20CA0326 Marriage of Giron 03-25-2021

COLORADO COURT OF APPEALS

Court of Appeals No. 20CA0326
Jefferson County District Court No. 12DR2307
Honorable Diego G. Hunt, Judge

In re the Marriage of

Eugene James Giron,

Appellant,

and

Daria Frances Drago Giron,

Appellee.

ORDER REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division III
Opinion by JUDGE FREYRE
Furman and Vogt*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced March 25, 2021

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*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2020.

¶ 1 In this post-dissolution of marriage proceeding, Eugene James Giron (father) appeals from the district court's order approving a magistrate's order modifying his child support obligation. We reverse and remand for further proceedings.

I. Background

¶ 2 Father's marriage to Daria Frances Drago Giron, now known as Daria Frances Drago (mother), ended in 2013. The court's permanent orders gave the parties equal parenting time with their three children. The court ordered mother to pay $620 in monthly child support, but the parties would equally share the children's extracurricular and school costs.

¶ 3 Father stopped exercising parenting time with the two older children in 2017, prompting mother to seek a child support modification. In July 2018, the district court modified child support by (1) reducing mother's support obligation between January and July 2017; (2) ordering father to pay $772 per month between July 2017 and August 2018; and (3) ordering father to pay $76 per month from August 2018 forward. The court premised the $76 order on its expectation that father would resume alternating weekend parenting time with the two older children by August

2018. The court declined to disturb that part of the permanent orders requiring the parties to share the children's extracurricular and school costs.

¶ 4 Mother again moved to modify child support in January 2019, asserting, as relevant here, that father was only paying $76 per month even though he never resumed parenting time with the two older children. Father asked the court to deny the motion or, if it granted the motion, to remove the order concerning the children's extracurricular and school costs. Father also sought an award of his attorney fees under section 14-10-119, C.R.S. 2020.

¶ 5 A magistrate granted mother's motion in August 2019. The modified order required father to pay $772 in monthly support retroactive to August 2018 and $910 per month from January 2019 forward.

¶ 6 On review of the magistrate's order under C.R.M. 7(a), the district court found that the magistrate erred in some respects. Nevertheless, the district court approved the magistrate's order, and father now appeals.

II. Appellate Standard of Review

¶ 7 A district court's review of a magistrate's order is like appellate review, and the magistrate's factual findings cannot be altered unless they are clearly erroneous. C.R.M. 7(a)(9); *In re Marriage of Thorstad*, 2019 COA 13, ¶ 26. Our review of the district court's decision is effectively a second layer of appellate review, so we too must accept the magistrate's factual findings unless they are clearly erroneous. *In re Parental Resps. Concerning G.E.R.*, 264 P.3d 637, 639 (Colo. App. 2011). Factual findings are clearly erroneous if they have no support in the record. *In re Marriage of Dean*, 2017 COA 51, ¶ 8.

¶ 8 We review a child support modification for an abuse of discretion. *In re Marriage of Tooker*, 2019 COA 83, ¶ 12. We review de novo whether the court applied the correct legal standard. *Thorstad*, ¶ 27.

III. $40,000 Gift Income

¶ 9 Father contends that mother's income should have included a $40,000 gift she received during the proceedings. We agree and therefore reverse the child support order and remand for the magistrate to recalculate mother's income.

A. Applicable Law

¶ 10 A child support calculation begins with the court's determination of the parties' gross incomes. *See* § 14-10-115(1)(b)(I), (5)(a)(I), C.R.S. 2020. A parent's gross income for child support purposes includes monetary gifts. § 14-10-115(5)(a)(I)(U). A one-time receipt of a monetary gift may be considered as part of a parent's gross income. *See In re A.M.D.*, 78 P.3d 741, 744 (Colo. 2003) (inheritance); *In re Marriage of Bohn*, 8 P.3d 539, 541 (Colo. App. 2000) (lottery prize).

