19CA0567 Marriage of Brooks 03-12-2020

COLORADO COURT OF APPEALS

Court of Appeals No. 19CA0567
Arapahoe County District Court No. 17DR830
Honorable Bonnie H. McLean, Judge

In re the Marriage of

Lexia Brooks,

Appellee,

and

Robert Brooks,

Appellant.

ORDERS AFFIRMED

Division III
Opinion by JUDGE ROTHENBERG*
Román and Dunn, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced March 12, 2020

Lexia Brooks, Pro Se

Robert Brooks, Pro Se

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2019.

¶ 1 In this post-dissolution of marriage case, Robert Brooks (father) appeals the district court's adoption of a magistrate's order permitting Lexia Brooks (mother) to relocate with the parties' two children, and he also challenges the support order entered. We affirm the orders.

I. Relevant Facts

¶ 2 In 2017, the district court entered a decree of legal separation for the parties and approved their agreement establishing equal parenting time and joint decision-making responsibility for their two daughters: eight-year-old L.B. and four-year-old J.B. The court also ordered father to pay mother monthly child support of $765.

¶ 3 In 2018, mother moved to restrict father's parenting time, alleging that while the children were in his care, he had hit L.B. in the face with his shoe, causing a bloody lip. At the evidentiary hearing on her motion, she testified about father's history of inflicting excessive corporal punishment and severe emotional harm on the children. She maintained that his physical abuse of the children was "still happening," and she presented video evidence demonstrating father's grossly excessive physical punishment of the children in the marital home between 2015 and 2017. Father

objected to this evidence, contending "he was unaware of being videotaped," but the magistrate overruled his objection and described the ten video recordings in an April 23, 2018, written order:

1. "In [v]ideo [o]ne, [f]ather has [L.B.] on his lap with her buttocks exposed. The . . . [child] appears to be . . . [five] or [six] years old. . . . The video shows [him] with [a] Timberland brand sandal briefly, but [he] then retrieves a tan colored belt. [He] is then seen striking [the child] ferociously thirty-two times . . . [and] appears to be upset that [the child] did not drink her water."
2. "Video [t]wo shows [f]ather pinning [L.B.] to the floor by her head and striking her [fourteen] times with the Timberland sandal. [His] strikes are forceful and frenzied."
3. "Video [t]hree shows [L.B.] pinned to the floor again and being struck by [f]ather [six] times with the Timberland sandal. The forceful nature of the strikes is the same."
4. "Video [f]our shows [f]ather wrestling with [L.B.] on his lap. Father proceeds to strike [the child] with the tan belt

multiple times. [He] is then seen grabbing [the child] by the collar and yelling at her inches from her face and then proceeded to strike her multiple times again. In all, [the child] was struck twenty-nine times."

5. "Video [f]ive shows [f]ather ordering [L.B.] to do . . . squatting exercises on a flight of stairs. [The child] is seen crying and in fear. [He] strikes her three times with the belt."

6. "Video [s]ix shows [L.B.] crying to [m]other about [f]ather."

7. "Video [s]even shows [L.B.] with her pants off and [f]ather striking her violently with the Timberland sandals four times. . . . Father can be heard yelling about schoolwork."

8. "Video [e]ight shows [f]ather picking up [J.B.]. The video does not show [him] striking the toddler, but [six to eight] strikes can be heard. [The child], who appeared to be approximately [two] years old, can be seen crying."

9. "Video [n]ine shows [f]ather and [L.B.] in a darkened room. [The child] is pinned to the floor again and [he]

can be heard yelling about [her] schoolwork. [He] strikes [her] [seventeen] times with his belt."

10. "Video [t]en shows a dark video with [f]ather's voice bellowing about something [L.B.] hid by the toilet. [Twenty-three] strikes can be heard in the video."

¶ 4 Father denied using excessive force on the children, but the magistrate found mother more credible on this issue. The magistrate described the video evidence as "extremely disturbing," described father's actions as "abhorrent, violent, and beyond the bounds of proper child rearing," and found that his actions were "not proportional" to any "alleged infraction" by the children.

