2019 IL App (2d) 180017-U
No. 2-18-0017
Order filed October 1, 2019

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IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

In re MARRIAGE OF DENNIS BORDYN,	)	Appeal from the Circuit Court of Du Page County.
Petitioner-Appellant,	)	
and	)	No. 13-D-1112
JUDITH BORDYN,	)	Honorable Neal W. Cerne,
Respondent-Appellee.	)	Judge, Presiding.

JUSTICE JORGENSEN delivered the judgment of the court.
Presiding Justice Birkett and Justice Hudson concurred in the judgment.

ORDER

¶ 1 *Held*: Appellant's motion for sanctions is denied. Appellant's failure to submit an adequate record of the trial court proceedings warrants summary affirmance, rather than consideration of appellate arguments. Affirmed.

¶ 2 In 2014, the trial court entered an order dissolving the marriage between appellant, Dennis Bordyn, and respondent, Judith Bordyn. The court denied their respective motions to reconsider.

¶ 3 In this appeal, Dennis, an attorney representing himself *pro se*, argues that the trial court erred in: (1) failing to strike Judith's notice of intent to claim dissipation of assets; (2) allowing

Judith to correct a scrivener's error in the notice of intent; (3) finding that Dennis dissipated assets; (4) allocating the marital property between the parties; and (5) failing to grant Dennis's petition for interim attorney fees.

¶ 4 The court's dissolution judgment was rendered after a trial that lasted 12 days. The record on appeal, however, contains *no transcripts* from those trial days. Rather, the report of proceedings is merely 208 pages, comprised of duplicates (three hearings were submitted twice), post-dissolution hearings (with one exception), and, ironically, three hearings concerning transcripts for the appeal.

¶ 5 As discussed in more detail below, the record is insufficient for this court to resolve the appellate issues substantively. Judith's motion for summary affirmance is granted. Dennis's motion for sanctions against Judith, previously taken with the case, is denied.

¶ 6 I. BACKGROUND

¶ 7 A. The 2015 Appeal

¶ 8 As mentioned, the court dissolved the parties' marriage in 2014. Dennis appealed (case No. 2-15-0301), raising the same five issues he raises in this appeal. Judith cross-appealed. Dennis ordered 3 transcripts for the record on appeal, and Judith ordered 13 additional transcripts. Judith's attorney then requested that Dennis include and pay for the additional transcripts, as they were necessary to the issues he raised in his appeal. Judith ultimately moved, pursuant to Illinois Supreme Court Rule 323 (eff. Dec. 13, 2005), that the trial court order Dennis to acquire and pay for the additional transcripts she had designated.

¶ 9 On June 1, 2015, the trial court denied Judith's motion. The court focused on the fact that Judith had filed a cross-appeal and, therefore, was also an appellant with a burden to prepare an appropriate record for her appeal. The court essentially determined that each appellant should

order and pay for the transcripts that he or she wanted included in the record for their respective appeals. "It's the appellant's burden to provide the appropriate record, and since you are both appealing, I don't think the rule requires to say cross[-]appellant or not, because I think it is apparent. You are standing in the shoes of an appellant, and it's your obligation, just as it is Mr. Bordyn's, to provide a record sufficient for the appellate court to rule upon."

¶ 10 Shortly thereafter, on June 12, 2015, Dennis moved *this* court to compel Judith to produce transcripts. On July 1, 2015, we denied the motion. Dennis filed the record with his transcripts, then returned to the trial court and moved to compel Judith to produce the transcripts that she had previously designated. On July 22, 2015, the trial court denied Dennis's motion, stating, "All right. So they [*i.e.*, Judith and her counsel] haven't paid for theirs. They don't want them in the record, so that's their—that's their call. It's their appeal. They don't want them." Dennis argued that Judith was required to produce the transcripts under Rule 323, but the court disagreed, again explaining, "They don't want to put them on [in] their appeal, so if they're not in their appeal, they're not in their appeal, that's their problem. So your motion, I think, is the exact same motion as theirs [that was previously denied.]"

¶ 11 Six months later, on December 7, 2015, Judith moved this court to enter a summary affirmance of the trial court's order. On December 28, 2015, we denied her motion. Critically, in April 2016, Judith moved to *withdraw her cross-appeal.* On April 27, 2016, we granted the motion and the cross-appeal was dismissed.

