2015 IL App (2d) 140640-U
No. 2-14-0640
Order filed July 1, 2015

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

DENISE E. McMULLEN,	)	Appeal from the Circuit Court
	)	of Lake County.
Plaintiff-Appellee,	)	
	)	
v.	)	No. 11-F-299
	)	
GEFFREY S. MILLER,	)	Honorable
	)	Jay W. Ukena,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE BURKE delivered the judgment of the court.
Justices Hutchinson and Birkett concurred in the judgment.

ORDER

¶ 1 *Held*: Respondent failed to present a proper record to refute the trial court's finding that the order of child support from which respondent appeals was an agreed order, and therefore, we presume it was an agreed order, a challenge to which cannot be raised in a section 2-1401 petition. We lack jurisdiction over respondent's argument that the trial court did not grant expeditious relief on his petition for visitation for failing to include this claim in the notice of appeal. Affirmed.

¶ 2 Respondent, Geffrey S. Miller, appeals the judgment of the trial court denying his section 2-1401 petition (735 ILCS 5/2-1401 (West 2014)) to vacate "orders for current child support subsequent to May 6, 2010." Respondent contends that the trial court lacked jurisdiction to enter the support order of September 24, 2012, which increased support, when it was not supported by

any pleadings of facts or prayer for relief, and therefore the order should be vacated and rescinded, leaving the May 6, 2010, order in effect. Respondent further contends that the trial court erred by failing to grant expeditious relief on his petition for visitation. We affirm.

¶ 3 I. BACKGROUND

¶ 4 The record discloses the following facts relevant to the disposition of this appeal. Petitioner, Denise E. McMullen, gave birth to a son on October 19, 2009. Respondent signed a voluntary acknowledgment of paternity.

¶ 5 On May 6, 2010, the trial court entered an agreed uniform order for support obligating respondent to pay $217 twice a month for child support and $43 twice a month for arrearages of child support, which totaled $869 on the date of the May 6 order.

¶ 6 On September 24, 2012, following a pretrial conference, the trial court entered an order increasing child support to $284 per pay period, subject to modification. The order also obligated respondent to pay the following: (1) $60 per week, representing approximately 42% of day care expenses; (2) 72% of any extracurricular activities going forward; and (3) $856 per pay period in back day care and medical expenses. The exact amount of arrears was to be calculated on the next court date.

¶ 7 On October 25, 2012, the trial court entered an order that continued respondent's obligation to pay $60 per week for day care expenses. The order also required respondent to pay $56 per pay period in arrears for child expenses "still to be determined." The court further ordered respondent to pay $546 in arrears for day care expenses, representing the difference between the previous September 24 order and the October 25 order.

¶ 8 On July 29, 2013, the trial court entered a "parental agreement/order" signed by both parties. The agreement dealt with custody, visitation, and other issues concerning the minor. The parties stipulated that all matters between them had been settled.

¶ 9 On January 3, 2014, the trial court suspended the $56 per pay period in arrears because the exact amount of arrears had not yet been calculated.

¶ 10 On April 25, 2014, respondent filed a section 2-1401 petition. In the petition, respondent alleged that, since May 6, 2010, petitioner had not filed a motion for modification of current child support, had not produced evidence relating to child care expenses, had not filed a petition regarding any specific amount of actual day care or un-reimbursed medical expenses, and had not filed a petition alleging the amount she had spent for day care, medical, or extra-curricular activities. Accordingly, respondent maintained that the subsequent orders of September 24, 2012, and October 25, 2012, relating to respondent's contribution for child-related expenses should be vacated because, with the lack of evidence, the trial court had no basis upon which it could make a determination.

¶ 11 In her response, petitioner filed a motion to strike and dismiss pursuant to section 2-615 and, alternatively, section 2-619 of the Code of Civil Procedure (735 ILCS 5/2-615, 2-619 (West 2012)) on the basis that respondent failed to allege the requirements for a section 2-1401 petition. Petitioner asserted that the trial court had clearly stated both in open court and in various other settlement discussions that all court orders entered as to child support, day care, and arrearage payments were agreed orders.

¶ 12 During the hearing on the petition, the trial judge noted that he had read the September 2012 order and had a "fairly good independent recollection of the events leading up to the entry of that order." He stated:

"And I think that the court order that was entered that day is fairly clear of the events that took place. I mean, it does mention that both parties were present. It does mention that the matter went to a pretrial. It also does not mention any hearing that really was conducted or any evidence that was introduced.

But at the same time, I was given plenty of—between [petitioner's counsel] and [respondent's counsel], we did an extensive pretrial that morning. They gave me a lot of information regarding the case. Maybe even more information than either one of them could have gotten in at a hearing. And I made recommendations and subsequently an order was entered.

