For Publication

IN THE SUPREME COURT OF THE VIRGIN ISLANDS

DONNA SLACK, Appellant/Respondent, v. **RUDOLPH SLACK,** Appellee/Petioner.	))))))))	**S. Ct. Civ. No. 2017-0033** Re: Super. Ct. DI. No. 003/2014 (STT)

On Appeal from the Superior Court of the Virgin Islands
Division of St. Thomas & St. John
Superior Court Judge: Hon. Denise A. Hinds-Roach

Considered: June 12, 2018
Filed: July 5, 2018

BEFORE: **MARIA M. CABRET**, Associate Justice; **ROBERT A. MOLLOY**, Designated Justice; and **JOMO MEADE**, Designated Justice.[1]

APPEARANCES:

Gaylin Vogel, Esq.
Kevin F. D'Amour, Esq.
Kevin F. D'Amour, P.C.
St. Thomas, U.S.V.I.
Attorneys for Appellant,

Francis E. Jackson, Jr., Esq.
Law Offices of Francis E. Jackson, Jr.
St. Thomas, U.S.V.I.
Attorney for Appellee.

OPINION OF THE COURT

CABRET, Associate Justice.

[1] Chief Justice Rhys S. Hodge and Associate Justice Ive Arlington Swan are recused from this matter. The Honorable Robert A. Molloy, Judge of the Superior Court of the Virgin Islands, and the Honorable Jomo Meade, Judge of the Superior Court of the Virgin Islands, have been designated to sit in their places pursuant to 4 V.I.C. § 24(a).

Donna Slack appeals from the Superior Court's amended final decree of divorce, entered February 10, 2017, asserting several errors. For the reasons that follow, we affirm in part, reverse in part, and remand this matter for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

Donna and Rudolph married on St. Thomas on July 17, 2004. Throughout the marriage, the parties maintained separate residences—with Mrs. Slack in Florida and Mr. Slack in St. Thomas—generally spending little time together in either party's residence, but coming together for occasional visits and travel. Although Donna earned regular income from her travel agency business and collected disability benefits, she was financially supported by Rudolph until the time of their separation. Following a period of strain in the marriage, the parties separated in 2013, and on January 17, 2014, Rudolph filed for divorce. On January 29, 2014, Donna filed her answer and counter-petition seeking alimony and equitable division of property and assets for her support. Subsequently, on July 10, 2014, Donna filed a motion for *pendente lite* support and attorney's fees and costs.

By memorandum opinion and order entered April 30, 2015, the Superior Court granted summary judgment on the uncontested issue of divorce. Following several full days of hearings at which the court heard extensive testimony from each party, on February 10, 2017, the Superior Court entered its final memorandum opinion together with an amended final decree of divorce resolving all issues regarding Donna's requests for alimony, equitable distribution of property, and *pendente lite* support. In its final decree, the court found that Donna was entitled to $30,000 in alimony and retroactively awarded her $12,000 in *pendente lite* support. However, the Superior

Court denied Donna's request for payment of her credit card debt or interest, as well as her request for payment of legal fees and costs.

II. JURISDICTION AND STANDARD OF REVIEW

"The Supreme Court [has] jurisdiction over all appeals arising from final judgments, final decrees or final orders of the Superior Court." V.I. CODE ANN. tit. 4, § 32(a). Because the Superior Court's February 10, 2017 amended final decree of divorce resolved all issues between the parties, it constitutes a final order and this Court has jurisdiction over the appeal. *Smith v. Henley*, 67 V.I. 965, 970 (V.I. 2017). Generally, we exercise plenary review over the trial court's application of law while we review its findings of fact for clear error. *Inniss v. Inniss*, 65 V.I. 270, 274-75 (V.I. 2016). The Superior Court's rulings with respect to attorney's fees and costs, distribution of marital property, and alimony are all reviewed for abuse of discretion. *In re Guardianship of Smith*, 58 V.I. 446, 449 (V.I. 2013) ("This Court reviews the Superior Court's ruling on a motion for attorney's fees and costs for abuse of discretion. . . [but] [t]o the extent the review implicates an interpretation of law, however, we review that interpretation de novo."); *Henley*, 67 V.I. at 970 ("We review the Superior Court's distribution of marital property in divorce for abuse of discretion."); *Berrios-Rodriguez v. Berrios*, 58 V.I. 477, 480 (V.I. 2013) ("[T]his Court reviews an alimony determination solely for abuse of discretion, unless the Superior Court based its alimony award on a misapplication of the law or a clearly erroneous factual finding.").

