2013 IL App (1st) 122662-U

FOURTH DIVISION
December 26, 2013

No. 1-12-2662

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN RE THE MARRIAGE OF PHILIP W. BANKS, Petitioner/Counter-Respondent-Appellant, v. SUSAN A. BANKS, Respondent/Counter-Petitioner-Appellee.	)))))))))	Appeal from the Circuit Court of Cook County No. 02 D 17687 Honorable Veronica Mathein, Judge Presiding.

JUSTICE EPSTEIN delivered the judgment of the court.
Presiding Justice Howse and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held*: Circuit court order granting the petition for payment of unpaid after school care expenses for the parties' minor child is affirmed.

¶ 2 Petitioner/counter-respondent, Philip W. Banks (Philip), appeals from the circuit court order entered on August 2, 2012, granting the petition for payment of his child's unpaid after

school care expenses filed by Respondent/counter-petitioner, Susan A. Banks (Susan).[1] For the reasons that follow, we affirm.

BACKGROUND

¶ 3 Philip and Susan were married on February 14, 2000 and have one minor child, who was born on February 24, 2001. On September 18, 2003, the parties were granted a judgment of dissolution of marriage. Susan was granted full custody of the child. Also included in the judgment was the following order: "[P]hilip shall be responsible for day care/after school care expense for the parties' minor child in the amount of $225.00 per week and pay said amount directly to [Susan] so long as the parties' minor child is enrolled in day care/after school care."

¶ 4 On September 19, 2011, Susan filed a two-count petition for (1) payment of unpaid after school care and (2) an increase in child support. Susan alleged that Philip had "deviated from the parameters of the dissolution order and [had] discontinued paying [her] daycare and after school care expenses in June of 2005."

¶ 5 On November 8, 2011, Philip filed his response to Susan's petition, denying that he had deviated from the parameters of the dissolution order. He also denied that he owed the alleged arrearage for day care and after school care expenses. On the same day, Philip propounded discovery from Susan. On December 13, 2011, the trial court ordered Susan to tender discovery

[1] In his notice of appeal, Philip also challenged the trial court's order increasing his child support obligation, but he has now abandoned the issue by failing to address it in his brief. See Illinois Supreme Court Rule 341(h)(7) (eff. Feb. 6, 2013) ("Points not argued are waived and shall not be raised in the reply brief, in oral argument, or on petition for rehearing.").

and her disclosure statement pursuant to Cook County Local Rule 13.3.1 (eff. Jun. 1, 2011)[2] within 21 days.

¶ 6 On March 2, 2012, Philip filed a motion to dismiss Susan's petition for payment of unpaid after school care pursuant to Supreme Court Rule 219(c) (Ill. S. Ct. R. 219(c) (eff. Jul. 1, 2002)) for failing to comply with his discovery requests. On June 6, 2012, after a hearing, the trial court denied Philip's motion to dismiss.

¶ 7 On July 31, 2012, an evidentiary hearing was held on Susan's petition. No court reporter was present and the record contains no transcript of the hearing. Instead, the record contains a bystander report which states:

> "1) On July 31, 2012, at 10:30 A.M., an evidentiary hearing was conducted in Judge Mathein's courtroom on the above captioned case, 02 D 017687.
>
> 2) A portion of this evidentiary hearing involved a motion filed by [Susan] wherein she alleged that [Philip] owed her daycare expenses, backdated to 2005.

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[2]Rule 13.3.1 provides:
"In all pre-judgment proceedings in which a party is seeking division of the marital estate, to establish, modify or enforce an order for maintenance, child support or educational expenses pursuant to Section 513 of the Illinois Marriage and Dissolution of Marriage Act, disposition of property in a civil union, retroactive child support in parentage matters, or an award of fees and costs against the other party, each party shall serve a completed disclosure statement of incomes, expenses, and assets ('Disclosure Statement') upon the other party on forms approved by the court. * * *
When further relief is sought from the court and a material change of circumstances has occurred, an updated completed 'Disclosure Statement' must be served on the other party no less than seven (7) days prior to any hearing."

3) Both Parties admitted that the child's grandmother, Anna Rudyak, spent time watching and caring for the child, and both Parties admitted that Anna Rudyak was paid for this time.

4) [Susan] presented handwritten receipts, signed by Anna Rudyak, for the time she spent watching and caring for the child; further, Susan Rudyak testified as to signatures and amounts on the receipts.

5) The record is silent as to the existence of deposits or withdrawals for daycare expenses made.

6) [Susan] further testified that this money was paid to Anna Rudyak for daycare.

7) Based upon the evidence presented, Judge Mathein ruled that the Parties' child was enrolled in daycare with Anna Rudyak.