B. Facts

¶ 11 When mother's father died, he left his estate to his wife, mother's stepmother. The stepmother gave $40,000 of her inheritance to mother in February 2019. Mother testified that the $40,000 went to pay down her home equity line of credit (HELOC), which would save her $200 per month in interest.

¶ 12 The magistrate declined to include $40,000 as part of mother's income because mother did not draw from the lump sum for day-to-day living expenses. Instead, the magistrate included the $200 interest savings as part of mother's income, finding that the debt repayment increased mother's available cash by that amount. The district court upheld the magistrate's findings.

C. Analysis

¶ 13 There is no dispute that mother received a $40,000 gift during the modification proceedings. Under section 14-10-115(5)(a)(I)(U), this one-time gift should have been included as part of mother's income. *See A.M.D.*, 78 P.3d at 744 ("[T]he legislature understood that annual incomes vary, and it intended for gross income to reflect actual monetary receipts, even if these receipts are non-recurring windfalls or one-time events.").

¶ 14 It appears from the magistrate's findings that she excluded the $40,000 from mother's income because she treated it as an inheritance, not a gift. To be sure, mother claimed that her stepmother wanted her to consider the $40,000 as an inheritance from her father; but she subsequently acknowledged that it was a gift.

¶ 15 A monetary inheritance is considered a monetary gift under section 14-10-115(5)(a)(I)(U). *See A.M.D.*, 78 P.3d at 745 (relying on earlier version of the child support statute). However, when a party receives a monetary inheritance, the district court must examine the recipient's use of money to determine how much of the inheritance is gross income for child support purposes. *Id.* at 746.

If the recipient uses the principal as a source of income either to meet existing living expenses or increase the recipient's standard of living, the expended principal is income. *Id.*

¶ 16 The magistrate's findings appear to follow this rationale, focusing on mother's use of the "inheritance" and not the sum she received. But mother did not inherit $40,000. Mother received a $40,000 gift out of her *stepmother's* inheritance.

¶ 17 Still, mother asserts in her answer brief that the magistrate correctly excluded the $40,000 from her income precisely because she could not use the lump sum. Claiming that her stepmother paid the loan company directly, mother states that she never received $40,000 in cash and, thus, had no ability to use the gift to meet her discretionary expenses. Mother cites cases holding that payments made to an individual must be available for the individual's discretionary use or to reduce daily living expenses to be included in gross income for child support purposes. *See In re Parental Resps. Concerning N.J.C.*, 2019 COA 153M, ¶ 24 (deferred compensation); *Tooker*, ¶¶ 11-23 (GI benefits and book stipend); *In re Marriage of Mugge*, 66 P.3d 207, 210 (Colo. App. 2003)

(employer's pension contribution). Mother asserts that applying those cases here supports the magistrate's finding.

¶ 18 In those cases, benefits were paid on behalf of an individual recipient. Since the individual had no way to access the benefits or use them to pay day to day expenses, the benefits were not includable as the individual's gross income for child support purposes. *See N.J.C.*, ¶¶ 7, 24 (company's "promise" of deferred compensation when father turned sixty-five did not assist then fifty-two-year-old father in paying his expenses at the present time); *Tooker*, ¶ 18 (father's GI tuition benefit was paid directly to father's college and father could not use the book stipend for anything else); *Mugge*, 66 P.3d at 211 (employee had no option to receive employer's pension contributions as wages).

¶ 19 Unlike those cases, the record here suggests that mother received the $40,000 directly from her stepmother and chose to apply it to her HELOC. Mother stated in the parties' joint trial management certificate that she received $40,000 from her stepmother after she lost her job; testified that the stepmother felt bad about making her repay the $40,000; and testified that she, not the stepmother, used the $40,000 to pay down the HELOC to

reduce her monthly interest. The magistrate similarly found that mother "[r]eceived a loan — some payment from her stepmother in the amount of $40,000," which was a sum the stepmother did not expect mother to repay, and that "[m]other further testified that she used this payment to refinance the HELOC on her home." As it appears that mother received and decided how to use the $40,000, the record and findings establish that she could have used the money to meet her discretionary expenses. Hence, mother's reliance on the holdings from *N.J.C.*, *Tooker*, and *Mugge* is misplaced, as the cases do not support the exclusion of the $40,000 from mother's income.

