2018 IL App (2d) 170701-U
No. 2-17-0701
Order filed September 12, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF KEITH G. CHVAL, Petitioner-Appellant, and LINDA CHVAL, Respondent-Appellee.	))))))))))	Appeal from the Circuit Court of Du Page County. No. 10-D-446 Honorable Elizabeth W. Sexton, Judge, Presiding.

JUSTICE ZENOFF delivered the judgment of the court.
Justices McLaren and Hutchinson concurred in the judgment.

ORDER

¶ 1 *Held*: The orders setting the amount of petitioner's child support arrearage, requiring him to contribute to respondent's attorney fees, and denying his motion to re-open proofs were affirmed where petitioner failed to provide a record that was sufficient to permit review of the challenged orders.

¶ 2 Petitioner, Keith G. Chval, appeals orders entered in the Circuit Court of Du Page County (1) setting the amount of his child support arrearage; (2) requiring him to contribute to the attorney fees incurred by respondent, Linda Chval; and (3) denying his motion to re-open proofs. The record is insufficient to permit review of these orders. We therefore affirm the judgment in accordance with *Foutch v. O'Bryant*, 99 Ill. 2d 389 (1984).

¶ 3 I. BACKGROUND

¶ 4 Keith and Linda were married in 1987, and they have five children. Keith, a licensed attorney, works for a company in which he has a 50% ownership interest. Linda had a successful career of her own until the onset of a serious medical condition around 2008. As a result of that medical condition, Linda receives social security benefits for herself and the children.

¶ 5 In February 2010, Keith petitioned to dissolve the marriage. On April 12, 2011, the court entered a judgment for dissolution of marriage incorporating both a joint parenting agreement and a marital settlement agreement (MSA). The issue of child support was reserved in the MSA, because the parties intended "to equalize their non-passive incomes and to share equally in the rearing of the children and their children's educational and activity expenses." With respect to maintenance, the basic agreement reflected in the MSA was that each party would receive half of the parties' combined net income. To accomplish this, beginning on April 1, 2011, and continuing for a period of 60 months, Keith agreed to pay Linda maintenance in the amount of $3,750 each month. Linda, in turn, agreed to pay Keith half of any disability benefits that she received for herself or the children, less certain allowances for insurance premiums and unreimbursed medical expenses. The requirement for the parties to equalize their incomes would terminate upon the occurrence of certain events, including if Linda remarried or cohabitated with another person. Otherwise, the MSA contemplated that Linda could file a petition to extend maintenance at any time within 60 months of the judgment.

¶ 6 The parties' agreement to equalize their incomes apparently worked well for them for five years. A few months before the 60-month deadline set forth in the MSA, Linda filed a petition to extend maintenance and establish a child support obligation.

¶ 7 Due to ongoing discovery, the hearing on Linda's petition did not proceed for more than

a year. The parties agreed that, until the court ruled on this petition, they would continue to follow the income equalization provisions of the MSA, "without prejudice to retroactive relief."

¶ 8 The court conducted an evidentiary hearing on Linda's petition on February 14 and March 3, 2017. The exhibits that the parties introduced at the hearing are not included in the record. Nor does the record contain a transcript of the March 3 proceedings. The order that was entered on March 3 continued the matter to March 13 for ruling on Linda's petition. Meanwhile, on March 9, Linda filed a petition pursuant to section 508(a) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/508(a) (West 2016)) asking for Keith to pay her approximately $30,000 in outstanding attorney fees and costs.

¶ 9 The record does not contain a transcript of the March 13, 2017, proceedings. The order that was entered that day continued the matter to March 15 for entry of an order with respect to Linda's petition to extend maintenance and establish a child support obligation. The court also set a separate hearing date on Linda's petition for contribution to attorney fees.

¶ 10 The record does not contain a transcript of the proceedings on March 15, 2017. The court entered two orders that day. One order established Keith's maintenance and child support obligations retroactive to April 1, 2016. Until further order of court, Keith was required to pay Linda $2,337 per month for maintenance and $583 per month for child support. The other order that was entered on March 15, which was an agreed order, continued the matter to April 28 for a hearing on the determination of Keith's arrearage.

¶ 11 The record does not contain a transcript of the April 28, 2017, proceedings. The order that was entered that day indicates that the matter was continued to May 11 for hearing on Linda's petition for contribution to attorney fees and for a determination of the arrearage.

¶ 12 The record does not contain a transcript of the May 11, 2017, proceedings. The order

that was entered that day indicates that the court held a hearing regarding attorney fees and the arrearage. The court stated in its order that it would issue a ruling by letter to the parties.