8) Therefore, Judge Mathein ordered [Philip] to reimburse [Susan] in the amount of $78,000.00 for daycare expenses."

¶ 8 As Philip now notes, based on the evidence presented during the hearing, the trial court issued the August 2, 2012 order that Philip now appeals. The court granted Susan's petition for the payment of unpaid after school care. The court also ordered that "Philip's day care/child care obligation from November 28, 2005 to [August 2, 2012, was] $78,000." The court entered judgment in that amount. The court also granted Susan's petition for an increase in child support from $600 to $772 per month, and ordered Philip to pay $1,548 in backdated support from the date that Susan filed her petition. On August 24, 2012, Philip filed his timely appeal.

¶ 9 ANALYSIS

¶ 10 Philip now argues that this court should reverse the trial court's August 2, 2012 and asserts that the trial court erred: (1) in defining Anna Rudyak (Anna)'s supervision of the parties' child as an enrollment in day care for the purposes of paying day care expenses, as required by the plain language of the judgment of dissolution of marriage; (2) in defining Anna as a "day care provider" for the purposes of paying day care expenses; and (3) in granting Susan's petitions because Susan failed to tender proof of income at the dispositive evidentiary hearing in violation of Illinois Supreme Court Rule 219(c). The standard of review of a support order is whether it was an abuse of discretion, or whether the factual predicate for the decision was against the manifest weight of the evidence. *In re Marriage of Bates*, 212 Ill. 2d 489, 523-24 (2004). Also, "[a]bsent an abuse of discretion, we will not disturb a trial court's decision to order a supporting parent to make a contribution toward daycare in addition to paying child support in the amount set forth by the statutory guidelines." *In re Aaliyah L.H.*, 2013 WL 6158405, ¶ 5; *In re Marriage of Serna*, 172 Ill. App. 3d 1051, 1054 (1988). "[I]t is well established that an abuse of discretion will be found only where no reasonable person would take the view adopted by the trial court." *In re Marriage of O'Brien*, 2011 IL 109039, ¶ 52.

¶ 11 At the outset, we shall address the issue of whether we may consider the bystander report. As noted, there was no transcript of proceedings of the August 2, 2012 hearing. In the absence of a transcript, Illinois Supreme Court Rule 323 (Ill. S. Ct. R. 323 (eff. Dec. 13, 2005)) authorizes, and it is generally incumbent upon the appellant to file, either a bystander's report of the proceedings (Ill. S. Ct. R. 323(c)) or an agreed statement of facts (Ill. S. Ct. R. 323(d)). *Midstate*

Siding & Window Co., Inc. v. Rogers, 204 Ill. 2d 314, 319 (2003); *Foutch v. O'Bryant*, 99 Ill. 2d 389, 392 (1984). Supreme Court Rule 323 states in relevant part:

> "(c) 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, 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*.
>
> (d) Agreed Statement of Facts. 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." (Emphasis added.) (Ill. S. Ct. R. 323(c), (d) (eff. Dec. 13, 2005)).

The record here, specifically the supplemental record, contains a copy of a document entitled "Bystander's Report of Oral Proceedings." The report is dated June 27, 2013, and is signed by Philip's attorney. Susan asserts, however, that this court cannot consider the report because it does not comply with Supreme Court Rule 323. She argues that the report was not filed within the 28-day time limit from the filing of Philip's notice of appeal and that the report was not "certified" by the trial court. "A self-serving report presented by one of the parties cannot be used against the other party unless certified or stipulated to." *Midwest Builder Distributing, Inc. v. Lord & Essex, Inc.*, 383 Ill. App. 3d 645, 657 (2007). "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." *Silverstein v. Grellner*, 15 Ill. App. 3d 695, 697 (1973). Philip asserts that the bystander report is properly before this court. As Philip notes, it was "entered as an agreed order, certified by the Cook County Civil Appeals Division clerk, and properly submitted, along with a motion to file this supplemental record *instanter*."

¶ 12 On June 28, 2013, the circuit court entered an order, stating, in relevant part:

> "This matter coming to be heard on status, *the parties in agreement*, it is hereby ordered:
>
> 1) [Philip] is granted leave to file the Bystander's Report from the July 31, 2012 evidentiary hearing *instanter*;

> 2) [Philip] is granted leave to tender the Bystander Report to the Civil Appeals Division for binding and certification *instanter*;
>
> * * *
>
> 5) [Susan] renews objection to timeliness of Bystander's Report for the appeal."

