The summaries of the Colorado Court of Appeals published opinions constitute no part of the opinion of the division but have been prepared by the division for the convenience of the reader. The summaries may not be cited or relied upon as they are not the official language of the division. Any discrepancy between the language in the summary and in the opinion should be resolved in favor of the language in the opinion.

SUMMARY
July 6, 2023

2023COA63

No. 22CA0441, *In re Marriage of Bochner* — Family Law — Uniform Dissolution of Marriage Act — Court-Appointed Decision-Maker — Modification of Decision of Decision-Maker — De Novo Hearing; Attorney Fees

In a post-decree dispute over parental decision-making, when a party challenges a court-appointed decision-maker's decision in court, and the decision is substantially upheld after a de novo hearing, section 14-10-128.3(4)(b), C.R.S. 2022, entitles the nonmoving party to attorney fees. As a matter of first impression, a division of the court of appeals holds that the de novo hearing must be an evidentiary hearing. Because the court did not hold an evidentiary hearing, the nonmoving parent is not entitled to attorney fees.

COLORADO COURT OF APPEALS **2023COA63**

Court of Appeals No. 22CA0441
Jefferson County District Court No. 19DR30275
Honorable Christopher C. Zenisek, Judge

In re the Marriage of

Melinda Paige Bochner,

Appellee,

and

Eric Andrew Bochner,

Appellant.

ORDER AFFIRMED AND CASE
REMANDED WITH DIRECTIONS

Division II
Opinion by JUDGE TOW
Furman and Johnson, JJ., concur

Announced July 6, 2023

Sherman & Howard L.L.C., Jordan M. Fox, Denver, Colorado, for Appellee

Eric Andrew Bochner, Pro Se

¶ 1 In this post-dissolution of marriage case involving Eric Andrew Bochner (father) and Melinda Paige Bochner (mother), father appeals the district court's denial of his C.R.C.P. 59(a)(4) motion seeking attorney fees and costs under section 14-10-128.3(4)(b), C.R.S. 2022. Our review requires us, as a matter of first impression, to consider what qualifies as a de novo hearing when a court is asked to review a decision of a court-appointed decision-maker. Because we conclude that the magistrate here did not conduct a de novo hearing — and the statute only authorizes an award of attorney fees for a de novo hearing — we affirm the district court's denial of father's request for attorney fees. We remand the case to determine mother's request for appellate attorney fees under section 14-10-119, C.R.S. 2022.

I. Factual and Procedural History

¶ 2 The parties' sixteen-year marriage was dissolved in 2020. When entering the decree, the district court adopted the parties' stipulated parenting plan regarding their three children. In this stipulation, the parties agreed that

- they would both remain in individual therapy;

- the children and father would continue in reunification therapy;
- father would have sole decision-making responsibility over the children's individual and reunification therapy; and
- they would keep working with a parenting coordinator/decision-maker (PCDM) who was given arbitration authority to resolve disputes regarding reunification therapy.

¶ 3 On June 28, 2021, the PCDM found that the therapeutic plan was not being followed. As a result, the PCDM directed the children to return to individual and reunification therapy. The PCDM also required the children's individual therapist and the reunification therapist to "speak with one another regularly to coordinate care for the family members" and to "confer with each parent's individual therapist as needed." The magistrate later adopted the PCDM's decision.

¶ 4 Mother filed a motion to modify the PCDM's decision under section 14-10-128.3(4)(a). In it, she asserted that section 12-245-203.5(2)(a)(I), C.R.S. 2022, barred the PCDM from compelling the

children, over the children's objections, to participate in individual and reunification therapy. *See id.* ("[A] mental health professional may provide psychotherapy services . . . to a minor who is twelve years of age or older, without the consent of the minor's parent or legal guardian, if the mental health professional determines that . . . [t]he minor is knowingly and voluntarily seeking such services . . . ."). At this time, the children were seventeen, fifteen, and twelve years old, and according to mother, they were "exhausted" with the therapy requirements because their relationship with father had not improved. Mother also asserted that the PCDM's decision violated the children's psychotherapist-patient privilege given that their individual therapist must communicate regularly with the parents' therapists and the reunification therapist. In the alternative, mother asked for an evidentiary hearing.

