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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1868**

In re the Marriage of:
Richard K. Burtness, petitioner,
Appellant,

vs.

Janine Burtness,
Respondent.

**Filed September 23, 2013
Affirmed
Worke, Judge**

Koochiching County District Court
File No. 36-F1-04-000259

John P. Dwyer, Fargo, North Dakota (for appellant)

Steven A. Nelson, International Falls, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Worke, Judge; and
Smith, Judge.

UNPUBLISHED OPINION

WORKE, Judge

Appellant challenges the district court's order finding him in contempt, arguing that he did not have the current ability to comply with the district court's spousal-maintenance order and that he could not perform the purge conditions. Appellant further

argues that the district court abused its discretion by refusing to modify his spousal-maintenance obligation. We affirm.

FACTS

Appellant Richard K. Burtness and respondent Janine Burtness were divorced in 1994. In the dissolution action, appellant was awarded virtually all of the parties' assets, worth \$2.3 million, while respondent received a car, some household items, and the promise of permanent spousal maintenance of \$5,000 per month. *Burtness v. Burtness*, No. A05-2432, 2006 WL 1985722, at *2 (Minn. App. July 18, 2006). By 2004, appellant was in arrears. This court affirmed the district court's judgment entered against appellant for \$119,500 of past due spousal maintenance and its order denying appellant's request to reduce his monthly maintenance obligation. *Id.* In June 2004, appellant paid respondent \$50,000 against the judgment, but made no further payments, resulting in \$567,200 in maintenance arrearages. On August 12, 2011, the district court found appellant in contempt and ordered him jailed, unless he posted \$50,000 in cash or surrendered his passport, signed over ownership of all of his guns and mounted animal trophies to respondent so that she could sell them, and gave respondent \$1000 each month from his social security check. The district court further directed appellant to make a full disclosure of all financial activity that occurred between 2004 and 2011, and to provide respondent with all documents and tax returns supporting this. Appellant surrendered his passport, turned over the guns and trophies, paid respondent \$1000 per month and began the process of financial disclosure.

The central issue in this matter is appellant's financial status and his ability to pay. Appellant's income was variable throughout the parties' marriage and that same pattern continued after the dissolution; although appellant's income varied, he continued to maintain a lavish lifestyle. In 2000, appellant remarried. Appellant described his second wife as an equal partner in many of his development projects. At the time of the current hearings, appellant claimed that he had no assets and that he and his wife were living on his social security income and her monthly receipt of \$400 from an Indian tribe.

Respondent's quest for financial information was greatly hampered by the fact that appellant had not filed tax returns for 19 years and did not keep documentation of loans, investments, expenses, or other financial matters. Appellant's wife testified that she and appellant had as many as 25 credit cards, but she only had records for eight or nine of the accounts. Appellant and his wife worked together on two major developments, the Jackson Creek development in Colorado and the Dismal River project in Nebraska. Appellant's claim is that both projects were spectacular failures and that he received only negligible payouts, which were offset by expenses that he was obligated to pay. Bank records show that his wife received cash payouts in excess of \$341,000, but appellant claimed that these were offset by expenses for the projects that appellant and his wife had paid for with credit cards. However, the district court noted "that it appears that none of this alleged credit card debt has been paid."

The true extent of appellant's financial resources is almost impossible to determine. Appellant produced income tax filings, which were prepared in 2011-12, for tax years 2006-2011, but these filings are based on information provided to the

accountant by appellant, who did not have records to document many of the claimed deductions. As to the Dismal River project, appellant testified that he was to receive \$750,000 in commissions, but that he was forced to accept shares instead, and then was forced to loan \$209,000 of the shares to the company. However, the 2007 K-1 filed by Dismal River II (DRII) reflects a \$209,000 withdrawal made from appellant's capital account. Appellant's wife admitted that the holding company that she and appellant formed, Dismal River Marketing, LLM (DRM), received a check of \$245,800 from DRII designated as commissions, as well as a \$48,185.60 check designated as reimbursement for expenses. She also admitted that DRM then issued checks worth \$236,500 to her personal account. Appellant claimed that his wife received \$341,000 as reimbursement for actual costs, but the district court found that the two were only able to document \$94,000 in legitimate business expenses. Appellant's 2007 tax return also listed a payment of \$165,000 for the value of the shares he sold back to DRII. It is obvious that appellant's finances are fluid and cannot be precisely determined.