* * *

The real issue here is whether we had an agreed order entered on September 24th, 2012, or not.

* * *

But what happened that day, and it's important, the events of that day including the pretrial, whether it's an agreed order or not. We conducted an extensive pretrial with [petitioner's counsel] and [respondent's counsel]. And they gave me extensive information regarding the background—financial background of the parties and very specifics about the daycare expenses, out-of-pocket healthcare, health insurance, extracurricular activities, [and] their incomes.

The support discussion came into being because the original support order that had been entered—I think the one you're talking about in May, a couple years before—I believe at some point in this period of time [respondent] was going through a divorce. And when—and he was ordered to pay temporary support to begin with, at least, in that

support case. That impacted on the amount of support that was granted in this case. And a discussion was had regarding that.

And now in September of 2012 there was some attempt at reconciliation. It was represented to me by both attorneys that [respondent] was back living with his wife and, therefore, not needing to pay that support. That's where we had a discussion about whether to go to what is or appeared to be guidelines.

And trust me, the attorneys were giving me a lot of this information. And we went—quite a bit of discussion figuring out the relative incomes, figuring out this expense and that expense.

And there was another issue that still hasn't been addressed in this case, and that (is) [petitioner] had requested the expenses be payable back to the child's birth, which does not come into play today, but under the paternity act you can get expenses back to birth. That was discussed, too. We didn't do anything on it.

And I'm the first one to say there was no hearing conducted that day. And the order's clear there was no hearing conducted that day. There was no evidence taken, no exhibits entered.

Normally, particularly after an extensive pretrial like this, what I usually tell the attorneys—it was sort of a collaborative effort. People weren't arguing that much back and forth except that maybe somebody wanted to do 50/50 and somebody else wanted to do something else, and we sort of picked out a formula to set that percentage.

I made then, quote, settlement recommendations based on our discussions. And it went on for quite awhile. And what I normally say, and I know I said it then, just, you

know, tell the parties that if we had a hearing today, this is how I mostly (*sic*) likely would rule.

Now, of course, if additional information came in at hearing or some of the information you gave me here doesn't get in, my ruling could be different. And I told them to talk to their clients to see if we had an agreement. And I said if so, draft an order with the recommendations that we discussed in it.

The attorneys later came up to me with an order that had been drafted, with the recommendations in it, and basically said that the parties have agreed to do this.

I'm the first to admit the word "agreed" wasn't there, which gives someone a loophole later on to argue something. ***

Based on all that, there's no question in my mind at that time and no question in my mind today that it was an agreed order.

Further I will, for the record, stipulate that if [respondent] was called—because that's what you told me the other day, he was going to come in and say it wasn't agreed to—I'd stipulate that he would testify 19 months after the order was entered, actually 20 months now after the order was entered, it wasn't agreed to. But I consider that to be buyer's remorse.

First, if he wasn't in agreement, he had 30 days to come in after that order was entered and probably would have got it vacated as of right. Instead, more than ten months after [this] father comes in the case, more than 19 months after the order was entered, a motion to vacate came into place. In that motion to vacate there's nothing in it to say that the order wasn't agreed. There is something in the reply to the response that discusses that. But I find that it was an agreed order. I also find that there's no due

diligence used in this case in filing this when you wait 19 months to try to say an order is void and use [2-]1401. It's not void. It's an agreed order. No due diligence was there. Therefore, I'm denying the motion to vacate."

¶ 13 The trial court ordered counsel to draft an order denying the petition and reference and incorporate the transcript into the order. Respondent timely appeals from the order denying his section 2-1401 petition to vacate.

¶ 14 II. ANALYSIS

¶ 15 We first note that petitioner has not filed an appellee's brief. However, because the issues are relatively straightforward, we may resolve the issues on the merits without an appellee's brief. See *First Capitol Mortgage Corp. v. Talandis Construction Corporation*, 63 Ill. 2d 128, 133 (1976).

¶ 16 Section 2-1401 of the Code of Civil Procedure establishes a procedure for litigants to challenge final judgments between 30 days and 2 years after the entry of the judgment. 735 ILCS 5/2-1401(a)(c) (West 2010); *People v. Vincent*, 226 Ill. 2d 1, 7 (2007). The quantum of proof necessary to sustain a section 2-1401 petition is a preponderance of the evidence, and the circuit court's ultimate decision on the petition is reviewed for an abuse of discretion. *Warren County Soil and Water Conservation District v. Walter*, 2015 IL 117783, ¶51 (citing *Smith v. Airoom, Inc.*, 114 Ill. 2d 209, 221 (1986)).