¶ 5 In response, father first alleged that mother was engaging in a pattern of parental alienation and interference in his relationship with the children. He then argued against mother's interpretation of section 12-245-203.5(2)(a)(I), saying that it was erroneous and contrary to legislative intent. He further argued that the parents

had consented to the release of the children's therapeutic information amongst the therapists and the PCDM. In the end, he indicated that if the PCDM's decision was "substantially upheld," he was entitled to his attorney fees and costs pursuant to section 14-10-128.3(4)(b).

¶ 6 Following the filing of mother's reply, the magistrate held a fifteen-minute status conference, at which only the parents' counsel appeared. The magistrate heard oral argument, permitted the parents to submit supplemental briefs, and stated that a written order would be issued.

¶ 7 On October 15, 2021, after reviewing the supplemental briefs, the magistrate granted mother's section 14-10-128.3(4)(a) motion. Noting that the motion involved purely legal questions, which raised no factual issues, the magistrate conducted what he referred to as a "de novo review" of the PCDM's decision. The magistrate sided with mother's interpretation of section 12-245-203.5(2)(a)(I): "If a child [twelve] years or older can consent to mental health therapy, he/she should also be able to refuse to engage in mental health therapy." The magistrate ultimately modified the PCDM's decision to allow the

children to choose whether to participate in therapy as well as to assert their psychotherapist-patient privilege.

¶ 8 Father, now pro se, petitioned the district court to review the magistrate's order. He maintained that the magistrate erred by (1) violating his due process rights by overriding his parenting decisions; (2) failing to distinguish between the legal concepts of "privilege" and "confidentiality"; (3) declining to deny mother's section 14-10-128.3(4)(a) motion as untimely; and (4) conducting a "de novo review" instead of a "de novo hearing." He asked the court to "substantially uphold" the PCDM's decision and award him attorney fees and costs under section 14-10-128.3(4)(b).

¶ 9 On January 12, 2022, the district court rejected the magistrate's order and reinstated the PCDM's decision. The court reasoned, among other things, that the magistrate had errantly "concluded that [section] 12-245-203.5 requires [the] children's approval for court-ordered therapy." It mentioned, however, that mother "might be correct that compelling therapy no longer is in the children's best interests, and she may wish to assert the legal premise that [they] may withhold their therapist's ability to share information."

¶ 10 Father moved to amend the district court's order under C.R.C.P. 59(a)(4), stating that the court overlooked his request for attorney fees and costs under section 14-10-128.3(4)(b). The district court denied father's C.R.C.P. 59(a)(4) motion, and father filed this appeal.

II. C.R.C.P. 59(a)(4)

¶ 11 Father contends that the district court erred by denying his C.R.C.P. 59(a)(4) motion. We disagree.

A. Standard of Review

¶ 12 We review a district court's decision to deny a C.R.C.P. 59(a)(4) motion for an abuse of discretion. *Top Rail Ranch Ests., LLC v. Walker*, 2014 COA 9, ¶ 74. A court abuses its discretion when its decision is manifestly arbitrary, unreasonable, or unfair, or based on a misapplication of the law. *In re Marriage of Medeiros*, 2023 COA 42, ¶ 28.

B. Relevant Law

¶ 13 Section 14-10-128.3(4)(a) allows a parent to file a motion with the district court requesting that a decision of a decision-maker be modified "pursuant to a de novo hearing."

¶ 14 Based on the pleadings, the district court may, in its discretion, grant a parent's request for a "de novo hearing." § 14-10-128.3(4)(b). If the court grants a "de novo hearing" and "substantially upholds" the decision of the decision-maker, the parent who requested the hearing must pay the other parent's attorney fees and costs unless "it would be manifestly unjust." *Id.*

C. Discussion

¶ 15 In denying father's C.R.C.P. 59(a)(4) motion, the district court wrote the following:

> [T]he [c]ourt's [January 12, 2022,] [o]rder regarding a [r]eview of [the] [m]agistrate[']s [October 15, 2021,] [o]rder [did] not grant[] a de novo hearing. Thus, [section 14-10-128.3(4)(b)] does not apply to the [c]ourt's [January 12th] order.
>
> To the extent the statute can be said to apply the [c]ourt determines that its application would be manifestly unjust due to the extreme litigation in this matter and the close statutory interpretation upon which the [c]ourt's decision was based.

