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SUMMARY
March 3, 2022

2022COA29

No. 20CA1109, *Marriage of Sheehan* — Family Law — Post-Dissolution — Maintenance; Civil Procedure — Remedial and Punitive Sanctions for Contempt

A division of the court of appeals concludes for the first time that, for purposes of remedial contempt for nonpayment of maintenance, a finding of present ability to pay cannot be based solely on a finding of voluntary underemployment.

Court of Appeals No. 20CA1109
Douglas County District Court No. 14DR30086
Honorable Andrew C. Baum, Judge

In re the Marriage of

Julie Lynn Sheehan,

Appellee,

and

Brian John Sheehan,

Appellant.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division IV
Opinion by JUDGE TOW
Richman and Grove, JJ., concur

Announced March 3, 2022

Aitken Law, LLC, Sharlene J. Aitken, Denver, Colorado, for Appellee

Cecelia M. Espenosa, Denver, Colorado, for Appellant

¶ 1 In this post-dissolution of marriage contempt proceeding, Brian John Sheehan (husband) appeals from the district court’s adoption of a magistrate’s judgment finding him in contempt and imposing remedial and punitive sanctions against him. Husband’s challenge raises questions not previously addressed by a Colorado appellate court — questions involving the interplay between imputation of income based on voluntary underemployment and contempt findings and sanctions for nonpayment of family support. We conclude that, when considering whether a party is in contempt for failure to pay support, a court cannot base a finding that the party has the present ability to pay solely on a conclusion that the party is voluntarily underemployed.¹ But the court can consider the party’s voluntary underemployment as evidence of a willful violation of the support order for punitive contempt purposes.

¶ 2 Applying this construct, we conclude that the district court magistrate improperly found husband in remedial contempt and imposed remedial sanctions. We further conclude that the

¹ We use “underemployed” in this instance because husband is employed. However, we see no reason why voluntary unemployment would not receive the same treatment we announce today.

magistrate's findings related to punitive contempt are insufficient to allow for meaningful review. Accordingly, we reverse the judgment and remand the matter to the district court for further proceedings consistent with this opinion.

I. Background

¶ 3 The thirty-year marriage between husband and Julie Lynn Sheehan (wife) was dissolved in May 2014. Along with their co-petition for dissolution of marriage, the parties filed a separation agreement in which husband agreed to pay wife (1) \$18,419.50 as an equalization payment related to the property division within forty-eight months of the entry of the decree, and (2) \$5,300 in monthly spousal maintenance until she reaches the age of sixty-seven years. The court incorporated the terms of the separation agreement into the decree as the permanent orders.

¶ 4 Almost immediately, the parties commenced a series of disputes over husband's maintenance obligation. While the prior disputes are not directly raised in this appeal, an understanding of the history is relevant to our consideration of the issues before us.

A. Husband's First Motion to Modify Maintenance

¶ 5 Three months after the marriage was dissolved, husband filed a motion to modify maintenance, asserting that his position had been eliminated and he was unlikely to find a new job at a comparable rate of pay. After a hearing in May 2015, the magistrate found that the parties' maintenance calculation had been based on husband earning \$13,750 per month, that husband had started his own business after being laid off, and that his income from that business was increasing and should increase to the point where his income would be approximately \$11,000 per month (which the magistrate opined was "not significantly less" than the income on which his maintenance calculation was based).² Thus, the court found, husband had failed to establish a substantial and continuing change such that the maintenance obligation had become unfair. The court did, however, retroactively modify the maintenance obligation for the months during which husband's motion had been pending to enable husband's business

² Although husband argues that the conclusion that a twenty percent reduction in gross income was not a significant change was flawed, he did not appeal that order, and thus that issue is not before us.

to get established; specifically, the court reduced husband's obligation to \$3,000 per month for three months and then to \$4,000 for six months, but it ordered husband to resume paying the original maintenance amount beginning in July 2015. Based on the reduced amounts, the court determined that husband was \$13,234 in arrears, which the court ordered him to pay over twenty-four months.

