STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0340

In re the Marriage of:
Patricia Ann Norman, petitioner,
Respondent,

vs.

David Lee Norman,
Appellant.

Filed May 12, 2009
Affirmed
Hudson, Judge

Becker County District Court
File No. 03-F8-06-000897

Stephen R. Dawson, 2108 South University Drive, Suite 103, Fargo, North Dakota 58103 (for respondent)

Patti J. Jensen, Galstad, Jensen & McCann, P.A., 1312 Central Avenue Northeast, P.O. Box 386, East Grand Forks, Minnesota 56721 (for appellant)

Considered and decided by Connolly, Presiding Judge; Hudson, Judge; and Worke, Judge.

U N P U B L I S H E D O P I N I O N

HUDSON, Judge

On appeal in this marital-dissolution-based contempt dispute, appellant-husband argues that his incarceration for civil contempt was improper because the purge

conditions were unreasonable, he was unable to satisfy those conditions, and those conditions were unlikely to produce his compliance. We affirm.

FACTS

Appellant David Lee Norman was served with a summons and petition for divorce from respondent Patricia Ann Norman on June 12, 2006. The summons and petition contained restraining provisions prohibiting the disposing of marital assets while the matter was pending. During the trial, it became clear that the parties had excessive debt, had no liquid assets, and were owners of several condominiums in Mexico. The district court ordered the parties to try to sell the condominiums while the trial was pending in an effort to "free up cash" to begin paying the parties' debt. The district court found that appellant had exclusive control over the sale of the properties because he was the party who traveled to Mexico, he was familiar with the condominium association and the realtor, and he had experience in buying and selling real estate. On the last day of trial, May 2, 2007, the district court stated that the proceeds from the sale of any condominium would be used to pay IRS debt.

In the summer of 2007, appellant sold one of the marital condominiums, a "Volkerding Unit," but he did not inform respondent or the district court of the sale, and he eventually spent at least $126,000 of the proceeds from the sale. These proceeds were characterized by the court as marital assets. On June 25, 2007, respondent filed a motion to show cause relating to the undisclosed sale of the marital assets. Appellant filed an affidavit in response explaining that "[t]he sale of the one Volkerding unit did close," that he "deposited all of those funds in an account," and that he "then transferred $100,000.00

from that account to a savings account so that it would be available for transfer to pay necessary debts with what remains to be available to be forwarded to the Internal Revenue Service or the State Tax Department." But appellant also admitted that he "did spend some of the money." Appellant attached bank records to his affidavit which confirmed that the entire sum of $126,000 had been spent.

As a result of appellant's actions, by order dated September 14, 2007, the district court found appellant in contempt of court and ordered appellant to serve 90 days in jail, with 60 days of that sentenced stayed. No purge conditions were given at that time.

Appellant moved to vacate the provision of the order that imposed the sentence of incarceration for contempt of court. On October 26, 2007, the district court denied appellant's motion to vacate and amended its contempt order by adding purge conditions, allowing appellant to purge himself of contempt if he deposited $126,000 into his attorney's trust account by November 30, 2007, and produced documentation of the sale of the condominium in Mexico, including information explaining the amount of money he received. In addition, the district court appointed Thomas Holtgrewe as a "special master" and authorized him to oversee the sale of the parties' remaining condominiums in Mexico.

Appellant sought a writ of prohibition from this court to preclude the district court from enforcing the October 26, 2007 contempt order. We denied appellant's petition, concluding that other remedies were available to appellant, specifically, that the district court still had time to amend its order to explicitly address a second-stage hearing in regard to the purge conditions in accordance with *Mahady v. Mahady*, 448 N.W.2d 888,

891 (Minn. App. 1989). The district court entered an order on December 18, 2007, which set the second-stage *Mahady* hearing for January 7, 2008.

Appellant did not meet either of the purge conditions. Following the January 7, 2008 hearing, the district court found that appellant had the ability to make the purge condition payment of $126,000, because he "continued his extravagant lifestyle" even after being found in contempt. The district court also found that appellant was given time to secure money for deposit in the trust account to purge the contempt and that the "time period was designed to induce him to comply with the current valid [c]ourt [o]rder—not to punish him for past failure to perform. He did not take the matter seriously and made no efforts to conform and to purge himself of the contempt." The district court also addressed the second purge condition, which required appellant to produce documentation of the sale of the condominium in Mexico, and found that

> no official documentation has been received by the [c]ourt to date, which would prove exactly how much [appellant] received for the sale of the condo. [Appellant] only produced one document, in Spanish, which appears to be a blanket assertion that the condo sold for $126,000, but said document has no legal authority.