¶ 13 The court signed the following order on May 24, 2017, and entered it the following day:

"This cause coming to be heard on [Linda's] motions to (a) set child support arrearages and (b) for 508(a) attorney's fees, and after hearing; IT IS HEREBY ORDERED:

(1) A judgment in the amount of $9,827.38 is entered in favor of [Linda] and against [Keith] for child support arrearages from April, 2016 – March, 2017. This Court acknowledges that generally any disability payments paid to the minors are to be deducted from child support payments, but in this case, the parties had a very specific formula of cross payments to equalize each parties' [*sic*] income. [Linda] actually paid one half of the disability payment to [Keith] even though there was never any mention of this source of income in any support obligation. If [Keith] is credited the entire disability payment, the income sharing formula in the Judgment of Dissolution is no longer 50/50. By giving [Keith] one half of the minor's disability and keeping one half, the Court views this as a 'wash' based on the highly individualized income sharing in this case.

(2) Under Section 508(a) of the [Act], [Linda] is awarded $10,000 in attorney's fees, which represents one third of [her] request. The award is based on the extra time [Linda's] attorney was required to respond to [Keith's] prior counsel's extensive discovery requests and numerous court appearances during this case. Neither of the parties have substantial assets and such extensive discovery, including depositions, was not necessary. Some of the non-financial information obtained during discovery was used by [Keith's] former counsel to harass and demean [Linda] during these hearings."

¶ 14 Keith filed a timely motion to reconsider the May 24, 2017, order, or, in the alternative, to re-open proofs. According to Keith, the court made an oral ruling on March 13 agreeing to use a certain "FinPlan" that he had proposed, and the court asked the parties to prepare an order reflecting the same and calculating the arrearage. (The record does not contain any such "FinPlan.") Keith argued that, with respect to the arrearage calculation in the May 24 order, the court misunderstood how the parties had treated the children's social security benefits. Specifically, despite what the court appeared to presume in its May 24 order, the MSA had indeed required the parties to share the children's benefits equally. Keith insisted that "award[ing] Linda 100% of the minors' benefits would skew the income sharing from the 50:50 that the Court intends." Keith claimed that—in contravention of the MSA, the prior practice of the parties, and the court's intent—"Linda unilaterally usurped 100% of the kids' benefits for herself through her arrearage calculation." He submitted that if the court properly allocated the children's benefits equally between the parties, he would owe a child support arrearage of $2,933.38, not $9,827.38.

¶ 15 Keith also argued in his motion to reconsider that the court erred in ordering him to contribute to Linda's attorney fees. He maintained that Linda was in a substantially better financial position than he was, as she had less debt, more available credit, and more non-marital assets. Keith also criticized the court for *sua sponte* finding in its May 24, 2017, order that his discovery abuses gave rise to unnecessary attorney fees. He suggested that the court lacked knowledge of the full context of the litigation history, insofar as Linda never responded to his numerous attempts to negotiate or his offer to continue the income-sharing arrangement. Accordingly, should the court not find that Linda had a superior financial ability to pay her own attorney fees, Keith asked the court to re-open proofs so that he could introduce evidence of his

attempts to negotiate with Linda.

¶ 16 In her response to Keith's motion to reconsider or re-open proofs, Linda argued that Keith was incorrect in assuming that the court had engaged in an income-sharing analysis when it extended his maintenance obligation and established his child support obligation. Instead, Linda contended, the court first set Keith's maintenance obligation pursuant to the statutory guidelines; then, after taking the maintenance award into consideration, as well as Keith's parenting time, the court deviated downward from the guideline amount when setting the child support obligation. Linda asserted that Keith appeared to be confused by a certain statement that the court had made during its oral rulings. Additionally, Linda argued, when determining the arrearage, the court had considered her calculations, a copy of which she attached to her response memorandum. Those calculations, she claimed, showed that she had indeed shared the children's social security benefits with Keith during the arrearage period (April 2016 to May 2017).

¶ 17 Addressing Keith's dissatisfaction with having to contribute toward her attorney fees, Linda noted that Keith was merely rehashing arguments that the court had rejected. Moreover, she stressed that she was permanently disabled. He, on the other hand, was "employed full-time at his own business, was about to receive $20,000+ in income tax refunds[,] and ha[d] a house and expenses paid for by his mother and other family members." Linda asserted that the court correctly took judicial notice of the court file when assessing Keith's discovery abuses. She maintained that there was no basis for re-opening proofs, as settlement negotiations were not admissible into evidence.

¶ 18 In his reply memorandum in support of his motion to reconsider or re-open proofs, Keith again insisted that, in the course of pronouncing its ruling on March 13, 2017, the court had adopted his "FinPlan." Unfortunately, Keith argued, that "FinPlan" did not take into account the

minors' social security benefits, as neither party had presented that information to the court. Nevertheless, he continued, the court's intent was for the parties to share an approximately equal income. In support of that contention, he pointed to certain of the court's comments in its May 24 order. By keeping 100% of the minors' social security benefits, he claimed, Linda was not proceeding in accordance with the court's intent. Should the court not wish to apportion the minors' benefits between the parties, Keith proposed that the court could order that those benefits be placed in a college savings account.