B. Wife's Six Prior Motions for Contempt

¶ 6 Husband immediately fell behind on his financial obligations to wife. Between August 2015 and June 2018, wife filed six contempt motions against husband for his noncompliance. Her first two contempt motions, filed in August and November 2015, alleged that husband had not timely paid either his ongoing obligation or his arrearages and sought only remedial sanctions. These first two motions were addressed in a single hearing in February 2016, at the conclusion of which the magistrate found husband in contempt.³ Reiterating her finding from the hearing on

³ Notably, though no punitive contempt was alleged, the magistrate nevertheless used the language of punitive contempt in her order, finding that wife had "proven [husband's] contemptuous behavior

husband's modification motion, the magistrate found that husband could be making at least \$11,000 per month. The magistrate ordered him to pay \$16,418.79 in arrearages within sixty days and also awarded wife \$4,826.50 in attorney fees. Husband ultimately paid these amounts to wife in several installments, albeit not within sixty days.⁴

¶ 7 In September 2016, wife again requested that the court issue a contempt citation. Wife asserted that husband was still not paying his support obligation and was now over \$32,000 in arrears. In addition, she alleged that husband owed her an additional sum for failing to pay a debt allocated to him in the property division. This time, wife sought both remedial and punitive sanctions. In March 2017, the court again found husband to be voluntarily underemployed and, thus, willfully violating the support order. The court determined that husband's total arrearage was \$30,598 and that he owed wife \$4,742 in attorney fees. The court set a

beyond a reasonable doubt," and that husband's conduct was "offensive to the authority and dignity of the court."

⁴ Wife had argued to the court that the payments husband had made were toward his ongoing obligation and not toward his arrearage. Nevertheless, following a review hearing on August 2, 2016, the magistrate found that husband had purged the contempt.

sentencing date in August 2017, at which time the court found that husband had purged the contempt by paying the amounts he owed under the March 2017 order.

¶ 8 Just days after the court found husband in contempt on wife's third contempt motion, wife filed her fourth such motion on March 14, 2017. Wife claimed another \$22,687 in support arrears since the filing of the previous contempt motion. Wife also asserted that husband had failed to pay his share of a tax debt pursuant to the parties' separation agreement. In September 2017, the parties resolved this fourth contempt motion by a stipulation. Husband conceded that he was in contempt and promised to pay \$14,949.49 in support arrears and \$1,200 for wife's attorney fees by December 18, 2017, which would be treated as a sentencing date.

¶ 9 In October 2017, two weeks after entering into that stipulation, wife filed her fifth contempt motion. In this motion, wife sought additional arrearages that had accrued since the filing of the fourth contempt motion and reiterated her demand related to the unpaid tax debt. In all, wife alleged husband owed, but had not paid, another \$40,582.13. Wife again sought both remedial and punitive sanctions. In December 2017, this contempt motion was

also resolved by a stipulation, whereby husband pleaded guilty to contempt and agreed to pay wife \$37,721.62 in support arrears and \$500 in attorney fees by June 1, 2018. The court approved the parties' stipulation and set the matter for sentencing on June 21, 2018.

¶ 10 On June 3, 2018, wife filed her sixth contempt motion. This time, wife asserted that husband had not paid any ongoing maintenance since the filing of the last contempt motion. Again, wife sought remedial and punitive sanctions.

¶ 11 At the June 21, 2018, sentencing hearing on the fifth contempt motion, wife requested husband be incarcerated because he had not purged the contempt. The court found that husband had paid over \$32,000 toward the arrears, but still owed \$5,661.62. The court continued the sentencing until August to give husband the chance to purge the contempt.

¶ 12 Before that hearing, however, the parties entered into another stipulation. Wife agreed that husband had purged the fifth contempt, while husband pleaded guilty to the sixth contempt and acknowledged that he owed arrears of \$46,165.45 and attorney fees of \$1,400. The magistrate set a sentencing hearing for April 1,

2019, at which husband conceded he still had not paid \$25,515. The court remanded husband to jail until he paid this amount. On April 11, 2019, wife’s attorney filed a status report informing the court that husband had “arranged a loan through his employer secured by his future earnings and liquidation of his retirement accounts,” and that the contempt had been purged.

C. Husband’s Second Motion to Modify Maintenance

¶ 13 On July 5, 2019, husband filed a second request to modify his maintenance obligation. Husband noted the lengthy history of contempt motions and orders, as well as the fact that wife had filed a verified entry of judgment for \$73,970.82⁵ and had begun garnishing husband’s wages. Husband noted that the garnishment was not sufficient to cover his monthly obligation.

