Circuit Court for Montgomery County
Case No. 104086FL

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0545

September Term, 2019

SERGUEI TIMACHEV

v.

MARINA LOBAS

Leahy,
Shaw Geter,
Moylan, Charles E., Jr.
(Senior Judge, Specially Assigned),

JJ.

Opinion by Shaw Geter, J.

Filed: July 10, 2020

This is an appeal from an order of the Circuit Court for Montgomery County denying exceptions filed by appellant and adopting the Magistrate's recommendations. Appellant timely appealed and presents the following questions for our review:

1. Did the trial court err by failing to exercise its independent judgment prior to adopting the recommendations and proposed order of the magistrate?

2. Did the trial court abuse its discretion in denying appellant's Motion to Vacate the order overruling exceptions and adopting the magistrate's recommendations when appellant provided documentary evidence that he was in fact ill?

3. Did the trial court error in adopting the magistrate's recommendation by improperly delegating the determination of child support arrears to the Office of Child Support Enforcement, an agency of the executive branch?

4. Did the trial court error in adopting the magistrate's recommendation that judgment be entered when no evidence was provided regarding the current balance of the alleged debt?

5. Did the trial court error in adopting the magistrate's recommendation that judgment be entered in favor of the appellee when there was no evidence that appellee had made payments toward the balance and appellant had previously been ordered to pay third parties?

6. Did the trial court error in adopting the magistrate's recommendation that alimony arrears be established when appellee did not file a pleading requesting such relief?

7. Did the trial court error when the magistrate admitted statements from Bank of America as a business record when the documents were not properly produced pursuant to Maryland Rule 5-902(b)?

For the reasons discussed below, we conclude there was no error and we affirm.

We address Questions I, II, IV and V only. Appellant's Question III, regarding child support and Question VII, regarding the admission of Bank of America statements are waived as neither were raised as an exception to the Magistrate's findings and

recommendations. Maryland Rule 2-541(g)(1) provides: "[a]ny matter not specifically set forth in the exceptions is waived unless the court finds that justice requires otherwise." Further, "the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court. . . ." Md. Rule 8-131. Appellant's reply brief states: "[t]o the extent not previously waived, Appellant withdraws all arguments relating to Question VI in his brief."

We rephrase and condense the questions as follows:

I. Did the trial court err by adopting the recommendations and proposed order of the magistrate?

   A. Did the court exercise independent judgment?

   B. Did the court fail to consider whether there was new evidence?

II. Did the trial court abuse its discretion by failing to grant appellant's motion to vacate its order denying exceptions, when appellant provided evidence that he was ill?

BACKGROUND

The parties were married on September 20, 1999, in a civil union ceremony and have two children. On March 18, 2013, the parties entered into a Voluntary Separation and Property Settlement Agreement ("Agreement") and their divorce was finalized on April 26, 2013. According to the Agreement, appellant was to pay $1,250 a month per child dating back to January 1, 2013. He was also to pay $2,500 in alimony for 12 months, which totaled $30,000 and he was to pay off the debts incurred on the following credit cards: Bank of America, Chase, and Discover.

Following the divorce, both parties filed various petitions for contempt and modifications along with motions to enforce. Most recently in 2018, and pertinent to this

appeal, appellee filed two contempt petitions, one on July 5, 2018 and the second on September 07, 2018. The July petition alleged that appellant failed to comply with the Agreement by failing to pay appellee $9,000 in alimony and failing to pay approximately $34,000 to credit card companies for the debt incurred during the marriage. Appellee requested appellant be held in contempt and that the court award her $54,800 plus interest and attorney fees. In the September petition, appellee claimed appellant failed to make child support payments.