The bystander report was filed in the circuit court on the same day. The clerk prepared a supplemental record, bound and certified, containing the court order and the bystander report. Also on June 28, 2013, Philip filed a motion in this court to supplement the record with a bystander's report of the proceedings *instanter* pursuant to Illinois First District Appellate Rule 19 [which governs the filing of supplemental records] and Supreme Court Rule 323(c). In his motion, Philip stated that the bystander report "was prepared and presented to [Susan] and the language of the Report was discussed with Susan and her counsel to ensure an accurate report of the proceedings." The motion also stated:

> "Having reached agreement on the language of the Report, the parties appeared before the Trial Court on June 28, 2013 and presented the Report, seeking leave to prepare the Report for binding and certification, pursuant to Local Rule 19. Both parties and the Trial Court satisfied that the Report is an accurate reporting of the facts of the proceedings on July 31, 2012, an Order was entered, granting Philip leave to present the Report to the Civil Appeals Division for binding and certification."

Susan filed no response or objection to Philip's motion. On July 8, 2013, this court granted

Philip's motion and ordered that "the record is supplemented with the documents attached, the bystander's report on July 31, 2012 proceedings as agreed by the parties." Moreover, we note that Susan has not contended that she does not agree with the statement of facts in the report and does not challenge the substance of the report. We conclude that the bystander report is properly part of the record which this court may consider. See *Sarelas v. Alexander*, 132 Ill. App. 2d 380, 386 (1971) (rejecting argument that filing of supplemental record by was in violation of the time limits imposed by Supreme Court Rule 323 where supplemental record was filed pursuant to rule pertaining to amendment of record on appeal).

¶ 13 We next address Philip's argument that the trial court erred in granting Susan's petitions, because Susan failed to tender proof of income at the dispositive evidentiary hearing in violation of Illinois Supreme Court Rule 219(c). As noted, on March 2, 2012, prior to the evidentiary hearing and pursuant to Illinois Supreme Court Rule 219(c), Philip brought a motion to dismiss Susan's petition for payment of unpaid after school care. Susan filed her response on April 4, 2012, stating that she had served Philip, on February 27, 2012, with her answers to interrogatories and response to his production request.[3] The trial court held a hearing on June 6, 2012. After this hearing, during which Susan was present in open court, and both parties were represented by counsel, the court denied Philip's motion to dismiss. There is nothing in the record indicating that Philip raised the issue again. Moreover, the record contains neither a transcript of the hearing on Philip's motion to dismiss, nor a bystander's report. Philip's attempts

[3] The record contains a copy of this response to Philip's motion but does not contain copies of Susan's answers or response to his discovery request. We further note that the record also contains no copy of Philip's discovery request.

to argue now that Susan did not comply with discovery, did not tender proof of income, or should have been sanctioned pursuant to Supreme Court Rule 219(c) fail. "[A]n appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim of error, and in the absence of such a record on appeal, it will be presumed that the order entered by the trial court was in conformity with law and had a sufficient factual basis." *Foutch v. O'Bryant*, 99 Ill. 2d at 391-92. "Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Id*. at 392.

¶ 14 We now address Philip's contention that, pursuant to the judgment of dissolution, he was not obligated to pay Susan for day care/after school care for their child unless the child was "enrolled" in day care/after school care. In support of his contention that this condition precedent was not met, Philip raises two related arguments. He contends that, pursuant to the definitions in Black's Law Dictionary (9th ed. 2009) and the Child Care Act of 1969 (225 ILCS §10 (West 2010)): (1) the trial court erred in defining Anna's supervision of the minor child as "day care" because the child was not "enrolled" in a day care/after school care facility and (2) the trial court erred in defining Anna as a "day care provider" or "day care facility." Again, there is nothing in the record to indicate that these issues were raised before the trial court. However, Philip argues that forfeiture is a limitation on the parties and not on the court. He also argues that these are legal issues. Therefore, he additionally contends that our standard of review is *de novo* because this appeal involves the interpretation of a judgment of dissolution and the interpretation of a statute. In support of this standard of review, Philip cites *Blum v. Kostner*, 235 Ill. 2d 21 (2009) and *In re Marriage of Beyer & Parkis*, 324 Ill. App. 305, 320 (2001).