¶ 19 With respect to the issue of attorney fees, Keith argued in his reply memorandum that Linda misrepresented the evidence by asserting in her response memorandum that his mother and other family members paid for his house. Keith presented a chart purporting to compare his financial condition to Linda's. (That chart was allegedly created using information from exhibits that are not contained in the record on appeal.) Returning to his request to re-open proofs, he asserted that the reason he did not initially present evidence of Linda's litigiousness was that Linda failed to challenge his litigiousness in her petition for attorney fees. He also insisted that the evidence he sought to introduce was admissible, as it pertained to the *absence* of settlement negotiations, not actual negotiations.

¶ 20 On August 8, 2017, the court heard and denied Keith's motion to reconsider and declined to re-open proofs. Both parties initially told the court that they would stand on their written submissions. The court then ruled: "At this point I understand what you're telling me, but I'm going to stick by my ruling. I think I took everything into account and I think I explained why I did it. And if the Appellate Court wants to tell me I'm wrong, they can tell me I'm wrong." Keith pressed the court to make a specific finding regarding Linda's inability to pay her own attorney fees. The court made that finding, recalling that it had previously noted for the record

that Linda "was on disability and did not have the ability to earn extra income." Keith then pressed the court to make another finding that he was able to contribute toward Linda's outstanding fees. The court made that finding, mentioning that Keith had a full-time job and "someone paying for [his] house." After Keith insisted that his house was not paid for, the court clarified that it was not saying that Keith's house was paid for, but that there was "a very odd arrangement" whereby other people made the down payment for the home where Keith lived. With respect to Keith's request to re-open proofs, the court explained that it could not consider evidence of negotiations and that Keith could have raised the issue of Linda's litigiousness at the original hearing on Linda's petition for fees. The court added that Keith's arguments with respect to re-opening the proofs might have been more compelling had the court awarded Linda all of the fees that she requested, as opposed to only one-third of her fees.

¶ 21 Keith filed a timely notice of appeal.

¶ 22 II. ANALYSIS

¶ 23 Keith argues that his "arrearage calculation is the correct one for effecting the court's clearly stated intent that the parties' [*sic*] each enjoy approximately equal after tax cash for living expenses, which the court intended to include the minors' social security benefits." Irrespective of the court's intent, he continues, if Linda is allowed to convert the children's social security benefits into solely her income, then the benefits should be taken into account, either as an offset to his child support obligation or as part of the equal sharing of the parties' combined incomes. Keith also challenges the order requiring him to contribute to Linda's attorney fees, contending that he has even less of an ability to pay than she does. Finally, he maintains that equity demands re-opening the proofs on the issue of attorney fees so that the court may receive "the complete record of the parties' respective litigation strategy and conduct."

¶ 24 Linda preliminarily responds that the record is insufficient to permit appellate review.

¶ 25 Absent either a stipulation between the parties or a court order to the contrary, the record on appeal must include "the judgment appealed from, the notice of appeal, and the entire original common law record." Ill. S. Ct. R. 321 (eff. Feb. 1, 1994). All exhibits that were filed in the circuit court are considered to be part of the common law record; any other exhibits may be included in the record upon proper motion directed to the reviewing court. Ill. S. Ct. R. 321; see also Ill. S. Ct. R. 329 (eff. July 1, 2017) (specifying the procedures for supplementing the record on appeal). The record on appeal must also include any report of proceedings that the party wishes to have incorporated into the record on appeal. Ill. S. Ct. R. 321; Ill. S. Ct. R. 323(a) (eff. July 1, 2017). To that end, the report of proceedings "shall include all the evidence pertinent to the issues on appeal." Ill. S. Ct. R. 323(a). If no verbatim transcript of a proceeding is available, a bystander's report prepared in accordance with Rule 323(c) (eff. July 1, 2017) may suffice. Alternatively, litigants are free to stipulate to the material facts. Ill. S. Ct. R. 323(d) (eff. July 1, 2017).

¶ 26 The failure to provide a record conducive to appellate review is fatal to an appeal. In *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391-92 (1984), our supreme court explained as follows:

> "[A]n appellant has the burden to present a sufficiently complete record of the proceedings at trial to support a claim or 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. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant."

¶ 27 The record here is insufficient to allow review of the challenged orders. The court first held a two-day evidentiary hearing on Linda's petition to extend maintenance and establish a

child support obligation. Keith represents in his brief that the court entertained oral argument from counsel upon the conclusion of evidence. The record contains a transcript of the first day's proceedings (February 14, 2017), but it does not contain a transcript or an acceptable substitute for the second day (March 3, 2017). The record likewise does not include any of the exhibits that were introduced at the hearing.

