

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1578

September Term, 2014

GREGORY F. PAULAY

v.

TATYANA PAULAY

Eyler, Deborah S.,
Wright,
Kenney, James A., III
(Retired, Specially Assigned),

JJ.

Opinion by Eyler, Deborah S., J.

Filed: June 23, 2015

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland court as either precedent within the rule of *stare decisis* or as persuasive authority. Md. Rule 1-104.

In this appeal, Gregory Paulay, the appellant, challenges an order of the Circuit Court for Montgomery County granting his wife, Tatyana Paulay, the appellee, *pendente lite* alimony and child support, and attorney's fees.¹ He presents two questions for review, which we quote:

I. Were the master and trial court clearly erroneous and/or did they abuse their discretion when they concluded that Appellee earned \$907.00 per month and adopted a mathematically incorrect figure as to Appellant's income?

II. Where neither the master nor the trial court cited, applied or analyzed the relevant Family Law Statutes as to alimony, child support or attorney's fees, did they err and/or abuse their discretion?

For the reasons to follow, we shall affirm the circuit court's order.

FACTS AND PROCEEDINGS

The parties were married in 2006. Their marriage produced two sons, who were ages seven and six at the time of the master's hearing. During the marriage, the parties lived in a large house that Gregory had purchased before the marriage and that was titled in his name solely. Gregory owned and ran a business out of the house. Tatyana was the primary caregiver for the children. In 2009, she began working as a home health care nurse.

The parties separated in the spring of 2013, when Tatyana left the marital home. Gregory filed a complaint for limited divorce and custody at that time. In October 2013, the parties filed a joint line of dismissal in that case.

¹For ease of discussion we shall use the parties' first names.

Subsequently, on December 17, 2013, Tatyana filed a “Complaint for Limited Divorce, Custody and Related Relief,” which included a request for *pendente lite* child support and for attorney’s fees. Gregory filed an answer and a “Counterclaim for Absolute Divorce, Custody, and Related Relief.” On May 9, 2014, Tatyana amended her complaint, adding a request for *pendente lite* alimony.

On May 21, 2014, a hearing was held before a master on the issues of *pendente lite* child support, *pendente lite* alimony, and attorney’s fees.² The master heard evidence and took the case under advisement. On June 3, 2014, the hearing was reconvened for the master to give his oral report and recommendations on the record. As relevant to the issues on appeal, the master found that Gregory’s gross monthly income was \$18,222 and that Tatyana’s gross monthly income was \$907. He recommended that Gregory be ordered to pay Tatyana \$2,500 per month in *pendente lite* alimony, retroactive to January 1, 2014. Then, “[e]xtrapolating the guidelines,” and using a child support guidelines worksheet furnished by counsel for Tatyana, he recommended that Gregory be ordered to pay Tatyana \$1,757 per month in *pendente lite* child support, retroactive to June 1, 2014.³ Finally, the master recommended that Gregory contribute \$25,000 toward Tatyana’s attorney’s fees: \$10,000 toward fees Tatyana already had incurred and \$15,000 toward her future attorney’s fees. On June 19, 2014, the master filed a transcript of his oral report and recommendations.

²The master also addressed *pendente lite* child access, which is not at issue on appeal.

³The worksheet is not in the record.

In the meantime, on June 13, 2014, Gregory filed exceptions. Among other things, he excepted to the master’s factual findings about both parties’ monthly incomes.

An exceptions hearing was held on August 14, 2014. The circuit court judge found that the master’s “first level findings of facts were [not] clearly erroneous.” The judge stated that she had “reviewed the numbers [her]self, done some calculations [her]self, [and she came] to the same place as [the] Master.” On August 29, 2014, the court entered an order adopting the master’s recommendations with respect to *pendente lite* alimony, *pendente lite* child support, and attorney’s fees. On September 15, 2014, Gregory filed a timely notice of appeal.⁴

DISCUSSION

I.