¶ 20 Because the statute mandates that a parent's gross income includes gift income, the $40,000 gift should have been included as part of mother's income. *See* § 14-10-115(5)(a)(I)(U). Accordingly, we reverse the child support order and remand for the magistrate to reconsider mother's gross income, including any gift income.

¶ 21 We do not accept father's argument that mother's income should include the $40,000 *and* the $200 in monthly savings (for a total of $41,200), Father provides us with no authority, and we are

aware of none, holding that a parent's gross income includes interest savings from a debt repayment.

¶ 22 We decline to consider mother's argument that the magistrate must likewise adjust father's income to include his monetary gifts and debt repayments. Mother did not make these arguments during the hearing and did not cross-appeal the magistrate's findings concerning father's income. *See Gold Hill Dev. Co. v. TSG Ski & Golf, LLC*, 2015 COA 177, ¶ 18 (arguments not raised to the district court may not be raised for the first time on appeal); *see also In re Marriage of Kann*, 2017 COA 94, ¶ 81 (precluding appellee from asserting error in the court's attorney fees finding when she did not file a cross-appeal).

¶ 23 To the extent they may arise on remand, we address father's other appellate contentions.

IV. Capital Gains Income

¶ 24 We disagree with father's contention that mother's income should include $179,362 in capital gains.

A. Applicable Law

¶ 25 Gross income for child support purposes specifically includes income from capital gains. § 14-10-115(5)(a)(I)(N). A court must

include capital gains in a parent's income if the parent receives or realizes them. *See In re Marriage of Zisch*, 967 P.2d 199, 202 (Colo. App. 1998) (the court should include the amount of a capital gain as a component of the recipient's gross income for the year in which the gain was received); *see also In re Marriage of Upson*, 991 P.2d 341, 343 (Colo. App. 1999) (the court shall include in gross income only those capital gains realized from post-property-division appreciation in the property), *disapproved of on other grounds by In re Marriage of Boettcher*, 2019 CO 81, ¶ 17.

¶ 26 The court must include capital gains in a parent's income if they are available to pay for child support or general living expenses. *See* § 14-10-115(1)(a)(I) (This statute "establish[es] as state policy an adequate standard of support for children, subject to the ability of parents to pay[.]"); *cf. N.J.C.*, ¶ 22; *Tooker*, ¶ 18.

B. Facts

¶ 27 Mother sold a rental property in 2018 and received $179,362 in sale proceeds. Relying on section 1031 of the Internal Revenue Code, mother rolled the sale proceeds into the purchase of another rental property. Mother testified that she did not receive income

from the sale "that [she] could spend and use and impact [her] quality of life."

C. Analysis

¶ 28 Section 1031 allows a taxpayer to defer capital gains and taxes resulting from the exchange of a "like kind" property. *See* 26 U.S.C. § 1031(a)(1) ("No gain or loss shall be recognized on the exchange of real property held . . . for investment if such real property is exchanged solely for real property of like kind which is to be held . . . for investment.").

¶ 29 Mother did not realize capital gains because she reinvested all $179,362 in sale proceeds into a new rental property through a section 1031 property exchange. And mother did not receive funds from the sale that she could use to pay support, living expenses, or personal expenses. *See N.J.C.*, ¶ 22; *Tooker*, ¶ 18. Thus, the $179,362 mother received in 2018 was not "income."

V. Interest Income and Extracurricular and School Costs

¶ 30 We reject father's contentions that (1) mother's income should include interest received on the investment of the $179,362; and (2) the magistrate failed to terminate the order concerning the children's extracurricular and school costs.

