

2011 IL App (2d) 100851-U
No. 2—10—0851
Order filed August 10, 2011

NOTICE: This order was filed under Supreme Court Rule 23(c)(2) 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
SECOND DISTRICT

<i>In re</i> PARENTAGE of M. R. P.)	Appeal from the Circuit Court
)	of Lake County.
)	
)	No. 06—F—1024
)	
)	Honorable
(Phillip J. Avelar, Petitioner-Appellant, v.)	Jorge L. Ortiz,
Michelle L. Parsons, Respondent-Appellee).)	Judge, Presiding.

JUSTICE BOWMAN delivered the judgment of the court.
Justices Hutchinson and Zenoff concurred in the judgment.

Held: (1) We dismissed petitioner's appeal insofar as he challenged a contempt judgment, as the judgment was immediately appealable but petitioner did not appeal within 30 days after the judgment or the ruling on the one postjudgment motion that extended his time to appeal; (2) we affirmed the denial of petitioner's section 2—1401 petition, as petitioner did not provide an official record of the evidentiary hearing by which we could determine whether the court's ruling was against the manifest weight of the evidence.

ORDER

¶ 1 Petitioner, Phillip J. Avelar, appeals *pro se* from an order (1) denying his motion to reconsider a judgment holding him in indirect civil contempt of court; and (2) denying his petition

under section 2—1401 of the Code of Civil Procedure (735 ILCS 5/2—1401 (West 2010)).¹ We dismiss the appeal in part and affirm in part.

¶ 2 On May 30, 2007, on the petition of respondent, Michelle L. Parsons, the trial court entered a judgment adjudicating petitioner the biological father of the minor, M. R. P.; awarding respondent residential custody of M. R. P.; and ordering petitioner to pay \$700 monthly child support. On October 1, 2007, respondent petitioned to increase child support. On November 27, 2007, after an evidentiary hearing, the trial court ordered petitioner to pay \$1,267 monthly child support and \$600 monthly toward day-care expenses. The judgment states that the latter figure was 30% of the day care costs.

¶ 3 On September 25, 2009, respondent filed a petition for a rule to show cause and other relief, alleging that petitioner had willfully failed to pay child support and day-care expenses as required by the November 27, 2007, judgment. In response, petitioner alleged in part that, at the hearing that resulted in the \$600 per month day-care obligation, respondent had deliberately made misleading statements, so that petitioner was now paying far more than 30% of the actual day-care expenses.

¶ 4 On December 21, 2009, after an evidentiary hearing, the trial court found petitioner in indirect civil contempt for having willfully failed to pay \$13,937 in child support and \$2,446.80 in day-care expenses, and it ordered petitioner to pay a purge amount of \$8,191.50. The judgment allowed respondent to file a petition for attorney fees.

¹Petitioner was the respondent in the parentage and custody proceedings that led to the contempt judgment. He also filed a petition under section 2—1401, a separate cause of action (see *Sarkissian v. Chicago Board of Education*, 201 Ill. 2d 95, 102 (2002)), thus making him the petitioner in that case. For convenience, we refer to him as “petitioner.”

¶ 5 On January 7, 2010, respondent filed her fee petition. On January 20, 2010, petitioner moved to reconsider the contempt order of December 21, 2009. On January 22, 2010, the trial court entered an order that, as pertinent here, awarded respondent \$1,071.50 in attorney fees relating to the contempt proceeding and denied petitioner's motion to reconsider the contempt judgment. Petitioner did not file a notice of appeal within 30 days after January 22, 2010.

¶ 6 On February 11, 2010, petitioner filed his section 2—1401 petition to vacate the November 27, 2007, judgment. The petition alleged that the judgment had been procured by fraud, in that respondent had intentionally misled the court by testifying that day-care for the minor had cost \$2,000 per month. According to the petition, in January 2009, petitioner had obtained invoices from the day-care facility proving that, since November 27, 2007, the monthly cost had never been as much as \$2,000 and, in 2008, averaged only \$614.83.

¶ 7 On February 16, 2010, petitioner filed a "Motion to correct order entered on January 22, 2010," alleging that, on January 22, 2010, there had been no hearing on his motion to reconsider the contempt judgment and that the hearing had been set for February 16, 2010. The motion requested that the January 22, 2010, order be "corrected" accordingly.

