

22CA0267 Marriage of Carpenter 07-13-2023

COLORADO COURT OF APPEALS

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Court of Appeals No. 22CA0267  
City and County of Denver District Court No. 16DR30328  
Honorable Nikea T. Bland, Judge

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In re the Marriage of

Kristen Lara Weinraub,

Appellee,

and

Rory Fitzgerald Carpenter,

Appellant.

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APPEAL DISMISSED IN PART  
AND ORDER VACATED

Division II  
Opinion by JUDGE TOW  
Furman and Johnson, JJ., concur

**NOT PUBLISHED PURSUANT TO C.A.R. 35(e)**  
Announced July 13, 2023

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Holt Resolution Group, LLC, Paula A. Holt, Denver, Colorado, for Appellee

Rory Fitzgerald Carpenter, Pro Se

¶ 1 In this post-dissolution of marriage proceeding involving Rory Fitzgerald Carpenter (father) and Kristen Lara Weinraub (mother), father appeals the district court’s January 4, 2022, order, which imposed on him an additional contempt sanction of twelve days in jail nearly a year after he was found in contempt and sentenced to six days in jail as a punitive sanction. We vacate that order and dismiss the appeal to the extent it seeks review of the March 11, 2021, contempt judgment.

I. Relevant Facts and Procedural History

A. Permanent Orders

¶ 2 In June 2017, the parties’ marriage ended. The district court’s permanent orders required father to pay mother \$5,525 for certain marital debts, monthly spousal maintenance of \$1,620 for fifty-three months, and monthly child support of \$953, retroactive to August 2016.

B. The March 30, 2018, Contempt Judgment

¶ 3 In December 2017, mother moved for contempt, alleging that father failed to pay the marital debts and only made a few nominal payments toward his maintenance and child support obligations.

¶ 4 On March 30, 2018, following an evidentiary hearing, the district court found father in indirect contempt and imposed remedial sanctions. To purge the contempt, the court ordered him to pay the \$5,525 for the marital debts as well as \$35,026 for his maintenance and child support arrearages.<sup>1</sup> The court gave him multiple extensions through March 30, 2020, to make the lump sum payment of \$35,026, contingent on him paying his monthly maintenance and child support obligations. In other words, if he was current with his monthly obligations, the lump sum payment would become due on March 30, 2020. The court subsequently granted in part his motion for reconsideration, which reduced his total arrearages to \$31,018.

#### C. The March 11, 2021, Contempt Judgment

¶ 5 In April 2020, mother filed a second contempt motion, alleging father's continued noncompliance with the permanent orders and with the March 2018 contempt judgment. She sought punitive and remedial sanctions.

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<sup>1</sup> Because the 2018 contempt judgment was not appealed, we express no opinion regarding the propriety of the remedial sanction imposed.

¶ 6 On January 25, 2021, the district court held an evidentiary hearing on mother's motion. On February 22, 2021, the district court issued an oral ruling finding father in contempt based on the following:

- He did not pay mother the \$5,525 for the marital debts.
- Since March 2018, he had maintenance arrearages of \$37,165.
- Since March 2018, he had child support arrearages of \$6,196.

The court then scheduled a sentencing hearing.

¶ 7 On March 10, 2021, the district court considered father's mitigating arguments and orally imposed a punitive sanction of six days in the Denver County jail. As a remedial sanction, the court directed him to pay his maintenance and child support obligations in full for six consecutive months (April 2021 to October 2021), and then, beginning in November 2021 — the month after his maintenance obligation was scheduled to end — pay his ongoing monthly child support of \$953 plus an additional \$500 toward his arrearages for six consecutive months. The court set another hearing for January 4, 2022, at which time his compliance with the

remedial sanctions would be reviewed and further sanctions, including incarceration, would be considered. The next day, the court entered a written judgment consistent with its oral ruling.

D. The January 4, 2022, Order

¶ 8 The January 4, 2022, review hearing was informal and brief. Mother said that father had not made full payments toward his monthly maintenance obligation and, as a result, asked that he serve at least thirty days in jail. Appearing without counsel, father explained that his current financial circumstances prevented him from paying the full monthly maintenance amount. The district court had a copy of the family support registry record, which it discussed with father, questioning him about certain missed payments. Ultimately, the court sentenced father to an additional twelve days in the Denver County jail. Later that day, the court issued a written order along with a writ of commitment.