A Scheduling Hearing was held on October 31, 2018, before a Family Magistrate and a three-hour merits hearing was scheduled for December 20, 2018. Both parties appeared for the hearing and presented testimony and evidence. Following the close of all evidence, the Magistrate issued the following oral recommendations:

> . . . that on or before the close of business of February 28th the Montgomery County Office of Child Support Enforcement shall conduct and audit and/or reconciliation of this case with input from both sides to determine what arrears, if any, are due. They then can enforce it as they deem fit—as they deem appropriate.
>
> . . . the alimony arrears due from the [appellant] to [appellee] are established at $7,500 dollars. And that a judgment shall be entered in favor of the defendant and against the plaintiff in that amount.
>
> As to the credit cards, it will be my recommendation that the defendant owes the plaintiff $46,670 dollars for the credit card debt agreed to in the agreement that was paid. Therefore, it will further be my recommendation that a judgment be in favor of the [appellee] and against the [appellant] for $4,660.[1]

On December 31, 2018. appellant filed the following exceptions to the Magistrate's

[1] The Magistrate's written report and recommendations were filed in January, 2019.

recommendations:

> (1) The Magistrate failed to consider how much, if at all, the unpaid alimony was offset by (i) [appellant's] payments towards the mortgage on the property at . . . Muncaster Mill Road and/or (ii) [appellee's] withholding of rent payments on the tenants of the property, which she should have sent to [appellant]. [Appellant's] mortgage payments and [defendant's] withholding of rent funds both (each) offset the unpaid alimony. . . .
>
> (2) Magistrate improperly fixed the amount of credit card debt and failed to properly consider the fact that [appellee] had not presented credit card statements to [appellant] in order to tell [appellant] what address to send payments to and how much the bills were for—information necessary to permit [appellant] to pay the credit card bills without this information. . . .
>
> (3) Magistrate improperly considered credit report from five years ago and credit card bills from three years ago, before the debts were written off and improperly failed to consider that it is now impossible to pay them; Information regarding [appellee] having received income om the debts appears on her 1099's, which the Magistrate did not have; the Magistrate did not have a current credit report for [appellee], nor any current statement from the credit card companies—the former would show that the debts were written off and the latter do not exist—Magistrate should have insisted that current statements be provided, as this would have forced [appellee's] counsel to admit they do not exist . . .
>
> (4) Magistrate improperly recommended both that [appellant] not be found in contempt and that a judgment amounting to a purge condition be imposed; . . .
>
> (5) Magistrate improperly recommends a judgment against [appellant] for money he either has already paid or [appellee] has already received, or for a debt that no longer exists; . . .

Appellant averred that there was additional evidence, in the form of bank records, 1099s, mortgage and rental payment documentation that should have been considered. He stated he would subpoena the necessary documents if a new hearing was granted. He requested the matter be returned to the Magistrate for "consideration of the newly available evidence . . ." Appellee filed a response to appellant's exceptions on January 11, 2019 and

a hearing was then scheduled for February 12, 2019 before a circuit court judge. Appellant requested a continuance and the matter was rescheduled to February 21, 2019.

On the date of the hearing, appellee and her counsel appeared. However, appellant did not, nor did he contact the judge's chambers or appellee to inform them of his whereabouts. The judge acknowledged that he signed an order granting appellant's prior request for a continuance and the court's administrative assistant contacted him about the date. The judge stated appellant "did not respond to that and then we tried to get him again today through the services of the interpreter who is present. She was able to call and leave a message for him to try to find out why he isn't here." The judge further noted appellant was given notice by mail "about the matter being rescheduled" because "notice of the hearing was mailed" out on February 14, 2019.

The judge asked appellee if she wished to make a motion, wherein appellee requested the "exceptions be overruled and that the recommendations of the special magistrate be adopted." The judge agreed and stated because appellant was not present "as he is required to be in order to establish what he's alleged in his exception, I will grant the motion and will deny his exceptions . . ." On that date, the judge signed an order denying appellant's exceptions and adopting the recommendations of the magistrate. On March 1, 2019, the court entered a judgment against appellant in accordance with the magistrate's recommendations and court order.

On March 8, 2019, appellant filed a Motion to Vacate Orders and requested to reset the matter for a hearing, which the court denied. Appellant then filed this timely appeal.

STANDARD OF REVIEW

"'Appellate discipline mandates that, absent a clear abuse of discretion, a chancellor's decision that is grounded in law and based upon facts that are not clearly erroneous will not be disturbed.'" *Kierein v. Kierein*, 115 Md. App. 448, 452 (1997) (quoting *Bagley v. Bagley*, 98 Md. App. 18, 31–32 (1993)). An abuse of discretion occurs

> when no reasonable person would take the view adopted by the [trial] court, when the court acts without reference to any guiding rules or principles, when the court's ruling is clearly against the logic and effect of facts and inferences before the court, when the ruling is violative of fact and logic, or when its decision is well removed from any center mark imagined by the reviewing court. The standard accounts for the trial court's opportunity to observe the demeanor and the credibility of the parties and the witnesses. We will not reverse simply because we would not have made the same ruling.