¶ 28 Keith represents in his brief that the court made certain oral findings on March 13, 2017, relating to the issues of maintenance and child support, including adopting a "FinPlan" that he presented. The record does not contain a transcript of the March 13 proceedings. Nor is this "FinPlan" included in the record.

¶ 29 On May 11, 2017, the court held a hearing on the issues of attorney fees and the determination of the child support arrearage. Keith asserts in his brief that the court heard arguments from the parties that day. Linda likewise indicates in her brief that, on May 11, the court "adopted all of the evidence adduced at the two-day hearing on the Petition for Extension regarding the parties' financial circumstances and heard no additional evidence." The record does not include a transcript of the May 11 proceedings.

¶ 30 The court signed an order on May 24, 2017, establishing the child support arrearage and ordering Keith to contribute $10,000 toward Linda's attorney fees. Keith then filed a motion asking the court to reconsider its May 24 order or, in the alternative, to re-open proofs. The parties' memoranda with respect to that motion, however, are devoid of context without a complete transcript of the previous evidentiary hearing, the exhibits introduced by the parties at that hearing, the "FinPlan" that the court allegedly later considered, and the transcripts of the March 13 and May 11 proceedings.

¶ 31 The record does include a transcript of the short hearing (6 1/2 pages of transcript) on Keith's motion to reconsider or re-open proofs. At that hearing, however, the parties merely stood on their written submissions. The court's only comment addressing the children's social security benefits was: "At this point I understand what you're telling me, but I'm going to stick by my ruling. I think I took everything into account and I think I explained why I did it. And if the Appellate Court wants to tell me I'm wrong, they can tell me I'm wrong." Keith asked the court to make explicit findings that Linda lacked an ability to pay her own attorney fees while he was able to pay those fees. The court made those findings. As Keith continued to argue with the court regarding his inability to pay fees, the court responded by noting that Keith had a full-time job and that certain other people contributed toward the down payment on his home. It is clear that the court was not attempting in that moment to articulate the full scope of its findings with respect to the parties' respective financial situations. Instead, the court was merely reacting to Keith's attempts to re-argue the issues after having said that he would stand on his written submissions.

¶ 32 Under these circumstances, the record is insufficient to assess the parties' substantive arguments with respect to the challenged orders. Keith's brief is replete with facts that are outside the record. See Ill. S. Ct. R. 341(h)(6) (eff. Nov. 1, 2017) (the statement of facts must contain "appropriate reference to the pages of the record on appeal"). He insists that the court erred in its treatment of the children's social security benefits, yet he recounts many of the critical events without citation to the record. To the extent that Keith claims that there was a mathematical error in Linda's arrearage calculations linked to the "received back" column of her chart, we must presume that Keith brought that issue to the court's attention at the May 11 hearing addressing the arrearage and that the court had a proper basis for rejecting Keith's

argument on this point. See *Foutch*, 99 Ill. 2d at 392 ("Any doubts which may arise from the incompleteness of the record will be resolved against the appellant."). Furthermore, the record does not give us the full picture of the evidence and arguments that the court considered when it determined that it was appropriate for Keith to contribute to Linda's attorney fees. Nor do we have any way of evaluating the court's ruling that Keith could have presented evidence of Linda's litigiousness earlier in the proceedings such that it was unnecessary to re-open the proofs. Although Keith says that his attempts to negotiate with Linda were "documented," the record does not contain any such documents. Pursuant to *Foutch*, we must presume that the orders entered by the trial court were in conformity with law and had a sufficient factual basis.

¶ 33 In closing, we note that, in both his opening brief and his reply brief, appellant cites from a December 21, 2017, transcript of proceedings, which he included in the record on appeal. Those proceedings occurred more than three months after Keith filed his notice of appeal. The hearing pertained to Linda's motion to strike and dismiss a petition for rule to show cause that Keith apparently filed against her sometime after he filed his notice of appeal. (The record does not contain a copy of Keith's petition or Linda's motion to dismiss that petition.) In his petition, Keith apparently complained that Linda failed to pay him half of the children's social security benefits. Keith now relies on certain of the court's comments during the December 2017 proceedings to bolster his argument that the court intended all along for the parties to share the children's social security benefits. In her response brief, Linda asks us to strike the December 2017 transcript from the record, although she does not cite any authority in support of her request. Even were we to consider this transcript, the court's comments at the December 2017 hearing do not excuse Keith's failure to provide a complete record relating to the specific orders that he challenges in this appeal.

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, we affirm the judgment of the Circuit Court of Du Page County.

¶ 36 Affirmed.