COLORADO COURT OF APPEALS

DATE FILED: August 19, 2021
CASE NUMBER: 2020CA1721

Court of Appeals No. 20CA1721
Arapahoe County District Court No. 13DR30489
Honorable Cynthia Mares, Judge

In re the Marriage of

Jeffrey Scott Mills,

Appellant,

and

Amy Beth Mills,

Appellee.

ORDER REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE LIPINSKY
Román and Harris, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced August 19, 2021

Jeffrey Scott Mills, Pro Se

Bertram & Graf, LLC, Gregory C. Graf, Greenwood Village, Colorado, for Appellee

¶ 1 Jeffrey Scott Mills (father) appeals the district court's order adopting a magistrate's order finding him in contempt and imposing remedial sanctions. We reverse the magistrate's imposition of sanctions and remand for further proceedings.

I. Background

¶ 2 In 2014, the court dissolved father's marriage to Amy Beth Mills (mother). The parties executed a separation agreement in which father agreed to pay mother $2,057 per month in child support and $5,000 per month in non-modifiable maintenance, as well as $10,285 in child support arrearages. At that time, father was serving in the Army and earning more than $14,000 per month.

¶ 3 Following father's discharge from the Army, he filed a motion to modify child support on the grounds that his income had substantially decreased and two of the children had become emancipated. In 2017, the magistrate found that father's income was $2,501 per month and lowered his monthly child support obligation to $628. The magistrate also ordered him to pay $12,920 in child support arrearages.

¶ 4 Two years later, mother filed a motion for contempt, alleging that father had failed to pay the court-ordered child support and maintenance. She requested remedial contempt sanctions, including an order requiring father to pay his outstanding obligations — $3,584 for child support and $241,120 for maintenance — plus any additional unpaid child support and maintenance that accrued before the contempt sentencing. The magistrate issued a citation to show cause and set the matter for a hearing in December 2019. (Mother also sought punitive contempt sanctions against father based on his alleged misappropriation of escrow funds belonging to mother. A court may enter punitive contempt sanctions upon finding "(1) the existence of a lawful order of the court; (2) contemnor's knowledge of the order; (3) contemnor's ability to comply with the order; and (4) contemnor's willful refusal to comply with the order." *In re Marriage of Nussbeck*, 974 P.2d 493, 497 (Colo. 1999). The magistrate denied mother's request for punitive contempt sanctions because no court order had "clearly and unambiguously" addressed the treatment of the escrow funds.)

¶ 5 After the hearing, the magistrate found that, although father had received more than $228,000 since 2016, the evidence did not establish where the money had gone. The magistrate then found that father knew of the support order, had not complied with it, had the present ability to pay his child support and maintenance obligations, and had sufficient resources to purge the contempt.

¶ 6 The magistrate held father in contempt and imposed remedial sanctions. Specifically, the magistrate ordered father to pay mother $274,784 within 120 days and said he would be imprisoned if he did not pay this amount.

¶ 7 Father petitioned the district court to review the magistrate's contempt ruling. Father argued that the record did not support the magistrate's finding that he had the present ability to pay $274,784 and, thus, to purge the contempt. The district court denied father's petition and adopted the magistrate's ruling.

II. Standard of Review

¶ 8 Our review of a district court's order adopting a magistrate's decision is effectively a second layer of appellate review. *In re Parental Responsibilities Concerning G.E.R.*, 264 P.3d 637, 638-39 (Colo. App. 2011). We review the magistrate's and the court's

conclusions of law de novo, but we defer to the magistrate's factual findings unless they are clearly erroneous. *In re Parental Responsibilities Concerning B.J.*, 242 P.3d 1128, 1132 (Colo. 2010); *see also In re J.A.V.*, 206 P.3d 467, 468 (Colo. App. 2009) (We "may reverse a district court order adopting a magistrate's order if a critical finding of the magistrate is clearly erroneous."). Factual findings are clearly erroneous when they are not supported by the record. *In re Marriage of Dean*, 2017 COA 51, ¶ 8, 413 P.3d 246, 249; *see also In re Marriage of Webb*, 284 P.3d 107, 108-09 (Colo. App. 2011).

