) "gives the trial court broad powers to craft the continuing award of child support in light of other equitable matters in the probate proceeding." *Estate of Hudson*, 385 Ill. App. 3d at 1117.

¶ 44 In any event, the trial court did not appear to base its dismissal of Morgano's counterclaim on jurisdictional grounds. The court stated that it was not going to "get into" the issues raised in Morgano's counter-petition "when there [was] an ongoing probate matter [pending] in Cook County." Thus, despite its erroneous, stray comment on jurisdiction, the court appeared to recognize and properly apply its discretion to dismiss the counter-petition under section 2-619(a)(3).

¶ 45 3. Rotante's Cross-Appeal

¶ 46 Rotante has cross-appealed the trial court's denial of her requests for visitation with Giovanna and Isabella in Chicago during the school year and for and for two weeks of visitation in Connecticut every summer. In denying Rotante's request for visits in Connecticut, the trial court stated, "I'm not going to get into the going out of state. *** [T]hat really opens up some cans of worms, some concerns for me." Regarding visitation in Chicago during the school year, the trial court stated, "I don't want to get into Christmas and spring break because the father may be taking trips, they may be traveling and those types of things, I think we can run into a lot of trouble." Rotante argues that the trial court's decisions on these matters were against the manifest weight of the evidence. According to Rotante, the girls were old enough to travel to Connecticut, DonnaMarie felt that it was important for the girls to visit their grandparents in Connecticut, and there was "nothing in the record that should have raised any concerns for the trial court." Regarding visitation in Chicago during the school year, Rotante maintains that the trial court focused on holidays such as Christmas and spring break, but there are many other times during which visitation could be scheduled during the school year (which lasts nine months). Rotante argues that the trial court did not identify, and the record did not reveal, any

concerns that should have prevented Rotante from visiting the girls at least once during the school year.

¶ 47 As an initial matter, we must determine the standard of review that governs our analysis of this issue. Rotante presumes that the visitation schedule ordered by the trial court should be reviewed under the manifest weight of the evidence standard. We disagree. Although neither section 607 nor the relevant case law prescribes any particular standard of review for this issue,[11] cases reviewing a trial court's visitation schedule for noncustodial parents are instructive. Those cases rule that "[a] trial court has broad discretion in ordering visitation of children with their parents [under the Act] and such a determination should not be modified on review unless there is manifest injustice to a parent or child." *In re Marriage of Rink*, 156 Ill. App. 3d 252, 259 (1985); see also *In re Marriage of Brophy*, 96 Ill. App. 3d 1108 (1981); *In re Marriage of Lawver*, 82 Ill. App. 3d 198 (1980). A trial court has at least as much discretion when fashioning a visitation schedule for a grandparent. Thus, we will apply the same deferential standard in reviewing the trial court's visitation schedule in this case.

¶ 48 We cannot say that the trial court abused its discretion or inflicted a "manifest injustice" upon Rotante, Giovanna, or Isabella by limiting Rotante's visitation to summer visits in Chicago. The trial court allowed sufficient contact between Rotante and the girls to foster the continuation of their relationship and to avoid the harm that the girls would suffer without Rotante being in their lives. Moreover, it is important to consider that allowing any visitation with Rotante contravened the wishes of the girls' father, who is a fit parent. Thus, the court had to balance the

[11] The statute provides that a motion to modify a grandparent visitation order (which may not be filed earlier than two years after the order is filed absent certain special circumstances) may not be granted unless the court finds by clear and convincing evidence that there has been a change in circumstances since the order was issued and that the modification is necessary to protect the mental, physical, or emotional health of the child. 750 ILCS 5/607(a-7)(1)-(2) (West 2014). However, the statute does not address the standard governing the review of a grandparent visitation schedule on direct appeal.

father's interests in raising his children against the girls' interest in seeing Rotante. It was not arbitrary or unreasonable for the trial court to conclude that allowing the girls to travel out of State to visit Rotante or allowing visits in Chicago during the school year might upset that balance. The court could have reasonably found that limiting visits with Rotante to summertime visits in Chicago would strike the optimal balance among all the parties' interests.

¶ 49 CONCLUSION

¶ 50 The judgment of the circuit court of Will County is affirmed.

¶ 51 Affirmed.