¶ 14 Husband alleged that he had been unable to obtain employment at the salary he was making when he agreed to the original maintenance obligation. He asserted that his then-current full-time position paid the highest salary he had been able to obtain

⁵ This amount reflected husband’s unpaid maintenance arrears from October 2017 through November 2018.

— roughly half of what he had made at the time his maintenance obligation was established.

¶ 15 Husband's motion remains pending.⁶

D. Wife's Seventh Motion for Contempt

¶ 16 A few hours after husband filed his second motion to modify maintenance, wife filed her seventh motion for contempt. Wife alleged that husband owed \$64,839.03 for unpaid maintenance and interest from June 1, 2018, through June 15, 2019. She also alleged that husband had not paid anything toward the \$18,419.50 equalization payment required pursuant to the permanent orders. Wife requested remedial sanctions in the form of an order to pay the principal and interest due on both obligations, along with an award of attorney fees. She also requested a punitive sanction in the form of a fine or fixed period of imprisonment, or both.

¶ 17 At the contempt hearing, husband conceded that he knew of, but did not comply with, the terms of the permanent orders. His defense was that he did not have the present ability to pay wife

⁶ According to the judicial branch's case management system, known as JPOD, the district court has closed the case. It is unclear why, given that husband's motion remains unresolved.

what he owed her and that he was not willfully refusing to pay his support obligation.

¶ 18 The magistrate — a different magistrate than the one who had presided over the matter to this point — found husband guilty of both remedial and punitive contempt. As sanctions, the magistrate ordered husband to pay the maintenance arrears, the equalization payment, and wife’s attorney fees. The magistrate then told husband, “[a]s to the punitive contempt, . . . I [am] remanding you into custody today. You will be on a no-bond hold until those monies are paid. We are going to set this for review in two weeks.” Over wife’s objection, the magistrate authorized work release for husband.⁷

¶ 19 At the review hearing two weeks later, husband acknowledged he had made no payments. Indeed, husband said that he had lost his job because of his incarceration. The magistrate entered a new sentence, imposing six months in jail and ordering that husband serve the sentence in thirty-day increments (i.e., thirty days in jail,

⁷ It appears from the record, however, that the jail did not permit husband to enter the work release program because of the no-bond hold.

thirty days out of jail) until he completed the sentence or purged the contempt through full payment.⁸

¶ 20 The district court adopted the magistrate's contempt findings and sanctions on C.R.M. 7(a) review.

¶ 21 Husband appeals. He first contends that the magistrate erred by finding an ability to pay based on imputed income and a finding of voluntary underemployment. Alternatively, he argues that, even if a finding of an ability to pay can rest on imputed income and a finding of underemployment, the magistrate erroneously analyzed those issues. He also challenges the sufficiency of the evidence underlying the magistrate's finding, for punitive contempt purposes, that his violation of the order was willful. Husband also contends that the magistrate improperly conflated the sanctions without adequately distinguishing between remedial and punitive contempt. Finally, husband challenges the award of attorney fees.⁹

⁸ Another division of this court granted husband's motion to stay the third month of his six-month sentence until completion of this appeal.

⁹ Husband's opening brief also contains a laundry list of ways in which he contends that the magistrate and the district court abused their discretion and "caused [him] irreparable harm," including the magistrate failing to include in her orders the required

II. Standard of Review and Applicable Law

¶ 22 A district court reviewing a magistrate’s decision under C.R.M. 7(a) may not alter the magistrate’s factual findings unless they are clearly erroneous. C.R.M. 7(a)(9). Our review of the district court’s decision is effectively a second layer of appellate review, and, like the district court, we must accept the magistrate’s factual findings unless they are clearly erroneous. *In re Parental Responsibilities Concerning G.E.R.*, 264 P.3d 637, 638-39 (Colo. App. 2011). “A court’s factual findings are clearly erroneous only if there is no support for them in the record.” *Van Gundy v. Van Gundy*, 2012 COA 194, ¶ 12. But we review de novo issues of law, including whether the magistrate applied the proper legal standard. *See In re Marriage of Young*, 2021 COA 96, ¶ 9.