¶ 5 The magistrate restricted father to supervised parenting time in a facility setting and allocated to mother sole decision-making responsibility for the children. Upon further review requested by father, the district court upheld the magistrate's rulings.

¶ 6 Thereafter, mother requested permission to relocate with the children to Florida and to increase father's child support obligation. Another magistrate presided who appointed a child and family investigator (CFI) to make recommendations regarding parenting

time consistent with the children's best interests, and who conducted an evidentiary hearing.

¶ 7 After considering the evidence, the second magistrate granted mother's relocation request, ordered that father's parenting time in Colorado or Florida continue to be supervised, and increased his child support obligation to $1702 per month. Father petitioned for review by the district court and it again adopted the magistrate's order.

II. Standard of Review

¶ 8 We must accept the magistrate's factual findings unless they are clearly erroneous. *See In re Marriage of Thorstad*, 2019 COA 13, ¶ 26. "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. We review conclusions of law de novo. *Thorstad*, ¶ 27.

¶ 9 A district court has broad discretion over the admissibility of evidence. *Bly v. Story*, 241 P.3d 529, 535 (Colo. 2010); *E-470 Pub. Highway Auth. v. 455 Co.*, 3 P.3d 18, 23 (Colo. 2000). Accordingly, we review a district court ruling on the admissibility of evidence for

an abuse of discretion. *Bly*, 241 P.3d at 535; *E-470 Pub. Highway Auth.*, 3 P.3d at 23.

¶ 10 In general, all relevant evidence is admissible, CRE 402, and the Colorado Rules of Evidence strongly favor admission of material evidence, *Palizzi v. City of Brighton,* 228 P.3d 957, 962 (Colo. 2010). CRE 103 and C.R.C.P. 61 allow reversal for erroneous exclusion of evidence only if the exclusion affected a substantial right of a party. CRE 103; C.R.C.P. 61; *Banek v. Thomas*, 733 P.2d 1171, 1178-79 (Colo. 1986) (finding reversible error in civil battery case against arresting officers where the district court's exclusion of evidence of plaintiff's conviction for resisting the arrest "left the jury with the impression . . . he did nothing to warrant the use of any force").

¶ 11 An error affects a substantial right only if "it can be said with fair assurance that the error substantially influenced the outcome of the case or impaired the basic fairness of the trial itself." *Banek*, 733 P.2d at 1178. If an error does not affect a party's substantial right, it must be deemed harmless and is not grounds for reversal. CRE 103; C.R.C.P. 61.

III. Parental Relocation

A. Best Interests or Endangerment Standard

¶ 12 Father contends the magistrate erred in not applying the endangerment standard when resolving mother's motion to relocate with the children. We disagree.

¶ 13 When a parent who is the children's primary custodian wishes to relocate with the children, the district court must consider all relevant factors including all statutory best interests factors in section 14-10-124(1.5)(a), C.R.S. 2019, and the nine relocation factors in section 14-10-129(2)(c), C.R.S. 2019. *See In re Marriage of Ciesluk*, 113 P.3d 135, 140 (Colo. 2005).

¶ 14 Section 14-10-129(1)(b)(I) provides that the district court "shall not restrict a parent's parenting time rights unless it finds that the parenting time would endanger the child[ren's] physical health or significantly impair [their] emotional development."

¶ 15 Contrary to father's contention, the endangerment standard does not apply to cases in which the primary custodian intends to relocate with the children to a residence that "substantially changes the geographical ties between the child and the other party." *See Ciesluk*, 113 P.3d at 140 n.12; *see also In re Marriage of DeZalia*,

151 P.3d 647, 648 (Colo. App. 2006) ("[A] reduction in parenting time resulting from the other parent's relocation with the child is not to be construed as a restriction requiring the court to apply the endangerment standard . . . .").

¶ 16 At the time of the relocation hearing in this case, mother was the children's sole residential parent. Thus, the magistrate properly applied the best interests standard, and the district court properly upheld the magistrate's ruling. *See DeZalia*, 151 P.3d at 648.

