

Nos. 1-10-1234 and 1-10-1977 (consolidated)

Notice: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

IN THE APPELLATE COURT
OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN RE: THE MARRIAGE OF)	Appeal from the
)	Circuit Court of
MARILYN AYALA,)	Cook County
)	
Petitioner-Appellee,)	No. 08 D 04357
)	
and)	Honorable William Boyd,
)	Judge Presiding.
VICTOR AYALA,)	
)	
Respondent-Appellant.)	

JUSTICE KARNEZIS delivered the judgment of the court.
Presiding Justice Cunningham and Justice Connors concurred in the judgment.

ORDER

HELD: Trial court's judgment for dissolution of marriage was proper where: (1) evidence of the parties' residency was established; (2) respondent was found to be in default for failing to comply with discovery; and, (3) petitioner testified as to the parties' assets. Further, this court's order denying respondent's motion for a stay pending appeal was proper

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pursuant to section 413(a) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/413(a) (West 2008)).

BACKGROUND

Petitioner Marilyn Ayala and respondent Victor Ayala were married in 2000. They had two children; Lauren, born on February 7, 2002, and Rose, born on June 3, 2004. Petitioner filed her petition for dissolution of marriage on May 5, 2008. After a lengthy and cantankerous pre-trial and discovery process, the trial court entered its default judgment for dissolution of marriage on April 5, 2010, from which respondent now appeals.

Petitioner's petition for dissolution of marriage first alleged that the parties were currently residents of Cook County, Illinois and had been for the past 90 days. Petitioner also sought in the petition sole custody of the parties' children, maintenance and support from respondent and an equitable share of the marital property.

Respondent was served with the petition and summons however, he failed to respond. Petitioner filed a motion for default judgment on July 30, 2008. In the motion, she alleged that although respondent had been served with a copy of the petition and summons, he had not filed an appearance or response to the petition within 30 days.

On August 7, 2008, respondent filed a *pro se* appearance. An agreed order was entered into, which provided that respondent had 21 days to respond to the petition. Petitioner then served respondent with interrogatories, a notice to produce and a blank Rule 13.3 disclosure statement on September 4, 2008. Petitioner also served

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respondent with a petition for temporary support and other relief.

On September 5, 2008, counsel for respondent filed an appearance.

Respondent then filed a verified response to the petition for dissolution of marriage. His response admitted the residency allegations in the petition. Respondent also filed a response to the petition for temporary support and other relief. Shortly thereafter, petitioner sent respondent's counsel a letter noting that respondent had not responded to her September 4, 2008, discovery requests. Petitioner subsequently filed a motion requiring respondent to seek employment and maintain a job diary.

After a hearing on October 29, 2008, the court ruled on the petition for temporary support and other relief. The order provided in part that either party could not borrow against any line of credit without the written approval of the other party, and that respondent should attempt to refinance his business loans.

Respondent then provided petitioner with a Rule 13.3 disclosure statement and responses to interrogatories. However, petitioner notified respondent that his answers were inadequate and incomplete, and requested respondent to provide complete answers.

On December 30, 2008, petitioner filed a petition for rule to show cause against respondent for violating the court's October 29, 2008, order. The petition alleged that respondent withdrew over \$90,000 from the parties' line of credit on November 12, 2008. The petition also alleged that respondent had made several additional withdrawals from various properties' lines of credit either without petitioner's

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authorization or withdrew an amount that exceeded the amount she authorized. The petition further alleged that respondent had refused to provide documents relating to his attempts to refinance his business loans.

After a hearing on the petition for rule to show cause and on the petition requiring respondent to seek employment and maintain a job diary, the trial court found respondent to be in indirect civil contempt. Specifically, the court found that respondent had withdrawn over \$90,000 from a line of credit without petitioner's authority and had failed to provide petitioner with copies of the communications related to his attempts to refinance his business loans. The court ordered respondent to repay the money in order to purge himself of the contempt. Also, on that day, the court ordered respondent to seek employment and maintain a job diary. Subsequently, respondent's counsel withdrew on April 10, 2009.