¶ 12 Thereafter, on August 24, 2016, we determined that Dennis's appeal must be dismissed for lack of jurisdiction, as there remained open matters pending before the trial court and, therefore, the judgment was not final and appealable and the notice of appeal was premature. *In re Marriage of Bordyn*, 2016 IL App (2d) 150301-U, ¶¶ 18-22 ("*Bordyn I*"). In addition, at

Judith's request, we sanctioned Dennis pertaining to his filing of a frivolous and misleading motion. *Id.* at ¶¶ 31-44.

¶ 13 B. The 2018 Appeal

¶ 14 The parties returned to the trial court and, in December 2017, all pending open matters there were resolved. Accordingly, Dennis filed another appeal, under the present case No. 2-18-0017. *Judith did not cross-appeal.* However, she moved to dismiss Dennis's appeal on the basis that it was untimely. We agreed, and, on March 1, 2018, dismissed the appeal for lack of jurisdiction. Dennis moved to vacate our order, but, on May 1, 2018, in an unpublished decision, we upheld our dismissal of the appeal and noted that Dennis could seek supervisory relief before the supreme court. *In re Marriage of Bordyn*, 2018 IL App (2d) 180017-U, ¶¶ 9-10. He did so, and, on November 1, 2018, the supreme court issued an advisory order, directing us to reinstate the appeal. *Bordyn v. Jorgensen, et al.*, No. 124139 (Nov. 1, 2018).

¶ 15 Accordingly, the appeal was reinstated and, on January 22, 2019, the record on appeal was filed. The report of proceedings consists of:

(1) two copies of the June 9, 2014, hearing on Judith's motion to correct scrivener's error;

(2) the court's November 6, 2014, entry of the dissolution judgment;

(3) the February 24, 2015, hearing on the parties' respective motions for reconsideration;

(4) two copies of the court's May 8, 2015, denial of Dennis's motion that the trial judge recuse himself;

(5) the June 1, 2015, hearing, where the court denied Judith's motion seeking to have Dennis include specific transcript dates in the record;

(6) two copies of the court's July 22, 2015, denial of Dennis's motion to compel Judith to provide transcripts in the appellate record; and

(7) the December 5, 2017, hearing, wherein the trial court resolved the remaining open matters so as to render the case final and appealable.

¶ 16 Two days after the record was filed, on January 24, 2019, Judith filed with this court a courtesy copy of her notice to Dennis that 13 additional hearing transcripts were necessary to be included in the record. Dennis, asserting that Judith's designation did not comply with Rule 323, moved for an extension of time to file his appellate brief while he proceeded before the trial court on motions to compel Judith to provide the transcripts and for sanctions. In her response to the motion for an extension, Judith asserted that Dennis was trying to re-litigate a problem that could easily be solved by an extension of time for Dennis to obtain transcripts and supplement the record: "Judith has no objection to Dennis, an attorney representing himself, from having more time to file his brief and wishes to streamline this litigation and simply have a complete record submitted and eliminate needless additional litigation." In a March 6, 2019, order, we granted the motion for extension of time, but noted that "the decision of designated transcripts to be included in the record on appeal will be made by the trial court."

¶ 17 Apparently, at the time of our order, the trial court had already made that determination. Specifically, on February 26, 2019, the trial court held a hearing on Dennis's motion to order Judith to produce the additional transcripts.[1] The court confirmed with Dennis that the cross-appeal had been dismissed and that Dennis was starting over in a new appeal. Dennis agreed; however, he stated that the record that already "went up" in this "reappeal" of the same matter

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[1] We note that the transcript, while not formally in the record on appeal, is attached as an exhibit to Dennis's pending motion for sanctions against Judith.

was the prior record from the first appeal containing only the transcripts that he deemed necessary for his appeal. The court reiterated, "that case [the first appeal] has been dismissed, so you're starting again; you know this." Dennis again agreed, but asserted that there is no requirement to produce every transcript, only "transcripts of every part of the appeal in which the appellate court will need a transcript to determine whether the court abused—exercised an abuse of discretion. If it's *de novo* review, they don't even need the transcripts ***." Judith's counsel pointed out that Dennis raised on appeal issues concerning the equitable division of property, a topic discussed over 12 trial days and that included evidence pertaining to the value given to assets, and whether assets should be deemed marital or non-marital. Judith argued that, when the issue concerns the propriety of the property division, the entire trial transcript was necessary. The trial court agreed: "I agree. I don't think you need to pick and choose from the trial. You have to include all the [ ] transcripts. It would make no sense to have one portion of a transcript and not the other portion, so that's your responsibility; you're appealing it." The written order reflects: "Mr. Bordyn's motion to compel [Judith] to produce transcripts for inclusion in the report of proceedings pursuant to Illinois Supreme Court Rule 323 is denied. It is further held that the entirety of the trial transcripts and those included in [Judith's] designation pursuant to Rule 323 are necessary for inclusion in the report of proceedings and Dennis shall have the burden of including those." In addition, the court denied Dennis's motion for sanctions against Judith and her counsel.

