

19CA2390 Marriage of Evans 03-25-2021

COLORADO COURT OF APPEALS

Court of Appeals No. 19CA2390
Douglas County District Court No. 12DR1522
Honorable Cynthia Mares, Judge

In re the Marriage of

Delinda Evans,

Appellee,

and

Kenneth Evans,

Appellant.

JUDGMENT AFFIRMED IN PART, VACATED IN PART,
REVERSED IN PART, AND CASE REMANDED WITH DIRECTIONS

Division V
Opinion by JUDGE NAVARRO
J. Jones and Yun, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced March 25, 2021

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¶ 1 Kenneth Evans (husband) appeals the district court’s order finding him in remedial contempt and sanctioning him \$635,691.75 for his failure to pay child support, support arrears, and attorney fees per a magistrate’s order.

¶ 2 We affirm in part and vacate in part those parts of the judgment finding husband in remedial contempt for failing to pay child support in February 2018 and failing to pay child support and arrears between March and December 2018. We remand for further proceedings on those issues.

¶ 3 We reverse those parts of the judgment finding husband in remedial contempt for failing to pay support arrears in February 2018 and his noncompliance with the magistrate’s order after December 2018.

¶ 4 We vacate the sanctions imposed and remand for further proceedings as to sanctions.

I. Relevant Facts

¶ 5 The 2013 decree dissolving the marriage between husband and Delinda Evans (wife) incorporated their “Separation Agreement and Parenting Plan” as permanent orders. As provided in that

agreement, husband was to pay wife \$534 in monthly child support.

¶ 6 In 2016, wife moved to modify child support because of changes to both parties' incomes. Before the court ruled on that motion, wife moved under C.R.C.P. 16.2(e) for the court to allocate a previously undisclosed asset, namely, husband's business, Premier Earthworks & Infrastructure, Inc. (PEI).

¶ 7 On February 11, 2018, the magistrate issued a written order resolving both motions. The magistrate found that husband's income was "not less than . . . \$394,000 each month," which he earned as 100% owner of PEI, a business worth "not less than \$2,625,000." Finding that husband's income placed the parties "well over the maximum combined income amount in the [child support] guidelines," the magistrate determined that husband must pay wife \$12,000 in monthly child support effective May 1, 2016. The magistrate also ordered husband to pay \$62,691.75 of wife's attorney fees, finding that his actions caused the need for the supplemental proceedings. The magistrate later approved a support order specifying that husband would pay a total of \$23,875 in monthly child support — \$12,000 in current child support and

\$11,875 in arrears, the arrears being payable over twenty-four months.

¶ 8 In December 2018, wife filed a verified motion for remedial contempt, asserting that husband had not paid attorney fees or child support per the February 11, 2018, order.

¶ 9 The contempt hearing occurred in June and July 2019. In December 2019, the district court found husband in remedial contempt for his noncompliance with the February 11, 2018, order. The court ordered husband to purge the contempt by paying \$573,000 in child support and arrears and \$62,691.75 in attorney fees within thirty days or go to jail until he paid the full amount.

¶ 10 On appeal, husband's opening brief does not specifically challenge the contempt finding or sanction imposed for his failure to pay attorney fees as ordered. *See Barnett v. Elite Props. of Am., Inc.*, 252 P.3d 14, 19 (Colo. App. 2010) (counsel must inform the reviewing court of the specific errors asserted). Adding a new heading in the reply brief ("The District Court erred in finding [husband] in Remedial Contempt regarding child support and attorney fee obligations") is not sufficient to present the issue for appellate review. *See In re Marriage of Wright*, 2020 COA 11, ¶ 32

(reviewing court will not consider contentions first raised in the reply brief). Because the opening brief is limited to addressing the contempt finding and sanctions imposed for noncompliance with the support provisions, so too is our analysis. We thus leave intact the court's order to the extent it found husband in remedial contempt for failing to pay \$62,691.75 in attorney fees and it imposed a sanction in the same amount.

II. Finality

¶ 11 As we understand husband's argument, he says he cannot be found in contempt for violating the February 11, 2018, order because that order is not final. He seems to believe that, until the district court rules on his C.R.M. 7 petition for review of the February 11, 2018, order, and he has an opportunity to appeal the review order to this court, he is not obligated to comply with the February 11, 2018, order. We disagree.

¶ 12 A magistrate's order is not appealable until it is reviewed by a district court judge. See C.R.M. 7(a)(10) ("The reviewing judge shall adopt, reject, or modify the initial order or judgment of the magistrate by written order, which order shall be the order or judgment of the district court."); C.R.M. 7(a)(11) ("Appeal of an order

or judgment of a district court magistrate may not be taken to the appellate court unless a timely petition for review has been filed and decided by a reviewing court”). Nevertheless, a magistrate’s order “shall be effective upon the date of the order or judgment and shall remain in effect pending review by a reviewing judge”

C.R.M. 5(a); see *Evans v. Evans*, 2019 COA 179M, ¶ 21 (“The magistrate’s order was enforceable when entered, even though husband timely appealed it to the district court.”).