On June 8, 2009, petitioner filed a second petition for rule to show cause and for other relief. The petition alleged that respondent failed to comply with several of the court's orders to provide petitioner with various documents including those relating to the parties' real estate holdings, respondent's life insurance and beneficiary information, respondent's employment efforts and, his alleged failure to pay petitioner's attorney fees. The petition further alleged that respondent failed to comply with the court's orders regarding his parenting time with the children.

Respondent thereafter obtained new counsel, Maria Jaffe, who filed an appearance on his behalf. The court then granted respondent 21 days to file his

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response to the petition for rule to show cause.

Respondent filed a response to the petition for rule to show cause on July 20, 2009, however, his response is not in the record on appeal. Shortly thereafter, on July 28, 2009, petitioner sent respondent a letter describing the documents that still had not been produced in response to petitioner's notice to produce. At a hearing on September 25, 2009, the court ordered respondent to comply with all outstanding discovery requests within 28 days, or he will be held in default and his pleadings will be stricken. The order also allowed petitioner to file a written motion for sanctions if respondent did not comply.

On October 2, 2009, petitioner filed a motion for sanctions pursuant to Supreme Court Rule 219 (eff. January 1, 1996). Respondent did not file a response to the motion for sanctions and did not comply with discovery.

At a hearing on December 2, 2009, the court granted petitioner's motion for sanctions and held respondent in default on all issues, other than custody and visitation. The court also struck respondent's pleadings and barred respondent from testifying or presenting any evidence or witnesses at the prove-up hearing. The court then set a date for a default prove-up hearing.

Subsequently, counsel for respondent filed a notice to withdraw. At a hearing on April 5, 2010, a law clerk from respondent's counsel's office notified the court that respondent's counsel was unavailable and requested a continuance. The court declined to continue the matter and denied counsel's motion to withdraw. The court

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then conducted the prove-up hearing. Petitioner testified as to the parties assets and income. Following her testimony, the court entered the judgment for dissolution of marriage. Subsequently, the court granted respondent's counsel's motion to withdraw.

Respondent's current counsel filed a notice of appeal on May 5, 2010. Respondent then filed a motion in this court for a stay, which was subsequently denied. On June 16, 2010, the trial court entered a qualified domestic relations order. Respondent then filed a second notice of appeal on July 13, 2010. The appeals were subsequently consolidated.

ANALYSIS

On appeal, respondent contends: (1) the trial court erred in entering the judgment for dissolution of marriage where no evidence of the parties' residency was presented; (2) the trial court erred in finding respondent in default as a result of his failure to comply with petitioner's discovery requests; (3) the trial court erred in entering the judgment for dissolution of marriage because petitioner's testimony was not supported by documentation; and, (4) the judgment for dissolution of marriage should have been stayed pending appeal.

Respondent first contends that the residency requirement of section 401(a) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/401(a) (West 2008)) was not met because petitioner did not present any proof that either party was an Illinois resident for the required 90-day time period.

Section 401(a) of the Act provides in part:

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"[t]he court shall enter a judgment of dissolution of marriage if at the time the action was commenced one of the spouses was a resident of this State * * * and the residence * * * had been maintained for 90 days next preceding the commencement of the action." 750 ILCS 401(a) (West 2008).

Here, petitioner's petition for dissolution of marriage alleged that the parties "are now and have been for 90 days next preceding this matter residents of Cook County, Illinois." Respondent's verified response admitted the allegation; however, the response was subsequently stricken as a sanction for failure to comply with discovery rules. Respondent maintains that because his response was stricken, his admission no longer existed and petitioner was required to prove residency, which she failed to do at the prove-up hearing. We disagree. When respondent's response was stricken, it was as if he had filed no response at all. It is well settled that when no answer is filed, all well-pleaded facts are admitted. Florsheim v. Travelers Indemnity Co., 75 Ill. App. 3d 298, 308 (1979). Therefore, petitioner's allegation that the parties were residents of Illinois for the required time period, was deemed admitted. Petitioner was not required to subsequently prove this fact at the prove-up hearing. We find that the residency requirement of section 401(a) of the Code was satisfied.

