STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0685

In re the Matter of:
Laura Michelle Marks
n/k/a Laura Michelle Schwartz, petitioner,
Respondent,

vs.

Christopher William Conrad Marks, Sr.,
Appellant.

Filed April 22, 2013
Affirmed in part, remanded in part
Ross, Judge

Hennepin County District Court
File No. 27-FA-273-776

Laura M. Schwartz, Burnsville, Minnesota (pro se respondent)

Michael O. Freeman, Hennepin County Attorney, Manuel Guzman, Assistant County Attorney, Minneapolis, Minnesota (for respondent)

John G. Westrick, Westrick & McDowall-Nix, P.L.L.P., St. Paul, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Ross, Judge; and Chutich, Judge.

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

ROSS, Judge

Christopher Marks, Sr., appeals from the district court's order finding him in constructive civil contempt of court for failing to meet his child-support obligations. Marks challenges the district court's conditional contempt order finding that he had the extant ability to meet purge conditions. Marks also challenges the district court's final contempt order confining him without finding that confinement is likely to produce compliance and finding that he had the ability to comply with release conditions. Because the record supports the district court's express finding that Marks had the ability to satisfy the purge conditions and its implicit finding that confinement is likely to produce compliance, we affirm. But we remand for a more precise determination of the conditions that Marks must meet to obtain release.

FACTS

Christopher Marks and Laura Schwartz divorced in 2002 and have three minor children for whom Marks has been ordered to pay child support since 2003. He has been found in contempt of court at least six times for his repeated failure to comply with child-support orders.

In February 2008, Marks was ordered to pay $659 in monthly child support based on imputed monthly income of $3,333. In July 2011, the district court ordered Marks to pay Schwartz $500 for unreimbursed medical expenses. Marks moved to decrease his child-support obligation in August 2011 and submitted documents showing that he worked at DaVita Dialysis earning $2,335 monthly. In October 2011, the district court

granted Marks's motion and reduced his monthly child-support obligation to $495, but it also ordered him to pay an extra 20% or $99 until he eliminated his child-support arrearage. The October 2011 order also directed Marks to pay the balance of the $500 owed for unreimbursed medical expenses from the July 2011 order plus $200 for unreimbursed medical expenses incurred by Schwartz in June and July 2011.

In November 2011, Schwartz moved to hold Marks in contempt of court because Marks failed to pay the unreimbursed medical expenses. At the hearing on her motion in December 2011, Schwartz submitted documents that Marks owed her $1,478.29 for unreimbursed medical expenses. She asserted that Marks also failed to pay $790.80 from a previous contempt order. Marks maintained that an ambiguity or clerical error in a previous order justified his failure to pay his portion of the unreimbursed medical expenses. He claimed that he had paid the $790.80 and stated that he intended to pay at least $800[1] toward his share of the unreimbursed medical expenses.

In a January 2012 order, the district court found Marks in constructive civil contempt of court for failing to comply with its previous orders. The court observed that Marks failed to pay his portion of unreimbursed medical expenses and child support on a timely basis. The district court allowed Marks to purge himself of the contempt by paying

[1] The July 2011 order directed Marks to pay $500 and the October 2011 order directed Marks to pay that amount plus $200 for unreimbursed medical expenses incurred in June and July 2011. In both the January 2012 conditional contempt order and April 2012 final contempt order, the district court ordered Marks to pay "$1,478.29, which includes an amount of $800 previously ordered representing unreimbursed medical expenses." But the total court-ordered amount of unreimbursed medical expenses as of October 2011 was $700, not $800. Because we are remanding on a separate issue, the district court may address this possible error in its discretion.

Schwartz (1) his share of unreimbursed medical expenses ($1,478.29), (2) timely child support following the court's October 2011 order ($495 plus 20% or $99) and $790.80 for arrearages, (3) $100 for the motion filing fee, and (4) his share of future unreimbursed medical and dental expenses. The district court ordered Marks to serve 180 days in jail, stayed for 90. The district court informed Marks that it would vacate the stay upon Marks's failure to meet the purge conditions only after a review hearing, commonly known as a *Mahady* hearing. *See Mahady v. Mahady*, 448 N.W.2d 888, 890 (Minn. App. 1989).