C.R.M. 7(a) language regarding seeking review of the orders, granting work release without setting a bond, ordering the jail sentence in a way that precludes him from earning good time credit, ordering the jail sentence to be served on a thirty-days-in-jail/thirty-days-free basis, and failing to grant his requests for a stay of the sentence. Because these issues were not presented in a manner that provides for meaningful review, we decline to consider these contentions. *See In re Marriage of Vittetoe*, 2016 COA 71, ¶ 39 (declining to consider underdeveloped arguments).

¶ 23 A contempt finding is within the discretion of the district court and will not be reversed absent an abuse of discretion. *In re Estate of Elliott*, 993 P.2d 474, 478 (Colo. 2000). A court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair, or when it is based on a misapplication of the law. *People v. Elmarr*, 2015 CO 53, ¶ 20.

¶ 24 The district court may hold a party in contempt if the court finds that the contemnor did not comply with a lawful court order of which the contemnor was aware. *In re Marriage of Cyr*, 186 P.3d 88, 91 (Colo. App. 2008). In remedial contempt proceedings, once the movant establishes that an underlying order of which the contemnor is aware has been violated, the burden shifts to the contemnor to prove an inability to comply. *In re Marriage of Lamutt*, 881 P.2d 445, 447 (Colo. App. 1994).

¶ 25 However, to support imposition of punitive sanctions, the burden of proving the contemnor's ability to comply remains with the movant. *People ex rel. State Eng'r v. Sease*, 2018 CO 91, ¶ 23 & n.5. The movant must prove beyond a reasonable doubt not only the existence of the order and the contemnor's knowledge of

the order, but also the contemnor's ability to comply with the order and that his refusal to do so is willful. *Cyr*, 186 P.3d at 92.

¶ 26 The relevant timing of the ability to comply depends on whether the contempt finding is remedial or punitive. Where the allegations involve nonpayment of support, remedial contempt requires a finding of the "present ability to pay." *In re Marriage of Nussbeck*, 974 P.2d 493, 498 (Colo. 1999). In contrast, in cases involving allegations of nonpayment of support, punitive sanctions are punishment for "violating a court order by failing to pay amounts due at a time when the contemnor had the ability to pay." *Id.*

¶ 27 Finally, where the court contemplates imposing an indefinite period of incarceration as a remedial sanction, the court must not only find that the contemnor has the ability to comply with the order (i.e., pay the ongoing support obligation) but also must find that he has the present ability to purge the contempt (i.e., pay the arrears). *In re Marriage of Hartt*, 43 Colo. App. 335, 336, 603 P.2d 970, 971 (1979). In the context of nonpayment of support, the first finding relates to the contemnor's ongoing obligation to make the required monthly support payment; the second relates to whether

he “has the present duty and ability to purge himself of contempt at the time of the entry of the remedial order.” *Id.*; *see also* C.R.C.P. 107(d)(2).

III. Analysis

¶ 28 Both at the hearing on the seventh contempt motion and on appeal, husband concedes that he knew of, but did not comply with, the terms of the permanent orders. His defense was, and is, that he could not be found in contempt because he had no ability to comply during the relevant contempt period and that his nonpayment is not a willful violation of the order.

¶ 29 On appeal, husband challenges the magistrate’s contempt findings and sanctions on several grounds.

A. Remedial Contempt

¶ 30 Husband argues that a court is not permitted to base a finding of present ability to pay on imputed income or a finding of voluntary underemployment. In other words, a finding that husband *should* have the money (and would, were he appropriately employed) is not the same as finding that he *does* have the current ability to pay. Neither party cites to any published Colorado case directly addressing this issue, and we are aware of none. Husband instead

focuses on cases that discuss the difference between a past ability to pay and a present one. *See, e.g., Estate of Elliott*, 993 P.2d 474; *People v. Razatos*, 699 P.2d 970 (Colo. 1985).

¶ 31 Husband's cases, though not dispositive, are informative. In *Estate of Elliott*, for example, the personal representative of an intestate decedent's estate had deposited the proceeds of the sale of the decedent's home in the representative's personal bank account. *Estate of Elliott*, 993 P.2d at 475. The representative apparently spent the money or gave it to her children. *Id.* at 476. The probate court found that the representative and her daughter had the capacity to restore the funds to the estate account and ordered that the representative remain in jail until the funds were restored. *Id.* at 477-78.