Jose v. Jose, 237 Md. App. 588, 598–99 (2018) (internal citation and quotations omitted). A reversal because of an abuse of discretion requires that the trial court's decision "be well removed from any center mark imagined by the reviewing court and beyond the fringe of what that court deems minimally acceptable." *Rose v. Rose*, 236 Md. App. 117, 131, *cert. denied*, 459 Md. 417 (2018) (internal quotations omitted).

DISCUSSION

I. The trial court did not err by adopting the recommendations and proposed order of the magistrate.

a. The court exercised independent judgment.

"Exceptions to the recommendations of a master warrant an independent consideration by the trial court." *Kierein*, 115 Md. App. at 453. While the court may examine additional evidence it "'should defer to the fact-finding of the master where the fact-finding is supported by credible evidence, and is not, therefore, clearly erroneous.'" *Id.* (quoting *Wenger v. Wenger*, 42 Md. App. 596, 602 (1979)). When exceptions are filed,

the trial court is to "'exercise its independent judgment, consider the allegations, and decide each such question,'" it should then issue "'an oral or written opinion, stat[ing] how [it] resolved those challenges.'" *Leineweber v. Leineweber*, 220 Md. App. 50, 61 (2014) (quoting *Kierein*, 115 Md. App. at 454).

b. Appellant presented no new evidence for the court's consideration.

Appellant argues the trial court erred in adopting the Magistrate's recommendations. He asserts even though he failed to appear at the exceptions hearing, the exceptions were "properly plead" and therefore appellant was due an independent consideration of the recommendations. Appellant argues the court did not exercise independent judgment because, at the exceptions hearing, the court stated, "given that the [appellant] is not present as he is required to be in order to establish what he's alleged in his exceptions, I will . . . deny his exceptions and will enter an order accordingly." He asserts the court's action was ". . . nothing more than a rubber stamping. . . ."

We disagree with appellant's bald assertion. In our view, the record is completely devoid of any evidence or statements that the court failed to exercise its independent judgement. We will not infer or hold that simply because the court acted promptly, it did not exercise its proper duty. A trial court is not required to provide "a litany of its reasons for accepting and adopting the fact finding, conclusions, and recommendations of a master." *Kierein*, 115 Md. App. at 455. "Moreover, '[t]rial judges are presumed to know the law and to apply it properly.'" *Marquis v. Marquis*, 175 Md. App. 734, 755 (2007) (quoting *Aventis Pasteur, Inc. v. Skevofilax*, 396 Md. 405, 426 (2007). They are not

obligated to "'set out in intimate detail each and every step in his or her thought process.'" *Id.* (quoting *Kirsner v. Edelmann*, 65 Md.App. 185, 196 n. 9 (1985)).

Appellant further asserts the court erred in adopting the magistrate's recommendations because there was new evidence regarding the credit card debt. According to appellant's exceptions, the magistrate, in the initial hearing, failed to consider various financial documents and thus, ruled improperly. He specifically requested consideration of "newly-available evidence." He contended that various documents, including bank statements, 1099s, mortgage statements, rent checks, etc. were necessary for the court's consideration. He further stated that he would subpoena the documents for the hearing. Appellee counters that the trial court did not err and further, appellant did not provide the new evidence he complained about and stated that he would provide, if granted a new hearing.

Appellant did, in fact, fail to appear for the hearing. By failing to appear, he therefore, did not present the "newly-available evidence" he claimed would be dispositive.

Section 9-208(i)(1) of the Family Law Article provides that when a trial court is reviewing exceptions, it may

> decide exceptions without a hearing, unless a request for a hearing is filed with the exceptions or by an opposing party within ten days after service of the exceptions. The exceptions shall be decided on the evidence presented to the magistrate unless: (A) the excepting party sets forth with particularity the additional evidence to be offered and the reasons why the evidence was not offered before the magistrate, and (B) the court determines that the additional evidence should be considered. If additional evidence is to be considered, the court may remand the matter to the magistrate to hear and consider the additional evidence or conduct a *de novo* hearing.