(A)

Gregory’s Income

Gregory contends the master’s factual finding that his monthly income was \$18,222 was “mathematically incorrect,” and therefore clearly erroneous; and that the court erred by accepting that figure and overruling his exception.

⁴Because Gregory did not pay the attorney’s fees as ordered, on September 23, 2014, the court entered judgments against him (one for \$10,000 and the other for \$15,000). On October 6, 2014, Gregory filed a second notice of appeal “as a confirmatory appeal to encompass the judgment entered for attorney’s fees.”

The master calculated Gregory's monthly income by averaging his yearly income for 2012 (\$144,670), 2013 (\$337,000), and 2014 (projected) (\$172,000), which equals \$217,890, and dividing that number by 12. This calculation should produce a monthly income of \$18,157.50. The master apparently made a mathematical error in that calculation, because he arrived at a monthly income for Gregory of \$18,222 -- \$64.50 higher than \$18,157.50.⁵

This \$64.50 difference is *de minimis*. Moreover, Gregory himself points out in his brief that there was evidence that his 2013 income was \$385,00, not \$337,000. If the \$385,000 figure had been used, that would have produced a monthly income for Gregory of \$19,490.83 -- \$1,268.83 more than the \$18,222 figure actually used by the master. Given that the master properly could have determined Gregory's monthly income to be \$19,490.83, and that \$64.50 is a negligible sum, we do not find any clear error in the master's finding that Gregory's monthly income was \$18,222. Accordingly, the circuit court did not err in overruling Gregory's exception made on this ground.

(B)

Tatyana's Income

Gregory contends the master's finding that Tatyana's gross monthly income was \$907 also was clearly erroneous, and that the court erred by accepting that figure as well.

⁵At oral argument in this Court, counsel for Tatyana stated that the error was his; it originated in the child support guidelines worksheet that he submitted to the master and that the master expressly relied upon.

The following evidence about Tatyana’s income was adduced at the master’s hearing. Tatyana testified that she is a nurse. In 2012, she was working full-time. Her tax return for that year reflects \$51,790 in wages. Tatyana worked full-time in 2013 until October, when she was diagnosed with labyrinthitis (severe vertigo). Her illness was so serious that she “went from maintaining a full-time job . . . to not being able to go to the bathroom safely by [her]self.” It took her “about three-and-a-half months . . . to start driving again.” During her illness, she stayed with her mother in Florida. She returned to Maryland on February 21, 2014. Tatyana’s tax return for 2013 shows that she earned \$42,921 in wages that year.

Tatyana further testified that at the time of the master’s hearing she was working “on a per diem . . . basis” for a home health care agency. She only worked “as-needed,” *i.e.*, if the agency called her, and had no guaranteed income. The week prior to the hearing she had worked nine hours. She was paid “\$34 to \$36” per hour. She was actively looking for employment, and had a job interview scheduled for the following week.

Tatyana explained that on May 6, 2014 (15 days before the master’s hearing), she completed a ten-week full-time contract position through Sunbelt Staffing. She introduced into evidence a paycheck summary from Sunbelt Staffing for the pay period March 10, 2014, to March 16, 2014. In that pay period, she worked 40 hours at \$22.68 per hour, for a weekly gross wage of \$907.20. During that same week, she received \$557.27 for “Housing NB” and \$92.38 for “Perdiem NB” Her gross “earnings” for the week totaled \$1,556.85.

Tatyana introduced into evidence a signed financial statement, dated May 9, 2014, that listed her gross monthly wage as \$907.20. On direct examination she testified that her financial statement accurately reflected her current finances “to the best of [her] ability.”

