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IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN RE THE MATTER OF ANYA Y.,)	Appeal from the
)	Circuit Court of
Minor-Appellant,)	Cook County, Illinois,
)	Domestic Relations
MANDY M. YOUNG,)	Division.
)	
Petitioner-Appellant,)	Nos. 08 D 1157 consolidated
)	with 08 OP 5825
)	
and VICTOR R. YOUNG,)	Honorable
)	Debra Walker,
Respondent-Appellee.)	Judge Presiding.

JUSTICE FITZGERALD SMITH delivered the judgment of the court.
Justices PUCINSKI and STERBA concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court did not err in rejecting the appellants' proposed bystander's report where the report was replete with inaccuracies. Accordingly, without the benefit of a trial transcript, or any suitable substitute for a report of the proceedings, we must presume that the circuit court's order granting sole custody of the minor child to her biological father had a sufficient factual basis and that it conforms with the law.

¶ 2 This cause arises from cross-petitions for dissolution of marriage and for temporary and permanent custody of the minor, Anya M. (hereinafter Anya), filed in the circuit court by the

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petitioner-appellant, Mandy M. Young, the minor's mother (hereinafter Mandy), and respondent-appellee, Victor R. Young, Anya's biological father (hereinafter Victor). After the parties filed their pleadings, the case proceeded to a bench trial on the issue of custody and visitation of Anya. At trial, Mandy was represented by attorneys of the Legal Aid Bureau, the minor was represented by an appointed guardian *ad litem*, and Victor proceeded *pro se*. After a four day trial, at which no court reporter was present, the circuit court granted sole custody of Anya to Victor with visitation rights to Mandy.¹ Both Mandy and the guardian *ad litem*, representing the child, now appeal contending that the placement of Anya in the sole custody of Victor does not serve her best interests and is contrary to the manifest weight of the evidence. They argue that the circuit court failed to give adequate consideration to the statutory factors (750 ILCS 5/602(a) (West 2002))² that should have weighed in Mandy's favor and instead relied on irrelevant facts to

¹The circuit court elaborated its findings in a 44-page written memorandum.

²According to section 602(a) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/602(a) (West 2002)), a court must determine custody in accordance "with the best interest of the child," considering all of the following "relevant" factors:

- "(1) the wishes of the child's parent or parents as to his custody;
- (2) the wishes of the child as to his custodian;
- (3) the interaction and interrelationship of the child with his parent or parents, his siblings and any other person who may significantly affect the child's best interest;
- (4) the child's adjustment to his home, school and community;
- (5) the mental and physical health of all individuals involved;
- (6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person;
- (7) the occurrence of ongoing or repeated abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986, whether directed against the child or directed against another person;
- (8) the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child;
- (9) whether one of the parents is a sex offender; and

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conclude that it was in Anya's best interest to live with her father. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 From the outset, we note that Mandy and the guardian *ad litem* have failed to provide us a sufficient record on appeal. Although this case involved a three and a half day bench trial, where seven witnesses (including Victor and Mandy) were called to the stand and numerous exhibits admitted into the trial record, the record before us does not contain the trial transcript, any exhibits, nor for that matter, any report of the proceedings below. Rather, the record includes only the common-law record containing the parties' pleadings and the circuit court's written findings and orders.

¶ 4 Our supreme court has repeatedly held that the burden is on the appellant to present a sufficiently complete record of the trial proceedings to support a claim of error on appeal.

Corral v. Mervis Industries, Inc., 217 Ill. 2d 144, 156 (2005); *Webster v. Hartman*, 195 Ill. 2d 426, 432 (2001); *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391–92 (1984); see also *Dargis v. Paradise Park, Inc.*, 354 Ill. App. 3d 171, 176 (2004). "From the very nature of an appeal it is evident that the court of review must have before it the record to review in order to determine whether there was the error claimed by the appellant." *Foutch*, 99 Ill.2d at 391. Without an adequate record preserving the claimed error, the court of review must presume the trial court's order had a sufficient factual basis and that it conforms with the law. *Corral*, 217 Ill. 2d at 157; *Webster*,

(10) the terms of a parent's military family-care plan that a parent must complete before deployment if a parent is a member of the United States Armed Forces who is being deployed."

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195 Ill. 2d at 432; *Foutch*, 99 Ill.2d at 392. Accordingly, in the absence of a complete record supporting the plaintiff's claim of error, we will resolve "[a]ny doubts which may arise from the incompleteness of the record *** against the appellant." *Foutch*, 99 Ill. 2d at 392.

