DATE FILED: December 17, 2020
CASE NUMBER: 2020CA111

SUMMARY
December 17, 2020

2020C0A173

No. 20CA0111, *In re the Parental Responsibilities Concerning M.E.R. and D.E.R-L.* — Family Law — Allocation of Parental Responsibilities, Parenting Time, Child Support — Uniform Services Former Spouses' Protection Act

A division of the court of appeals holds, as a matter of first impression in Colorado, that the Uniformed Services Former Spouses' Protection Act, 10 U.S.C. § 1408, does not prohibit treating a parent's veteran's disability benefits as income for purposes of determining child support.

COLORADO COURT OF APPEALS **2020C0A173**

Court of Appeals No. 20CA0111
El Paso County District Court No. 18DR30811
Honorable Jann P. DuBois, Judge

In re the Parental Responsibilities Concerning M.E.R-L. and D.L.R-L., Children,

and Concerning Jeffery E. Lay,

Appellant,

and

Mary A. Rodmon,

Appellee,

and Concerning El Paso County Child Support Services,

Intervenor-Appellee.

JUDGMENT AFFIRMED

Division VII
Opinion by JUDGE TOW
Navarro and Lipinsky, JJ., concur

Announced December 17, 2020

William E. Peters, P.C., William E. Peters, Denver, Colorado, for Appellant

Beltz & West, P.C., Daniel A. West, Colorado Springs, Colorado, for Appellee

Diana K. May, County Attorney, Cori B. Steinberg, Assistant County Attorney, Colorado Springs, Colorado, for Intervenor-Appellee

¶ 1 This proceeding concerns the allocation of parental responsibilities (APR) for M.E.R-L. and D.L.R-L. between their parents, Jeffery E. Lay (father) and Mary A. Rodmon (mother). Father appeals the trial court's orders for child support and attorney fees, as well as one of the trial court's evidentiary rulings.

¶ 2 To resolve this appeal, we must consider, as a matter of first impression in Colorado, whether a provision of the Uniformed Services Former Spouses' Protection Act (USFSPA), 10 U.S.C. § 1408, prohibits a trial court from including a parent's veteran's disability benefits in that parent's gross income when calculating a child support obligation. We conclude that the USFSPA does not prohibit including such benefits in a parent's gross income for child support purposes. In addition, we conclude that the trial court did not abuse its discretion by declining to sanction mother for her tardy witness disclosure or by awarding mother a portion of her attorney fees. Therefore, we affirm.

I. Background

¶ 3 Father and mother are the unmarried parents of M.E.R-L., born in 2016, and D.L.R-L., born in 2018. The parties lived together for fifteen months between 2017 and 2018, during which

father agreed to pay the equivalent of mother's salary so she could stay at home with M.E.R-L. When mother learned she was pregnant with D.L.R-L., the parties' relationship deteriorated, and father moved out of the house. Father then initiated this APR proceeding.

¶ 4 The contested permanent orders hearing occurred over four days between August and October 2019. As relevant to this appeal, the court calculated child support based on mother's $5,547 monthly income and father's $7,504 monthly income, which consisted of his military retirement pay ($4,071 per month) and veteran's disability benefits ($3,433 per month). The calculation resulted in an order for father to pay mother $1,042.31 in monthly child support. The court also ordered father to pay $5,000 of mother's attorney fees due to the disparity of income and father's actions during the proceedings.

II. Witness Testimony

¶ 5 We first address father's challenge to the trial court's evidentiary ruling. Father contends that the trial court erred when it allowed mother's witnesses to testify at the permanent orders hearing even though mother had not timely disclosed them. He

contends that he was unduly surprised and did not have time to prepare for their testimony. We are not persuaded.

A. Standard of Review and Applicable Law

¶ 6 The court has considerable discretion to determine whether to impose sanctions for noncompliance with C.R.C.P. 16.2, including exclusion of witnesses, and we will not disturb its decision absent an abuse of discretion. C.R.C.P. 16.2(j); *see In re Marriage of Cardona*, 321 P.3d 518, 527 (Colo. App. 2010), *aff'd on other grounds*, 2014 CO 3. The court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair. *In re Marriage of Gibbs*, 2019 COA 104, ¶ 8.

¶ 7 C.R.C.P. 16.2(e)(3) requires parties in a domestic relations case to provide a list of lay and expert witnesses no later than sixty-three days before the contested hearing or final orders. The trial court may modify this time requirement to suit the needs of the particular case. *See* C.R.C.P. 16.2(a)-(b) (the disclosure requirements, discovery, and hearings are tailored to the needs of the case, and the court may modify its standard case management order accordingly). If a party tries to call an undisclosed witness, the

court may exclude the witness absent good cause for the omission. C.R.C.P. 16.2(j).