¶ 13 Here, the February 11, 2018, order was effective on that date. Husband’s pending C.R.M. 7 petition for review of that order did not affect the order’s enforceability or relieve husband of his obligation to comply with its terms. So he could be found in contempt for not complying with that lawful order.

III. Legal Principles Regarding Remedial Contempt

¶ 14 As relevant here, a district court may hold a party in remedial contempt if the court finds that the contemnor did not comply with a lawful court order of which the contemnor was aware. *In re Marriage of Cyr*, 186 P.3d 88, 91 (Colo. App. 2008). The court must make the additional finding of fact that the contemnor had the present ability to comply with the order. *In re Marriage of Zebedee*,

778 P.2d 694, 698 (Colo. App. 1988). A remedial contempt sanction must also include a purge clause describing the means by which the party may purge the contempt and the sanctions that will be in effect until the party does so. C.R.C.P. 107(d)(2); *In re Marriage of Webb*, 284 P.3d 107, 110 (Colo. App. 2011).

¶ 15 Therefore, the court must make two findings of present ability to pay — one supporting the contempt finding (i.e., “the contemnor had the present ability to perform the act ordered”) and a second justifying the imposition of a remedial order (i.e., “the contemnor has the present ability to comply with the order and, thus, purge himself of the contempt”). *Zebedee*, 778 P.2d at 698; see *In re Marriage of Hartt*, 43 Colo. App. 335, 336, 603 P.2d 970, 972 (1979).

¶ 16 A district court’s decision whether to find a party in contempt and the imposition of sanctions are discretionary decisions that we will not reverse absent a showing of an abuse of that discretion. See *Webb*, 284 P.3d at 108 (contempt finding); *People v. McGlotten*, 134 P.3d 487, 491 (Colo. App. 2005) (sanctions). We review the court’s factual findings regarding contempt for clear error and must

accept them unless they lack record support. *Webb*, 284 P.3d at 108-09.

IV. Contempt Finding

A. Husband's Ability to Comply

¶ 17 Husband does not argue that he was unaware of the February 11, 2018, order. Rather, he contends that the district court erred by finding him in contempt because the evidence clearly established that he did not have the present ability to comply with that order.

¶ 18 The contemnor bears the burden to prove the inability to comply with an order and to purge the contempt. *In re Estate of Elliott*, 993 P.2d 474, 479 (Colo. 2000).

¶ 19 Wife testified that husband bought a \$1.9 million house in January 2018 using a wire transfer from PEI as earnest money and a down payment. She also testified that husband's mortgage on the home was \$7,712 per month. And wife testified that husband's bank account at the end of 2017 showed a \$1.7 million balance. Finally, wife testified that husband used his business like a "piggy bank," paying for things like a designer purse; plane tickets for himself, his new wife, and her children; dancing lessons; a visit to a

five-star spa; florists; visits to anti-aging clinics; designer clothing; and maintenance expenses for his boat.

¶ 20 On the other hand, husband and his expert testified, supported by documentary evidence, that husband had overvalued his business; had to sell business equipment to pay business debt and become more liquid; had a business line of credit that was higher than the cash balance; and could not use the business line of credit to pay his support obligations. Husband testified that his ownership of a house, boat, and purse did not demonstrate a present ability to pay since he owned those assets before the February 11, 2018, order was entered. Husband also testified that his new wife would reimburse him for expenses related to their wedding, such as paying for flowers, and that other expenses, such as the spa visit, were gifts.

¶ 21 The court, however, found the testimony of husband and his expert “incredible” — a finding to which we must defer. *See In re Estate of Romero*, 126 P.3d 228, 231 (Colo. App. 2005) (evaluation of credibility of witnesses, including expert witnesses, is solely within the district court’s province). The court pointed to evidence that husband had traveled outside of the country in the eighteen

months preceding the hearing, including a trip to England and Ireland in the summer of 2018; owned a boat that he could sell; decreased debts owed to himself; owned a house with value; and owned a business with significant assets of which he had complete ownership and control. The court also noted the expert's testimony that husband's equity in the business had increased, that the business had \$15,000,000 in current assets and working capital of \$2,000,000, and that the business had experienced an overall decrease in debt.

¶ 22 The record thus contains competent record evidence from which the court could find that husband failed to meet his burden to show an inability to pay. In fact, the court specifically found that husband has sufficient assets to pay wife the entire \$635,691.75 sanction it later imposed.