¶ 32 The supreme court reversed. The court noted that "when 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." *Id.* at 479. The supreme court found that the probate court's determination that the representative had the present ability to comply with the contempt order was clearly erroneous. *Id.* at

479-80. Significantly, the court noted that, “[i]n a remedial contempt action, an individual’s purported bad faith or self-induced inability to pay does not alter the factual determination that the individual does not maintain a present ability to pay.” *Id.* at 479 n.2.

¶ 33 In *Razatos*, 699 P.2d 970, the supreme court had previously suspended an attorney’s license and ordered him to pay restitution, but the attorney had not yet paid that restitution. *Id.* at 972. The supreme court appointed a special master to determine whether the attorney should be held in contempt. *Id.* The special master found that the contemnor had the ability to comply with the order of restitution “at all times since the entry of the Supreme Court’s order.” *Id.* at 975. However, because the only evidence before the master of the contemnor’s financial condition was his tax returns for years prior to the date of the hearing, the supreme court concluded that the evidence “sa[id] nothing about his ability to pay on March 29, 1984 (the date of the first hearing).” *Id.* Thus, no remedial contempt order could be imposed. *Id.*

¶ 34 Here, the magistrate found that husband had the ability to pay. But that finding appears to be based on two things: his

history of voluntary underemployment and the fact that he was able to purge the prior contempts. As to the former, as the supreme court said in *Estate of Elliott*, even if husband is acting in bad faith with respect to his employment, that cannot support a finding of present ability to comply. *Estate of Elliott*, 993 P.2d at 479 n.2.¹⁰ As to the latter, his ability to purge prior contempts has no bearing on whether he had the present means, as of the date of the contempt hearing, to comply with the support order or to purge the current contempt. *See Razatos*, 699 P.2d at 975. A past ability to comply does not necessarily mean a present one.

¶ 35 Although not mentioned in her initial factfinding, the magistrate did observe during the sentencing hearing that there were “7,000-plus dollar deposits into his bank accounts monthly.”

¹⁰ Some jurisdictions distinguish between coercive remedial (or civil) contempt — meaning sanctions that are designed to coerce compliance — and merely compensatory remedial (or civil) contempt — meaning sanctions designed to compensate for losses sustained as a result of the contempt. *See, e.g., Spear v. McDermott*, 916 P.2d 228, 236-37 (N.M. Ct. App. 1996); *see also Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 782 n.7 (9th Cir. 1983). In those jurisdictions, self-induced inability to comply is a defense to coercive sanctions, but not to compensatory sanctions. Colorado has not adopted this distinction, and neither party argues that we should do so.

However, the record reflects those deposits occurred in 2018 and early 2019 — while husband was operating his business — and were transfers from an account identified on husband’s sworn financial statement as his business account. Those deposits had ceased by May 2019, when husband stopped running his business and found employment. Evidence of income and deposits from months before the hearing are not relevant to whether husband had the ability to pay as of the time of the hearing. *See id.*

¶ 36 Significantly, the magistrate herself indicated that she did not know where the money had come from to purge the prior contempts. At least with respect to the amount required to purge the sixth contempt (and thus secure husband’s release from jail), the record is clear where those funds came from: he obtained a loan from his employer against his future earnings. Wife acknowledged this fact in the status report her counsel filed after husband was put in jail for the sixth contempt.

¶ 37 But the fact that a contemnor might be able to borrow money to satisfy his duty to purge the contempt is irrelevant.¹¹ The ability to purge the contempt must lie with the contemnor at the time of the hearing, not through some future transaction to obtain additional resources. *Estate of Elliott*, 993 P.2d at 481. It has often been said that requiring a finding of a present ability to comply ensures that “the contemnor holds in his hand the proverbial keys to the jailhouse door.” *In re Parental Responsibilities Concerning A.C.B.*, 2022 COA 3, ¶ 24 (citing *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 633 (1988)). But a finding of a present ability to comply based on the ability to borrow the funds from someone else or to secure a better job places the jailhouse keys in someone else’s hand.

