COLORADO COURT OF APPEALS

DATE FILED: February 24, 2022
CASE NUMBER: 2021CA72

Court of Appeals No. 21CA0072
Douglas County District Court No. 16DR30508
Honorable Andrew C. Baum, Judge
Honorable Patricia D. Herron, Judge

In re the Marriage of

Bailey McGuiness,

Appellant,

and

Dustin Azulay,

Appellee.

JUDGMENT AFFIRMED IN PART
AND REVERSED IN PART

Division IV
Opinion by JUDGE RICHMAN
Tow and Grove, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced February 24, 2022

Anne Whalen Gill, L.L.C., Ann Whalen Gill, Castle Rock, Colorado, for Appellant

Palmer, Goertzel & Associates, PC, Andrew H. Goertzel, Greenwood Village, Colorado, for Appellee

¶ 1 In this post-dissolution of marriage proceeding between Bailey McGuiness (mother) and Dustin Azulay (father), mother appeals the district court's judgment finding her in remedial contempt, requiring her to pay father's attorney fees as a sanction, and modifying parenting time for the parties' three children. We affirm the finding of contempt and the parenting time modification but reverse the attorney fees portion of the judgment.

I. Background

¶ 2 In 2016, the parties jointly petitioned for a legal separation of their five-year marriage.

¶ 3 After a hearing in 2017, the district court entered a separation decree and permanent orders in relevant part designating mother as the children's primary residential parent, ordering the parties to share joint decision-making authority in all significant areas, requiring father to undergo psychosexual therapy, and allocating limited parenting time to him pending that therapy. Father subsequently filed a status report from his therapist indicating that father was benefitting from his therapy sessions, he had stopped his concerning online activity, and the likelihood that he would return to it was very low. The district court entered an order that it

was appropriate to increase father's parenting time and for the parties to confer on the matter.

¶ 4 The parties then moved to convert their separation decree into a dissolution decree. The court granted their request and dissolved the marriage.

¶ 5 At mother's request, the court ordered father to sign a release so that she could talk to his therapist. Father signed the release and filed a certificate showing that he had completed anger management classes, which the court had ordered.

¶ 6 Thereafter, the court entered a new parenting plan allocating one overnight parenting time visit to father every other weekend, as well as dinner visits during the week. The plan also provided for a five-to-ten-minute phone call each evening. Further, under the plan,

> [a]fter 3 months of consistent parenting time, providing documentation of successful participation/completion of anger management classes and individual therapy, . . . [f]ather shall have parenting time every other weekend from Friday at 5:00 p.m. until Sunday at 5:00 p.m.

¶ 7 Three months later, father moved, first pro se and then by counsel, to increase his parenting time to an equally shared

schedule with mother. Mother, however, contended that father had not sufficiently complied with the court's requirements to justify increasing his parenting time to two overnight visits every other week. Therefore, father moved for contempt, seeking punitive and remedial sanctions against mother for her failure to comply with the court's parenting time orders. He alleged seven counts, including as relevant here that mother denied him parenting time and phone calls, failed to make joint decisions, and disparaged him.

¶ 8 After a hearing, the court found mother in remedial contempt and modified parenting time. The court ordered father to re-engage in consistent therapy with a focus on anger management, and that after submitting photographs showing that each child has a bed in his home, father shall have overnight visits every Thursday and every other Friday to Sunday, increasing to Mondays after sixty days.

¶ 9 Regarding contempt, the court found mother in remedial contempt on six of the seven counts father alleged, finding that there were valid court orders, mother was aware of the orders and did not comply with them, and that she had the ability to comply. The court ordered mother to pay father's attorney fees associated

with the contempt, and it noted that father did not seek make-up parenting time, but that it was increasing his parenting time "very quickly." The court further admonished mother that her "gatekeeping actions" did not benefit the children. The court indicated it would set another hearing in approximately six months to determine punitive contempt, but then later dismissed the punitive contempt charges.