¶ 18 Dennis appealed the trial court's February 26, 2019, order in appeal No. 2-19-0222. On April 26, 2019, on its own motion, a panel of this court dismissed the appeal on the basis that we lacked jurisdiction. Thereafter, on May 13, 2019, Dennis filed in *this* appeal (No. 2-18-0017) a motion for sanctions against Judith and her counsel pursuant to Illinois Supreme Court Rule 375

(eff. Feb. 1, 1994), for: (1) filing a frivolous cross-appeal; (2) making a false certification in the cross-appeal docketing statement; and (3) filing, in bad faith, designations of transcripts to include in the record of proceedings when the designations did not comply with Rule 323. Dennis requests that we bar Judith from filing a responsive pleading or brief, strike her brief, and enter any other relief we deem proper. On June 21, 2019, we ordered the motion taken with the case.

¶ 19 While we have received Dennis's opening brief, Judith's response brief is not yet due. However, she filed, on September 19, 2019, a motion for summary affirmance, noting the difficulty presented in trying to respond to Dennis's brief, in light of the deficient record. Judith asserts that the issues Dennis raises on appeal require consideration of trial transcripts that are not contained in the record, that, on February 26, 2019, the trial court ordered Dennis to provide those transcripts on appeal, and that he has not done so. Given the issues raised and Dennis's failure to provide an adequate record, Judith argues that *Foutch v. O'Bryant*, 99 Ill. 2d 389, 391 (1984), and other cases allow this court to presume, in the uncertainty arising from the incomplete record, that the trial court's order was in conformity with the law and had a sufficient factual basis.

¶ 20 Dennis objects to Judith's motion, asserting that we denied her similar motion in the 2015 appeal and, therefore, should deny this motion for the same reasons. Regurgitating the timeline and arguments he has made concerning transcripts and Judith's allegedly-sanctionable conduct that he has raised multiple times since 2015, Dennis argues that her arguments lack good faith and the cross-appeal was frivolous. He argues that Judith's contention that Dennis should pay for and provide the transcripts was rejected on June 1, 2015 but, "undaunted," she continues to put forth her "meritless" argument that was rejected by this court in the 2015 appeal. Dennis

argues, "Judith should be denied the relief of summary affirmance when the claim made by Judith that the report of proceedings is incomplete is the result of Judith's failure and refusal to obtain and provide the trial court transcripts ordered by her for preparation and inclusion in the report of proceedings, including the transcript that Judith specified applied to one of her issues on cross appeal." Despite this failure on Judith's part, Dennis notes, he has nevertheless provided, "at his sole expense," the common law record, 208 pages of hearing transcripts, and trial court exhibits.

¶ 21 II. ANALYSIS

¶ 22 A. Summary Affirmance

¶ 23 We choose to start our analysis by addressing Judith's motion for summary affirmance, commencing with Rule 323(a), which, in relevant part, provides:

> "A report of proceedings may include evidence, oral rulings of the trial judge, a brief statement of the trial judge of the reasons for his [or her] decision, and any other proceedings that the party submitting it desires to have incorporated in the record on appeal. The report of proceedings shall include all the evidence pertinent to the issues on appeal.
>
> Within the time for filing the docketing statement under Rule 312 the appellant shall make a written request to the court reporting personnel as defined in Rule 46 to prepare a transcript of the proceedings that appellant wishes included in the report of proceedings. Within 7 days after service on the appellee of the docketing statement and the request for transcript the appellee may serve on the appellant a designation of additional portions of the proceedings that the appellee deems necessary for inclusion in the report of proceedings. Within 7 days after service of such designation the appellant

> shall request the court reporting personnel to include the portions of the proceedings so designated or make a motion in the trial court for an order that such portions not be included unless the cost is advanced by the appellee." Ill. S. Ct. R. 323(a) (eff. Dec. 13, 2005).

¶ 24 The failure to comply with Rule 323 and to provide an adequate record requires the reviewing court to presume that the trial court's judgment was proper. Specifically, our supreme court in *Foutch* stated:

> "[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. Any doubts which may arise from the incompleteness of the record will be resolved against the appellant." *Foutch*, 99 Ill. 2d at 391-92.