A. Investment Income

¶ 31 During the hearing, father's attorney referenced an unspecified exhibit showing the interest rate on mother's HELOC and asked the court to impute the same six percent interest to the $179,362. Save for this statement, father did not present any evidence showing that mother could or would earn investment income on the sale proceeds or the interest rate that should apply. *See In re Marriage of Wright*, 2020 COA 11, ¶ 8 (parties have an obligation to provide evidence that supports their claims). "The arguments of counsel, of course, are not evidence." *City of Fountain v. Gast*, 904 P.2d 478, 482 n.5 (Colo. 1995).

B. Children's Costs

¶ 32 Father testified that he could no longer afford to pay the children's extracurricular and school costs and he thought they were unnecessary. Father did not present any evidence or information showing what the expenses were or offer any factual basis to terminate the order requiring him to pay those expenses. *See Wright*, ¶ 8.

¶ 33 We observe the argument made by father's attorney at the hearing that extracurricular and school costs are already included

in the child support guidelines. We also observe that father reiterated this argument in his petition for magistrate review and opening brief, effectively asserting that the order for him to share the extracurricular and school costs is a double-dip.

¶ 34 Yet, father's only support for this argument is the July 2011 final report of the Colorado Child Support Commission, which he did not provide in the record on appeal. We have no obligation to conduct a search for that document in order to review father's claim. *See, e.g.*, *In re Marriage of Dickey*, 658 P.2d 276, 278 (Colo. App. 1982) (appellate court will not consider exhibits not designated as part of the record on appeal). Moreover, it appears that father did not provide a copy of that document to the magistrate or district court. We will not consider evidence not admitted at the hearing or submitted to the court before ruling. *See Boulder Plaza Residential, LLC v. Summit Flooring, LLC*, 198 P.3d 1217, 1222 (Colo. App. 2008). We will not disturb the magistrate's decision based solely on the text of a document that has not been offered at any level of review.

¶ 35 As to father's claim that mother had the burden to convince the magistrate that the order concerning the children's

extracurricular and school costs should remain in place, we reject it. As the party seeking relief from this part of the permanent orders, father had the burden to establish that the magistrate should terminate the order. *See People in re Interest of S.E.G.*, 934 P.2d 920, 922 (Colo. App. 1997) (the party seeking to change the status quo bears the burden of proof).

VI. Child Support Worksheet

¶ 36 Since we are remanding for the court to recalculate mother's income, we need not address any arguments concerning the specific child support calculation. The child support amount must be reconsidered after the magistrate determines mother's income. However, we briefly address and disagree with father's argument that the magistrate erred by applying the formula from *In re Marriage of Quam*, 813 P.2d 833 (Colo. App. 1991).

¶ 37 The basic child support obligation is based, in part, on the number of overnight visits exercised by each parent. *See In re Marriage of Wells*, 252 P.3d 1212, 1213 (Colo. App. 2011); *In re Marriage of Emerson*, 77 P.3d 923, 926 (Colo. App. 2003). In a "shared physical care" arrangement, each parent keeps the children overnight for more than ninety-two overnights per year and both

parents contribute to the children's expenses in addition to the payment of child support. § 14-10-115(3)(h). In a "split physical care" arrangement, "each parent has physical care of at least one of the children by means of that child or children residing with that parent the majority of the time." § 14-10-115(3)(i).

¶ 38 Here, the parties share parenting time and expenses for the youngest child, but father has no overnights with the two older children and does not contribute to their expenses. Father is also not the primary residential caregiver for any of the children. *See Wells*, 252 P.3d at 1214-15 ("split physical care" applies only when *primary* residential care of multiple children is split between the parents); *see also In re Marriage of Alvis*, 2019 COA 97, ¶ 28 (where parenting time is shared equally, neither parent is the "custodial" parent with exclusive or near-exclusive physical care). Hence, the parties do not exercise either a "shared physical care" or "split physical care" parenting arrangement.