On cross-examination, Tatyana was questioned about her contract position through Sunbelt Staffing, specifically, how she had calculated her gross monthly wage to be \$907.20. Tatyana testified that she had gotten the figure by “look[ing] at [her] paystub.” Shortly thereafter, however, Tatyana realized that she had made a mistake and testified that \$907.20 was “not what [she] got a month” but was “what [she] got a week.” At that point, Tatyana’s lawyer interjected and asked to make a “proffer,” which the court permitted him to do. He proffered that he had prepared Tatyana’s financial statement with her on the date it was signed, and her monthly income figure of \$907.20 had been “calculated based on her paystubs and not upon her contract at full-time employment.”⁶ When cross-examination resumed, Tatyana claimed that because her full-time contract position through Sunbelt Staffing had ended a few days before she signed her financial statement, and she did not immediately start another job, she actually was earning “pretty much zero on [the] date [she signed the financial statement].”

In his report and recommendation, the master found as a fact that Tatyana’s gross monthly income was \$907. He said:

⁶This “proffer” was completely uninformative.

I don't totally understand where her income of \$907 comes from, but it's what she listed on her financial statement. I think she was trying to be truthful. Whereas I don't [think] that about [Gregory].

None of the evidence presented before the master supported or in any way corroborated the \$907.20 gross monthly income figure provided in Tatyana's financial statement. As Tatyana's own testimony made plain, in preparing her financial statement, she mistakenly used the *weekly* wage she had been earning from the full-time contract position through Sunbelt Staffing as a *monthly* wage figure. This may have been an honest mistake, but nevertheless it was a mistake. The master's factual finding that Tatyana's monthly income was \$907 was clearly erroneous and should have been rejected, on exceptions, by the circuit court.

(C)

Prejudice

In a civil case, reversal is not warranted for error alone. There must be error and prejudice. *Flores v. Bell*, 398 Md. 27, 33 (2007) (“It has long been the policy in this State that this Court will not reverse a lower court judgment if the error is harmless.”). Thus, in the case at bar, we only will reverse the circuit court's order based on its accepted but erroneous finding that Tatyana's monthly income was \$907 if that finding was prejudicial to Gregory. *See generally id.* (“The burden is on the complaining party to show prejudice as well as error.”).

Although he does not expressly argue prejudice, Gregory maintains that the master should have determined Tatyana’s monthly income by using the same process it used to determine his own monthly income. That is, the master should have averaged Tatyana’s yearly incomes for 2012 and 2013, and projected annual income for 2014 (based upon the ten weeks she was doing full-time contract work through Sunbelt Staffing), arriving at an average annual income “in the vicinity of” \$45,000; and that would have translated into a monthly income of \$3,750. Again, Gregory does not argue prejudice, but the argument he makes assumes that a finding of monthly income for Tatyana of \$3,750, instead of \$907, would have significantly altered the *pendente lite* alimony and child support awards.

We disagree with Gregory that income averaging was the proper way for the master (and the court) to have determined Tatyana’s monthly income. The master used income averaging to determine Gregory’s monthly income because Gregory had not been forthcoming or honest about his income. Indeed, despite constant urging by the master, Gregory did not introduce evidence sufficient to assess his then-current income. It was for that reason that the master resorted to income averaging to make his finding about Gregory’s monthly income.

By contrast, there *was* evidence before the master, in the form of Tatyana’s testimony, showing her then-current income. Specifically, Tatyana testified that she was working on a “per diem” basis, and that the week before the hearing she had worked nine hours, at an hourly rate between \$34 and \$36. Assuming \$36 as her hourly rate, nine hours of work per

week would come to an annual income of \$16,848, which translates into a \$1,404 monthly income.

We disagree with Gregory's alternative suggestion, which is to calculate Tatyana's monthly income based on the \$907.20 weekly income she was earning at Sunbelt Staffing during the 10 weeks that ended on May 6, 2014. That monthly income would be \$3,931.20. The problem with this suggestion is that it ignores the purpose of *pendente lite* alimony, which is to maintain the status of the parties pending the resolution of the divorce case, and that *pendente lite* alimony is based solely on need. *Guarino v. Guarino*, 112 Md. App. 1, 10 (1996). *Pendente lite* child support has a similar purpose. *See Knott v. Knott*, 146 Md. App. 232, 262 (2002) (holding that courts have discretion to modify *pendente lite* child support at any time, even absent a material change in circumstances).

