

COLORADO COURT OF APPEALS

Court of Appeals No.: 04CA2436
Arapahoe County District Court No. 02DR1521
Honorable Juanita L. Rice, Judge

In re the Marriage of

Victor Palli,

Appellant,

and

Latha Palli,

Appellee.

ORDER REVERSED, SENTENCES AND SANCTIONS VACATED,
AND CASE REMANDED WITH DIRECTIONS

Division VI

Opinion by: JUDGE CARPARELLI
Webb and J. Jones, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced: October 26, 2006

James Darnel, Glendale, Colorado, for Appellant

Cox, Mustain-Wood Walker Schumacher, Randall C. Mustain-Wood, Littleton,
Colorado, for Appellee

Victor Arunkumar Palli (husband) appeals from the trial court's order finding him in contempt for dissipating marital property and failing to provide an accounting to Latha Palli (wife). We reverse the order of contempt, vacate the sentences and remedial sanctions, and remand with directions.

Husband filed a petition to dissolve the marriage on May 31, 2002. The parties stipulated to interim orders on June 26, 2003, which, in pertinent part, required them to obtain an equity line of credit on their marital residence. The proceeds of the line of credit were to be used for the payment of attorney fees and costs and for the cost of supervision when they exchanged their child for parenting time.

In February 2004, wife filed a motion for contempt alleging that husband spent \$167,351 of the refinanced proceeds on unauthorized expenditures and that he repeatedly violated the automatic temporary injunction that immediately took effect upon the filing of the petition under § 14-10-107(b)(I)(A), C.R.S. 2006. She also asserted that husband had dissipated approximately \$956,536 from a joint investment account in May and June 2002,

liquidated another account beginning in February 2004 of \$101,000, and refused to generate business for his company, which was a marital asset. Wife further claimed that husband failed to account for any of his extraordinary expenditures as required under the automatic temporary injunction.

Following an evidentiary hearing on the citations that issued, the trial court found husband in contempt for spending the refinanced funds on unauthorized expenditures without wife's agreement, consent, or knowledge. The court also found that he violated his fiduciary duty to account for the funds. The court determined that husband had dissipated additional marital funds totaling some \$1 million.

The trial court sentenced husband to a total of 120 days in jail, twenty days to be served immediately with the remainder of the sentence suspended. The court also ordered that by September 1, 2004, husband was to place the funds from the house refinance, in the amount of \$167,351.19, into a trust account for wife. Husband was further ordered to pay an additional \$664,319 into the trust account by September 30, 2004. The trial court ruled that if

husband failed to pay the funds on a timely basis, he would be required to serve the remainder of his sentence.

The trial court subsequently determined that husband failed to deposit the funds as ordered and sentenced him to serve fifty days of his remaining sentence as a punitive sanction and fifty days more as a remedial sanction.

In November 2004, the trial court held a review hearing. It found that husband remained in non-compliance and, explaining that its sanction for the contempt was both punitive and remedial, continued his sentence until payment was made and the contempt was purged.

Husband filed several motions for a stay and other relief which the trial court denied. As of January 2005, it appears husband was still serving his sentence.

I.

Husband first contends that the trial court improperly based its finding of contempt partly on actions he took prior to the filing of the petition for dissolution. We agree.

A. Jurisdiction

Initially, we note that husband has mischaracterized the issue as one of jurisdiction. Specifically, he argues that the trial court lacked jurisdiction to hear matters occurring prior to the filing of the petition. However, subject matter jurisdiction concerns a court's authority to deal with the class of cases in which it renders judgment and a court has jurisdiction over the subject matter if the case is one of the types of cases that the court has been empowered to entertain by the sovereign from which the court derives its authority. Williamson v. Williamson, 39 P.3d 1199 (Colo. App. 2001). It is well recognized that trial courts, sitting in dissolution proceedings, may exercise the power of contempt to enforce obedience of their orders, Gonzales v. Dist. Court, 629 P.2d 1074 (Colo. 1981), and here, the court was vested with jurisdiction to consider wife's motion for contempt in all of its aspects.

We recognize, as wife argues, that husband failed to challenge the trial court's reliance on pre-petition events in the proceedings below. However, because the issue concerns the sufficiency of the evidence and whether the trial court's findings are supported by the

required elements, we conclude that it is properly before us for review.

B. Merits of Contention

To find a party in contempt, four things must be shown: (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. See In re Boyer, 988 P.2d 625 (Colo. 1999)(discussing punitive contempt).

A court may impose two types of sanctions for contempt, remedial or punitive. Remedial sanctions are imposed to force compliance with a lawful order to compel performance of an act within the person's power or present ability to perform. C.R.C.P. 107(a)(5); In re Marriage of Nussbeck, 974 P.2d 493 (Colo. 1999). When imposing a remedial sanction, 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. In re Estate of Elliott, 993 P.2d 474 (Colo. 2000).

A punitive sanction is imposed to punish by 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(a)(4); In re Marriage of Nusbeck, supra. The court must include an express finding that the contemnor's conduct was "offensive to the authority and dignity of the court" and it may not suspend any part of the punitive sanction based upon the performance or nonperformance of future acts. C.R.C.P. 107(d)(1), (e); People v. Entrup, ___ P.3d ___ (Colo. App. No. 05CA0130, July 27, 2006). The elements of contempt must also be proved beyond a reasonable doubt. C.R.C.P. 107(d)(1).