¶ 8 On July 26, 2010, the trial court entered an order stating that, on that day, the court had heard evidence and argument on petitioner's section 2—1401 petition and several other matters. The order stated in part, "[Petitioner's] motion to reconsider contempt on Jan. 20, 2010 is denied." It also denied petitioner's section 2—1401 petition. The record contains no transcript of the hearing or substitute for a transcript.

¶ 9 On August 24, 2010, petitioner filed a notice of appeal from "[t]he order entered July 26, 2010 denying [petitioner's] Motion to Reconsider and the Order of December 21, 2009, finding

[petitioner] in contempt of court.” No other notice of appeal appears in the original common-law record. However, on January 5, 2011, petitioner moved this court to “amend” the notice of appeal in the original record so as to include another notice of appeal that he had also filed on August 24, 2010. Petitioner’s motion included a copy of this notice of appeal, which was taken from “[t]he order entered July 26, 2010 denying [petitioner’s] Motion to Vacate the child support order of November 27, 2010” and asked this court to hold the November 27, 2007, judgment void. This court denied petitioner’s motion, but we took judicial notice that both notices of appeal had been “consolidated into one appeal.”

¶ 10 We turn first to petitioner’s appeal from the contempt order of December 21, 2009. We must dismiss the appeal. We have a duty to consider our jurisdiction over an appeal and to dismiss the appeal if jurisdiction is lacking. A timely notice of appeal is mandatory and jurisdictional. *Secura Insurance Co. v. Illinois Farmers Insurance Co.*, 232 Ill. 2d 209, 213 (2009). The notice of appeal must be filed “within 30 days after the entry of the final judgment appealed from, or, if a timely posttrial motion directed against the judgment is filed ***, within 30 days after the entry of the order disposing of the last pending postjudgment motion directed against that judgment.” Ill. S. Ct. R. 303(a)(1) (eff. May 30, 2008). A party is ordinarily entitled to only a single postjudgment motion, and a repetitive postjudgment motion does not extend the time in which to appeal. *In re Marriage of Wonderlick*, 259 Ill. App. 3d 692, 694 (1994).

¶ 11 Here, the contempt judgment was immediately appealable. See Ill. S. Ct. R. 304(b)(5) (eff. Feb. 26, 2010). Petitioner timely filed the one postjudgment motion to which he was entitled; the trial court denied that motion on January 22, 2010. However, petitioner did not file a notice of appeal from the contempt judgment until August 24, 2010, obviously beyond the time limit.

Although he did file his notice of appeal within 30 days after the trial court denied his motion to “correct” the contempt judgment, that second motion did not extend the time in which to appeal. Therefore, we dismiss the appeal from the contempt judgment.

¶ 12 We turn to petitioner’s appeal from the denial of his section 2—1401 petition, which challenged the November 27, 2007, judgment as void because of fraud. Petitioner argues that the trial court erred in denying his petition, because he showed that respondent procured the judgment by fraud. We note that, after hearing evidence, the trial court rejected petitioner’s claim. Thus, in effect, petitioner is arguing that the judgment is against the manifest weight of the evidence.

¶ 13 The fatal problem with petitioner’s argument is that the record contains no transcript of the hearing on the section 2—1401 petition and no substitute for a transcript, *i.e.*, a certified bystander’s report or an agreed statement of facts. See Ill. S. Ct. R. 323(c), (d) (eff. Dec. 13, 2005). Petitioner as appellant has the burden to show that the trial court erred, and, without a record sufficient to demonstrate that the judgment was against the manifest weight of the evidence, we must presume that the judgment was correct. See *Han v. Holloway*, 408 Ill. App. 3d 387, 390 (2011); *Lah v. Chicago Title Land Trust Co.*, 379 Ill. App. 3d 933, 938-39 (2008). Therefore, we must reject petitioner’s contention that the judgment was against the manifest weight of the evidence.

¶ 14 The appeal from the judgment of the circuit court of Lake County is dismissed in part, and the judgment is affirmed in part.

¶ 15 Appeal dismissed in part and affirmed in part.