The Jackson Creek development went into bankruptcy in 2004. Appellant received a promissory note worth \$1.9 million dollars from the bankruptcy, secured by the Jackson Creek property. Appellant claimed that this was extinguished in a foreclosure sale, but appellant transferred his ownership interest in 2006 to his wife, who wrote a series of checks totaling \$55,000 from the Jackson Creek, LLC account that were deposited in her personal bank accounts. In addition, she received checks from Kenneth "Buddy" Barfield, who is the principal in a company called Bair Chase. Bair Chase is associated with LinksVest/Bair Chase, LLC, Bair Chase Property Company, LLC, as

well as JRJ Investment Fund, Ltd., WestVest Properties, Ltd., LinksVest, LLC, Jackson Creek, and Alexander Group Consulting. Bair Chase acquired the Jackson Creek property, which ultimately was sold to a man from Texas for more than \$20 million. The LinksVest entities sold the Jackson Creek property to Bair Chase. During the closing of the sale to the man from Texas, \$900,000 was paid to Jackson Creek Parties; appellant was identified by the bankruptcy court as being a part of this group. Appellant testified that the \$245,000 paid to his wife by Barfield was repayment of numerous loans. Appellant's wife testified that Barfield was appellant's good friend and he sent money to her individual accounts so they could pay bills, but she has never met Barfield. When respondent challenged these loans, suspecting that they were payments for appellant's interest in Jackson Creek, appellant produced 57 promissory notes, prepared in 2012, to document that the money Barfield sent was in the form of loans.

The district court found certain other testimony suspect. Appellant stated that he had received a lot from DRII as part of his compensation, but he did not register the title to the lot. Appellant and his wife set up a limited liability company, DR Sunset, LLC; she was the sole member of the company. After the incorporation, appellant's wife signed the deed to transfer the property to DR Sunset, with appellant signing solely as spouse. Although appellant testified that this was to limit liability to third parties other than respondent and not to evade respondent's judgment, respondent had filed a judgment lien in Nebraska, which could have been executed against this property if title had been registered in appellant's name.

Appellant owned a town home in North Dakota, in which his mother had a life estate. Appellant transferred his interest in this house to his wife, but after his mother died, he had the title transferred back to his name and claimed it as his homestead, making it exempt from respondent's judgment filed in North Dakota.

During the period of time that appellant failed to pay spousal maintenance, from 2004 to 2011, he made at least three hunting trips to South Africa, Zimbabwe, and Kamchatka in Russia. Appellant claims that these trips were gifts from business associates. Appellant had hunting trophies of exotic animals that are worth in excess of \$20,000.

The district court found that appellant "has not presented sufficient evidence to persuade the court that he has no ready access to significant funds," and that appellant's "own evidence shows that at a minimum, over \$741,000 in income has passed through his hands and been under his control from January 2007 up to the commencement of this action[,] . . . [which] translates to over \$160,000 per year." Finally, the court found appellant not credible, based on his testimony, his demeanor, and "the various circumstantial contradictions."

The district court found appellant to be in civil contempt and ordered him immediately incarcerated. The district court set the following purge conditions: (1) pay respondent \$100,000; and (2) disclose all sources and the amounts of cash or funds upon which "he, his household, his current spouse and all of his business entities[,] whether they be partnerships of any kind, corporations of any kind, ventures of any kind [that he] has had access to or has spent from 2004 through the present." This appeal followed.