If the record supports the trial court's findings, they will be binding on appeal. However, we will overturn a finding of contempt if the trial court has abused its discretion. Sec. Investor Prot. Corp. v. First Entm't Holding Corp., 36 P.3d 175 (Colo. App. 2001).

The temporary injunction automatically created by the filing of a petition for dissolution of marriage under § 14-10-107(4)(b)(I) prohibits either party from disposing of any marital property without the consent of the other except in the usual course of

business or for the necessities of life, and requires a party to account to the court for extraordinary expenditures made after the injunction is in effect. In re Marriage of Meisner, 715 P.2d 1273 (Colo. App. 1985). The injunction, although created by operation of statute, is considered an order of the court. See In re Marriage of Finer, 893 P.2d 1381 (Colo. App. 1995)(temporary injunction under § 14-10-107(4)(b)(I)(C) is equivalent to a preliminary injunction and is an appealable order under C.A.R. 1(a)(3)).

Here, the finding of contempt related to husband's dissipation was based upon conduct occurring both before and after the petition was filed. Those instances of dissipation found to have occurred after the petition as well as husband's violation of the interim court order requiring the use of refinanced funds for certain purposes were proper to support a finding of contempt. However, it is clear that any dissipation by husband before this action was commenced could not lawfully support a finding of contempt because there was no court order in effect restricting husband's use of marital funds. See In re Marriage of Posinoff, 683 P.2d 377 (Colo. App. 1984)(husband had equal right to all funds in a joint

account and his withdrawal of those funds prior to the dissolution proceeding was not per se fraudulent or a theft).

Moreover, husband also had no statutory "court ordered" duty to account for extraordinary expenses before the temporary injunction came into existence. Therefore, contrary to wife's argument, the finding of contempt could not have been based upon any post-petition failure by husband to account for those funds spent before the petition was filed.

Except for the payment for \$167,351.19, the trial court did not differentiate between the underlying acts of dissipation when imposing its various sanctions. Consequently, we are unable to discern whether the sanctions, both punitive and remedial, were addressed to pre-petition acts. For example, it is not clear from the trial court's order exactly what incidents of post-dissolution dissipation are to be remedied by the \$664,319 reimbursement payment. However, in that regard, the record establishes that a significant portion of that amount can only be attributed to husband's pre-petition dissipation. Further, the court generally imposed the fixed sentence of imprisonment and we are not able to

tell whether it applied exclusively to husband's dissipation of the refinanced funds.

Because we cannot ensure that the sanctions only applied to improper conduct, the court's error in predicating the finding of contempt, in part, on pre-petition acts requires reversal of the entire order. Accordingly, we vacate the sentences and set aside the other sanctions imposed.

On remand, if the trial court enters new findings of contempt, they must not include any acts of dissipation committed before the petition. The sanctions imposed must also be modified accordingly to redress only those acts that constitute violations of a court order. Although the pre-petition acts of dissipation cannot support a finding of contempt, our holding is not meant to relieve husband of any responsibility for transferring marital assets prior to the commencement of the dissolution action or in failing to account for any missing money. These are factors that would be relevant in the court's formulation of an equitable property distribution. Further, husband's acts of pre-petition dissipation could be considered as

evidence of either the willfulness of any post-petition dissipation or husband's present ability to pay.

III. Other Errors

Husband raises several other issues. We briefly address those that may arise on remand.

Husband argues that the trial court made no specific finding that he had the present ability to pay the amounts necessary to purge the contempt. We agree and, although implied findings to that effect may at times suffice, an explicit finding regarding husband's present ability to pay should be made if remedial sanctions are entered on remand. See In re Marriage of Harris, 670 P.2d 446 (Colo. App. 1983)(present ability to comply was implicit in the trial court's findings); cf. People v. Razatos, 699 P.2d 970, 975 (Colo.1985)(holding that the record did not support remedial contempt order because it did not establish defendant had the ability to pay the ordered restitution at the time of the hearing).

Further, if, on remand, punitive sanctions are again imposed, the court should make a specific finding of offense to the authority and dignity of the court.

We also agree with husband that the trial court erred in suspending part of the punitive sentence on the condition of future compliance in violation of C.R.C.P. 107(e). See People v. Entrup, supra (suspension of fixed sentence and conditioning it on the payment of attorney fees was improper under C.R.C.P. 107(e)). However, the trial court was permitted to enter both remedial and punitive sanctions. See C.R.C.P. 107(d); People v. Razatos, supra (where remedial contempt is sought, an adjunct criminal contempt sanction of fine or imprisonment is also available to vindicate dignity of court if the contempt citation so states).

Finally, the trial court was not precluded by its contempt orders from also entering judgment based on the permanent orders. See In re Marriage of Nussbeck, supra (entry of a judgment for past due support or maintenance payments ordered by the court will not alter a trial court's authority to enforce its order underlying that judgment through contempt proceedings).

In light of our disposition, it is not necessary that we reach husband's constitutional arguments.

We reverse the order of contempt, vacate the sentences and remedial sanctions and remand for new findings and additional proceedings as the court deems necessary.

JUDGE WEBB and JUDGE J. JONES concur.