¶ 38 We recognize that it is husband’s burden to prove he lacks the ability to comply. And we recognize that the magistrate found husband’s credibility lacking. Nevertheless, the magistrate’s analysis of husband’s claim that he was unable to comply was

¹¹ Notably, in one of the prior contempt rulings, the magistrate had also based her contempt finding, at least in part, on the fact that husband could obtain a loan to pay for the arrearages.

tainted by the improper consideration of husband's alleged voluntary underemployment and his past success at purging contempts. In other words, the magistrate did not truly decide whether husband had the present ability to pay his ongoing obligation or (as it relates to the ability to purge the contempt) pay over \$80,000 when she remanded him into custody. Rather, she decided that he could come up with the money to do so, either through a loan or by getting a better job. Neither of those future actions have any bearing on whether the \$80,000 key to the jailhouse door was in husband's hand that day.

¶ 39 In short, the magistrate's conclusion that husband had the present ability to purge the contempt at the time of his sentencing lacks record support. Moreover, the magistrate applied the incorrect legal standard, and thus abused her discretion by finding remedial contempt.

B. Punitive Contempt

¶ 40 Husband argues that the punitive contempt finding is also flawed for two reasons. First, he argues that he cannot be found in punitive contempt because he lacks the present ability to comply. Second, he contends that the evidence does not support the

punitive contempt finding. We disagree with his first contention but conclude that the magistrate’s findings are insufficient to review his second contention.

1. Present Inability to Pay

¶ 41 As noted, the issue of the *present* ability to comply is not the focus of punitive contempt; rather, the issue is whether at some point the contemnor had the ability to pay but did not do so. *Nussbeck*, 974 P.2d at 498. In this context, self-induced inability to comply is not a defense; indeed, it may well be the fulcrum on which the finding of willfulness pivots. *See, e.g., Lynch v. Lynch*, 677 A.2d 584, 594 (Md. 1996) (holding that where the contempt allegations were premised on the obligor quitting her job in bad faith for the purpose of avoiding her support obligation, the proper procedure would have been to seek criminal contempt rather than civil contempt). In other words, a person’s voluntary act of becoming or remaining underemployed to set up a claim of poverty to avoid paying a support obligation may well constitute willful noncompliance with the support order.

¶ 42 Thus, husband’s contention that “if there is no ability to pay, the evidence cannot support a finding of willfulness and punitive

contempt cannot be sustained” is mistaken. If a contemnor’s financial situation is of his own making, a court is not precluded from finding willful noncompliance.

2. Willfulness Based On Voluntary Underemployment

¶ 43 Husband next argues that, even if the magistrate was permitted to consider imputed income and voluntary underemployment, she failed to properly apply the statutory standards in doing so. (Husband asserts this argument in his attack on the remedial contempt sanction; nevertheless, because it is relevant to this issue as well, we address it.) He argues that the concepts of imputed income and voluntary underemployment are considerations for determining a party’s potential income when establishing child support or maintenance; they are not, he asserts, part of the “contempt statute.”¹² This is true, but it is not dispositive of the issue.

¶ 44 As husband notes, imputed (or potential) income is used to determine a support obligation when a party is voluntarily

¹² Of course, Colorado does not have a general “contempt statute” applicable to this case. Rather, the relevant contempt provisions are set forth in rule — specifically, C.R.C.P. 107.

underemployed. § 14-10-114(8)(c)(IV), C.R.S. 2021 (addressing spousal maintenance); § 14-10-115(5)(b), C.R.S. 2021 (addressing child support).¹³

¶ 45 Husband first argues that the statute provides that a good faith career choice precludes a finding of voluntary underemployment. § 14-10-114(8)(c)(V)(B). He also contends that a party's potential income is required to be "determined and documented by the court." Finally, husband argues that, in order to impute income to a party, the court must find that the party is "shirking his or her [maintenance] obligation by unreasonably foregoing higher paying employment that he or she could obtain." *People v. Martinez*, 70 P.3d 474, 476 (Colo. 2003).

¶ 46 Applying these standards, husband argues, the record reflects that he "continues to make good faith efforts to pursue the highest paying job related to his career choice; he is not foregoing higher paying employment; and there are not jobs paying what [husband] was making at the time of the Separation Agreement."

¹³ A court may also consider allegations of voluntary underemployment or unemployment when ruling on a motion to modify an existing support obligation. See *In re Marriage of Connerton*, 260 P.3d 62, 65 (Colo. App. 2010).