B. Sufficiency of the Evidence

¶ 17 Father next contends the evidence was insufficient to support the relocation. We disagree.

¶ 18 A parent who challenges a post-dissolution relocation order must show that the district court abused its discretion. *See Ciesluk*, 113 P.3d at 148. An abuse of discretion occurs when the court's decision is arbitrary, unreasonable, or unfair, or if the court misapplies the law. *In re Marriage of Hatton*, 160 P.3d 326, 330 (Colo. App. 2007).

¶ 19 The district court has broad discretion in modifying existing parenting time orders, and we must exercise every presumption in

favor of upholding its decisions. *See In re Marriage of Barker*, 251 P.3d 591, 592 (Colo. App. 2010); *see also Hatton*, 160 P.3d at 330.

¶ 20 Here, the magistrate's determination that relocation was in the children's best interests is supported by substantial evidence in the record. The magistrate credited mother's concerns about father's excessive disciplinary methods on the children, and his conviction that instilling fear in the children is an appropriate way to teach them to behave during his parenting time. She also testified that moving to Florida would benefit the children because they would have considerable family support there, excellent educational opportunities, and a lower cost of living.

¶ 21 The CFI's report also supported the move to Florida, pointing out that mother had a large extended family network in Florida to assist her.

¶ 22 We give considerable deference to the magistrate and district court in relocation matters because they are in a superior position to evaluate the facts in each case and to assess the children's best interests. *See In re Parental Responsibilities Concerning D.T.*, 2012 COA 142, ¶ 17 (an appellate court may not usurp a district court's role in weighing the testimony, assessing credibility, and resolving

any competing inferences or conflicts in the evidence); *Hatton*, 160 P.3d at 330.

¶ 23 Here, the magistrate heard the testimony of the witnesses, examined the evidence, and found that the children's relocation to Florida was in their best interests. *See D.T.*, ¶ 17; *see also In re Marriage of Udis*, 780 P.2d 499, 503-04 (Colo. 1989) (an appellate court may presume that the district court, in reaching its decision, considered all the evidence before it).

¶ 24 Father nevertheless contends the magistrate's relocation order failed to consider the least detrimental alternative. However, we conclude the parenting time order was reasonable, given the distance between the parties' residences; was compliant with section 14-10-124(1.5)(a)(VIII); and was based upon the CFI's recommendations concerning the children's best interests. *See In re Marriage of Martin*, 42 P.3d 75, 78-80 (Colo. App. 2002).

C. Child Abuse & Domestic Violence

¶ 25 Father next contends the magistrate's findings were insufficient to show that his actions fell under the definition of child abuse contained in section 18-6-401(1)(a), C.R.S. 2019. He

maintains that his disciplinary methods were reasonable and appropriate. We disagree.

¶ 26 If child abuse or domestic violence is an issue in a case, the magistrate must consider the enumerated factors in section 14-10-124(4). *See* § 14-10-124(1.5)(a), (4)(b); *see also In re Marriage of Morgan*, 2018 COA 116M, ¶¶ 17-18.

¶ 27 One factor is "[w]hether one of the parties has committed an act of child abuse or neglect as defined in section 18-6-401." § 14-10-124(4)(a)(I). Another factor is "[w]hether one of the parties has committed an act of domestic violence, has engaged in a pattern of domestic violence, or has a history of domestic violence." § 14-10-124(4)(a)(II).

¶ 28 Under section 18-6-401(1)(a), a person commits child abuse if he or she

> permits a child to be unreasonably placed in a situation that poses a threat of injury to the child's life or health, or engages in a continued pattern of conduct that results in malnourishment, lack of proper medical care, cruel punishment, mistreatment, or an accumulation of injuries that ultimately results in the death of a child or serious bodily injury to a child.

¶ 29 However, a parent's use of physical force on a minor child that would otherwise constitute an offense is justified if that parent uses reasonable and appropriate physical force on the child when and to the extent it is reasonably necessary and appropriate to maintain discipline or promote the welfare of the child. § 18-1-703(1)(a), C.R.S. 2019.

