Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2019-252

JUNE TERM, 2020

Heidi Putnam v. Errol J. Tabacco*	}	APPEALED FROM:
	}	
	}	Superior Court, Franklin Unit,
	}	Family Division
	}	
	}	DOCKET NO. 303-10-17 Frdm
		Trial Judge: Thomas Carlson

In the above-entitled cause, the Clerk will enter:

Father appeals an order of the superior court's family division upholding the magistrate's order directing him to pay child support to mother. We affirm.

Father and mother were in a relationship from 2010 to March 2017. They have one child together, who was born in June 2011 and lives with mother. Mother filed this parentage action in October 2017. In November 2018, after holding an evidentiary hearing, the magistrate issued an order directing father to pay child support in the amount of $1300 per month retroactive to October 2017. Father moved for reconsideration. He argued that the magistrate should have adjusted his income under 15 V.S.A. § 656a to account for his additional dependents. He also argued the magistrate erred in finding father, but not mother, to be voluntarily underemployed. The magistrate denied the motion, explaining that father was not entitled to an adjustment for his older children because they did not live with him and he did not have a support obligation for them. The magistrate also declined to alter his findings regarding the parties' employment. Father appealed to the family division, which upheld the magistrate's decision. Father then appealed to this Court.

We review the decision of the magistrate based on the record made before the magistrate. Tetreault v. Coon, 167 Vt. 396, 399 (1998); 4 V.S.A. § 465; V.R.F.P. 8(g)(4). We will uphold the magistrate's findings of fact unless they are clearly erroneous and will affirm conclusions of law if supported by the findings. Tetreault, 167 Vt. at 399-400.

Father's first claim on appeal is that the magistrate and family court erred in denying his request for an income adjustment for his two older children. Section 656a of Title 15 provides that "the total child support obligation for the children who are the subject of the support order shall be adjusted if a parent is also responsible for the support of additional dependents who are not the subject of the support order." 15 V.S.A. § 656a(b). "Additional dependents" are defined as "any natural and adopted children and stepchildren for whom the parent has a duty of support." Id. § 656a(a). We have held that a parent who does not have custody of an additional dependent or a child support obligation to that dependent is not eligible for an adjustment under 15 V.S.A. § 656a. Miller v. Miller, 2005 VT 89, ¶ 16, 178 Vt. 273.

The magistrate denied father's request for an adjustment under § 656a because it found that father did not have custody of his older children for purposes of child support and did not have a child support obligation to them. The magistrate's findings are not clearly erroneous. A parent is considered to be noncustodial for purposes of child support if the parent exercises physical custody of the children, defined as keeping them overnight, for less than twenty-five percent of a calendar year. See 15 V.S.A. § 656 (setting procedure for calculating child support when one parent has sole custody); id. § 657 (defining types of custody). Father testified at the magistrate hearing that he saw his two older daughters, who were sixteen and eighteen years old, approximately once a week. They spent the school week in Montpelier, where they attended high school, and came to his house when they could. He testified that sometimes they came on Friday night and stayed until Monday morning, and other times they came on Sunday night and left on Monday morning. He did not provide any records indicating the number of overnights they spent with him. Mother testified that father's older daughters were with him "[a]pproximately twenty percent" of the time, mainly on weekends. Father also testified that he did not pay child support to his older children's mother because she earned more than he. Father did not provide the child support order pertaining to his older children. On this record, the magistrate's findings that father was not a custodial parent of his older daughters for purposes of child support and that he did not have a child support obligation to them were not clearly erroneous.

Father argues that he still has a duty of support for his older daughters when they are in his care, even though he is not required to pay their mother any child support. He argues that his income should be adjusted to reflect this obligation. We considered and rejected a similar argument in Miller v. Miller, 2005 VT 89, ¶ 9. In that case, a mother who did not have custody of or a child support obligation to her older child sought an income adjustment for her financial contributions to support that child, including travel expenses to visit him in Maine, expenses incurred when he visited her in Vermont, and other items she purchased for him, such as hockey equipment. We examined the statutory language and concluded that "noncustodial parents are not eligible for a § 656a income adjustment for additional dependents because this section allows only custodial parents who provide primary child support and spend the child-support guideline amount to receive an adjustment." Id. We explained that if we were to interpret § 656a to allow a noncustodial parent with no child support obligation for additional dependents to receive the income adjustment for additional dependents, it would undermine the goals of the child-support guidelines. Id. ¶ 17. Under Miller, even if father does contribute some amount to his older children's expenses, he is not entitled to an adjustment to his income under § 656a because he is not providing primary support for those children.[1]

Father appears to argue that Miller should not apply to a situation where a parent has shared custody of additional dependents for purposes of child support.[2] Even if this were a valid basis to distinguish our holding in Miller, it is not the situation in this case. As discussed above, the magistrate found father to be a noncustodial parent for purposes of child support because he

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[1] In his reply brief, father argues that we implicitly overruled Miller in LaMothe v. LeBlanc, 2013 VT 21, 193 Vt. 399. As a general rule, we will not address an argument that is raised for the first time in a reply brief. Bigelow v. Dep't of Taxes, 163 Vt. 33, 37 (1994). We note that LaMothe did not involve either a claim for an additional-dependent adjustment under 15 V.S.A. § 656a or a sole-custody child support order.

[2] Father claims that he has a shared-custody child support order for his older children and asks us to review that order in deciding this appeal. The order is not part of the record and we therefore cannot consider it. Gus' Catering, Inc. v. Menusoft Sys., 171 Vt. 556, 557 (2000) (mem.).

exercised physical custody of the children less than twenty-five percent of the nights. Father's purported basis for distinguishing Miller is therefore inapplicable here.

Father also argues that the magistrate abused his discretion in determining that mother was not voluntarily underemployed. In calculating child support, the magistrate begins by determining each party's gross income, which includes "the potential income of a parent who is voluntarily unemployed or underemployed" unless the parent is physically or mentally incapacitated, is attending a qualifying vocational or technical education program, or "the unemployment or underemployment of the parent is in the best interest of the child." 15 V.S.A. § 653(5)(A)(iii). "The determination of whether a party is voluntarily unemployed or underemployed, or whether any of the above-listed exceptions apply, are primarily factual, and we will uphold the magistrate's findings if they are supported by sufficient evidence." LaMothe v. LeBlanc, 2013 VT 21, ¶ 42, 193 Vt. 399.

Mother testified that she worked eighty percent of full time and was taking leave without pay to deal with a medical issue. She stated that she suffered from depression during her relationship with father and was hospitalized at one point. She stated that she was still dealing with emotional issues arising from their relationship and used the time when she was not working "for self-care to deal with those issues." Father did not cross-examine mother on this point. There was no evidence that mother reduced her hours for the purpose of avoiding her support obligation or to deliberately earn less than she was capable of earning. See Beaudoin v. Beaudoin, 24 P.3d 523, 528 (Alaska 2001) (explaining voluntary underemployment claim in child support cases requires court to determine whether parent's earnings reflect voluntary and unreasonable decision to earn less than parent is capable of earning). Accordingly, the record is sufficient to support the court's finding that mother was not voluntarily underemployed. See LaMothe, 2013 VT 21, ¶ 43 (affirming magistrate's finding that mother was not voluntarily underemployed based on her testimony that she was laid off and looking for work).

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Beth Robinson, Associate Justice

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William D. Cohen, Associate Justice