¶ 9 Father represents, and mother does not dispute, that he served the twelve-day jail sentence.

¶ 10 On February 17, 2022, father filed his notice of appeal.

### E. Further Review Hearings

¶ 11 The district court again held a review hearing on May 9, 2022. At that time, mother informed the court that father was compliant with his financial obligations, and the court scheduled one more review hearing for August 22, 2022. On November 9, 2022, the court entered an order purporting to “discharg[e] the contempt action” because father “complied with the prior order” and “[m]other did not file a pleading alleging [he] was not in compliance after the August 22, 2022 [r]eview [h]earing.”<sup>2</sup>

### F. Show Cause Order

¶ 12 After the appellate briefing was complete, this court issued a show cause order directing father to explain why this appeal should not be dismissed as moot given that (1) he was not seeking review of a contempt finding; (2) he has already served the twelve-day jail sentence; and (3) the district court ultimately discharged the contempt action. *In re Marriage of Carpenter*, (Colo. App. No. 22CA0267, Mar. 17, 2023) (unpublished order).

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<sup>2</sup> Given that the contempt order (at least the January 2022 version of it) was under appeal at the time, the district court lacked jurisdiction over the order.

¶ 13 In a short pro se response, father averred that the appeal was not moot because he was “challenging the actual legality of the district court[']s findings and not the . . . punitive sanction[.]”

¶ 14 An appeal is moot if granting relief would have no practical effect on an existing controversy. *In re Marriage of Thomas*, 2021 COA 123, ¶ 21.

¶ 15 In this context, however, despite the fact that father has already served the twelve-day jail sentence and the court purportedly discharged the contempt action, the appeal is not moot because father is challenging the validity of the district court’s contempt findings or lack thereof. *See White v. Adamek*, 907 P.2d 735, 737 (Colo. App. 1995) (although contemnor no longer faced the possibility of a fine or incarceration, the finding of contempt itself imposed a continuing stigma that could lead to adverse consequences, and therefore the case was not moot). Moreover, the district court’s attempt to discharge the contempt appears to have been ineffectual. Thus, it appears this situation is capable of repetition but evading review. *See People in Interest of H.*, 74 P.3d 494, 495 (Colo. App. 2003). Accordingly, we discharge the show cause order, and address the merits of father’s appeal.

## II. The March 2021 Contempt Finding

¶ 16 To the extent father attempts to challenge the March 2021 contempt finding, he is too late.

¶ 17 A contempt judgment is final once the district court adjudicates the contempt issue and imposes a complete sanction. *In re Marriage of January*, 2019 COA 87, ¶ 12; see C.R.C.P. 107(f).

¶ 18 The district court disposed of all issues related to mother's contempt motion — that is, a finding of contempt was entered, and punitive and remedial sanctions were imposed. The court completed its punitive sanction by sentencing father to a fixed jail sentence of six days. See C.R.C.P. 107(a)(4) (punitive contempt sanctions include a “fixed sentence of imprisonment”). The court also imposed what it termed remedial sanctions by ordering him to follow a detailed payment schedule.<sup>3</sup> See C.R.C.P. 107(d)(2) (stating that the means of purging remedial contempt must be described, and contemnor may be imprisoned until compliance).

¶ 19 We recognize that the district court held periodic review hearings to check father's compliance with the remedial order. But,

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<sup>3</sup> Father does not challenge the propriety of the remedial sanction, and we offer no opinion on the matter.



as stated above, the March 2021 judgment was final and appealable when entered. If we were to conclude otherwise, the contempt judgment would never be subject to appellate review until after the last review hearing, which, in this case, occurred approximately a year and a half after the judgment was entered.

¶ 20 Under C.A.R. 4(a), an appeal must be filed within forty-nine days of the entry of a judgment or, upon a showing of excusable neglect, within thirty-five days from the expiration of the forty-nine-day window.

¶ 21 We are without jurisdiction to review the March 2021 contempt finding as father filed his notice of appeal on February 17, 2022, which is well beyond the deadline in C.A.R. 4(a). *See In re Marriage of Roddy*, 2014 COA 96, ¶ 7 (unless the notice of appeal is timely filed, appellate court lacks jurisdiction to hear the appeal). Thus, to the extent his challenge is directed to the March 2021 contempt finding, we dismiss that portion of the appeal.<sup>4</sup> *See id.* at ¶ 12.