¶ 10 Father submitted his attorney's affidavit for $27,829.75 in fees related to the contempt proceedings, mother objected, and the district court held a fee hearing and ultimately awarded father $19,602 in fees. After the court denied mother's C.R.C.P. 59 motion, this appeal followed.

II. Contempt

¶ 11 Mother contends that the district court erred by (1) hearing the contempt and parenting time modification issues together, thereby denying her due process; (2) finding her in contempt without evidentiary support on some counts; and (3) requiring her to pay father's attorney fees as a remedial contempt sanction. We reject the first two contentions but agree with the third.

A. Due Process

¶ 12 Contempt procedures are judged by whether they effectively accord the contemnor due process. *Bd. of Cnty. Comm'rs v. Gurtler*, 181 P.3d 315, 318 (Colo. App. 2007). We review procedural due process contentions de novo. *In re Parental Responsibilities Concerning A.C.B.*, 2022 COA 3, ¶ 16.

¶ 13 Mother argues that she had asked not to testify for the punitive contempt portion of the hearing so as to preserve her Fifth Amendment rights, and to therefore handle the contempt issues first and then the parenting time modification issues. However, the court combined the issues, forcing her to testify about the motion to modify parenting time with punitive contempt charges still pending. We agree with father, however, that mother consented to a combined hearing, and she was not denied due process.

¶ 14 Mother indicated at the beginning of the hearing that she did not want to testify on the punitive contempt charges and that therefore the contempt issues would have to be heard first, and she asked to continue the hearing. The court proposed hearing both the contempt and modification evidence on the continued hearing date but allowing the two witnesses who had appeared that day to

testify. Mother's attorney responded, "[g]reat." On the next hearing date, mother reiterated that although the court was combining the issues, the contempt issues had to be handled first before any discussion of modification. She did not object to the combined hearings, however, or ask for a separate hearing date on the modification issues.

¶ 15 Mother then moved for a directed verdict on the contempt issues after other witnesses, including father and his therapist, testified and before she testified. The court denied the motion, noting that it was not going to rule from the bench on the contempt issues and that although separating the contempt and modification issues would be a concern if there were a jury, the court could keep the issues separate.

¶ 16 Under these circumstances, we discern no error. Mother agreed to a combined hearing dealing with the contempt issues first, and that is what occurred. As the court noted, it could effectively separate the contempt and modification issues when ruling. *Cf. Silverberg v. Colantuno*, 991 P.2d 280, 291 (Colo. App. 1998) (noting that "trial judges sitting as factfinders are presumed to ignore incompetent and inadmissible evidence").

¶ 17 Accordingly, the court did not err by not issuing a final ruling on contempt when mother moved for a directed verdict and instead taking the matter under advisement and ruling at the end of the combined hearing. Moreover, since the punitive contempt was ultimately dismissed, any error from hearing mother's testimony would be harmless.

B. Evidence Supporting Contempt

¶ 18 We further conclude that the evidence at the hearing, although conflicting, supports the district court's finding that mother was in contempt for violating its orders.

¶ 19 The district court has discretion whether to find a party in contempt, and its decision will not be reversed on appeal absent an abuse of that discretion. *In re Marriage of Webb*, 284 P.3d 107, 108 (Colo. App. 2011). We review the court's factual findings regarding contempt for clear error, meaning that we must accept those findings if the record supports them. *See id.* at 108-09; *see also Aspen Springs Metro. Dist. v. Keno*, 2015 COA 97, ¶¶ 26-27. When the evidence concerning contempt is conflicting, we defer to the district court's resolution of the conflicts. *Webb*, 284 P.3d at 109.

¶ 20 Here, the parties' evidence conflicted sharply on nearly every issue during the lengthy hearing. Nonetheless, the record supports the court's findings, and we therefore do not disturb them or the court's determination that mother was in contempt.