¶ 23 We recognize that the record evidence could have supported a different finding. But where a contempt finding is based on conflicting evidence, we will not disturb it on review if it has record support. *See In re Marriage of Herrera*, 772 P.2d 676, 679 (Colo. App. 1989); *see also In re Marriage of Plesich*, 881 P.2d 379, 381 (Colo. App. 1994) (reviewing court views the record in the light most

favorable to the district court). That is, we may not reweigh or re-evaluate the evidence on appeal to reach a different result. *See Hall v. Moreno*, 2012 CO 14, ¶ 54; *see also In re Marriage of Joel*, 2012 COA 128, ¶ 14.

¶ 24 We are not persuaded otherwise by husband’s argument that the court improperly considered purchases that predated the February 11, 2018, order. True, “[a] past or future ability to comply are not sufficient grounds for a remedial contempt order.” *Elliott*, 993 P.2d at 481. But the court may find that a party has the present ability to comply by relying on evidence of a party’s income and property ownership, *Cyr*, 186 P.3d at 94; evidence of a party’s expenditures, *In re Marriage of Schneider*, 831 P.2d 919, 922 (Colo. App. 1992); and evidence of retention of assets such as real estate or cars that could be liquidated to generate funds, 20 Frank L. McGuane & Kathleen A. Hogan, *Colorado Practice Series, Family Law & Practice* § 32:15 (Westlaw 2d ed. database updated May 2020). So the court could reasonably conclude that husband’s ownership and maintenance of assets he purchased before the February 11, 2018, order demonstrated a present ability to comply with the order.

¶ 25 As husband points out, however, the court’s contempt ruling is not entirely clear as to whether the court found that he could pay the full \$23,875 per month, or merely some amount greater than he actually paid in the months since the order (which occasionally was \$1,000 per week). The court found that husband “has the present ability to pay either more than the \$1,000 a week in child support or more of [wife’s] attorney’s fees owed to her pursuant to” the February 11, 2018, order. In addition, the court found that husband “currently has, and has had the present ability to pay [wife] in 2018 and 2019.” Based on these findings, the court concluded that

[husband] is in remedial contempt for failing to pay more than \$1,000 a week in child support in violation of the magistrate’s order requiring [husband] to pay \$12,000 per month in child support and the additional \$11,875.00 per month toward child support arrears, for a total of \$23,875.00 per month for twenty-four months.

¶ 26 While we appreciate the work the court and the parties have performed in the proceedings to date, we believe a remand is necessary so the court can clarify its findings and specify what amount husband had the ability to pay during the period charged

in the contempt. If husband had the ability to pay the full \$23,875, the court should make this specific finding. But if the court finds that husband could pay only part of his support obligation, the court must determine what amount husband could pay and, if necessary, amend its judgment accordingly. And, as explained below, the court must also reconsider the sanctions and purge clause based on its findings about husband's present ability to pay.

¶ 27 For example, if the court finds that husband could pay only \$12,000 per month, then husband could be held in contempt only for failing to pay that amount. In that event, husband could not be held in contempt for failing to pay the remaining \$11,875 each month. *See Razatos*, 699 P.2d at 975.

¶ 28 Insofar as husband suggests that he could not be held in contempt unless he had the present ability to pay the *entire* \$23,875 per month, he is mistaken. Even if he could not pay \$23,875 per month, he knowingly violated the magistrate's order if he failed to pay any lesser amount that he had the present ability to pay, and he may be held in contempt for doing so. *See C.R.C.P.* 107(a)(1) (contempt includes "disobedience or resistance by any person" to any lawful court order). Accordingly, we affirm the

court's judgment to the extent it holds husband in contempt for not paying more than \$1,000 per week from February 2018 through December 2018.¹ We vacate the judgment to the extent it finds husband in contempt for failing to pay the entire \$23,875 per month during that period and remand for further proceedings on that issue.

B. The Contempt Finding Exceeded the Charging Document

¶ 29 Husband contends that the contempt finding went beyond the language of the charging document. Specifically, he argues that the district court erred by finding him contempt for not complying with the February 11, 2018, order in 2019. We agree because “[a]n accused cannot be convicted of contempt other than that set forth in the charging document.” *Dooley v. Dist. Ct.*, 811 P.2d 809, 811 (Colo. 1991).

¶ 30 Wife filed her contempt motion on December 4, 2018, asserting that “[a]s of this date,” husband had failed to pay attorney fees and child support per the February 11, 2018, order. The citation was issued on December 12, 2018. Neither the motion nor the citation were amended after December 12. Thus, the contempt

¹ We explain this time limitation in our ensuing discussion.

charge was limited to husband's noncompliance with the February 11, 2018, order between February and December 2018.