B. Additional Background

¶ 8 The trial court entered a case management order that shortened the witness disclosure deadline from sixty-three days to sixty days. The final orders hearing was initially scheduled for July 10, 2019, making May 10, 2019, the witness disclosure deadline.[1] Neither party filed witness disclosures by this deadline.

¶ 9 When father pointed out the parties' mutual noncompliance at a June 11, 2019, status conference, the court again told the parties to file their disclosures. The court further instructed the parties to ensure that the child and family investigator (CFI) appeared at the final orders hearing. Both parties filed witness disclosures on June 18, 2019; father's disclosure listed only the CFI, while mother's listed the three individuals whose testimony is the subject of father's claim on appeal.

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[1] Sixty days before July 10, 2019, was Saturday, May 11. When a due date is measured before an event, if the final day is a Saturday, Sunday, or legal holiday, counting continues backward to the next business day. C.R.C.P. 6(a)(1).

¶ 10 At the start of the July 10 hearing, father notified the court that he had discharged the CFI and that he objected to mother's witnesses. The court continued the hearing to August 7, 2019, and again ordered the parties to ensure the CFI's attendance. The court ordered mother's witnesses to return for the hearing because it surmised that the CFI "may want to hear from those people."

¶ 11 Father again objected to mother's witnesses at the start of the August 7 hearing. The court allowed the witnesses to testify.

C. Discussion

¶ 12 Father has not demonstrated that the court's decision regarding mother's witnesses was manifestly arbitrary, unreasonable, or unfair. Father knew on June 11 that the court would allow late witness disclosures and knew on July 10 that the court had ordered mother's witnesses to appear at the final orders hearing. Thus, father should not have been surprised when mother called the witnesses on August 7.

¶ 13 Further, while mother did not disclose her witness list sixty days before July 10, she nonetheless provided her disclosures on June 18 per the court's second order. This disclosure, which occurred fifty days before the August 7 hearing, informed father of

the witnesses she intended to call and the nature of their testimony. Thus, contrary to father's assertion, father had ample time to prepare for their cross-examination. Indeed, father's allegation that he lacked time to adequately investigate these witnesses is bald and conclusory. He provides no specifics, such as identifying what testimony surprised him or what he would have done differently had he received the disclosures ten days earlier. *See In re Marriage of Woolley*, 25 P.3d 1284, 1287 (Colo. App. 2001) (no prejudice in allowing nondisclosed witness to testify at post-decree hearing concerning the child because witness had been treating the child for two years and testified at permanent orders).

¶ 14 Finally, despite the discretionary nature of C.R.C.P. 16.2(j), father asks us to apply the principles underlying C.R.C.P. 16, which he asserts mandates the imposition of sanctions for late witness disclosures. To the extent the two rules are different, we deny his request, because C.R.C.P. 16(a) expressly provides that Rule 16 "shall not apply to domestic relations" cases. But in any event, Rule 16 does not require a trial court to exclude an untimely disclosed witness. *See Four Strong Winds, Inc. v. Lyngholm*, 826 P.2d 414, 417 (Colo. App. 1992) ("[I]t generally rests within the

sound discretion of the trial court to enforce [the Rule 16 witness disclosure] requirement and to determine whether any violation of this requirement merits the imposition of sanctions and, if so, the nature of the sanction to be imposed."). In sum, neither Rule 16.2 nor Rule 16 mandates any sanction, let alone the preclusion of witnesses.

¶ 15 In the absence of any demonstrated prejudice flowing from the untimely disclosure, we conclude that the court did not abuse its discretion by permitting the witnesses to testify.

III. Veteran's Disability Benefits

¶ 16 Father also appeals the trial court's calculation of his child support obligation. In particular, he argues that the trial court erred by including his veteran's disability benefits in his gross income. We disagree.

A. Standard of Review and Applicable Law

¶ 17 We review child support orders for an abuse of discretion but review de novo the legal standard applied by the court. *In re Parental Resps. Concerning N.J.C.*, 2019 COA 153M, ¶ 12. Further, to the extent our analysis requires statutory interpretation, our

review is also de novo. *In re Marriage of Paige*, 2012 COA 83, ¶ 9 (citing *In re Marriage of Mugge*, 66 P.3d 207, 210 (Colo. App. 2003)).

¶ 18 Child support is calculated by using each parent's actual gross income. § 14-10-115(1)(b)(I), (3)(c), (5)(a)(I), C.R.S. 2020. Gross income includes income "from any source," other than certain listed exceptions that are not applicable here, and specifically includes disability insurance benefits. § 14-10-115(5)(a)(I), (5)(a)(I)(S).