III. Legal Principles

¶ 9 A court may hold a party in contempt for "disobedience or resistance" to a lawful court order. C.R.C.P. 107(a)(1); *see In re Marriage of Davis*, 252 P.3d 530, 537 (Colo. App. 2011). A court may impose remedial sanctions after making a finding of contempt. *See* C.R.C.P. 107(d)(2) (The court "may find the person in contempt *and* order sanctions.") (emphasis added); *Dean*, ¶ 9, 413 P.3d at 249-50 (recognizing that a finding of contempt must precede the imposition of sanctions). Remedial sanctions 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).

¶ 10 To impose such sanctions, the court must specify the means by which the contemnor may purge the contempt and find that the contemnor has the "ability to perform the acts required to purge [the] contempt." *In re Estate of Elliott*, 993 P.2d 474, 479 (Colo. 2000); *see* C.R.C.P. 107(d)(2); *see also In re Marriage of Zebedee*, 778 P.2d 694, 698 (Colo. App. 1988). A contemnor's past or future ability to comply with the order is insufficient to show a present ability to comply. *Elliott*, 993 P.2d at 481; *see also People v. Razatos*, 699 P.2d 970, 975 (Colo. 1985) (reversing a remedial contempt order because the evidence did not show that the defendant had the ability to pay the ordered restitution at the time of the hearing).

¶ 11 Thus, the court must make two findings regarding the contemnor's ability to comply — one supporting the contempt finding (that the contemnor was capable of complying with the underlying order) and a second justifying the imposition of the remedial sanctions (that the contemnor has the ability to purge the contempt at the time of the sentence). *In re Marriage of Barber*, 811

P.2d 451, 456 (Colo. App. 1991); *see Zebedee*, 778 P.2d at 698. The requirement that the contemnor have the present ability to comply applies even if the contemnor not only disobeyed the court's prior order but also transferred assets to avoid complying with the order. *See Elliott*, 993 P.2d at 479 n.2 ("In a remedial contempt action, an individual's purported bad faith or self-induced inability to pay does not alter the factual determination that the individual does not maintain a present ability to pay.").

¶ 12 After the party seeking contempt makes a prima facie showing, the burden of proving a present inability to comply rests with the contemnor. *See In re Marriage of Lamutt*, 881 P.2d 445, 447 (Colo. App. 1994). If the contemnor fails to prove that he no longer owns an asset that he indisputably owned at one time, the court may determine that the contemnor continues to own the asset. *See In re Estate of Owens*, 2017 COA 53, ¶¶ 46-48, 413 P.3d 255, 265 (affirming a remedial contempt order where the contemnor "could not provide a coherent, consistent account of what had happened to the funds"); *see also Wagley v. Evans*, 971 A.2d 205, 213 (D.C. 2009) (holding that the court did not err by entering a remedial

contempt order against a father who failed to "proffer any evidence" to establish his inability to pay court-ordered child support).

¶ 13 A court's decision whether to find a party in contempt and to impose sanctions is a discretionary one that we will not reverse unless the court abused its discretion. *See Davis*, 252 P.3d at 537; *see also People v. McGlotten*, 134 P.3d 487, 491 (Colo. App. 2005).

IV. Discussion

¶ 14 Father argues that the magistrate's finding regarding his present ability to pay $274,784 was clearly erroneous. We agree and reverse the magistrate's sanctions.

¶ 15 The magistrate made the following findings in support of her determination that father had the present ability to comply with the order and purge the contempt:

- When he was discharged from the Army in 2016, father received $107,631 in separation pay and accrued leave pay, but the evidence did not show where this money went.
- Father received a $11,168 tax refund for 2016, but the evidence did not show what happened to this money.