¶ 47 We first address, and reject, husband's contention that the statute requires the court to explicitly determine and document his potential income. Initially, we note that the statutory language husband invokes in support of this argument is found in the child support statute, § 14-10-115(5)(b.5)(I), and no parallel language exists in the maintenance statute. In any event, even if this language were applicable to maintenance, it is inapposite to this dispute. While the specific income being imputed to a party is necessary for the determination of the support obligation — and the documentation of it in the record is essential to the consideration of future attempts to modify the obligation — it is not essential to the determination of whether a party's noncompliance with an already established obligation is willful.

¶ 48 Husband's other arguments (regarding whether his is a good faith career choice and whether he is shirking his support responsibility) may be more availing, but because of the nature of the magistrate's findings, we cannot tell. In making her findings, the magistrate did not specifically tie any particular finding to any specific element of contempt. As a result, it is difficult to know

what she relied on in determining that husband's actions were willful.¹⁴

¶ 49 From her oral findings, it appears that the magistrate relied heavily on prior orders entered in the case. For example, she read at length from the order denying husband's first motion to modify maintenance. The magistrate noted that husband was working on building his business, and that he admitted at the time that he could make up to \$11,000 per month if he were to work five days per week. The magistrate read that, as of that May 2015 order, the previous magistrate had found that he had the ability to pay maintenance while meeting his own needs.

¶ 50 The magistrate then read from the order resolving the first contempt motion. That order, as noted, reiterated the finding that husband could make at least \$11,000 per month. And she read from the next contempt order, in which the prior magistrate had found that he remained (at that time) voluntarily underemployed.

¹⁴ She also did not clearly state whether she was placing the burden of proving *all* of the elements of punitive contempt on wife. Indeed, she appears not to have done so, as she made her remedial contempt findings first, and then merely incorporated them into her punitive contempt findings.

¶ 51 The magistrate then turned to her own findings. She noted that when husband was put in jail for the previous contempt, he was able to “come up with that amount of money in a very, very short period of time.” She rejected his claim that the funds for the most recent purge came from a loan from his employer.¹⁵ She indicated that a comparison of his sworn financial affidavit from 2016 and the one from 2019 raised suspicion because nothing had changed between them, other than he had liquidated his \$10,000 IRA account. His assets and debts were the same, and yet, the magistrate said, “you keep coming up with the money.” The magistrate concluded that the sworn financial statements did not accurately reflect husband’s income.

¶ 52 Then, after setting forth her remedial contempt findings, the magistrate turned to the punitive contempt. She made no further findings underlying a determination of willfulness. She simply said that his lack of compliance was willful.¹⁶

¹⁵ As noted, this finding is not supported by the record. Wife previously acknowledged that the loan existed and was the means by which husband purged the sixth contempt.

¹⁶ She also did not say she was making this finding beyond a reasonable doubt, though the minute order she later signed reflects such a finding.

¶ 53 She did not find that he was shirking his obligation. She did not find that he was unreasonably forgoing higher-paying employment. She did not reiterate that he was voluntarily underemployed.¹⁷ Thus, to the extent the magistrate’s determination of willfulness was based on a finding of voluntary underemployment, the magistrate’s order is perfunctory. It does not set forth the legal standards applied, nor tie any specific factual findings to those legal standards. *See Martinez*, 70 P.3d at 476-77 (concluding that whether a party is voluntarily underemployed “requires the trial court to make factual findings and apply a legal standard to those findings”).

¶ 54 And if the willfulness determination is *not* based on a conclusion that husband is voluntarily underemployed, it is unclear what it is based on, and it is thus unclear whether the record supports such a finding. And, because she did not treat the finding

¹⁷ Indeed, because punitive contempt requires a finding that, despite having the ability to do so, the contemnor failed to comply at a time encompassed by the allegations in the contempt motion, *see In re Marriage of Nussbeck*, 974 P.2d 493, 498 (Colo. 1999), merely reiterating such a finding without actually analyzing the evidence of husband’s job search activities and his job prospects during the time period covered by the contempt motion would be improper in any event.

of a present ability to pay (for remedial contempt) as distinct from the ability to pay at some earlier point (for punitive contempt), it is unclear at what point in time the magistrate found husband had the ability to pay but refused to do so.