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<sup>4</sup> We note that even if we were to address the merits of father's challenge to the March 2021 contempt finding, we would discern no error. The record is missing the transcripts from the January 25,

### III. The January 4, 2022, Contempt Order

¶ 22 Father contends that the district court’s January 2022 contempt order cannot stand. To get there, he says that the court erred by imposing an additional sanction of twelve days in jail without first expressly finding that he failed to perform a duty within his power and ability to perform. We agree and, for the reasons that follow, vacate the order.

#### A. Standard of Review

¶ 23 The decision whether to find a party in contempt is within the district court’s sound discretion and may not be reversed absent an abuse of that discretion. *In re Marriage of Webb*, 284 P.3d 107, 108 (Colo. App. 2011). A court abuses its discretion when it misapplies the law or its decision is manifestly arbitrary, unreasonable, or unfair. *In re Marriage of Sheehan*, 2022 COA 29, ¶ 23.

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2021, contempt hearing, the February 22, 2021, oral ruling, as well as the March 10, 2021, sentencing hearing. As the appellant, it is father’s responsibility to “include in the record transcripts of all proceedings necessary for considering and deciding the issues on appeal.” C.A.R. 10(d)(3). In the absence of a complete record, we must presume that the material portions omitted would support the district court’s findings and conclusions. *See In re Marriage of Dean*, 2017 COA 51, ¶ 13 (“Where the appellant fails to provide . . . a transcript, the reviewing court must presume that the record supports the judgment.”).

¶ 24 While we review the district court’s legal conclusions de novo, we are bound by its factual findings unless they are clearly erroneous, meaning there is no evidence in the record to support them. *See Hartsel Springs Ranch of Colo., Inc. v. Cross Slash Ranch, LLC*, 179 P.3d 237, 239 (Colo. App. 2007); *see also In re Marriage of Dean*, 2017 COA 51, ¶ 8.

### B. Discussion

¶ 25 Father argues that the district court’s January 2022 contempt order lacked specific findings that he had the present ability to pay his financial obligations at the time of the sentencing. We agree.

¶ 26 C.R.C.P. 107 distinguishes between two types of contempt, direct and indirect, and two types of sanctions, punitive and remedial. *In re Parental Responsibilities Concerning A.C.B.*, 2022 COA 3, ¶ 21. Though it is undisputed that this appeal involves indirect contempt, it is not clear what type of sanctions the district court imposed.

¶ 27 Remedial contempt sanctions may be imposed to force compliance with a court order. C.R.C.P. 107(a)(5); *A.C.B.*, ¶ 24. Such sanctions must be supported by factual findings establishing that the contemnor (1) did not comply with a lawful court order;

(2) knew of the order; and (3) has the present ability to comply with the order. *A.C.B.*, ¶ 24. The court must also “describ[e] the means by which the person may purge the contempt.” C.R.C.P. 107(d)(2). If a remedial contempt proceeding involves a person’s “failure to perform an act in the power of the person to perform and the court finds the person has the present ability to perform the act so ordered, the person may be . . . imprisoned until its performance.” C.R.C.P. 107(d)(2); *see A.C.B.*, ¶¶ 24-25.

¶ 28 To that end, remedial contempt requires two findings of the contemnor’s ability to comply — “one which supports the finding of contempt and a second which justifies the imposition of the remedial sanction.” *In re Marriage of Barber*, 811 P.2d 451, 456 (Colo. App. 1991).

¶ 29 Punitive sanctions take the form of an “unconditional fine, fixed sentence of imprisonment, or both, for conduct that is found to be offensive to the authority and dignity of the court.” C.R.C.P. 107(d)(4). The court must expressly make that required finding. C.R.C.P. 107(d)(1). The court is not permitted to suspend any part of a punitive sanction “based upon the performance or

non-performance of any future acts,” nor can it impose a probationary sentence. C.R.C.P. 107(e).

¶ 30 Initially, we note that, according to the minute order from the March 2021 hearing, the January status hearing was “on the matter of remedial contempt payments.” We further note that, though father was represented by court-appointed counsel at the March 2021 contempt hearing, he was not represented at the January 2022 hearing. Thus, it would appear that the January 2022 proceeding was intended to address potential remedial sanctions.