¶ 21 Specifically, regardless of when father submitted documentation of his anger management and individual therapy, mother admitted at the hearing that she had refused to permit him to exercise the expanded parenting time the court ordered — and clarified was intended to be self-executing — even after she had received such documentation. Further, father testified, and mother did not dispute, that she sent an email to the oldest child's school describing father as unsafe. She then was present when father was denied access to a school event, but she did not intervene despite knowing that he had a right to attend the children's school events. She also disparaged father to the children's daycare provider, resulting in the provider excluding father from her home.

¶ 22 As to mother's argument that she enrolled the parties' oldest child in school before the permanent orders were entered requiring joint decision-making, we note that this count also involves mother disparaging father to the school, which, as noted above, is

supported by the evidence. Thus, we need not address the school enrollment issue.

¶ 23 Regarding mother hijacking father's social media accounts, father testified that although he gave mother his password, she then changed it, and he was unable to access the accounts. Additionally, the court also described this count as mother disparaging father. And, as noted, the evidence supports that mother did that with the information she learned from father's social media. She sent an email to the school, and she shared details about father's sex life with the children's daycare provider.

¶ 24 In sum, the evidence supports the court's remedial contempt findings despite mother's evidence and arguments to the contrary. Therefore, we do not disturb those findings or the court's order finding mother in remedial contempt. *See Aspen Springs Metro. Dist.*, ¶ 27; *Webb*, 284 P.3d at 108-09.

C. Attorney Fees

¶ 25 We agree with mother's argument, however, that the portion of the contempt judgment ordering her to pay father's attorney fees as a remedial sanction must be reversed.

¶ 26 The sanction that may be imposed for contempt under C.R.C.P. 107 is a legal issue that we review de novo. *See Webb*, 284 P.3d at 109-10.

¶ 27 Rule 107 provides for two types of contempt sanctions, punitive and remedial. C.R.C.P. 107(d)(1), (2). Remedial sanctions, which are the only sanctions at issue here, are intended "to force compliance with a lawful order or to compel performance of an act within the person's power or present ability to perform." C.R.C.P. 107(a)(5); *see Webb*, 284 P.3d at 110. As such, a remedial contempt sanction must contain a purge clause, meaning that "[t]he court shall enter an order . . . describing the means by which the person may purge the contempt and the sanctions that will be in effect until the contempt is purged." C.R.C.P. 107(d)(2); *see Webb*, 284 P.3d at 110; *Gurtler*, 181 P.3d at 318.

¶ 28 Accordingly, although attorney fees may be awarded as a component of a remedial contempt sanction under Rule 107(d)(2), where a contemnor commits one-time violations for which no purge clause is provided, attorney fees may not be assessed because remedial contempt requires a purge clause. *See Webb*, 284 P.3d at 110; *see also People ex rel. State Eng'r v. Sease*, 2018 CO 91, ¶ 22

(describing remedial contempt sanctions as sanctions "which the contemnor may purge by complying with the court order in question") (citation omitted); *A.C.B.*, ¶ 24 ("[A] remedial sanction of imprisonment is always conditional. That is, by virtue of the finding that the contemnor has the present ability to comply with the court's order and, thereby, purge the contempt, the contemnor holds in his hand the proverbial keys to the jailhouse door — once he purges the contempt, he is free."); *Aspen Springs Metro. Dist.*, ¶ 34 (holding that attorney fees could not be imposed as a remedial sanction when the contemnor's behavior had occurred in the past and he "could not purge his contempt because he could not undo what he had done").

¶ 29 Father argues that the district court described some of mother's activity — specifically, her interference with his parenting time and phone calls — as "ongoing" and therefore these were not one-time violations as in *Webb*. But, regardless, the specific violations the court addressed had occurred in the past and were not capable of being undone, and the court did not include a purge clause explaining how mother could purge the contempt for these charges going forward. And having failed to do so, the court could

not order her to pay father's attorney fees as a remedial sanction. *See Webb*, 284 P.3d at 109-10; *Aspen Springs Metro. Dist.*, ¶¶ 32, 34.