B. Discussion

¶ 19 Father argues that his veteran's disability benefits should not be included in his gross income because they are not "insurance benefits" and are not taxable. He further contends that, to the extent section 14-10-115 purports to include these benefits, the statute is preempted by federal law. We address, and reject, each contention in turn.

1. Disability Benefits Are Income Even if They Are Not From an Insurance Program

¶ 20 As a threshold issue, we note that father provides no citation for his assertion that these benefits are "not 'insurance' as contemplated by Colorado State law." True, he characterizes veteran's disability benefits as "a federal entitlement pursuant to 38

CFR § 3.750," but that characterization does not inform us whether our legislature intended to treat the program as the equivalent of an insurance program. And a division of this court — in a case involving veteran's disability benefits — observed that "disability benefits are expressly included as 'gross income.'" *In re Marriage of Fain*, 794 P.2d 1086, 1087 (Colo. App. 1990).[2]

¶ 21 But even if father's characterization of the nature of the benefits is accurate, that fact is not dispositive. As noted, "gross income" includes income "from any source." § 14-10-115(5)(a)(I). The only statutory exclusions do not encompass father's benefits. *See* § 14-10-115(5)(a)(II). Thus, we conclude that veteran's disability benefits fall within the broad definition of gross income.

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[2] Significantly, not only did the father in *In re Marriage of Fain*, 794 P.2d 1086 (Colo. App. 1990), not challenge the treatment of his social security and veteran's disability benefits as income, he explicitly argued they should have been treated as his only income. *Id.* at 1087. The issue in *Fain* was whether the trial court properly included proceeds from a structured personal injury settlement in the father's gross income. *Id.* Thus, despite the *Fain* division's treatment of the disability benefits as income, that case is not dispositive of the issue before us.

2. The Nontaxable Nature of the Benefits Is Irrelevant

¶ 22 Nor are we persuaded that the nontaxable nature of the disability benefits is of any import. As our supreme court has recognized, "the [child support] statute makes no distinction between sources of income based on the federal or state tax codes." *In re Marriage of Nimmo*, 891 P.2d 1002, 1005 n.5 (Colo. 1995). Indeed, the court went on to state that "tax definitions are irrelevant to an interpretation of § 14-10-115." *Id.*; *see also Fain*, 794 P.2d at 1087 ("[T]he more specific definition of 'gross income' in § 14-10-115 prevails over other definitions for federal and state income tax purposes.").

3. Federal Law Does Not Preclude Treating Veteran's Disability Benefits As Income for Calculating Child Support

¶ 23 Father claims that the use of veteran's disability benefits in the calculation of his gross income runs contrary to the USFSPA. *See* 10 U.S.C. § 1408. Thus, he argues, to the extent section 14-10-115 purports to include these benefits in father's gross income, the federal provision must be given preemptive effect. We disagree.

¶ 24 We begin by noting that the United States Supreme Court has discussed the use of veteran's disability benefits in the calculation of a veteran-parent's gross income. In *Rose v. Rose*, 481 U.S. 619 (1987), the Court affirmed a state court's order holding the parent who owed child support (the obligor) in contempt for failing to pay the court-ordered support. *Id.* at 636. The obligor had defended against the contempt charges, in part, by arguing that federal law prohibited a state court from requiring a veteran to use his disability benefits to pay child support. The Court rejected the obligor's claim, observing that veteran's disability benefits "compensate for impaired earning capacity . . . and are intended to 'provide reasonable and adequate compensation for disabled veterans *and their families*.'" *Id.* at 630 (citations omitted).

¶ 25 Father argues that *Rose* is distinguishable because, although the original child support order had been established using the obligor's veteran's disability benefits as his income, the obligor had not appealed that order. Thus, the issue in *Rose* was not whether the disability benefits could be used to *calculate* the support obligation, but rather whether a parent could be required to use those benefits to *satisfy* the support obligation. While we