¶ 30 Here, the magistrate found that father's disciplinary methods were unreasonable, the district court adopted the magistrate's order, and the record supports that finding. *See* § 14-10-124(4)(d) ("When the court finds by a preponderance of the evidence that one of the parties has committed child abuse or neglect, domestic violence, or sexual assault resulting in the conception of the child, the court shall consider, as the primary concern, the safety and well-being of the child and the abused party.").

¶ 31 Nor did the magistrate err in finding that "there was domestic violence in the [parties'] relationship."

¶ 32 The CFI report described an incident in which father had pulled mother's hair and pushed her onto the couch in front of the children. Mother reportedly stated that father dragged her while saying, "I'm going to kill you." Although father was acquitted of the

domestic violence charge, the magistrate was not precluded from considering the incident when determining whether relocation was in the children's best interests. *See* § 14-10-124(1.5)(a), (4)(a)(II); *see also One Lot Emerald Cut Stones v. United States*, 409 U.S. 232, 236 (1972) (because there are different burdens of proof in criminal and civil cases, a finding of reasonable doubt about an event in a criminal case does not negate the possibility that a preponderance of evidence in a civil case could show the event occurred).

¶ 33 Father also contends the magistrate erred in failing to consider the "*mens rea* or *actus reus* required by statutory context for common-law definitions and conviction." However, he did not raise this issue in his petition for district court review, and we will not consider it for the first time on appeal. *See People in Interest of K.L-P.*, 148 P.3d 402 (Colo. App. 2006) (concluding an issue decided by a magistrate is not preserved for appellate review if it was not presented to the district court reviewing the magistrate's order).

D. Video Evidence

¶ 34 Father next contends the magistrate abused her discretion in admitting and relying on the video evidence of him disciplining the children in the former marital home. He maintains that the

evidence should have been suppressed pursuant to section 16-15-102(10), C.R.S. 2019, because he was a victim of unlawful eavesdropping pursuant to section 18-9-304, C.R.S. 2019. He is incorrect.

¶ 35 Father has presented us with no persuasive legal authority holding that sections 18-9-304 and 16-15-102(10) apply to family law cases, which are civil in nature. *See People in Interest of A.E.L.*, 181 P.3d 1186, 1192 (Colo. App. 2008) (exclusionary rule does not require suppression of evidence obtained as a direct result of a Fourth Amendment violation in a civil dependency and neglect proceeding).

¶ 36 In any event, the evidence was cumulative of the CFI's testimony and report, and we conclude any error was harmless. *See Hansen v. Lederman*, 759 P.2d 810, 813 (Colo. App. 1988); *see also* C.A.R. 35(c). The magistrate took judicial notice of the CFI report; the transcript of the April 2018 restriction hearing; the resulting restriction order, which gave a lengthy account of the video evidence; and the district court order adopting the restriction order. *See People in Interest of O.J.S.*, 844 P.2d 1230, 1233 (Colo. App. 1992) ("A court may take judicial notice of its own file, its

findings of fact, and its conclusions of law."), *aff'd sub. nom. D.A.S. v. People*, 863 P.2d 291 (Colo. 1993). Father also admitted that he hit the children.

E. Father's Medical Exhibits

¶ 37 Father next contends the magistrate abused her discretion in excluding exhibits that he offered at the relocation hearing, and that the district court abused its discretion in upholding that ruling. We disagree.

¶ 38 Hearsay is "a statement other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." CRE 801(c). Hearsay is inadmissible unless it falls within a statutory exception or an exception found in the rules of evidence. CRE 802.

¶ 39 Father sought to introduce two exhibits consisting of (1) an excerpt in an online ethics forum related to a 2002 article in the Journal of Burn Care and Research; (2) an undated online article from the Journal of the American Academy of Dermatology concerning eczema; and (3) L.B.'s medical records.