¶ 31 Yet, the court found husband in contempt for failing to pay "in 2018 *and* 2019." (Emphasis added.) Based on the citation, husband could not be found in contempt for noncompliance occurring after December 2018. Hence, the court erred by finding husband in contempt for failing to pay in 2019.

¶ 32 Moreover, exercising our discretion under C.A.R. 1(d) to notice any error appearing of record, we conclude that husband could not be held in contempt for failing to pay his support arrears in February 2018.

¶ 33 To be held in contempt, a party must have refused to do exactly what the court order required. *In re Marriage of Davis*, 252 P.3d 530, 537 (Colo. App. 2011). The February 11, 2018, order required husband to pay support arrears, but the court did not determine the precise amount (\$11,875 per month) until March 19, 2018. So husband could not be found in contempt for failing to pay the \$11,875 arrears amount in February 2018 because no order required him to do so. *See id.*

C. Summary

¶ 34 On remand, the court must (1) clarify what amount husband could pay during the contempt period; (2) amend its judgment to find that husband could not be in contempt for failing to pay after December 2018; and (3) amend its judgment to find that husband could not be in contempt for failing to pay support arrears in February 2018.

V. Contempt Sanctions

¶ 35 Payments under a remedial sanction order should reimburse the person injured by the contemnor's disobedience. *Eichhorn v. Kelley*, 56 P.3d 124, 126 (Colo. App. 2002). The amount of a remedial sanction, however, is limited to the damages and expenses resulting from the contempt. *See Simmons v. Brown*, 486 P.2d 445, 446 (Colo. App. 1971) (not published pursuant to C.A.R. 35(f)).

¶ 36 Aside from the sanction related to attorney fees that we do not disturb, the district court imposed a \$573,000 sanction that reflected twenty-four months of unpaid child support (totaling \$288,000) and unpaid arrears (totaling \$285,000). This sanction must be recalculated to consider the following:

- Regarding child support, husband could be found in contempt only for failing to pay during the nine months charged in wife's contempt motion (February to December 2018), and only to the extent he had the present ability to pay it. Any sanction must be commensurate with such findings. *See id.*
- Regarding support arrears, husband could be found in contempt only for failing to pay from March to December 2018, and only to the extent he had the present ability to pay it. Any sanction must reflect such findings. *See id.*
- Husband paid varying amounts of child support between February and December 2018, sometimes as much as \$1,000 per week. The court must credit husband for those payments and may not include them in any sanction amounts.

¶ 37 Accordingly, we vacate \$573,000 of the contempt sanctions and remand for the court to determine the appropriate remedial sanctions, if any, consistent with the above points.

VI. Purge Clause

¶ 38 The district court allowed husband to purge his remedial contempt by paying the entire \$635,691.75 within thirty days of the judgment or reporting to jail. Considering our disposition, we necessarily vacate \$573,000 of the purge amount relating to husband's noncompliance with the support and arrears provisions of the February 11, 2018, order. On remand, if the court again orders remedial sanctions, the court must fashion a new purge clause in light of its amended judgment. *See* C.R.C.P. 107(d)(2); *Webb*, 284 P.3d at 110.

¶ 39 Due to this disposition, we need not address husband's due process contention.

VII. Appellate Attorney Fees

¶ 40 Wife seeks an award of her attorney fees for this appeal, citing C.A.R. 38 and 39.1 and the obdurate behavior doctrine, which allows the court to award attorney fees if the losing party has acted in bad faith or for oppressive reasons. *Double Oak Constr., L.L.C. v. Cornerstone Dev. Int'l, L.L.C.*, 97 P.3d 140, 151 (Colo. App. 2003). Given our holdings, we do not conclude that husband's appeal of the contempt order was abusive, made in bad faith, or oppressive.

We therefore deny the request. *See Wood Bros. Homes, Inc. v. Howard*, 862 P.2d 925, 934 (Colo. 1993).

VIII. Conclusion

¶ 41 We reverse those portions of the judgment finding husband in remedial contempt for (1) nonpayment of arrears in February 2018, and (2) noncompliance with the support and arrears provisions of the February 11, 2018, order after December 2018. On remand, the district court should amend its contempt judgment accordingly.

¶ 42 Because additional findings are necessary as to husband's present ability to pay during the relevant periods, we affirm in part and vacate in part the portions of the judgment finding husband in contempt for nonpayment of (1) support from February to December 2018 and (2) arrears from March to December 2018, and we remand for further proceedings.

¶ 43 We vacate \$573,000 of the remedial sanction and purge clause, and we remand for the court to determine what sanctions, if any, should be imposed for husband's remedial contempt.²

JUDGE J. JONES and JUDGE YUN concur.

² As explained, we do not disturb the judgment to the extent it found husband in remedial contempt for failing to pay \$62,691.75 in attorney fees and it imposed a sanction in that amount.