¶ 16 Father makes two arguments. First, the district court erred by determining that section 14-10-128.3(4)(b) did not apply because his request for attorney fees and costs arose in the context of a petition for review. Second, the district court erred by determining

that even if section 14-10-128.3(4)(b) applied, an award of attorney fees and costs against mother would be manifestly unjust. Mother counters that section 14-10-128.3(4)(b) does not afford father relief because there was no de novo hearing. We agree with mother.

¶ 17 The statute does not define "de novo hearing." Nor has any appellate case in Colorado explored the term in the context of the decision-maker statute. However, the General Assembly used the same language to permit challenges to arbitration awards in the context of disputes between parents over the exercise of parental responsibilities. § 14-10-128.5(2), C.R.S. 2022. Applying the arbitration statute, a division of this court has observed that "[t]he purpose of a de novo hearing is for the court to hear the relevant evidence . . . not just the 'pleadings.'" *Vanderborgh v. Krauth*, 2016 COA 27, ¶ 15.

¶ 18 De novo means "anew." Black's Law Dictionary 548 (11th ed. 2019). In other words, the statute authorizes a court, upon a timely request from a parent, to conduct a hearing "anew" as if the arbitrator (or, here, decision-maker) had not made a decision in the first place, taking evidence to determine whether the parenting decision at issue is in the best interests of the child. If such a

hearing is conducted, and if that hearing results in the decision-maker's decision being "substantially upheld," the prevailing parent is entitled to attorney fees.

¶ 19 We recognize that the magistrate did not "substantially uphold" the decision of the decision-maker and, instead, rejected the decision. But on petition for review under C.R.M. 7(a), the district court reversed the magistrate and reinstated the PCDM's decision. We assume, without deciding, that because the ultimate resolution of the challenge resulted in the PCDM's decision remaining in place the decision was "substantially upheld."

¶ 20 As father acknowledges, however, the magistrate did not conduct an evidentiary hearing. Rather, the magistrate held a status conference at which only counsel attended (per the instructions of the magistrate). The magistrate invited supplemental briefing on the parties' positions and indicated that *if* he concluded that there were factual disputes, he would schedule a hearing. After reviewing the parties' briefs, the magistrate ruled without setting a hearing. This was not a "de novo hearing" as contemplated by the statute.

¶ 21 Because no de novo hearing was held, the attorney fee provision of section 14-10-128.3(4)(b) is inapplicable. Father, thus, is not entitled to attorney fees. So, albeit on slightly different grounds, we conclude that the district court's denial of the C.R.C.P. 59 motion was not an abuse of discretion. *See Laleh v. Johnson*, 2017 CO 93, ¶ 24 (noting that an appellate court may affirm a trial court's judgment "on any ground supported by the record, whether relied upon or even considered by the trial court" (quoting *People v. Aarness*, 150 P.3d 1271, 1277 (Colo. 2006))).

III. Appellate Attorney Fees

¶ 22 Mother requests an award of appellate attorney fees under section 14-10-119 based on the disparity in the parents' financial resources. *See In re Marriage of Boettcher*, 2018 COA 34, ¶ 34 (section 14-10-119 empowers the court to equitably apportion attorney fees and costs between the parties based on their relative ability to pay), *aff'd*, 2019 CO 81. Because the district court is better equipped to determine the factual issues regarding the parents' current financial resources, we remand the issue to the district court. *See* C.A.R. 39.1; *In re Marriage of Schlundt*, 2021 COA 58, ¶ 54.

IV. Disposition

¶ 23 The order is affirmed, and the case is remanded to the district court to determine mother's request for appellate attorney fees under section 14-10-119.

JUDGE FURMAN and JUDGE JOHNSON concur.