acknowledge this distinguishing feature of the case, we nevertheless glean guidance from the Court's observation, albeit likely dictum, that "a state court may *consider* disability benefits as part of the veteran's income in setting the amount of child support to be paid." *Id.* at 626. Notably, several courts have read *Rose* as explicitly authorizing the treatment of veteran's disability benefits as income for purposes of calculating a veteran-parent's support obligation. *See Goldman v. Goldman*, 197 So. 3d 487, 493-94 (Ala. Civ. App. 2015); *Loving v. Sterling*, 680 A.2d 1030, 1031 (D.C. 1996); *Fletcher v. Fletcher*, 573 So. 2d 941, 943 (Fla. Dist. Ct. App. 1991); *In re Marriage of Wojcik*, 838 N.E.2d 282, 299 (Ill. App. Ct. 2005); *Casey v. Casey*, 948 N.E.2d 892, 902-03 (Mass. App. Ct. 2011); *In re Braunstein*, 236 A.3d 870, 873-74 (N.H. 2020); *Nieves v. Iacono*, 77 N.Y.S.3d 493, 494 (App. Div. 2018); *Lesh v. Lesh*, 809 S.E.2d 890, 896 (N.C. Ct. App. 2018); *Dye v. White*, 976 P.2d 1086, 1087-88 (Okla. Civ. App. 1999); *Wingard v. Wingard*, 11 Pa. D. & C.4th 343, 347 (Ct. C.P. 1991); *Youngbluth v. Youngbluth*, 6 A.3d 677, 687 n.3 (Vt. 2010); *Alwan v. Alwan*, 830 S.E.2d 45, 51 (Va. Ct. App. 2019).

¶ 26 Father also argues that *Rose* is inapplicable because the obligor in that case relied on three provisions related to veterans'

benefits in Title 38 of the United States Code, whereas, here, father relies on the USFSPA. So we turn our analysis to the question of whether that statute prohibits the inclusion of veteran's disability benefits in a veteran-parent's income for purposes of calculating a child support obligation. We conclude that it does not.

¶ 27 Military retirement benefits are generally distributable as marital property in dissolution of marriage cases. 10 U.S.C. § 1408; *see In re Marriage of Hunt*, 909 P.2d 525, 530 (Colo. 1995). Distributable benefits, however, are limited to "disposable retired pay," which is defined at 10 U.S.C. § 1408(a)(4) as excluding disability pay. Thus, federal and Colorado cases interpreting the USFSPA hold that disability pay is not subject to division as part of a marital property distribution. *See Howell v. Howell*, 581 U.S. ___, ___, ___, 137 S. Ct. 1400, 1405 (2017) (citing *Mansell v. Mansell*, 490 U.S. 581, 594-95 (1989)); *see also In re Marriage of Tozer*, 2017 COA 151, ¶ 13 (disability retirement is not disposable retired pay under the USFSPA and is not subject to division as marital property); *In re Marriage of Williamson*, 205 P.3d 538, 540 (Colo. App. 2009) (same); *In re Marriage of Franz*, 831 P.2d 917, 918 (Colo. App. 1992) (same). In fact, father argues that *Howell* is instructive

here because, he asserts, that case stands for the proposition that the USFSPA prohibits states from treating veteran's disability benefits as divisible community property.

¶ 28 But father misses a very important distinction. *Howell* discusses only the treatment of disability benefits as community property.[3] Nothing in *Howell*, or in the USFSPA itself for that matter, addresses whether a state — through statute or judicial decision — may treat disability benefits as income for calculating a child support obligation. In fact, the Court acknowledged that a state court "remains free to take account of the contingency that some military retirement pay might be waived, or, as the petitioner himself recognizes, take account of reductions in value when it calculates or recalculates the need for spousal support." *Howell*, 581 U.S. at ___, 137 S. Ct. at 1406 (citing *Rose*, 481 U.S. at 630-34, 632 n.6); *cf. In re Marriage of Nevil*, 809 P.2d 1122, 1123 (Colo. App.

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[3] We note that the case before us involves only the allocation of parental responsibilities and establishment of a support obligation concerning the children of two unmarried individuals. Thus, since no property division has taken — or will take — place, the question of whether these benefits may be treated as "community property" — or, as is relevant to Colorado law, as "marital property" — is inapplicable to this case.

1991) (holding that federal law does not prohibit consideration of military disability benefits when "determining the propriety and amount of an award of spousal maintenance").

¶ 29 Father cites to no case that holds that the USFSPA prohibits states from including veteran's disability benefits in a veteran-parent's income when calculating a child support obligation. Nor are we aware of any such case. To the contrary, every court we have found that faced this issue rejected the preemption argument. *See Goldman*, 197 So. 3d at 493-94; *Casey*, 948 N.E.2d at 901-02; *Carpenter v. Carpenter*, No. 344512, 2020 WL 504778, at *5 (Mich. Ct. App. Jan. 30, 2020) (unpublished opinion); *Strong v. Strong*, 2000 MT 178, ¶ 40, 8 P.3d 763, 770; *Braunstein*, 236 A.3d at 875; *Dachille v. Dachille*, 983 N.Y.S.2d 193, 196-97 (Sup. Ct. 2014); *In Interest of C.E.A.Q.*, No. 09-19-00037-CV, 2020 WL 5240458, at *3 (Tex. App. Sept. 3, 2020); *Alwan*, 830 S.E.2d at 51. Courts in several other states, although not addressing this particular preemption argument, have also held that veteran's disability benefits are properly included in income when determining a veteran-parent's child support obligation. *See Belue v. Belue*, 828 S.W.2d 855, 857 (Ark. Ct. App. 1992); *In re Paternity of C.L.H.*, 689