¶ 5 In this case, Mandy and the guardian *ad litem* challenge various factual findings made by the circuit court during the bench trial, contending that the court's grant of full custody of Anya to Victor was against the manifest weight of the evidence. However, without the benefit of a trial transcript, we have no basis to evaluate these claims. For example, the guardian *ad litem* argues that the circuit court "seriously misconstrued" the testimony regarding the criminal history of Mandy's new boyfriend (Al Fontana) in determining that the boyfriend poses a threat to Anya. The guardian *ad litem* points out that contrary to Victor's "actual testimony" at trial that "an unidentified off-duty police officer robbed drug dealers and kept drugs at the gym that Al [Mandy's new boyfriend] owns," the trial court incorrectly found that "Victor testified that Mr. Fontana was convicted of posing as a cop and robbing drug dealers and then storing the drugs in his business, Al's Gym." We cannot evaluate this claim, however, without a report of the proceedings below as we cannot know what Victor actually testified to at trial. Nor can we determine whether the trial court gave proper weight and credibility to Victor's testimony without the benefit of a trial transcript.

¶ 6 We similarly cannot evaluate Mandy's contention that witness testimony established that Victor's behavior demonstrated ongoing and repeated abuse, or in the very least, violence or threat of violence toward Mandy. While we acknowledge that the record contains a plenary order of protection entered against Victor in the fall of 2008, immediately prior to Mandy's filing of a

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petition for dissolution of marriage, without the benefit of a trial transcript and the various alleged and conflicting testimony by Victor and Mandy regarding their apparently violent and tumultuous relationship, we cannot determine whether the trial court, properly weighed the credibility of these two witnesses in favor of Victor. In that regard, we observe that in coming to its credibility determination, the trial court did have the benefit of observing the parties' demeanor during trial.

¶ 7 For similar reasons, we cannot evaluate Mandy's argument that in coming to its decision, the circuit court failed to consider the parents' expressed interest at sharing custody, and Anya's close and loving relationship with her half-brother, who lives with Mandy. From the record before us, we cannot determine which, if any, witnesses testified to this information and to what extent the trial court believed one witness over another in resolving this factor in favor of Victor. Nor can we evaluate Mandy's contention that the circuit court's conclusion that Anya has more stability with Victor, and that Victor is more able than Mandy to facilitate a relationship between Anya and the parents, is against the manifest weight of the evidence. Since all of these contentions are based upon alleged errors committed by the circuit court during the bench trial, and we are without a report of those proceedings, we must presume that the circuit court's order granting sole custody to Victor had a sufficient factual basis and that it conforms with the law.

Corral, 217 Ill.2d at 157; *Webster*, 195 Ill.2d at 432; *Foutch*, 99 Ill.2d at 392.

¶ 8 Mandy and the guardian *ad litem* nevertheless urge us to consider the proposed bystander's report that they unsuccessfully attempted to certify before the circuit court and which we permitted them to file as a supplemental record on appeal. Unfortunately, we are not at

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liberty to do so.

¶ 9 It is well-settled that pursuant to Illinois Supreme Court Rule 323, in the absence of a report of proceedings, an appellant may use an agreed statement of facts (see Illinois Supreme Court Rule 323(d) (eff. Dec. 13, 2005) ("The parties by written stipulation may agree upon a statement of facts material to the controversy and file it without certification in lieu of and within the time for filing a report of proceedings")), or a bystander's report, certified by the circuit court. Illinois Supreme Court Rule 323(c) (eff. Dec. 13, 2005). Illinois Supreme Court Rule 323(c) (eff. Dec. 13, 2005), which authorizes the use of a bystander's report states in full:

"Procedure if No Verbatim Transcript Is Available (Bystander's Report): If no verbatim transcript of the evidence of proceedings is obtainable the appellant may prepare a proposed report of proceedings from the best available sources, including recollection. In any trial court, a party may request from the court official any audiotape, videotape or other recording of the proceedings. The court official or any person who prepared and kept, in accordance with these rules, any audiotape, videotape, or other report of the proceedings shall produce a copy of such materials to be provided at the party's expense. Such material may be transcribed for use in preparation of a bystander's report. The proposed report shall be served on all parties within 28 days after the notice of appeal is filed. Within 14 days after service of the proposed report of proceedings, any other party may serve proposed amendments or an alternative proposed report of proceedings. Within 7 days thereafter, the appellant shall, upon notice, present the proposed report or reports and any proposed amendments to the trial court for settlement and approval. The court,

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holding hearings if necessary, shall promptly settle, certify, and order filed an accurate report of proceedings. Absent stipulation, only the report of proceedings so certified shall be included in the record on appeal." Illinois Supreme Court Rule 323(c) (eff. Dec. 13, 2005).

¶ 10 In the present case, the circuit court refused to certify the proposed bystander's report. That report³ was prepared by Mandy and the guardian *ad litem* after trial and in anticipation of this appeal. However, after considering it, in a nine-page written order, explaining its ruling, the circuit court refused to certify that report, finding it to be "inaccurate based upon certain omissions, exaggerations, and inconsistencies."