III. Parenting Time Modification

¶ 30 Mother further contends that the district court abused its discretion by increasing father's parenting time over her objection when the evidence showed that his therapy and anger management classes were not working. We disagree.

¶ 31 The district court has broad discretion when modifying an existing parenting time order, and we may not disturb its decision absent an abuse of discretion. *In re Marriage of Barker*, 251 P.3d 591, 592 (Colo. App. 2010); *see also In re Marriage of Hatton*, 160 P.3d 326, 330 (Colo. App. 2007) (an appellate court exercises every presumption in favor of upholding parenting time decisions).

¶ 32 A court may modify an order granting or denying parenting time rights whenever the modification would serve the child's best interests. § 14-10-129(1)(a)(I), C.R.S. 2021; *In re Marriage of Parr*, 240 P.3d 509, 511 (Colo. App. 2010). The court's decision must be consistent with the public policy encouraging frequent and continuing contact between each parent and the minor child. *See*

§ 14-10-124(1), C.R.S. 2021; *cf. Hatton*, 160 P.3d at 333-34 (remanding parenting time order, in part, because the court failed to consider the public policy encouraging frequent and continuing contact between each parent and the child).

¶ 33 We reject mother's argument that the court's findings in support of increasing father's parenting time lack record support. Specifically, mother takes issue with the court's findings — under the ability of the parties to encourage the sharing of love, affection, and contact between the child and the other party — that "[f]ather has acted in the children's best interests" and that "in some instances, his frustration is understandable." *See* § 14-10-124(1.5)(a)(VI).

¶ 34 We acknowledge that mother and other witnesses presented evidence of angry outbursts by father, and mother argued that father's parenting time should not be increased because of his failure to control his anger. However, father's therapist testified that father had benefitted from his anger management classes, he had his anger issues largely under control and had the tools to manage them, and the therapist had no safety concerns about father having increased parenting time with the children.

Additionally, father described his frustration because he had done the required therapy and classes, submitted documentation, and signed a release to allow mother to talk to his therapist, yet mother still refused to follow the self-executing order increasing his parenting time. He further testified to mother's disparaging communications about him to the school and daycare provider and the repercussions that resulted.

¶ 35 This evidence supports the court's findings and modification decision. The court acted within its broad discretion in crediting father's evidence in determining that it was appropriate to increase his parenting time while requiring him to continue therapy. *See In re Marriage of Fabos*, 2019 COA 80, ¶ 46 ("[D]etermining credibility is the district court's prerogative.").

¶ 36 Contrary to mother's argument, the court's findings that she interfered with father's parenting time and refused to implement the step-up parenting plan are also supported by the record. As noted, mother admitted that she did not allow father to increase his parenting time, even after the court confirmed that such provisions were self-executing, because she was still concerned about his behavior.

¶ 37 Last, we do not address mother's argument, which she raises for the first time in the reply brief, thereby giving father no opportunity to respond, that father's behavior endangers the children and that the court should have applied the endangerment standard. *See In re Marriage of Herold*, 2021 COA 16, ¶ 14 (issue raised for the first time in reply brief will not be addressed).

IV. Appellate Attorney Fees

¶ 38 In light of our disposition to reverse the attorney fees awarded as a remedial sanction, we also deny father's request for appellate fees under Rule 107(d)(2). *See Aspen Springs Metro. Dist.*, ¶ 37.

V. Conclusion

¶ 39 The portion of the judgment awarding attorney fees and costs is reversed. In all other respects, the judgment is affirmed.

JUDGE TOW and JUDGE GROVE concur.

Court of Appeals

STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203
(720) 625-5150

PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Gilbert M. Román,
Chief Judge

DATED: January 6, 2022

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