- In 2017, father deposited an escrow check in the amount of $1,872 into a Rio Grande Federal Credit Union account that father had not disclosed to mother.
- In 2017, father withdrew $35,000 from his federal thrift savings plan account, which had a reported value of more than $43,000. Father deposited $12,382 of the withdrawn monies into his bank account but did not explain where the other $22,618 went.
- The evidence did not show what happened to the $13,531 father received in 2018 when he liquidated a 401(k) plan.
- In 2018, $50,000 was deposited into father's bank account, which he claimed came from his new wife's parents for his new wife's purchase of her home.
- In January 2019, father received $8,797 from his thrift savings plan and transferred $8,038 to his new wife.

- In 2018 and 2019, father sold two motorcycles in which he had equity of $3,000 and $4,000, respectively.
- From 2016 to 2018, father's bank account showed total deposits of $54,609 (including the $12,382 from the thrift savings plan noted above).
- Father's testimony about his financial resources lacked credibility.

¶ 16 Based on these findings, the magistrate noted that, even though father had received more than $228,000 since 2016, he had a "remarkable lack of assets titled in his name." Nonetheless, the magistrate concluded that father had the present ability to pay the $274,784 in maintenance and child support arrearages and, thus, to purge himself of the contempt.

¶ 17 We conclude that neither the evidence nor the magistrate's findings support the determination that, when the magistrate entered the contempt order in 2020, father had the ability to pay mother $274,784 within 120 days and purge the contempt. In reaching this conclusion, we take guidance from *Elliott*. 993 P.2d 474. In that case, the probate court held a personal representative

in contempt for refusing to return assets that she had previously taken from the subject estate. *See id.* at 475-76. The supreme court reversed. *Id.* at 480-81. It explained that, while the record showed that the personal representative had a past ability to comply with the court's order when she possessed the assets, the evidence further showed that she had given away or spent all the assets by the time of the contempt finding and imposition of remedial sanctions. *Id.* at 479-80. It held that a party's past ability to comply with an order, when the party had shown that the present circumstances no longer supported her ability to comply, was insufficient to establish a present ability to comply and, thus, for entry of remedial sanctions. *Id.* at 481.

¶ 18 Here, the magistrate found, with record support, that father had received $228,000 from various sources over the last three years, had deposited $54,609 into his bank account from 2016 to 2018, and had received $7,000 from the motorcycle sales. Given this evidence of father's past financial ability to pay the outstanding child support and maintenance obligation, father bore the burden to show that the money was no longer available to him and establish his present inability to purge the contempt. *See id.* at

480-81; *Lamutt*, 881 P.2d at 447. The evidence showed that father met that burden to the extent he established that, at the time of the contempt hearing, he did not possess $274,784.

¶ 19 Specifically, father presented evidence that, two days after he deposited $12,382 from his thrift savings plan into his bank account, he paid mother $12,381. He also showed that he gave his new wife $8,038 from the $8,797 he received from the most recent thrift savings plan withdrawal. And he demonstrated that, following the $50,000 deposit into his bank account, he transferred $50,000 to Land Title Guarantee Company (allegedly for the purchase of his new wife's home).

¶ 20 In addition, father's bank records revealed that he had spent nearly all the $54,609 deposited into his bank account from 2016 to 2018, and that the account balance was only $10 in 2018. Father also introduced into evidence his current bank account statement, which revealed a balance of $146 and a high balance of just over $2,300 over the previous three months, and testified that his other bank account had "about $20" in it.

¶ 21 Father therefore showed that he no longer possessed more than $70,000 of the funds he had received since 2016, as well as all

but $10 from the $54,609 he had previously deposited into his bank account. *See Elliott*, 993 P.2d at 479 n.2.

¶ 22 We are not persuaded that father had the present ability to pay $274,784 by the magistrate's reference to father's contribution to, and use of, his new wife's home and the car titled in wife's name. No evidence was presented on the value of these items. Thus, any equity father may have held in those items at the time of the hearing was merely speculative and did not establish that father had the present ability to purge the contempt by paying $274,784.