The evidence at trial showed that, when the parties separated in the spring of 2013, Tatyana left the marital home. She rented an apartment and the children split their time between the parents' two homes. When Tatyana became sick, she no longer could work or take care of the children. She lost her job and her apartment. As mentioned, she went to live with her mother in Florida. When she returned to Maryland on February 21, 2014, she lived in a hotel. By the time of the master's hearing, she was living with an older couple, temporarily, and was looking for an apartment. Many of the expenses in her financial statement were estimates, because she had not been able to support herself for a while due to her illness, but the master found them credible. Tatyana estimated that her total monthly

expenses, including those for the children, would be \$4,833. That included \$1,800 for rent, \$1,000 for food, and \$485 in transportation expenses.

Tatyana's contract with Sunbelt Staffing already had ended and the most relevant, current evidence about what she was earning was a monthly income of \$1,404. If the master had used that figure instead of finding that Tatyana's monthly income was \$907, we are confident that that would not have changed his *pendente lite* alimony award of \$2,500 per month. The master commented in making the alimony award that Tatyana had been seriously ill and as a consequence was having to start over to get herself on her feet. Gregory's monthly income was \$18,222, and he was living in the family home. Tatyana was living with an older couple and was trying to arrange for an apartment and a steady job. It is highly unlikely that a correct calculation of Tatyana's then-current monthly income would have resulted in a *pendente lite* alimony award of less than \$2,500 per month. Accordingly, Gregory has not shown, by a preponderance of the evidence, that the master's error in determining Tatyana's income, and the court's acceptance of that income amount, resulted in prejudice to him.

Likewise, Gregory has not shown that he was prejudiced by the child support award determined by the master and approved by the court based on an erroneous monthly income for Tatyana. This is an above guidelines case in which the master extrapolated from the guidelines and arrived at the figure of \$1,757. We have similarly extrapolated, using a

\$1,404 monthly income for Tatyana instead of \$907; and the difference is about \$2 per month, which is negligible and certainly not prejudicial.

II.

Gregory contends the master did not cite, apply, or analyze the relevant statutes pertaining to alimony, child support, or attorney’s fees, and therefore abused his discretion in making his recommended awards; and the court did not do so either, and therefore abused its discretion as well. There is no merit in this contention.

With respect to alimony, Gregory merely repeats the arguments he made under Issue I, with respect to the calculations/determinations of the parties’ monthly incomes. We already have rejected those arguments. He complains that the master and circuit court did not consider Md. Code (1999, 2012 Repl. Vol.), section 11-106(b) of the Family Law Article (“FL”). The master explained to Gregory during the hearing, when he attempted to introduce certain irrelevant evidence, that he was not making findings regarding a final award of alimony (which would be governed by FL section 11-106) but regarding *pendente lite* alimony (which is governed by FL section 11-102). The master plainly took into account Tatyana’s needs and the goal of maintaining the status quo that existed during the marriage and prior to Tatyana’s disruptive illness. The master did not fail to apply the law or abuse his discretion, nor did the trial judge.

With respect to child support, although the guidelines worksheet was not placed in the record, it is clear that the master used the worksheet, which made an extrapolation based on

the guidelines by which child support for the two children, in an above guidelines shared custody case, was determined. Again, there was not a failure to apply the law or an abuse of discretion by either the master or the court on exceptions.

Finally, the master recommended that Gregory pay \$10,000 of the \$20,462 in attorney’s fees that Tatyana had incurred to date (\$12,000 of which she already had paid) and \$15,000 in future attorney’s fees, through the trial on the merits on the issue of custody. In support of her request for attorney’s fees, Tatyana called Michael Troy, a practicing family law lawyer, who was accepted by the master as an expert witness. Mr. Troy reviewed the \$20,462 in fees charged by counsel for Tatyana as of the time of the master’s hearing and testified that they were fair and reasonable. Mr. Troy assessed this case as high conflict, based on a number of emails between the parties concerning a discovery dispute, and opined that such cases usually are more time intensive than low conflict cases, especially when the opposing party is not represented by counsel, a circumstance that tends to make communication less efficient. Mr. Troy opined, based on the nature of the case and the conflict, that Tatyana reasonably would incur between \$15,000 and \$25,000 in attorney’s fees through the merits trial of the custody dispute. The master recommended that Gregory be directed to pay Tatyana \$15,000 (the lower estimate) for those anticipated fees.