Next, respondent contends the trial court erred in finding him in default as a result of his failure to comply with petitioner's discovery requests. However, respondent's argument fails to specifically argue how the trial court's sanction was an

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abuse of discretion. Instead, respondent generally contends that "[t]here was no valid reason the trial court needed to sanction [respondent] so severely" and "[t]he trial court's maximum sanction, a default judgment, was excessive."

Petitioner's motion for sanctions alleged that respondent either failed to comply with discovery requests or complied with requests but respondent's answers were incomplete. As a result, the trial court granted petitioner's motion, holding respondent in default on all issues, other than custody and visitation, for his failure to comply with discovery.

The imposition of sanctions is within the discretion of the trial court, and this court will not disturb a trial court's decision on appeal absent a clear abuse of that discretion. Peal v. Lee, 403 Ill. App. 3d 197, 203 (2010). To determine whether the trial court abused its discretion, we consider the following factors: (1) the surprise to the adverse party; (2) the prejudicial effect of the proffered testimony or evidence; (3) the nature of the testimony or evidence; (4) the diligence of the adverse party in seeking discovery; (5) the timeliness of the adverse party's objection to the testimony or evidence; and (6) the good faith of the party offering the testimony or evidence. Shimanovsky v. General Motors Corp., 181 Ill. 2d 112, 120 (1998).

Here, as noted above, respondent fails to specifically argue how the trial court's order of default was an abuse of discretion. Further, respondent's brief fails to include the above factors or any discussion of the above factors. Respondent has made very little effort to convince this court that the trial court's order was an abuse of discretion.

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The record establishes that respondent failed to comply with numerous discovery requests, requiring petitioner to file two petitions for rule to show cause, which still did not result in respondent's full compliance. Ordering respondent in default as a result of his deliberate refusal to comply with discovery requests was not an abuse of discretion.

Next, respondent contends that the trial court erred in entering the judgment for dissolution of marriage because there was no documentation to support petitioner's testimony.

A trial court's determination of the value of marital assets in a division of property proceeding will not be disturbed on appeal unless it is against the manifest weight of the evidence. In re Marriage of Vancura, 356 Ill. App. 3d 200, 203 (2005). We review the trial court's determination on the ultimate division of marital property under an abuse of discretion standard. In re Marriage of Hubbs, 363 Ill. App. 3d 696, 700 (2006).

Here, respondent's contentions in his brief consist of one page of argument and fail to provide this court with any specific reasons as to why the trial court's order was erroneous. The trial court's judgment noted that petitioner testified about the parties' assets and liabilities "to the extent that she knows them" and that her knowledge was "limited by the fact that [respondent] refused to comply with her discovery requests despite being given numerous opportunities to do so." Essentially, respondent complains the judgment was erroneous because petitioner's testimony was not supported by the very documentation that respondent failed to provide, and for which he was ultimately held to be in default. Under these circumstances, we find the trial

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court's judgment proper.

Lastly, respondent contends that the trial court's judgment order should have been stayed pending the appeal. Respondent argues that section 413(a) of the Act violates the Illinois Constitution's separation of powers clause (Ill. Const. 1970, Art. II, §1) because it contradicts Illinois Supreme Court Rule 305 (155 Ill. 2d R. 305), which provides for the right to a stay.

Section 413(a) of the Act provides in part:

"An order requiring maintenance or support of a spouse or a minor child or children entered under this Act or any other law of this State shall not be suspended or the enforcement thereof stayed pending the filing and resolution of post-judgment motions or an appeal." 750 ILCS 5/413(a) (West 2008).

We point respondent to the numerous cases that our research uncovered in which this court found that section 413(a) precluded a stay. For example, In re Marriage of Petersen, 319 Ill. App. 3d 325, 343-44 (2001) and In re Marriage of Ackerley, 333 Ill. App. 3d 382, 400 (2002), both concluded that section 413(a) precluded the court from entering a stay from an order requiring maintenance or child support. We choose to follow this established precedent and decline to follow respondent's contention.

Accordingly, we affirm the judgment of the trial court.

Affirmed.

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