

18CA1206 Marriage of Blaikie 06-20-2019

COLORADO COURT OF APPEALS

Court of Appeals No. 18CA1206
Eagle County District Court No. 12DR54
Honorable Russell H. Granger, Judge

In re the Marriage of

Patricia Lucero-Blaikie,

Appellee,

and

Gordon John Blaikie,

Appellant.

JUDGMENT AFFIRMED AND CASE
REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE GROVE
Taubman and Vogt*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced June 20, 2019

McGuane and Hogan, P.C., John R. Vranesic, Denver, Colorado, for Appellee

Courtland Williams, Denver, Colorado, for Appellant

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2018.

¶ 1 Gordon John Blaikie (husband) appeals the district court's judgment finding him in remedial contempt for failing to pay \$23,413.50 in attorney fees owed to Patricia Lucero-Blaikie (wife). We affirm the judgment but remand for the court to consider wife's request for attorney fees under C.R.C.P. 107(d)(2).

I. Background

¶ 2 The decree of dissolution and permanent orders dividing the parties' marital estate was entered in 2013. Three years later, on wife's motion under C.R.C.P. 16.2(e)(10), the district court allocated \$601,447.00 in marital assets that husband had failed to disclose before permanent orders. The court ordered husband to pay wife's reasonable attorney fees for her motion, which the parties later agreed totaled \$23,413.50.

¶ 3 Husband, however, did not pay the agreed-upon amount, and three months after the attorney fee order was entered, wife sought remedial contempt against husband for his nonpayment of the attorney fee award. The court ultimately found husband in remedial contempt and ordered that he could purge the contempt by paying \$24,296.15 (the amount owed plus eight percent interest)

within two days. The court also awarded attorney fees incurred by wife at the contempt hearing.

¶ 4 Husband purged the contempt before appealing to us. He also successfully sought a stay of the fee award arising from the contempt hearing and, pending this appeal, submitted a supersedeas bond in the amount of \$5,993.12 into the district court registry.

II. Appellate Standard of Review

¶ 5 A finding of contempt is within the discretion of the district court and will not be reversed absent an abuse of discretion. *In re Estate of Elliott*, 993 P.2d 474, 478 (Colo. 2000). We follow a trial court's factual determinations as to contempt unless they are clearly erroneous. *In re Marriage of Webb*, 284 P.3d 107, 108-09 (Colo. App. 2011). Findings are clearly erroneous if they have no support in the record. *Gagne v. Gagne*, 2019 COA 42, ¶ 17.

III. The Record Supports the Judgment

¶ 6 To find a party in remedial contempt, the court must make three findings, the last of which (and the only finding disputed on appeal in this case) is that the party has the ability to comply with a

lawful court order. *In re Marriage of Cyr*, 186 P.3d 88, 92 (Colo. App. 2008). The burden is on the alleged contemnor to show an inability to pay. *Elliott*, 993 P.2d at 479.

¶ 7 Here, the court found that husband had the ability to pay the attorney fee award because he had “sufficient credit limits with which he can make payments.” Husband contends that his ability to borrow is irrelevant to his ability to pay. He further argues that the evidence shows that he had no significant income or financial assets with which to satisfy the fee award. On the record before us, we disagree.

¶ 8 A judgment is presumed to be correct until it is affirmatively proved otherwise; thus, the party asserting error on appeal must present a record that discloses the error. *Dillen v. HealthOne, L.L.C.*, 108 P.3d 297, 300 (Colo. App. 2004). Any facts not appearing in the record cannot be reviewed, *People v. Wells*, 776 P.2d 386, 390 (Colo. 1989), so if transcripts are necessary for us to consider and decide the issues on appeal, the appellant must include them in the record. *See* C.A.R. 10(d)(3).

¶ 9 Where an appellant fails to provide a necessary transcript on review, we must presume that the evidence supports the district court’s findings of fact and, absent a misapplication of law, we may not disturb those findings. *Newport Pac. Capital Co. v. Waste*, 878 P.2d 136, 139 (Colo. App. 1994); *see also In re Marriage of Dean*, 2017 COA 51, ¶ 13.