¶ 40 According to father, those exhibits would have shown that one or both of the children may have had a medical condition that could

have been mistaken for child abuse. However, the court disallowed the introduction of the children's medical records, particularly those of L.B., because father did not have a witness to testify that the medical records were accurate. Nor did father raise any hearsay exception arguments as grounds for admission before the magistrate. *See Harrison v. Smith*, 821 P.2d 832, 834 (Colo. App. 1991) (refusing to consider argument that evidence should have been admitted under a certain hearsay exception because the argument was presented for the first time on appeal); *see also Fed. Lumber Co. v. Wheeler*, 643 P.2d 31, 35 (Colo. 1981) (where party offering hearsay "made no answer to the objection, and the court was presented with no hearsay exceptions which would allow the admission," district court did not err in excluding the hearsay).

¶ 41 Father nevertheless argues that the testimony of L.B.'s doctor was not required to admit her medical records because there was no indication they lacked trustworthiness. But he did not make this argument before the magistrate, and we decline to address his assertion for the first time on appeal. *See Harrison*, 821 P.2d at 834; *see also Fed. Lumber Co.*, 643 P.2d at 35.

F. Statements by Children's Therapist in CFI Report

¶ 42 Father next contends the magistrate abused her discretion in admitting the CFI report because it included statements by the children's therapist about "details of sessions with all parties" in violation of the Health Insurance Portability and Accountability Act. We are not persuaded.

¶ 43 The magistrate disallowed testimony by the children's therapist, and there was other evidence in the record to support the magistrate's finding that relocation was in the children's best interests. *See People in Interest of R.D.H.*, 944 P.2d 660, 664 (Colo. App. 1997); *see also* C.A.R. 35(c); *Hansen*, 759 P.2d at 813. Thus, we conclude any error in admitting that portion of the CFI report alluding to statements by the children's therapist was harmless. Given this disposition, it follows that we need not address father's argument that statements by the children's therapists to the CFI were privileged communications under section 13-90-107(1)(g), C.R.S. 2019.

G. Admission of CFI Report

¶ 44 Father next contends the magistrate abused her discretion by relying on the CFI report because the CFI did not conduct a fair

investigation. However, father's argument does not affect the admissibility of the expert's opinion, only its weight, and that is a matter within the discretion of the magistrate. *See Farmland Mut. Ins. Cos. v. Chief Indus., Inc.*, 170 P.3d 832, 837 (Colo. App. 2007) (issues concerning the sufficiency of expert evidence are irrelevant to the issue of whether the expert's testimony was properly admitted); *see also In re Parental Responsibilities of M.J.K.*, 200 P.3d 1106, 1114 (Colo. App. 2008) (finding no abuse of discretion by the district court in relying on CFI recommendations; although one party contended the CFI violated applicable standards, the CFI was subject to cross-examination, and the court had an opportunity to weigh the recommendations and determine whether they were in the children's best interests), *disagreed with on other grounds by In re D.I.S.*, 249 P.3d 775, 781 (Colo. 2011).

¶ 45 We also reject father's related contention that the magistrate abused her discretion by adopting the CFI's parenting time recommendations.

¶ 46 The CFI recommended the relocation, but it was within the magistrate's discretion whether to accept that recommendation. *In*

re Marriage of McNamara, 962 P.2d 330, 334 (Colo. App. 1998) (the district court is not required to follow recommendations).

¶ 47 Although the magistrate reviewed the CFI report, other evidence also demonstrated that the children's best interests would be served by residing with mother in Florida. *See id.* at 334; *see also Hatton*, 160 P.3d at 330; *In re Custody of C.J.S.*, 37 P.3d 479, 482-83 (Colo. App. 2001) (district court did not abuse its discretion when it approved recommendations that the special advocate made based on the best interests standard).

H. Father's Religious Beliefs

¶ 48 Father next contends the magistrate and district court ignored his religious beliefs, which he believes support that his disciplinary methods were reasonable and necessary. We are not persuaded.