FL section 11-110, entitled “[o]rder to pay reasonable and necessary expenses,” authorizes the circuit court, “[a]t any point in a proceeding pertaining” to alimony, including *pendente lite* alimony, to order one party to pay the other “an amount for the reasonable and

necessary expense of prosecuting or defending the proceeding.” FL § 11-110(a)(2) and (b). “Reasonable and necessary expense” includes suit money, counsel fees, and costs. FL § 11-110(a)(3). Before ordering such a payment, “the court shall consider . . . the financial resources and financial needs of both parties” and “whether there was substantial justification for prosecuting or defending the proceeding.” FL § 11-110(c)(1) and (2). “The court may award reimbursement for any reasonable and necessary expense that has previously been paid.” FL § 11-110(e).

Significant portions of the master’s hearing were devoted to evidence about the financial resources and needs of Gregory and Tatyana. The master familiarized himself with the parties’ financial statements, credited the information on Tatyana’s statement and, as he did generally with Gregory’s testimony, discredited much of what he included on his financial statement. Although, as we have explained, the master erred in accepting the \$907 monthly income for Tatyana, he was aware of her past and recent financial circumstances sufficient to conclude that there was substantial justification for her to prosecute the proceeding and, in particular, to seek an award of attorney’s fees, including reimbursement for fees already paid, and to seek suit money for further pursuit of her custody claim. Indeed, there was evidence that since Tatyana’s temporary move to Florida from October 2013 to February 2014, during her illness, Gregory had been uncooperative in allowing her to spend time with the children (including insisting that he be present when she did so).

The master also was familiar with Gregory’s income, notwithstanding his lack of forthrightness on the topic, and commented that counsel for Tatyana had been “generous” in using a monthly income for Gregory based on a yearly income of less than the \$337,000 he had earned in 2013 (the last full year before the master’s hearing). It was evident from this information that Gregory had the wherewithal to pay attorney’s fees and suit money for Tatyana.

This Court presumes that judges, including masters, are familiar with the law and apply it correctly. *See Wagner v. Wagner*, 109 Md. App. 1, 50 (1996) (“[W]e presume judges to know the law and apply it, even in the absence of verbal indication of having considered it.”). It was not necessary for the master or the reviewing court on exceptions to make express reference to FL section 11-110 in their decisions. Moreover, it is evident from those decisions and the comments made, including the court’s reference to “suit money” in its August 29, 2014 order, that the master and the judge (both specialists in family law) knew the law and were applying it. Neither one abused his or her discretion in recommending that Gregory contribute \$10,000 toward the in counsel fees Tatyana already had incurred and that Gregory pay Tatyana \$15,000 in suit money to prosecute the child custody phase of this high conflict case.⁷

⁷Gregory has filed a motion to correct the record to include transcripts of a hearing on a motion to modify *pendente lite* alimony and child support that Gregory filed and Tatyana opposed. He claims that findings regarding Tatyana’s income, including her income around the time of the master’s and exceptions hearings at issue in this appeal, are relevant to this
(continued...)

**ORDER OF THE CIRCUIT COURT FOR
MONTGOMERY COUNTY AFFIRMED. COSTS
TO BE PAID BY THE APPELLANT.**

⁷(...continued)

appeal, and should be considered by us.

The resolution of this appeal must be based on the record evidence before the master and the court when the rulings that are being challenged were made. That record is not deficient or in need of correction. Findings made at a later point in time are not relevant and it would not be proper to include them in the record we are reviewing. We deny the motion.