¶ 15 We reject Philip's argument that our review is *de novo*. Philip misinterprets *Blum v. Koster*, 235 Ill. 2d 21 (2009). The court there did not state that the interpretation of a "judgment" of dissolution is a question of law. In fact, the *Blum v. Koster* court interpreted the *parties*' marital agreement which had been *incorporated into* the judgment of dissolution. As the court noted: "A marital settlement agreement is construed in the manner of any other contract, and the court must ascertain the *parties'* intent from the language of the agreement." (Emphasis added.) *Id*. at 33; see also *In re Marriage of Belk*, 239 Ill. App. 3d 806, 808 (1992) (explaining that a marital settlement agreement *that is incorporated into a dissolution decree* is interpreted in the same manner as other contracts and that the court construes the *settlement provisions* within a dissolution judgment so as to determine the *parties*' intent). Here, the record contains no marital settlement agreement, the judgment of dissolution makes no reference to a marital settlement agreement, and neither party claims that there was a marital settlement agreement. It appears, then, that the parties did not have one. Thus, unlike the cases cited in Philip's brief, it appears that this case did not involve a marital agreement incorporated into the judgment of dissolution and the trial court here did not "interpret" any marital agreement. *A fortiori* the trial court was not determining the parties' intent and the cases cited by Philip are inapposite. Moreover, the trial court did not "interpret" its own judgment but, rather, enforced its judgment. Thus, we need not consider Philip's additional arguments regarding the trial court's supposed incorrect interpretations of the terms "enrolled" and "day care provider" as those terms are defined in the Child Care Act of 1969 (225 ILCS §10 (West 2010)). Thus, we reiterate that our standard of review of the trial court's order is whether it was an abuse of discretion, or whether the factual

predicate for the decision was against the manifest weight of the evidence. *In re Marriage of Bates*, 212 Ill. 2d at 523-24.

¶ 16 We recognize that " 'if the facts are uncontroverted and the issue is the trial court's application of the law to the facts, a court of review may determine the correctness of the ruling independently of the trial court's judgment.' " *Tri-G, Inc. v. Burke, Bosselman & Weaver*, 222 Ill. 2d 218, 254 (2006) (quoting *Norskog v. Pfiel*, 197 Ill. 2d 60, 70-71 (2001)). This is not such a case. Although we have determined that the bystander report is part of the record, our determination of evidentiary matters must be based on solely that report. Philip's briefs, however, are replete with facts not contained in the bystander report and these facts are disputed by Susan. For example, Philip argues that "[a]t the evidentiary hearing on the issue, Susan stated that both she and [the parties' minor son] reside with Anna, without paying rent of any kind." Philip fails to cite to the record in support of this assertion and it is not contained in the bystander report. Susan claims she "provided all appropriate financial documentation indicating what her financial position was." She asserts that the parties' child "was enrolled in a legitimate after school program." She also states that she "was and is a party to a written contract to pay for said after school care." Regarding Philip's characterization of Anna's services as "gratuitous" and his contentions that Anna "does not qualify as a day care provider or facility" and that Anna's "watching the minor child in Susan's familial residence is not a 'day care home,' " Susan counters that "the after school care was, and is, provided for [the parties' child] in a building separate from the one [Susan] lives [*sic*] and, in fact, she has not lived in her Mother's house for approximately ten years." Philip invites this court to draw reasonable inferences as to which issues he raised in

the trial court by viewing the statements contained in the bystander report in conjunction with the silent record. We decline to do so.

¶ 17 Susan did not distinguish the present case from those involving marital settlement agreements. She has addressed, however, Philip's contractual theory and his assertion that his responsibility for day care expenses depended upon a "condition precedent" that the child was actually "enrolled" in a day care/after school care program. As Susan notes, in Philip's answer to her petition for payment of unpaid after school care, no facts were alleged that set forth the defense of condition precedent. Susan cites Illinois Supreme Court Rule 133, entitled "Pleading Breach of Statutory Duty; Judgment or Order; Breach of Condition Precedent" and which reads in relevant part:

> "(c) In pleading the performance of a condition precedent in a contract, it is sufficient to allege generally that the party performed all the conditions on his part; *if the allegation be denied, the facts must be alleged in connection with the denial showing wherein there was a failure to perform*." (Emphasis added.) Ill. S. Ct. R. 133(c) (eff. Jul. 1, 1982).

Philip alleged no facts in his answer to Susan's petition for payment of unpaid after school care. He now attempts to show that a condition precedent was not met by setting forth alleged facts that are *de hors* the record. In his answer, Philip responded only generally to Susan's complaint and denied allegations that he had "deviated from the parameters of the Dissolution Order." (Of course, Susan did not allege that she had performed a condition precedent in a contract because there was no contract in the first instance.) Thus, even if the trial court's decision had been a

matter of contract interpretation, Philip has forfeited any argument that a condition precedent was unmet.

¶ 18 CONCLUSION

¶ 19 In view of the foregoing, we affirm the judgment of the circuit court of Cook County. We conclude, as we must based on the state of this record, that the trial court did not abuse its discretion in granting Susan's petition for the payment of unpaid after school care, and ordering Philip to pay $78,000 for his day care/child care obligation from November 28, 2005 to August 2, 2012.

¶ 20 Affirmed.