N.E.2d 456, 458 (Ind. Ct. App. 1997); *In re Marriage of Lee*, 486 N.W.2d 302, 305 (Iowa 1992); *Ballou v. Ballou*, No. 2011-CA-001465-ME, 2012 WL 2946138, at *2 (Ky. Ct. App. July 20, 2012) (unpublished opinion); *Carter v. Carter*, 49,517, pp. 5-6 (La. App. 2 Cir. 11/26/14), 155 So. 3d 81, 85; *Sward v. Sward*, 410 N.W.2d 442, 444 (Minn. Ct. App. 1987); *Schmuck v. Schmuck*, 2016 ND 87, ¶ 10, 882 N.W.2d 918, 922; *Ladson v. Maxey*, No. 43733-3-II, 2014 WL 2601701, at *2-3 (Wash. Ct. App. June 10, 2014) (unpublished opinion); *Duke v. Richards*, 600 S.E.2d 182, 188 n.9 (W. Va. 2004).

¶ 30 All told, at least twenty-four states and the District of Columbia treat veteran's disability benefits as income when calculating child support obligations. We are aware of no state that declines to do so. We are not persuaded to swim against this formidable tide.

¶ 31 In sum, father's veteran's disability benefits are income to be included as gross income pursuant to section 14-10-115. And nothing in federal law prohibits the use of such income in calculating father's child support obligation. Thus, the trial court did not err by including father's benefits in his gross income for this purpose.

IV. Attorney Fees

¶ 32 Finally, father argues that the record does not support the court's attorney fees award. We disagree and uphold the award.

¶ 33 Section 14-10-119, C.R.S. 2020, allows courts to apportion fees in dissolution cases between the parties based on relative ability to pay. *Vanderborgh v. Krauth*, 2016 COA 27, ¶ 37. In awarding fees under this section, the court must consider the parties' financial resources, including any disparity in the parties' earning capacities. *See In re Marriage of Renier*, 854 P.2d 1382, 1386 (Colo. App. 1993). The decision whether to award fees under the statute is discretionary, and we will not disturb such a decision absent a showing of an abuse of that discretion. *In re Marriage of Aragon*, 2019 COA 76, ¶ 8.

¶ 34 The court found, with record support, that the parties had disparate incomes "for a substantial portion of this litigation." Throughout the proceeding, father received more than $7,000 per month in retirement and disability pay. In contrast, mother was unemployed when father initiated the APR proceeding in June 2018 and remained unemployed until July 1, 2019, shortly before the permanent orders hearing was set to begin. Indeed, in its

November 2018 temporary orders, the court declined to impute any income to mother because she was caring for a child under the age of twenty-four months. *See* § 14-10-115(5)(b)(I)(B) (court must not impute income where a parent is unemployed or underemployed because they are caring for a child under the age of twenty-four months for whom the parents owe a joint legal responsibility). Mother testified that she had $15,000 to $20,000 in savings when father moved out in June 2018 and that she used that money and her other "life savings" to pay her expenses. Mother testified that her money ran out after four months and she started putting expenses on her credit cards and borrowing money from her parents. Mother based her attorney fees request on the parties' disparate income "up to July 1 of 2019."

¶ 35 These facts support the court's finding that the parties had a disparity of income during most of the proceedings. These facts also refute father's arguments that (1) there is no explanation for the decrease in value of mother's 401(k) account and (2) mother's financial affidavits are inconsistent.

¶ 36 There is also record support for the court's finding that husband's actions during the proceedings necessitated mother's

fees. The record shows that, between April and July 2019, father filed hundreds of pages of documents and repetitive pleadings, some of which directly challenged mother's actions during the proceedings. The court was within its discretion to conclude that mother's fees incurred in responding to these filings were reasonable and necessary. *See Woolley*, 25 P.3d at 1288 (a party's behavior may be considered only to the extent it might affect the reasonableness and necessity of attorney fees awarded).

V. Conclusion

¶ 37 The judgment is affirmed.

JUDGE NAVARRO and JUDGE LIPINSKY concur.

Court of Appeals

STATE OF COLORADO
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Denver, CO 80203
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PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Steven L. Bernard
Chief Judge

DATED: March 5, 2020

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