¶ 25 Simply put, in light of the foregoing, we are at a loss to comprehend Dennis's refusal to acknowledge his obligation to provide a full record here. This 2018 appeal is a *new* appeal. He is the *sole* appellant. *He* bears the burden of producing a record sufficient for this court to adequately review and resolve the issues that *he* has raised on appeal. Dennis appears not to recognize the difference between rulings in 2015, rendered when Judith was an appellant too (as cross-appellant), as opposed to those that have been rendered subsequent to her dismissal of the cross-appeal. Not one ruling on this issue has been in his favor since the cross-appeal was dismissed. Indeed, if he did not understand, prior to February 26, 2019, that he is responsible to produce all of the record necessary for us to resolve his issues on appeal, he should certainly have understood after the trial court's order. On March 6, 2019, this court ordered that the

record shall be determined by the trial court, the trial court ordered Dennis to produce all of the transcripts, and, yet, Dennis has not complied with that order. In reality, it matters not whether Judith's designations here were fatally late under Rule 323, or even whether she had designated *anything*: it is not Judith's responsibility to ensure that Dennis provides a record sufficient for us to resolve *his* complaints on appeal. See *Webster v. Hartmann*, 195 Ill. 2d 426, 436 (2001) (affirming appellate court's decision, which noted that "the defendant-appellee had no burden to ensure that a complete record was filed in the reviewing court" and reiterating that, "[o]n appeal it is always the appellant's burden to provide the court of review with a sufficient record in order to establish error.") As it stands, this court remains incapable of properly resolving the issues Dennis raises based solely on the record that he has provided.

¶ 26 Perhaps Dennis believes that the record, as is, adequately provides this court "all the evidence pertinent to the issues on appeal." See Ill. Sup. Ct. R. 323(a). He is mistaken. Specifically, his first three issues concern: (1) the court's alleged error in allowing Judith to claim dissipation, when her notice of intent to claim dissipation was allegedly defective; (2) the court's decision to allow Judith to correct a scrivener's error on the notice of dissipation; and (3) the court's finding that Dennis dissipated $165,000 in assets. However, the alleged errors all *culminate* in the court allegedly erroneously finding dissipation, a finding we review deferentially and will not disturb unless contrary to the manifest weight of the evidence. See *In re Marriage of Schneeweis*, 2016 IL App (2d) 140147, ¶ 17. Without the trial record, we have no ability to even discern the manifest weight of the evidence; perhaps, in his testimony, Dennis effectively admitted to dissipation, which would support the court's finding and possibly cure any prejudice caused by an alleged error in the defective notice. We simply have no record upon

which to base a review of the court's dissipation finding and must presume it was correct. *Foutch*, 99 Ill. 2d at 392.

¶ 27 Dennis argues that the court erred in failing to grant his petition for interim attorney fees and, in the dissolution judgment, failing to equitably allocate the attorney fees of both parties against the marital property. Dennis claims that his petition for fees was supposed to be heard at trial, but the court failed to rule on it. He argues that he again raised the issue in his motion to reconsider, but the trial court then denied the motion to reconsider in its entirety. Dennis appealed this issue in 2015, and it was one of the issues that we found had not been resolved and, thus, required dismissal of the appeal. Thereafter, however, in December 2017, the court on remand denied the petition for interim fees, commenting:

> "With regards to the petition for interim fees, there was no evidence presented during—during the trial that would support the award of attorney's fees and, therefore, I was under the presumption that the motion had been abandoned. *** Then I go back to the fact there was no evidence presented, testimony presented that would justify the award of interim fees. Interim fees you have to show—in essence to level the playing field. There was no evidence as to the amount that had been paid to [Judith's counsel]. There's been—was no testimony as to the amount that had been paid to [Dennis's trial counsel], and there was no—and, frankly, the assets of the parties really didn't justify a need or someone's greater ability to pay the fees of one over the other ***."

As Dennis concedes, the decision to award or deny fees is reviewed for an abuse of discretion. See *In re Marriage of Schneider*, 214 Ill. 2d 152, 174 (2005). Section 501(c-1) of the Illinois Marriage and Dissolution of Marriage Act (Act) (750 ILCS 5/501(c-1) (West 2014)) provides that an award of interim fees is governed by numerous factors that the court must weigh and

consider. Here, Dennis disagrees with the court's statement that there was no evidence to support fees, and he again references evidence and testimony at trial to support his claims, but all *we* have in the record, besides the pleadings and exhibits, is the court's statement that no evidence was presented at trial to support a fee award, especially when considered against the parties' assets. Without more, we simply cannot find that the court abused its discretion in denying interim fees, let alone reach the next step of considering whether the court equitably allocated attorney fees against marital property.