The district court held the *Mahady* hearing in March 2012. Marks conceded that he had not satisfied the purge conditions. He testified that he had quit his job at DaVita Dialysis and was denied unemployment benefits. Marks claimed that he had applied for several jobs, but he provided no documentary proof. Marks admitted that he had the ability to make a partial payment of his share of the unreimbursed medical expenses at the time of the December 2011 hearing but said that he later spent that money on rent and groceries because he and his current wife were both unemployed by the time the district court issued the January 2012 conditional contempt order. He testified that he had no money in the bank and that no one owed him money. Marks added that he had obtained part-time seasonal employment beginning in April and was in the process of being certified as a commission-based insurance salesman.

In an order filed in April 2012, the district court found Marks in willful constructive civil contempt of court for refusing to meet his obligations to pay child support, unreimbursed medical expenses, and other previously ordered costs. The district

court decreased Marks's monthly child-support obligation from $495 to $459, plus 20% or $92 per month until the elimination of his arrearage, which totaled $16,418.42 as of March 19, 2012. The April 2012 final contempt order provided the same purge conditions as the January 2012 conditional contempt order—with the exception of the modified monthly child-support obligation—and added that Marks "shall be subject to release from confinement if he makes payment of a portion of the arrearages in the amount of $5,000 or posts a supersedeas bond in the same amount. He has the ability to pay this amount to meet this condition." The district court ordered Marks's confinement but granted him a stay pending appeal.

D E C I S I O N

The district court has broad discretion to hold a party in civil contempt. *Crockarell v. Crockarell*, 631 N.W.2d 829, 833 (Minn. App. 2001), *review denied* (Minn. Oct. 16, 2001). When reviewing a district court's decision whether to hold a person in contempt, we rely on its factual findings unless they are clearly erroneous. *Mower Cnty. Human Servs. ex rel. Swancutt v. Swancutt*, 551 N.W.2d 219, 222 (Minn. 1996). Findings of fact are clearly erroneous if we examine all of the evidence and are left with the definite and firm conviction that a mistake was made, *Kroeplin v. Haugen*, 390 N.W.2d 872, 877 (Minn. App. 1986), *review denied* (Minn. Sept. 25, 1986), or if the findings are manifestly contrary to or not reasonably supported by the evidence as a whole, *Kornberg v. Kornberg*, 525 N.W.2d 14, 19 (Minn. App. 1994), *aff'd*, 542 N.W.2d 379 (Minn. 1996). We view the record in the light most favorable to the district court's findings when determining whether findings are clearly erroneous. *LaChapelle v. Mitten*, 607 N.W.2d

151, 160 (Minn. App. 2000), *review denied* (Minn. May 16, 2000); *see also Gustafson v. Gustafson*, 414 N.W.2d 235, 237 (Minn. App. 1987) (instructing that appellate courts consider whether the order "was arbitrary and unreasonable or whether it finds support in the record"). We reverse a district court's ultimate decision to invoke its contempt powers only for an abuse of discretion. *Mower Cnty.*, 551 N.W.2d at 222.

The district court held Marks in constructive civil contempt of court. A district court may hold a party in contempt of court for willful failure to make court-ordered payments. *Id.* at 222–23. Constructive contempt is contempt not committed in the immediate presence of the court, such as disobedience to a judgment, order, or process of the court. Minn. Stat. § 588.01, subd. 3 (2010). A contempt is civil in nature, not criminal, if the objective of the sanction is remedial and not punitive, and one of its purposes is to coerce compliance with an existing order. *Mower Cnty.*, 551 N.W.2d at 222. When holding a person in civil contempt, the district court must satisfy certain procedural requirements, commonly known as the *Hopp* factors: (1) possess subject-matter and personal jurisdiction; (2) clearly define the acts to be performed; (3) provide notice of the acts to be performed and a reasonable time within which to comply; (4) receive application by the adversely affected party giving specific grounds for complaint; (5) conduct a properly noticed hearing giving the allegedly nonperforming party an opportunity to show compliance or reasons for failure; (6) make a formal determination of failure to comply and decide whether conditional confinement is reasonably likely to induce full or partial compliance; (7) provide an opportunity for the nonperforming party to show inability to comply despite a good-faith effort; and

(8) determine the contemnor's ability to gain release either through compliance or a good-faith effort to comply. *Id.* at 223; *see also Hopp v. Hopp*, 279 Minn. 170, 174–75, 156 N.W.2d 212, 216–17 (1968).