¶ 10 Husband did not include a copy of the transcript from the contempt hearing in the record on appeal. So, we must presume that the court’s written findings that husband “lives and pays almost all of his expenses by credit card,” which he “has done . . . for a considerable period of time”; “always” pays his attorney fees by credit card; and “intermingles his personal and business expenses with regard to his credit cards,” are all supported by the record. *See Newport Pac.*, 878 P.2d at 139.

¶ 11 In turn, we uphold the court’s finding that “[b]ecause of the manner in which [husband] pays himself and his personal living expenses,” his \$56,000 of available credit established that he had the ability to pay. While the availability of credit might not always support a finding of a present ability to comply, the court found

that husband customarily paid nearly all his expenses with his personal and business credit cards.

¶ 12 The court also found that husband had used his credit cards to pay upwards of \$157,000 toward his and wife's attorney fees in the year preceding the contempt hearing. We will not second-guess the court's conclusion that because husband's customarily paid expenses via credit card, his available credit indicated an ability to pay. *See In re Marriage of Nelson*, 2012 COA 205, ¶ 35 (reviewing court will not substitute its judgment for the district court's); *see also Gordon v. Gordon*, 757 S.E.2d 351, 354 (N.C. Ct. App. 2014) (concluding that husband had ability to pay support order via available cash advances and lines of credit on his credit cards). Accordingly, we may not disturb the district court's conclusion that husband failed to meet his burden to show an inability to comply.

¶ 13 We acknowledge that the exhibits from the contempt hearing could potentially lend support to husband's argument that he has an inability to pay because he has no income or financial resources and significant credit card debt. But without an accompanying transcript, the exhibits are out of context and lack explanation and,

thus, we are unable to evaluate them as husband requests. *See In re Marriage of Joel*, 2012 COA 128, ¶ 14 (reviewing court will not reweigh factual evidence). While husband attempts to explain the significance of the exhibits in his opening brief, statements of counsel may not substitute for that which must appear of record. *Subsequent Injury Fund v. Gallegos*, 746 P.2d 71, 73 (Colo. App. 1987).

¶ 14 Insofar as husband argues that the court improperly focused only on his credit availability and did not consider his income, property, or overall debt, we disagree. We may presume the court considered all the evidence before it, even if it did not make express findings regarding husband's complete financial picture. *See In re Marriage of Udis*, 780 P.2d 499, 504 (Colo. 1989); *see also In re Marriage of Plesich*, 881 P.2d 379, 381 (Colo. App. 1994) (reviewing court must view the record in the light most favorable to the district court).

¶ 15 Last, we decline husband's urging to create an expansive list of factors relevant to a contemnor's ability to pay. We leave it to the district court to assess whether a party has the ability to pay based

on the particular circumstances of each individual case. *See, e.g., Cyr*, 186 P.3d at 94 (income and property ownership may show an ability to pay); *In re Marriage of Schneider*, 831 P.2d 919, 922 (Colo. App. 1992) (ability to pay supported by evidence of father’s expenditures); *In re Marriage of Greiner*, 711 P.2d 716, 717 (Colo. App. 1985) (potential earning power may be considered in determining present ability to pay); 20 Frank L. McGuane, Jr. & Kathleen A. Hogan, *Colorado Practice Series, Family Law & Practice* § 32:15, Westlaw (2d ed. database updated May 2018) (courts may look at voluntary depletion of assets, voluntary election to cease employment, and decisions to pay other creditors or obligations when considering ability to pay).

IV. Attorney Fee Request

¶ 16 Citing C.R.C.P. 107(d)(2), wife requests an award of her appellate attorney fees incurred “in connection with the contempt proceeding.” We remand the case for the district court to determine wife’s entitlement to and the amount of fees, if any, incurred on appeal under this rule. *See id.*; *see also Madison Capital Co. v. Star Acquisition VIII*, 214 P.3d 557, 562 (Colo. App. 2009).

V. Conclusion

¶ 17 The judgment is affirmed, and the case is remanded for the court to consider wife's attorney fees request.

JUDGE TAUBMAN and JUDGE VOGT concur.