The district court concluded that the sanction of incarceration would compel appellant's compliance "by improving his communication and level of cooperation with the [s]pecial [m]aster in effort to close the sale of the condominiums in Mexico, which in turn will provide some funding to meet the purge condition."

Based on these findings, the district court concluded that appellant's civil contempt was willful and inexcusable; that appellant was given notice of a sanction and

purge conditions, as well as time to meet those conditions; that appellant was given a hearing to show compliance or reasons for failure to comply; that appellant had the ability to comply; that appellant failed to comply; and that conditional confinement was likely to compel full or partial compliance. This appeal follows.

D E C I S I O N

I

Appellant argues that the district court abused its discretion by setting purge conditions which were unlikely to induce his performance and which he did not have the ability to satisfy. "The district court has broad discretion to hold an individual in contempt. This court reviews a district court's decision to invoke its contempt power under an abuse-of-discretion standard." *In re Marriage of Crockarell*, 631 N.W.2d 829, 833 (Minn. App. 2001) (citation omitted), *review denied* (Minn. Oct. 16, 2001). An order of contempt will be overturned if the findings of fact supporting the order are clearly erroneous. *Mower County Human Servs. ex rel. Swancutt v. Swancutt*, 551 N.W.2d 219, 222 (Minn. 1996). Requisite findings for civil contempt are set forth in *Hopp v. Hopp*, 279 Minn. 170, 174–75, 156 N.W.2d 212, 216–17 (1968). The obligor's financial condition is at issue twice. First, the contempt finding depends on a determination that the obligor has the ability to pay the obligations as they come due. *Id.* at 175, 156 N.W.2d at 217 (holding that confinement should not be directed if the party is "wholly unable" to perform). Second, the court must set purge conditions and determine whether the contemnor has the ability to meet those conditions. Minn. Stat. § 588.12 (2008) (providing that imprisonment for contempt is dependent upon act being "in the power of

the person to perform" at the time imprisonment ordered); *Hopp*, 279 Minn. at 175, 156 N.W.2d at 217 (stating "[t]hat when confinement is directed," the contemnor "should be able to effect his release by compliance or, in some cases, by his agreement to comply as directed to the best of his ability"). In addition, the court must determine that "conditional confinement is reasonably likely to produce compliance." *Hopp*, 279 Minn. at 175, 156 N.W.2d at 217; *see also Tatro v. Tatro*, 390 N.W.2d 461, 464 (Minn. App. 1986) ("Findings on the defendant's ability to comply with the conditions of a contempt order are required when a contempt motion is granted.").

Here, the October 2007 amended order allowed appellant to purge the contempt by (1) producing documentation of the sale of the condominium in Mexico and (2) depositing $126,000 into his attorney's trust account by November 30, 2007. Based on the testimony of appellant and the court-appointed special master at the January 2008 hearing, the district court found that appellant had the ability to make the purge condition payment of $126,000, but failed to do so because he "continued his extravagant lifestyle" even after being held in contempt. This extravagance included: three trips to Mazatlan, Mexico, with stays lasting between one week and one month each; one trip to Arizona for a week; one trip to Hollywood, California to attend a Halloween party at the Playboy Mansion; the lease of a $40,000 luxury car with a $575 monthly payment; and the fact that appellant continued to reside in the marital lake home even though that home was purportedly sold to appellant's family members for over $450,000. The district court found that appellant had "access to money from a source or sources unknown to the [c]ourt," and that since the time appellant became aware of his purge condition, he sold

his Harley-Davidson motorcycle for $12,000 and received a check in the amount of $68,000 as a down payment on the "Volkerding Unit Two" condominium, but did not deposit any of that money in the trust account. The district court also found that since he became aware of the purge condition, appellant had made no effort to assist the special master in closing the $90,000 sale of the "Seeger" condominium. In addition, the district court found that if the special master had been given documentation regarding the sale price of one "Volkerding Unit" condominium, it would have assisted him in working with the realtor and condominium association in Mexico to sell the remaining condominiums. The district court stated that appellant "has not cooperated with [the special master] in this matter and has frustrated efforts to make further sales." The district court's findings are well supported by the record.