¶ 17 Respondent contends that the trial court lacked jurisdiction to enter the support order of September 24, 2012, which increased support, when it was not supported by any pleadings of fact or prayer for relief, and therefore the order should be vacated and rescinded, leaving the May 6, 2010, order in effect. The trial court found that the September 24 order was an agreed order, and the findings of the trial court were incorporated into the judgment order denying

respondent's petition. Respondent contends that the trial court erred in finding that the September 24 order was an agreed order based solely on the court's recollection of the pretrial conference and the absence of any confirmation in the record that the order was entered with the agreement of either party.

¶ 18 Respondent has the burden of presenting a record of the proceedings at trial to disprove the trial court's finding. If no verbatim transcript is available, the appellant can submit a proposed report of the proceeding (a bystander's report), or the parties, by written stipulation, may agree upon a statement of facts material to the controversy. Ill. S. Ct. R. 323(c), (d) (eff. Dec. 13, 2005).

¶ 19 A bystander's report must be certified by the trial court under Rule 323(c). However, in this case, the judge orally cited the contents of what would have been in a bystander's report had it been prepared. This would have refuted respondent's claim that the September 24 order was not an agreed order. Moreover, petitioner had asserted in her motion to strike and dismiss that the trial court had clearly stated both in open court and in various other settlement discussions that all court orders entered as to child expenses were agreed orders. Therefore, respondent would have had no recourse under the agreed statement of facts provision in Rule 323(d) either.

¶ 20 Because respondent has not presented this court with a record to support his claim that the September 24 order was not an agreed order, we must presume that the order entered by the trial court was in conformity with the law and had a sufficient factual basis. See *Webster v. Hartman*, 195 Ill. 2d 426, 433 (2001); *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984). Any doubts which may arise from the incompleteness of the record must be resolved against respondent. *Foutch*, 99 Ill. 2d at 392. Respondent had the burden of proof to show by a preponderance of the evidence that the September 24 order was not an agreed order and he failed

to meet that burden. Accordingly, we find the trial court's denial of respondent's section 2-1401 petition was not an abuse of discretion.

¶ 21 "[A]greed orders are generally not subject to appeal or attack except where the order has resulted from fraudulent misrepresentation, coercion, incompetence of one of the parties, gross disparity in the position or capacity of the parties, or newly discovered evidence." (Internal quotation marks omitted.) *People ex rel. Devine v. Murphy*, 181 Ill. 2d 522, 538 (1998). Because we presume that the September 24 order was an agreed order, and respondent did not argue that the order resulted from fraudulent misrepresentation, coercion, incompetence of one of the parties, gross disparity in the position or capacity of the parties, or newly discovered evidence, it is not subject to appeal or attack. Accordingly, we need not consider respondent's other arguments as to whether the order is void for lack of jurisdiction over the subject matter or whether the trial court erred in entering the order without hearing evidence or making findings of fact.

¶ 22 Respondent next argues that the trial court failed to grant expeditious relief on his petition for visitation. In support, respondent maintains that the record, on its face, shows a pattern of arbitrary and capricious conduct by the trial court in failing to calendar an evidentiary hearing, take evidence, make findings of fact, or make rulings of law in a timely fashion. He asserts that the court unreasonably prolonged the proceeding when the court was "only asked to award parental visitation and rule on a non-specific petition for supplemental support. Respondent argues that the trial court erred in permitting successive opposing counsel to withdraw from representation, causing a great loss of time and duplication of effort. Respondent further maintains that the trial court erred by allowing opposing counsel to prolong the proceedings. We reject respondent's argument.

¶ 23 First, because this claim was not included in the notice of appeal, we lack jurisdiction to consider it. See *General Motors Corp. v. Pappas*, 242 Ill. 2d 163, 176 (2011) ("A notice of appeal confers jurisdiction on a court of review to consider only the judgments or parts of judgments specified in the notice of appeal"). Second, even if we could consider the claim, because respondent did not include it in the section 2-1401 petition, it would have been procedurally defaulted. See *People v. Bramlett*, 347 Ill. App. 3d 468, 475 (2004). Finally, even if respondent had included this claim in both the section 2-1401 petition and the notice of appeal, the petition for visitation was filed on April 11, 2011, and the subsequent parenting agreement, which was filed on July 29, 2013, would have rendered respondent's argument moot.

¶ 24 III. CONCLUSION

¶ 25 For the reasons stated, we affirm the order of the circuit court of Lake County denying respondent's section 2-1401 petition.

¶ 26 Affirmed.