¶ 55 In short, because the punitive contempt findings lack sufficient specificity for us to provide meaningful review, we reverse the judgment and remand to the district court to determine, based on the evidence presented at the contempt hearing, whether wife has proved beyond a reasonable doubt that husband's failure to timely pay the equalization payment or maintenance during the period covered by the contempt motion was willful. *See Young*, ¶ 40 (remanding for reconsideration where magistrate's findings regarding sufficiency of obligor's resources to meet maintenance obligation were insufficient to permit meaningful review).

C. Sanctions

¶ 56 Husband next attacks the magistrate's imposition of sanctions, asserting that the magistrate conflated the sanctions in such a way that the remedial sanctions cannot be distinguished from the punitive ones. Because we have concluded that the contempt findings must be reversed, the sanctions will necessarily

be vacated. Because the issue may arise on remand, however, we address husband's contention.

¶ 57 Remedial sanctions are intended to force compliance with a lawful order or to compel performance of an act within a person's power to perform. C.R.C.P. 107(a)(5); *Nussbeck*, 974 P.2d at 498. Punitive sanctions, in contrast, are designed to punish. *See Cyr*, 186 P.3d at 91. Punitive sanctions take the form of an unconditional fine, a fixed sentence of imprisonment, or both, and they cannot be conditioned on performance of any obligation or act. C.R.C.P. 107(a)(4), (e).

¶ 58 The court may combine remedial and punitive sanctions. C.R.C.P. 107(e). But an order imposing remedial and punitive sanctions must make the proper distinction between punitive and remedial contempt and include the proper supportive findings. *See id.*; *see also In re Marriage of Zebedee*, 778 P.2d 694, 698 (Colo. App. 1988).

¶ 59 Here, the magistrate's imposition of sanctions required husband to pay maintenance arrears, the equalization payment, and wife's attorney fees. When the magistrate remanded husband into custody, she said "[a]s to the punitive contempt, . . . I [am]

remanding you into custody today. You will be on a no-bond hold until those monies are paid.” (Emphasis added.) Two weeks later, at the sentencing hearing, the magistrate imposed the jail sentence alternating months in and out of custody “to attempt to purge this contempt.”

¶ 60 No aspect of the magistrate’s sentence was unconditional. Thus, as a matter of law, no aspect of the sentence was punitive. C.R.C.P. 107(a)(4), (5). However, because we have found that there was insufficient evidence to support a remedial contempt finding, there can be no remedial sanctions. Thus, the magistrate’s sanction must be reversed.

¶ 61 This includes the order for husband to pay wife’s attorney fees. *See In re Marriage of January*, 2019 COA 87, ¶ 4 (holding that reasonable attorney fees in connection with a contempt proceeding are a component of remedial sanctions under C.R.C.P. 107(d)(2)). To the contrary, attorney fees are not available as a punitive sanction. *Eichhorn v. Kelley*, 56 P.3d 124, 126 (Colo. App. 2002).

¶ 62 If, upon reconsideration of the punitive contempt allegations, the court finds husband’s nonpayment willful, any sanctions it

elects to impose must be punitive ones as contemplated by C.R.C.P. 107(a)(4).

IV. Wife's Request for Appellate Attorney Fees

¶ 63 Wife requests an award of appellate costs and attorney fees, asserting a variety of legal bases. Because we reverse the judgment, her request for costs is denied. C.A.R. 39.

¶ 64 Similarly, we deny wife's request for attorney fees pursuant to C.A.R. 38(b) and section 13-17-102(2), C.R.S. 2021. In light of our resolution of husband's appellate arguments, his pursuit of the appeal was not frivolous and did not lack substantial justification.

¶ 65 And because we conclude that no remedial sanctions are appropriate, we deny her request for fees under C.R.C.P. 107(d)(2).

¶ 66 Finally, we decline to address her request for fees under section 14-10-119, C.R.S. 2021, and instruct the district court to consider this request on remand. *See In re Marriage of Hill*, 166 P.3d 269, 273 (Colo. App. 2007).

V. Conclusion

¶ 67 The judgment is reversed, and the case is remanded for further proceedings consistent with this opinion.

JUDGE RICHMAN and JUDGE GROVE concur.