¶ 23 Still, mother argues that the magistrate understated father's assets. She points to father's testimony that he had $39,000 in a Colorado Public Employees' Retirement Association (PERA) account and evidence that, in 2019, $6,900 in cash had been withdrawn from his bank account. But no evidence showed whether father could use his PERA account funds to pay mother or whether father possessed the $6,900. In any event, even if we were to consider this additional $45,900, the assets for which father could not account would total only $190,900, and thus did not establish that he could pay $274,784.

¶ 24 Mother also asserts that father was a beneficiary of a trust. However, no evidence was admitted on the value of such trust, the property held by the trust, or father's right to receive distributions from the trust.

¶ 25 The record, however, reflects that father did not prove that he had no assets available to pay his child support and maintenance obligations. The magistrate found that father had not accounted for other funds he had received, in the amount of approximately $138,000. The magistrate could presume that those unaccounted-for funds were available to purge the contempt. *See Owens*, ¶ 48, 413 P.3d at 265.

¶ 26 The unaccounted-for funds, in addition to the $7,000 from the motorcycle sales, fell short of $274,784. Thus, while the record does not support the magistrate's finding that father had the present ability to pay $274,784 within 120 days and purge the contempt, the evidence showed that father had the present ability to pay $145,000. The record does not reflect why the magistrate did not enter a remedial sanction requiring father to pay this sum within 120 days or face incarceration.

¶ 27 In any event, we conclude that the evidence did not support the magistrate's finding that father had the present ability to pay $274,784 and purge the contempt. We therefore reverse the magistrate's remedial sanctions.

¶ 28 A finding of contempt, however, is separate from the imposition of sanctions. *See* C.R.C.P. 107(d)(2); *Dean*, ¶ 9, 413 P.3d at 249-50. And father does not develop any argument to contest the magistrate's finding of contempt — that he violated the order to pay monthly maintenance and child support. *See Westrac, Inc. v. Walker Field*, 812 P.2d 714, 718 (Colo. App. 1991) ("Because defendant has failed to specify why the trial court erred, we will not review the ruling . . . .").

¶ 29 To the extent he suggests that the contempt finding (as opposed to the sanctions order) was predicated on the order requiring father to pay $274,784, we disagree. To be held in contempt, a party must have refused to do exactly what the court order required. *People v. Lockhart*, 699 P.2d 1332, 1336 (Colo. 1985). Before the magistrate entered the remedial contempt sanctions, no court order required father to pay $274,784.

¶ 30 The support order, which formed the basis for the magistrate's contempt finding, required father to pay monthly support of $5,000 for maintenance and $628 for child support, as well as $12,920 in arrearages. Father does not dispute that he violated this order or contest the magistrate's finding that he had the present ability to comply with the order at the time the court entered it. *See Barber*, 811 P.2d at 456 (noting the two separate findings necessary on the present ability to comply).

¶ 31 In sum, while we do not disturb the magistrate's determination that father was in contempt for failing to comply with the support order, the magistrate abused her discretion by imposing a remedial contempt sanction that ordered father to pay mother $274,784 within 120 days.

V. Conclusion

¶ 32 We reverse the magistrate's order imposing remedial sanctions against father. We remand the case with directions to reconsider the imposition of sanctions and, consistent with this opinion, determine the sum father has the ability to pay at the time of the remand proceedings.

JUDGE ROMÁN and JUDGE HARRIS 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: Steven L. Bernard
Chief Judge

DATED: March 5, 2020

***Notice to self-represented parties**: The Colorado Bar Association provides free volunteer attorneys in a small number of appellate cases. If you are representing yourself and meet the CBA low income qualifications, you may apply to the CBA to see if your case may be chosen for a free lawyer. Self-represented parties who are interested should visit the Appellate Pro Bono Program page at https://www.cobar.org/For-Members/Committees/Appellate-Pro-Bono*