We hold the court was not required to speculate as to the evidence appellant would present nor was it required to further investigate or subpoena the documents appellant alleged would be important for its consideration. The burden was clearly on appellant and when he failed to appear, the court did not err in denying his exceptions.

II. The trial court did not abuse its discretion by failing to grant appellant's motion to vacate its order denying exceptions.

Following the denial of appellant's exceptions and entry of the Order adopting the magistrate's recommendations, he filed a motion to vacate. His basis for failing to appear at the hearing was "due to illness, he was under a doctor's care—see attached Exhibit 1." Appellee filed an opposition to the motion and requested the motion be denied. She provided the following supplementation:

> 1. Defendant has been able to obtain the plaintiff's medical records for February 21, 2019, by subpoena.
>
> 2. The same demonstrate that the plaintiff was at Dr. Khludenev's office around 1:30p.m., hours after the hearing in question had concluded. His body temperature, diastolic blood pressure and pulse were unremarkable (97.1 F, 88mmHg, 81, respectively). He had elevated systolic blood pressure and, apparently some evidence of earlier flu, and was sent home with a suggested follow up in two weeks. In summary, there was no reason why Mr. Timachev could not get in touch with the Court hours before to inform it of his anticipated absence and the reason therefore.

On April 16, 2019, the court denied appellant's motion to Vacate the Court's order of February 21, 2019 and March 1, 2019.

When appellate courts review a motion for a new trial, the standard of review used is abuse of discretion. *Yiallouros v. Tolson*, 203 Md. App. 562, 574 (2012). "Maryland Rule 2-533 provides that a motion for new trial is within the sound discretion of the trial

court and its ruling is ordinarily not reviewable on appeal." *Titan Custom Cabinet, Inc. v. Advance Contracting, Inc.*, 178 Md. App. 209, 23 (2008). A trial court's decision on a motion for a new trial is not irreversible, but

> rather, it will expand or contract depending upon the nature of the factors being considered, and the extent to which the exercise of that discretion depends upon the opportunity the trial judge had to feel the pulse of the trial and to rely on his own impressions in determining questions of fairness and justice.

Id. (quoting *Buck v. Cam's Broadloom Rugs*, 328 Md. 51, 58–59 (1992)).

Appellant claims the trial court abused its discretion when it denied his request for a new hearing because the motion provided sufficient reasoning as to why he did not attend the exceptions hearing. He further states that the court should have held a hearing on his motion. He alleges that appellee's reliance on *Zdravkovich v. Siegert*, 151 Md. App 295 (2003) is misplaced because the appellant in that case failed to appear for a trial, while in this case the "court had all of the evidence taken by the Magistrate, and was only being asked to review the findings of facts and exercise an independent judgement."

In *Zdravkovich*, a breach of contract case, we held that the trial court did not abuse its discretion when it dismissed appellant's case after he failed to appear. *Zdravkovich v. Siegert*, 151 Md. App. 295, 306 (2003). We stated:

> While the Maryland Rules contain no rule dealing specifically with the court's inherent power to dismiss a case *sua sponte* when the plaintiff fails to appear on the day of trial, the Court of Appeals has acknowledged that a trial court may, without abusing its discretion, grant judgment in favor of a defendant when the plaintiff fails to appear for trial.

Id.

While the *Zdravkovich* case involved a trial and the case at bar was an exceptions hearing, appellant is incorrect that the court had all the necessary evidence. As stated above, appellant's exceptions were based on his assertion that additional evidence should be considered, which he would provide at the hearing. When he failed to appear, the court relying on the evidence provided in the previous hearing, exercised its independent judgment and adopted the Magistrate's recommendations. Under Maryland Rule 2-311, "[e]xcept when a rule expressly provides for a hearing, the court shall determine in each case whether a hearing will be held. . . ." As stated in its order, the court considered both appellant's motion to vacate as well as appellee's opposition in making its decision. We hold its decision was clearly within the "center mark."

JUDGMENTS OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.