DECISION

Civil contempt: ability to pay

A court may find a person in civil contempt of court for “disobedience of any lawful judgment, order, or process of the court.” Minn. Stat. § 588.01, subd. 3(3) (2012). “When the contempt consists in the omission to perform an act which is yet in the power of the person to perform, the person may be imprisoned until the person performs it, and in such case the act shall be specified in the warrant of commitment.” Minn. Stat. § 588.12 (2012). The court may enforce compliance with its legitimate orders through a civil contempt proceeding. *Hopp v. Hopp*, 279 Minn. 170, 173, 156 N.W.2d 212, 216 (1968). This includes the specific authority to enforce maintenance and child support orders by use of a civil contempt proceeding. *Crockarell v. Crockarell*, 631 N.W.2d 829, 833 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001). We review the district court’s decision to invoke its contempt power for an abuse of discretion and will not reverse the district court’s factual findings unless they are clearly erroneous. *Id.*

In order to properly exercise its civil contempt powers, the district court must find that (1) it had jurisdiction over the subject matter; (2) its decree clearly defined the acts to be performed; (3) the party directed to perform had notice of the order and a reasonable time within which to comply; (4) the adversely affected party has applied to the court for assistance in compelling the other party to perform; (5) the nonperforming party is given notice and an opportunity to explain why he has failed to comply with the order; (6) after a hearing, the party has failed to comply and conditional confinement is reasonably likely to compel compliance; (7) the party had the ability to comply with the court’s order; and

(8) the confined party can obtain his release either by compliance or performance of specified acts. *Hopp*, 279 Minn. at 174-75, 156 N.W.2d at 216-17. The contemnor has the burden of demonstrating an inability to comply with the order. *Crockarell*, 631 N.W.2d at 837.

Appellant concedes that the district court properly found him in contempt. But he asserts that the district court's findings regarding his ability to pay his maintenance obligation are clearly erroneous. Specifically, appellant argues that (1) he has documented that the monies received from Barfield are loans, not reimbursements from the Jackson Creek project; (2) although he received a great deal of money, he was obligated, as a self-employed person, to pay legitimate business expenses and his net income, after deduction of business expenses, was insufficient to pay maintenance; (3) the district court erred by finding that assets that belonged to his wife should be available for payment of support; (4) the district court's finding that he received \$741,000 between 2007 and 2011 is clearly erroneous and not supported by the income tax returns filed for those years; and (5) the district court improperly relied on the value of his exempt homestead in computing appellant's ability to pay.

Appellant has the burden of demonstrating an inability to perform as ordered. *Id.* Both appellant and his wife submitted extensive affidavits with attachments on September 13, 2012, which they claim show an inability to pay. The affidavits and the accompanying financial statements prepared by an accounting firm were prepared with information provided by appellant and his wife, because most of the documentary information about the various projects does not exist. Appellant and his wife claim that

they have attempted to acquire documentation from former partners and investors but have been unsuccessful. These affidavits memorialize much of the hearing testimony, which the district court rejected as not credible. There is a basis for the district court's finding that appellant was not credible. Appellant claimed that \$100,000 was withheld twice in order to pay tax liability, yet he did not file tax returns for at least 19 years. He claimed that other money received went to pay down credit cards, yet was unable to substantiate credit card payments. Any cash or unencumbered property was promptly transferred into his wife's name, so that it could not be executed upon by judgment creditors, including respondent. Although appellant presented an affidavit from Barfield claiming that the cash payments he sent to appellant were loans, the notes documenting these loans were prepared only after respondent discovered during appellant's wife's deposition that she was receiving a substantial amount of money from Barfield. During the original request for disclosure, appellant's wife failed to mention her primary bank account, the one into which the Barfield payments were deposited, or the fact that Barfield was sending money. She later testified that Barfield sent another \$50,000 during the pendency of the contempt hearing and that appellant had her withdraw that amount in cash so that he could drive to Texas and personally return it to Barfield.

We defer to the district court's credibility determinations made in a contempt hearing. *Szarzynski v. Szarzynski*, 732 N.W.2d 285, 298 (Minn. App. 2007); *see also Varner v. Varner*, 400 N.W.2d 117, 121 (Minn.App. 1987) (noting that a district court "is not required to accept even uncontradicted testimony if the surrounding facts and circumstances afforded reasonable grounds for doubting its credibility"). In *Crockarell*,

the district court rejected the obligor's similar claim that the only assets available to pay support were his current wife's, who was not obligated to pay support. 631 N.W.2d at 836. The district court found that the obligor

transferred his own assets to his wife and has manipulated his finances to avoid his child-support obligations. Further, the district court found that [the obligor's] efforts and expertise have helped to generate or accumulate millions of dollars in property and assets for his wife and other business associates while, at the same time, [the obligor] has made no attempt to seek employment.