¶ 39 The statute does not address how to calculate child support under such a parenting time arrangement. *See Wells*, 252 P.3d at 1214-15; *Quam*, 813 P.2d at 835. Case law, however, makes clear that multiple worksheets should not be used because doing so

"inappropriately treat[s] the children, for child support purposes, as if each was an only child," which is "contrary to the guidelines and schedule, which provide for incremental increases in support for each additional child in a family." *Wells*, 252 P.3d at 1214; *see also Quam*, 813 P.2d at 835.

¶ 40 Instead, *Wells* and *Quam* require using a formula to apportion the parents' overnight visitation with multiple children so as to allocate the child support obligation in proportion to the amount of time the children spend with each parent when all of the children do not visit for the same number of overnights. *See Quam*, 813 P.2d at 835; *see also Wells*, 252 P.3d at 1213-14.

¶ 41 Considering the parties' parenting time arrangement here, the *Quam* formula is appropriate. Therefore, if at the time of remand father exercises a different number of overnights with each child, the magistrate may again rely on *Quam* to calculate child support.

¶ 42 We are not persuaded by father's assertion that the formula inflates his child support obligation because it fails to credit him for his half-time care of the youngest child. The formula ensures that one parent is not credited with more overnights than he or she actually exercises with *all* the children. *See Quam*, 813 P.2d at

835. While father has 182 overnights with the youngest child, he has zero overnights with the other two children. So, the formula appropriately credits father for the 182 nights he has with one child while simultaneously crediting mother for the 365 overnights she has with the parties' two older children. *See id.* (the formula best achieves the legislative intent of apportioning the child support obligation in proportion to the amount of time spent by the children in each parent's custody); *see also In re Marriage of Gross*, 2016 COA 36, ¶ 18 (the less time a child spends in the obligor's physical care, the higher the obligor's child support obligation will be to the other parent).

VII. Retroactive Modification

¶ 43 On remand, the magistrate may again make the order retroactive to August 2018.

¶ 44 Ordinarily, a child support modification order is effective as of the date the motion to modify is filed. *See* § 14-10-122(1)(a), (d), C.R.S. 2020. However, when there has been a court-ordered, voluntary, or mutually agreed upon change in the physical care of a child, child support is modified as of the date of the change in care, rather than as of the date the motion to modify is filed. § 14-10-

122(5); *see In re Marriage of Garrett*, 2018 COA 154, ¶ 21. This section applies where a modification is driven or necessitated by a change in the children's physical care arrangement. *Gross*, ¶¶ 17, 20. The purpose for a retroactive modification under section 14-10-122(5) is twofold: (1) it provides a remedy for a parent who has effectively overpaid child support due to a change in the care of the child, *In re Marriage of Weekes*, 2020 COA 16, ¶ 33; and (2) it ensures that the parents' continuing duty to support their children does not lapse during the children's minority, *Garrett*, ¶ 31.

¶ 45 Father argues that 14-10-122(5) only allows a retroactive modification if the change of physical care occurred after the date of the existing support order. Since the children were in mother's home when the existing support order entered in July 2018, father argues that a new change of physical care needed to occur after July 2018 for subsection (5) to apply. He argues that no such change of physical care occurred after July 2018. We disagree.

¶ 46 Under the terms of the July 2018 support order, father was supposed to resume parenting time with the two older children in August 2018. To be sure, the court calculated child support on its finding that the children would spend 26.16% of their time with

father after August 2018. But father did not resume parenting time. Hence, the children who were supposed to spend 26.16% of their time with father were spending 100% of their time with mother. Effectively, this was a change of physical care on which the existing order was based and, as such, was sufficient to justify a retroactive modification of child support. Therefore, the magistrate may again make support retroactive to August 2018, when there was a mutually agreed upon change of physical care.