¶ 31 Nevertheless, the sanction the district court actually imposed at the conclusion of that hearing appears to be a punitive sanction rather than a remedial one. Specifically, it was fixed in duration. In fact, when the court imposed the sentence, it specifically tied the sentence to the previous punitive sanction, saying the sentence was “double what the previous sentence was.” Put another way, the

sanction did not provide that it would end when the contempt was purged. C.R.C.P. 107(d)(2).<sup>5</sup>

¶ 32 Regardless of the nature of the sanction, the district court’s order cannot stand. If it was intended to be a further remedial sanction for continued nonperformance of his support obligations, the district court did not make a finding that father had the present ability to make the payments. *In re Estate of Elliott*, 993 P.2d 474, 479 (Colo. 2000) (“[W]hen remedial sanctions are imposed, the court must make findings of fact regarding the actions constituting the contempt and the present duty and ability to perform the acts required to purge oneself of contempt.”); *see also Sheehan*, ¶ 37 (noting that the requirement of a finding of a present ability to comply ensures that “the contemnor holds in his hand the proverbial keys to the jailhouse door” (quoting *A.C.B.*, ¶ 24)). Indeed, here, father was not given those proverbial keys at all, because the sanction did not have a purge clause — a required component of a remedial sanction. *Webb*, 284 P.3d at 110. In

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<sup>5</sup> We note that in mother’s reply to father’s response to this court’s show cause order, she refers to the twelve-day jail sentence as “the punitive sanction.”

other words, the sanction did not provide that father could end the incarceration by coming into compliance. *See In re Marriage of Cyr*, 186 P.3d 88, 92 (Colo. App. 2008) (“When the court imposes a remedial contempt sanction, it must do so ‘in writing or on the record describing the means by which the person may purge the contempt.’” (quoting C.R.C.P. 107(d)(2))).

¶ 33 To the extent the jail sentence was intended to be punitive, the district court erred in several ways. First, father was denied his right to counsel. Second, the court did not find that the *continued* nonpayment was offensive to the authority and dignity of the court. And third, by imposing a six-day jail sentence, then returning to the issue of punitive sanctions for the same contempt, the court effectively either (1) suspended part of the jail sentence based on father’s performance between March 2021 and January 2022 or (2) created a type of probationary sentence (with the court serving as probation officer). Neither is permissible. C.R.C.P. 107(e).

¶ 34 In our view, the only procedure by which the district court could impose an additional *fixed* twelve-day jail sentence was by way of a new punitive contempt proceeding. A person charged with punitive contempt is entitled to certain procedural due process

protections before the court can impose such sanctions. See C.R.C.P. 107(c), (d)(1); see also *People v. Aleem*, 149 P.3d 765, 786 (Colo. 2007) (Coats, J., concurring in the judgment) (“Rule 107 of the rules of civil procedure prescribes a procedure for punishing contemptuous conduct, which generally complies with due process.”); *People ex rel. Pub. Utils. Comm’n v. Entrup*, 143 P.3d 1120, 1125 (Colo. App. 2006) (when imposing punitive sanctions, the court must observe the procedural requirements of C.R.C.P. 107); *Elliott*, 993 P.2d at 478 n.1 (to impose punitive sanctions, the court must advise the contemnor of certain rights, such as a right to counsel and a right to have the proceeding heard by another judge); *In re Marriage of Nussbeck*, 974 P.2d 493, 499 (Colo. 1999) (“[C]ertain procedural requirements must be met before a court can impose punitive sanctions.”). The district court did not provide father with those protections here. And even if we treat mother’s oral request for more jail time as a formal contempt motion, the procedures identified in C.R.C.P. 107(c) and (d)(1) were not followed.

¶ 35 In sum, the district court erred by (1) entering a new order finding father in contempt without the required findings for either remedial sanctions (i.e., present ability to comply) or punitive



sanctions (i.e., offensive to the dignity of the court) and (2) imposing an additional sanction of a fixed term of imprisonment of twelve days in jail. We therefore vacate the January 2022 contempt order.

¶ 36 Given our disposition, we need not address father’s related argument that the district court erred in imposing the additional punitive sanction because it relied on “evidence outside the timeline of the original contempt motion.”

#### IV. Disposition

¶ 37 To the extent father is challenging the March 2021 contempt finding, we dismiss that part of the appeal for lack of jurisdiction.

¶ 38 We vacate the January 2022 contempt order finding father in indirect contempt for not paying his financial obligations under the March 2021 contempt judgment and imposing an additional remedial sanction of twelve days in jail.

JUDGE FURMAN and JUDGE JOHNSON concur.