I

Marks challenges the district court's finding in its January 2012 conditional contempt order that he had the extant ability to comply with the purge conditions. Marks contends that there was no "proof" that he had the ability to comply because he was unemployed. When invoking its civil-contempt powers, the district court must determine whether the obligor has the ability to meet the purge conditions. *Crockarell*, 631 N.W.2d at 837. When determining whether an obligor can meet the purge conditions, the district court may consider the obligor's earning capacity and history. *Hopp*, 279 Minn. at 177, 156 N.W.2d at 218. But it need not "determine how an obligor [can] access the money necessary to meet the purge conditions." *Crockarell*, 631 N.W.2d at 837. Rather, it is Marks's burden as the alleged contemnor to prove that he is unable to meet the purge conditions. *See Mahady*, 448 N.W.2d at 890–91. The record amply supports the district court's finding.

At the December hearing, Marks did not indicate that he was unable to pay the monthly child-support, his share of unreimbursed medical expenses, or Schwartz's filing fee. Instead, Schwartz and the district court operated under the impression that Marks was working for DaVita Dialysis and earning wages, consistent with the information he provided in his August 2011 motion to modify child support. The purge condition requiring Marks to timely pay his child support in the amount of $495 plus 20% or $99

equaled the amount in the October 2011 order that granted Marks's August 2011 motion. Marks admitted that he did not make payments for medical expenses, claiming confusion about a previous order. When the district court asked Marks, "Do you have an intention of paying [the medical expenses]?" Marks responded, "I do. I could probably get the 800 that was initially ordered [and] probably have that paid in four weeks and then it would probably take me until late February to mid-March to get caught up on the other three or four months of medical expenses."

It was not until the March hearing that Marks testified that he had quit his job at DaVita Dialysis before the December hearing. He said that he failed to inform the district court or Schwartz because "it didn't even come up and [he] didn't think about mentioning it. . . . [He] was out with family members and just quickly ran out to the car from the mall while [they] were holiday shopping and called in for the hearing." Marks testified that he had applied "at several places, probably a couple hundred between Monster and Career Builder," but he did not submit any documentation of his efforts at either the December or March hearing. Marks claimed that he did not pay the $1,478 in medical expenses because he did not have the full amount and chose not to make a partial payment because both he and his current wife were unemployed when the district court issued the January 2012 conditional contempt order. Marks did not testify at either hearing that he is unable to work full time, and his testimony did not establish that he was not voluntarily unemployed. *See* Minn. Stat. § 518A.32, subd. 1 (2012) (governing determination of child support if a parent is voluntarily unemployed). The district court did not err in setting forth the purge conditions in its January 2011 conditional contempt order.

II

Marks contends that the district court failed to make a finding in the April 2012 final contempt order that conditional confinement is likely to produce his compliance with support obligations. But the district court must find that conditional confinement is likely to produce compliance only in the initial order adjudicating contempt. *Schubel v. Schubel*, 584 N.W.2d 434, 436 (Minn. App. 1998). "Moreover, if an obligor 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." *Id.* The district court found in the January 2012 conditional contempt order that Marks's "failure to comply with [the district court's] orders constitutes constructive civil contempt of court and conditional confinement is likely to produce compliance with the Court's orders." This finding satisfies the *Schubel* requirement, and we have recognized that the record establishes that Marks had the ability to comply with the purge conditions. The district court's determination to incarcerate Marks was therefore premised on its supported understanding that incarceration would produce compliance.

And not only does this finding also defeat Marks's argument that confinement would inhibit his ability to comply by removing opportunities to seek employment and work, Marks cites no legal authority supporting reversal on this basis.

III

Marks challenges the release condition in the district court's April 2012 final contempt order. The contemnor must have the present ability to comply with the stated conditions and gain release. *Hopp*, 279 Minn. at 177, 156 N.W.2d at 218. We cannot

discern the basis of the district court's finding that Marks has the ability to pay $5,000 or post a supersedeas bond in the same amount.

The district court did not address the release condition at the March hearing. Marks testified that he has no money in the bank, that no one owes him money, and that he is currently unemployed. He claimed to have secured future employment, but he did not testify that he would soon receive wages or advances that would enable him to pay $5,000. Our review of the record does not reveal the basis for the district court's determination that Marks could pay $5,000 and thereby effect his release. Because we cannot determine the basis for this condition, we remand for the district court to amend its order or to make the necessary findings on the release conditions and Marks's ability to comply.

Affirmed in part, remanded in part.