¶ 49 Suffice it to say that case law throughout the country contains many examples in which civil laws of general application were applied constitutionally to the actual religious practices of religious organizations. For example, the courts have sustained government prohibitions on handling venomous snakes or drinking poison, even as part of a religious ceremony, *McDaniel v. Paty*, 435 U.S. 618, 628 n.8 (1978), and have also affirmed criminal convictions for the

transportation across state lines of plural wives by members of religious sects believing in polygamy, *see Cleveland v. United States*, 329 U.S. 14, 18-19 (1946); *see also Higgins v. Maher*, 258 Cal. Rptr. 757, 761 (Cal. Ct. App. 1989) ("Commission of a crime, such as murder, will remain a matter for civil authorities regardless of the tenets of a religious organization whose members may perpetrate the offense.").

¶ 50 We therefore conclude the magistrate and district court did not err in rejecting father's contention that his religious beliefs excused or justified the physical abuse that the court found he had inflicted upon his children, and in relying upon and applying Colorado civil law to these proceedings.

IV. Increase in Child Support

¶ 51 Father next contends the magistrate erred and abused her discretion in not imputing the same amount of income to mother that the district court had imputed to her at the time of the decree. We are not persuaded.

¶ 52 The district court has broad discretion in calculating income, and whether to impute income to a parent is typically a factual finding subject to deference on review if supported by the record.

See People v. Martinez, 70 P.3d 474, 480 (Colo. 2003). However, we review de novo whether the district court applied the correct legal standards and guidelines to its findings. *In re Marriage of Atencio*, 47 P.3d 718, 720 (Colo. App. 2002).

¶ 53 To impute income to a parent, the district court must find that the parent is unemployed or underemployed and is shirking his or her child support obligation. *In re Marriage of Connerton*, 260 P.3d 62, 65 (Colo. App. 2010); *see also Martinez*, 70 P.3d at 480 (when determining whether to impute income to a parent, a court should begin by determining whether the parent is unreasonably forgoing higher paying employment and then consider what the parent could reasonably be earning and contributing to the support of his or her children).

¶ 54 After finding that a parent is voluntarily unemployed or underemployed, the district court may impute income to the parent for purposes of calculating child support based on the parent's potential income. § 14-10-115(5)(b)(I), C.R.S. 2019.

¶ 55 Potential income includes the amount a parent could earn from a full-time job commensurate with the parent's demonstrated earning ability, without regard to the availability of actual positions.

People in Interest of A.R.D., 43 P.3d 632, 637 (Colo. App. 2001). In determining potential income, the court may consider several factors, including the parent's historical income, education, and work experience. *See In re Marriage of Jaeger*, 883 P.2d 577, 582 (Colo. App. 1994) (in imputing income, the court may average a parent's past income); *see also In re Marriage of Marshall*, 781 P.2d 177, 179 (Colo. App. 1989) (a court may consider the parent's education, training, or experience in determining present earning capacity).

¶ 56 Ultimately, however, a child support order should be based on the parent's actual ability to pay. *See* § 14-10-115(1)(a)(I); *see also Martinez*, 70 P.3d at 479 (imputation of income to a parent is intended to require parents to support their children to the extent of their reasonable ability to pay); *In re Marriage of Mackey*, 940 P.2d 1112, 1115 (Colo. App. 1997) (imputed income should be based on relevant, probative evidence of a parent's ability to earn income).

¶ 57 At the hearing, mother testified that she quit her job in anticipation of relocating with the children to Florida. When she was employed as an HR recruiting coordinator at the University of Colorado Hospital in 2017, she was earning $22.50 per hour.

¶ 58 The magistrate found that mother was "highly intelligent and very capable," and relying on her previous earnings and education, the magistrate found she was capable of working full time at $22.50 per hour or $39,000 per year. *See Jaeger*, 883 P.2d at 582; *see also Marshall*, 781 P.2d at 179. The record supports the magistrate's decision not to impute additional income, and while other evidence in the record may support a different income finding, we defer to the magistrate's assessment of the conflicting evidence. *See D.T.*, ¶ 17.

¶ 59 In summary, we conclude the magistrate and district court properly considered all relevant factors and correctly applied the law in ruling on mother's relocation motion, in setting a reasonable visitation schedule for the children, and in calculating child support. Thus, we have no basis for disturbing the district court's orders.

V. Conclusion

¶ 60 The orders are affirmed.

JUDGE ROMÁN and JUDGE DUNN concur.