Id. (quotation omitted).

Here, the district court noted that appellant's failure to fully disclose loans and sources of income was "compelling evidence of sources of income showing his ability to pay spousal maintenance." The district court also concluded that appellant had not sustained his burden of proving inability to pay because of his lack of credibility. The court determined that appellant has the "present ability to meet his \$5,000 per month spousal support obligation." These findings are not clearly erroneous. Based on the district court's credibility determinations, appellant has not sustained his burden of proving that he was unable to pay the ordered spousal maintenance.

Civil contempt: purge conditions

Appellant argues that the district court erred by failing to determine that he had the ability to perform the purge conditions. *See Mahady v. Mahady*, 448 N.W.2d 888, 890 (Minn. App. 1989) (stating that court must not only find that the contemnor had the ability to pay the obligations when due, but must also find that the contemnor has the ability to meet the purge conditions).

The district court found that appellant “has not presented sufficient evidence to persuade the court that he has no ready access to significant funds.” Instead, the district court found that circumstantial evidence suggesting that appellant had access to significant funds was “much more reasonable and persuasive.” A district court is not obligated to determine the source of funds available to meet purge conditions, but may draw adverse inferences against a contemnor who is not candid about his finances. See *Zaldivar v. Rodriguez*, 819 N.W.2d 187, 197 (Minn. App. 2012) (reasoning that illegal immigrant had sources of income to meet purge condition because he “had managed to financially support himself for several years”). See also *Butt v. Schmidt*, 747 N.W.2d 566, 576 n. 3 (Minn. 2008) (noting in a child support dispute that when a party in exclusive possession of evidence fails to produce that evidence “an unfavorable inference may be drawn about the party as to the relevant issue”).

Here, the district court, after receiving appellant’s and his wife’s September 2012 affidavits, noted that appellant’s “recent income/asset disclosures are insufficient to purge his contempt of court for non-payment of spousal maintenance. They contain no new or helpful information.” The district court continued to find appellant not credible; there is a substantial basis in the record for the district court’s findings and its conclusions as to credibility. These findings as to appellant’s ability to meet the purge conditions are not clearly erroneous.

Motion to modify spousal maintenance

Appellant argues that the district court abused its discretion by refusing to modify his maintenance obligation. The district court may modify a maintenance award upon a

showing of a substantial change of circumstances that makes the terms of the award unreasonable or unfair. Minn. Stat. § 518A.39, subd. 2 (2012). We review the district court's decision about modification of maintenance for an abuse of discretion. *Kemp v. Kemp*, 608 N.W.2d 916, 921 (Minn. App. 2000). We review the district court's factual findings about income for clear error. *Peterka v. Peterka*, 675 N.W.2d 353, 357 (Minn. App. 2004).

The district court here implicitly found that there had been no substantial change in circumstances. First, at the time of the dissolution, appellant was engaged in the same sort of self-employment occupation and had highly irregular earnings. In the dissolution by stipulation, appellant received \$2.3 million in liquid assets, while respondent received only a limited amount of personal property and the promise of permanent maintenance of \$5,000 per month. The district court's current findings show the same situation: appellant's income and resources are wildly irregular and stem from a number of different activities. There has been no change in these circumstances. The district court's task of determining if there was a change in circumstances was made much more difficult by appellant's failure to file income tax returns for 19 years or to maintain any sort of financial records. The district court rejected as unreliable the records and tax documents that appellant apparently assembled by memory without adequate documentary support. As stated above, the district court found appellant not credible and did not believe his testimony that he was living in poverty, because it was at odds with the lifestyle he maintained and because appellant was unable to explain how he and his wife managed to pay for their daily expenses.

The proponent of modification of a maintenance award has the burden of proving that there has been a substantial change in circumstances that makes the award unreasonable and unfair. *Kielley v. Kielley*, 674 N.W.2d 770, 779 (Minn. App. 2004). The district court rejected appellant's claim of a change in his financial circumstances and concluded that appellant did not sustain his burden of proof. The district court noted that appellant's "income generation, his method of economic survival and flourish (whatever it might be called) and his lifestyle have changed little if at all since [respondent's] marriage to him." This was not an abuse of discretion.

Affirmed.