¶ 28 Finally, Dennis argues that the court disregarded a significant amount of marital assets in the dissolution judgment and in disregarding Dennis's contribution thereto. His argument then proceeds to claim (without, obviously, citations to the report of proceedings, as there are none) that there "was no evidence or testimony" to support the court's findings and that Judith made various claims at trial. Section 503(d) of the Act (750 ILCS 5/503(d) (West 2014)) requires the court to divide marital property in just proportions, considering numerous factors. As Dennis acknowledges, the trial court's classification of marital property will not be disturbed unless contrary to the manifest weight of the evidence. See *In re Marriage of Jelinek*, 244 Ill. App. 3d 496, 503 (1993). Although he claims the issue on appeal concerns one of law, to be reviewed *de novo*, his actual arguments belie that position. Moreover, Dennis ignores that his citation solely to exhibits and pleadings improperly foists upon this court a burden to assess the court's findings with respect to those documents, without the full context or benefit of the trial testimony that the court considered before weighing the strength of that evidence.

¶ 29 Summary affirmance, as opposed to dismissal, may be appropriate where the reviewing court lacks an appropriate record. See, *e.g.*, *Webster*, 195 Ill. 2d at 432 (affirming appellate court's decision to summarily affirm trial court, where the appellant failed to provide a record

adequate for review). Here, as the record is deficient and we cannot properly review Dennis's issues on appeal, we affirm the trial court's judgment.

¶ 30 B. Sanctions

¶ 31 As to Dennis's motion for sanctions, it is denied. In short, his allegations that the cross-appeal was frivolous are unpersuasive and amount to mere speculation. Indeed, before filing her cross-appeal, Judith also moved the trial court to reconsider its ruling on various issues, suggesting that she, too, disagreed with aspects of the court's decision. Dennis's contention that Judith could not possibly have good-faith complaints to raise, given that the court's judgment was, in his view, favorable to her, is not valid. That she chose to dismiss her appeal after being ordered to pay for her designated transcripts does not mean that the former caused the latter and, even if it did, the decision might have been an economic one, as opposed to one reflecting bad faith. His contention that sanctions should issue because counsel filed a false certification in the cross-appeal docketing statement have been repeatedly rejected and, in any event, are simply not compelling here, in this appeal, four years later. Finally, his contention that Judith's designations did not comply with Rule 323, were, therefore, taken in bad faith, and are, thus, sanctionable, must be rejected. He argues that her transcript designations in this case were not made in the timeframe provided by rule, where she issued them one year after his docketing statement in the appeal. He notes that, in a "conspicuous lack of candor," Judith's counsel fails to point out the one-year gap and "one can speculate why [counsel] wait[ed] until a year after the running of the [seven]-day limit on serving a designation of transcripts on Dennis one month before Dennis's brief was due." However, it is *Dennis* who conspicuously lacks candor. Indeed, as he well knows, after he filed his docketing statement, Judith moved to dismiss the appeal, a motion that

we *granted*, and the one-year gap occurred while Dennis sought supervisory relief before the supreme court. In short, we deny Dennis's motion for sanctions.

¶ 32 We note that, in *Bordyn I*, before sanctioning Dennis at Judith's request, we recognized that he has been a licensed and practicing attorney in Illinois for decades, now almost 35 years. We found that he made blatant misrepresentations to this court, and that he also violated provisions of the Code of Professional Responsibility. We discussed at length his numerous violations and sent a copy of our order to the ARDC's administrator. See *Bordyn I*, 2016 IL App (2d) 150301-U, ¶¶ 31-44.

¶ 33 We have considered whether additional sanctions are also warranted here. We are completely skeptical that Dennis's attempts to force Judith to pay for the transcripts and his repeated attempts to direct this court to 2015 rulings that were rendered under a different set of facts, *i.e.*, when Judith was also an appellant, are innocent. His refusal to simply acknowledge that this is his appeal and that he must provide a sufficient record has resulted in numerous duplicative or overlapping filings. It has also created confusion. It has presumably increased Judith's costs and fees, and it has been a strain on both this court's and the trial court's time and resources. Nevertheless, Judith has not requested sanctions and, for now, we simply affirm the trial court and deny Dennis's sanctions motion.

¶ 34 III. CONCLUSION

¶ 35 For the reasons stated, the judgment of the circuit court of Du Page County is affirmed.

¶ 36 Affirmed.