¶ 47 Father makes a perfunctory argument in the reply brief that the magistrate erred in finding that there was a substantial and continuing change of circumstances sufficient to warrant a child support modification in the first instance. We do not address such arguments. *See In re Marriage of Drexler*, 2013 COA 43, ¶ 24 (reviewing court will not address arguments made for the first time in reply brief).

VIII. Attorney Fees

A. In the Modification Order

¶ 48 We disagree with father's argument that he was entitled to an award of his attorney fees at the time of the hearing.

¶ 49 Section 14-10-119 empowers the district court to apportion costs and fees equitably between parties based on their relative ability to pay. *In re Marriage of Gutfreund*, 148 P.3d 136, 141 (Colo. 2006). The award is intended to equalize the parties' status and to ensure that neither party suffers undue economic hardship as a result of the proceedings. *In re Marriage of Page*, 70 P.3d 579, 584 (Colo. App. 2003). The decision whether to award attorney fees under section 14-10-119 is discretionary with the district court, and we will not disturb it absent an abuse of that discretion. *In re Marriage of Davis*, 252 P.3d 530, 538 (Colo. App. 2011).

¶ 50 The record contains ample evidence to support the magistrate's factual findings that (1) mother had more assets, but also had greater parenting responsibilities; (2) the parties' incomes were nearly equal; and (3) father's income source was more stable. These findings are not clearly erroneous, as established by the following record evidence.

¶ 51 Mother historically earned approximately $9,300 per month working as a senior engineer. However, mother sought to modify child support in part because she lost that job. At the time of the hearing, mother earned $3,630 per month from various sources,

including unemployment, real estate commissions, the $200 she saved from paying her HELOC, and rental income. Mother testified that while she had started a consulting company six months earlier, the company had no assets, she used her HELOC to make payroll, and she had yet to earn a paycheck. Mother believed that the company would be profitable in six more months. In addition to her company, mother also owned a home and rental property. Mother listed $35,000 in debt on her sworn financial affidavit.

¶ 52 Also, at the time of the hearing, mother and father shared parenting time for the youngest child but mother exclusively cared for the other two children. Mother received $76 in monthly support from father, who assisted in paying the youngest child's expenses, but paid no costs related to the other two children.

¶ 53 As to father, he had worked for the same employer since 2013, consistently earning approximately $3,900 per month. That amount did not include father's expected three percent raise or bonus income. Father testified that he had difficulty meeting expenses each month, borrowed money from his mother, and had maxed his credit cards. Father owned his own home.

¶ 54 The magistrate could have concluded that this same evidence justified an attorney fees award to father. However, we will not reweigh the evidence or substitute our judgment for that of the district court. *See In re Marriage of Joel*, 2012 COA 128, ¶ 14; *In re Marriage of Ohr*, 97 P.3d 354, 357 (Colo. App. 2004). Because the denial of father's attorney fees request is supported by this record, we decline to disturb it. *Davis*, 252 P.3d at 538.

B. On Appeal

¶ 55 Father seeks an award of his attorney fees under section 14-10-119, again arguing that mother has substantially more financial resources. We remand this request to the magistrate, who is better equipped to resolve the factual issues regarding the parties' financial circumstances. *See Alvis*, ¶ 30.

¶ 56 We deny mother's request for attorney fees under C.A.R. 38(b) because father's appeal is not frivolous.

IX. Conclusion

¶ 57 The order is reversed, and the case is remanded with directions for the magistrate to recalculate mother's income, reconsider child support, and consider father's request for appellate attorney fees under section 14-10-119.

¶ 58 On remand, the magistrate must allow the parties a full opportunity to present all relevant evidence concerning their current financial circumstances. *In re Marriage of Salby*, 126 P.3d 291, 301 (Colo. App. 2005); *In re Marriage of Foss*, 30 P.3d 850, 853 (Colo. App. 2001) (where a new support order must be made, the parties must be allowed to show their current circumstances).

¶ 59 The existing support order will remain in place until a new support order enters.

JUDGE FURMAN and JUDGE VOGT concur.