¶ 11 In its written order, the circuit court explained that the trial lasted three and a half days, and included the testimony of seven witnesses and the admission of numerous exhibits. The circuit court also noted that while Mandy was represented by counsel at trial, Victor proceeded *pro se*, and the trial court observed him "taking very few notes during trial." The trial court also noted that after questioning Victor, it was apparent that although he had been provided a copy of it, "Victor had not read the proposed report and did not understand what, if anything, he was supposed to do with it." The circuit court further noted that it compared the proposed bystander's report to its own copious notes taken during trial, and found it to be replete with inaccuracies. The court then listed examples of omitted relevant and material testimony that could be deemed favorable to Victor and unfavorable to Mandy, exaggerations of witness testimony that could be deemed unfavorable to Victor, testimony taken out of context, and

³The proposed bystander's report is 113 pages long.

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testimony that was in direct conflict with the court's own trial notes, noting that these were "but a few illustrations of inaccuracies contained within the proposed report."

¶ 12 The court further noted that the proposed bystander's report frequently did not conform to the order of the testimony as recorded in the court's notes, making it practically impossible for the court to check it against its own notes. The court also pointed out that the proposed bystander's report entirely omitted several relevant sections of the proceedings, including the cross-examination and redirect examination of several witnesses, as well the court's own questions at the end of the trial and the parties' responses to them. Accordingly, the circuit court refused to certify the proposed report.

¶ 13 Contrary to the guardian *ad litem*'s contention, the circuit court was not obligated to certify the proposed bystander's report, nor did it err in its refusal to do so, where it found the proposed report to be inaccurate. See *e.g.*, *Allen v. Lin*, 356 Ill. App. 3d 405 409 (2005) (quoting *Silverstein v. Grellner*, 15 Ill. App. 3d 695, 697 (1973) ("Where the proposed report of proceedings does not accurately reflect what occurred before the court during the trial of the case, the trial judge may refuse to certify such a report"); *Stehl v. Dose*, 83 Ill. App. 3d 440, 444 (1980) ("A trial judge should never certify a report he knows to be incorrect or inaccurate."); see also *Feldman v. Hermes*, 16 Ill. App. 2d 58, 64 (1957) ("[W]e will not permit a scanty and inadequate report, showing on its face the omission of evidence, to suffice as a basis for compelling the court to reconstruct a record of the proceedings. That duty rests on the litigant and his attorney.")

What is more, if as the guardian *ad litem* contends, the proposed bystander's report submitted to the circuit court represented a *bona fide* effort by the guardian *ad litem* and Mandy's attorney to

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render an accurate and literal account of what took place during the bench trial, the proper remedy for the court's refusal to certify that report would have been to seek *mandamus*. *Mundy Landscaping & Garden v. Hish*, 187 Ill. App. 3d 164, 167 (1989) (Nash, J. specially concurring) ("[d]efendant's remedy when the trial court declined to settle and certify a report of proceedings was in *mandamus*"); *Silverstein*, 15 Ill. App. 3d at 698 ("the proper action for appellant upon a refusal to certify the proposed report would have been to seek a writ of *mandamus* to have the trial judge certify the report in question"); see also *Urmoneit v. Purves*, 33 Ill. App. 3d 939, 942 (1975) ("the remedy for failure to certify the report of proceedings would have been *mandamus*"). Alternatively, the guardian *ad litem* might also have "sought a supervisory order from our supreme court directing the trial judge to comply with its Rule 323(c)." *Mundy Landscaping & Garden*, 187 Ill. App. 3d at 167 (Nash, J. specially concurring).

¶ 14 Since, in this case, Mandy and the guardian *ad litem* did not attempt to seek any such relief, we must presume the correctness of the circuit court's judgment rather than attempt to review it without the benefit of a trial transcript or any meaningful substitute. See *Corral*, 217 Ill. 2d at 156 (holding that absent an adequate record preserving the claimed error, a reviewing court will presume that the circuit court's ruling was in conformity with the law and had a sufficient factual basis, and any doubts arising from the incompleteness of the record will be resolved against the appellant, and the order of the circuit court will be affirmed); see also *Coleman v. Windy City Balloon Port, Ltd.*, 160 Ill. App. 3d 408, 419 (1987) (citing *Mileke v. Condell Memorial Hospital*, 124 Ill. App. 3d 42, 48-49 (1984)); *In re marriage of Hofstetter*, 102 Ill. App. 3d 392, 396 (1981) ("[i]t is not the obligation of the appellate court to search the record

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for evidence supporting reversal of the circuit court. *** When portions of the record are lacking, it will be presumed that the circuit court acted properly in entry of the challenged order and that the order is supported by the part of the record not before the reviewing court"); see also *Foutch*, 99 Ill. 2d at 392.

¶ 15 For all of the aforementioned reasons, we affirm the judgment of the circuit court.

¶ 16 Affirmed.