Furthermore, we note that arguments in appellant's brief contradict his testimony from the January 2008 hearing. Appellant argues in his brief that the district court erroneously held that appellant could have allocated money received from the sale of appellant's Harley-Davidson toward the $126,000 owed as part of the purge conditions. Appellant states that "[a]s the [district] court was aware as [appellant] testified to the same at a prior hearing, he used the equity in the Harley to replace a car for the parties' daughter in college. [Appellant] did not sell the Harley to generate cash for himself; he sold the Harley to transfer equity in the same for the benefit of the parties' daughter." But at the January 2008 hearing, when asked how much money appellant had in his checking account and where that money came from, appellant stated, "Total of about probably less than $1,100" and that it came "[p]rimarily from two sources, the sale of a

Harley-Davidson, and borrowing from my daughter." Again at the same hearing, appellant was asked how he paid for the lease payments on his new luxury vehicle and appellant responded, "My—my Harley. I believe. That was pretty big." But later in the hearing, the district court asked appellant, "[W]hat money did you use to live in Mexico for six weeks?" Appellant responded, "The Harley money, and money, if I need money, from—Carmen's been good about it."

On this record, we conclude that appellant had the ability to fulfill the purge conditions.

II

Appellant argues that the district court erred because the contempt order did not address whether confinement was reasonably likely to produce his compliance with the purge conditions. Appellant further argues that the purge conditions were not imposed to produce compliance, but, rather, were imposed in order to punish him.

On appeal, this court is to reverse the factual findings of a contempt order only if the findings are clearly erroneous. Minn. R. Civ. P. 52.01; *Swancutt*, 551 N.W.2d at 222. The district court's legal conclusions are reviewed independently. *See Maxfield v. Maxfield*, 452 N.W.2d 219, 221 (Minn. 1990) (allowing appellate courts to correct erroneous application of the law). But appellate courts are to give due regard to the district court's credibility assessment. Minn. R. Civ. P. 52.01; *Novack v. Nw. Airlines, Inc.*, 525 N.W.2d 592, 598 (Minn. App. 1995).

If a contemnor "is able to perform a purge condition, a matter of fact that must be determined, the choice to incarcerate is patently premised on the reasonable likelihood of

producing compliance." *Schubel v. Schubel*, 584 N.W.2d 434, 436 (Minn. App. 1998). Contempt cannot lie where there is an impossibility of performance. *See Hopp*, 279 Minn. at 175, 156 N.W.2d at 217 ("the civil contempt power, by definition, cannot be used to . . . confine a person until he does the impossible."). Additionally, "[c]ivil contempt proceedings are designed to induce future performance of a valid court order, not to punish for past failure to perform." *Engelby v. Engelby*, 479 N.W.2d 424, 426 (Minn. App. 1992). The *Hopp* court asked and answered its own question regarding what a district court is to do when a party fails to comply with the purge conditions of an order for contempt and claims that performance is impossible:

> [C]an the trial judge refuse to accept inability to perform as an excuse for failure to comply if he is satisfied that the party directed to pay has not made a reasonable effort by means of his own selection to conform to an order well within his inherent, but unexercised, capacities? The answer to this question must be in the affirmative . . . .

279 Minn. at 176, 156 N.W.2d at 217.

Appellant asserts that the district court was "fully aware" that he was "wholly unable to generate $126,000.00 [in] one month as was ordered." But the burden of proving inability is on the obligor in a civil contempt proceeding. *Id.* at 175, 156 N.W.2d at 217. Here, despite appellant's assertion to the contrary, the district court determined that confinement was reasonably likely to produce appellant's compliance. We agree. The district court expressly addressed the fact that appellant had the ability to comply, but simply chose not to do so. The district court found that rather than comply, appellant continued to live an extravagant lifestyle and make large purchases while failing to make

even a single deposit into his attorney's trust fund. Moreover, appellant's deposit of $68,000 after he was already incarcerated demonstrates that the sanction of incarceration was reasonably likely to produce appellant's compliance because it did, in fact, do so, at least partially.

Appellant also contends that the contempt order was punitive because it punished him for interfering with the sale of one of the parties' condominiums. Appellant claims that this matter should have been resolved by the property settlement in the dissolution and that by holding him in contempt for failing to effectuate the sale of the condominium, the district court was, in effect, requiring him to "take[ ] marital property to restore other marital property." But the district court's contempt order had nothing to do with the parties' property settlement. Rather, the contempt order concerned appellant's defiant and persistent refusal to comply with the district court's orders. The district court ordered appellant to cooperate with the sale of marital properties, presumably so that the district court could properly divide the funds. Appellant's claim is unavailing, and we see nothing punitive in the district court's contempt order.

The district court did not abuse its discretion in setting the purge conditions because appellant clearly had the ability to comply, but chose not to do so. The burden of proving inability to perform was on appellant in this civil contempt proceeding, and appellant did not meet that burden.

Affirmed.