III. DISCUSSION

On appeal, Donna argues that the Court erred by: (1) summarily denying her request for legal fees and costs; (2) finding that there was insufficient evidence to show that Rudolph Slack possessed a Government Employees Retirement System ("GERS") account; (3) failing to address Donna's credit card debt, either by distributing the debt as marital debt, or by recognizing Donna's

monthly interest payments on the debt as necessary expenses for purposes of computing the award of *pendente lite* support; and (4) reducing the award of *pendente lite* support by 50% solely on the basis of Rudolph's imminent retirement. We address each of Donna's arguments in turn.[2]

A. Request for Legal Fees and Costs

On July 10, 2014, Donna filed a motion requesting, among other things, that Rudolph be required to pay Donna's legal fees and expenses. Later, Donna renewed that request in both her closing brief of March 1, 2016, and by renewed motion, filed November 15, 2016. In support of her request, Donna argued that she was in "serious financial need" with respect to her ability to defend against Rudolph's petition for divorce, and therefore, that she was entitled to such an award under 16 V.I.C. § 108.[3] Yet the body of the Superior Court's February 10, 2017 memorandum opinion lacks any mention of Donna's request for legal fees and costs. Instead, without providing any reasoning or explanation, the court summarily denied Donna's request in the penultimate line of the accompanying order, stating only "that the parties shall be responsible for their respective attorney's fees and costs." On appeal, Donna argues that the Superior Court's failure to state its reasons for denying her request constitutes error.

[2] On appeal, Rudolph argues that all of Donna's claims for support and maintenance are categorically precluded under the doctrine of judicial estoppel, which "prevents a party from adopting inconsistent positions when doing so would constitute a fraud on the court." *See Sarauw v. Fawkes*, 66 V.I. 253, 260 (V.I. 2017). He contends that because Donna has benefited from ten years of favorable tax treatment "by claiming to be the principal breadwinner in her household and by affirming the separate property regimes provided for in the Antenuptial Agreement," she should be judicially estopped from seeking maintenance or support from Rudolph. And although Rudolph did introduce evidence of Donna's tax returns for other purposes—to argue that Rudolph's house was not a marital household and that Donna was not in need of support—Rudolph did not present his judicial estoppel argument before the Superior Court, and it is therefore waived on appeal. V.I. R. APP. P. 22(m).

[3] 16 V.I.C. § 108 provides in relevant part: "After the commencement of an action, and before a judgment therein, the court may, in its discretion, provide by order . . . that a party in need obtain from the other party such funds as may be necessary to enable the party in need to prosecute or defend the action, as the case may be. . . ."

Rudolph contends that Donna has failed to demonstrate that the Superior Court erred in summarily denying her request for fees and costs, asserting that Donna "has identified no legal authority which requires the trial court to explain the reasons why it declined to award fees." Rudolph characterizes her argument as "imply[ing] that the mere fact that the trial court declined to explain its rationale for denying her motion for fees and costs, itself constitutes an abuse of discretion," and asserts that "this is not the law." But, Rudolph is mistaken as this is, in fact, the well-established law in this jurisdiction.

Although Donna cites to cases from the United States Court of Appeals for the Third Circuit, rather than our own precedent, in support of her argument, we have repeatedly held, both in general terms and specifically in the context of motions for legal fees and costs, that "meaningful review is not possible where the trial court fails to sufficiently explain its reasoning," and that such failure of explanation constitutes reversible error. *See, e.g.*, *Mahabir v. Heirs of George,* 63 V.I. 651, 666 (V.I. 2015) (remanding matter for Superior Court to clarify its order awarding legal fees and costs because a "lack of explanation makes it impossible for this Court to meaningfully review the Superior Court's determination—under abuse of discretion or any other standard"); *and Kalloo v. Estate of Small,* 62 V.I. 571, 584 n.11 (V.I. 2015) (citing *James v. Faust*, 62 V.I. 554, 559 (V.I. 2015)). Indeed, this case presents a more egregious error than that presented in *Mahabir*—where the trial court failed to sufficiently explain how it reached the precise sums awarded—as here the Superior Court entirely failed to explain its decision to deny, rather than grant, Donna's request. Accordingly, we conclude that the Superior Court erred by summarily denying Donna's request for legal fees and costs and remand the record in this matter for the Superior Court to clarify the

portion of its February 10, 2017 opinion ordering the parties to bear their own costs and fees. *See Mahabir*, 63 V.I. at 669 (remanding record for clarification of order awarding attorney's fees).

B. Equitable Distribution of Rudolph's GERS Pension

In its February 10, 2017 opinion, the Superior Court concluded that "there is insufficient evidence of record for this Court to find that Mr. Slack possesses" a GERS pension. In an accompanying footnote the Court explained: "Mr. Slack denies having a government pension. The testimony indicates that Mr. Slack is employed by the Virgin Islands government position [sic]; however, there is no evidence of record, aside from Mrs. Slack's averment, to support Mrs. Slack's claim of a pension." On appeal, Donna primarily argues that the Superior Court erred in its findings because the evidence shows that Rudolph has worked for the Virgin Islands Department of Education for approximately forty years, and since GERS is a compulsory retirement program for all government employees, the court should have used "deductive reasoning" and taken judicial notice of the fact that Rudolph possessed a GERS pension. We disagree.

In this jurisdiction, the Superior Court may take judicial notice of a fact if it represents general knowledge in the territory or it is capable of being readily determined by relying on sources whose accuracy cannot be questioned reasonably. V.I. R. E. 201. As indicated by the commentary to this rule, it is based on Rule 201 of the Federal Rules of Evidence. Accordingly, the body of case law construing that rule may properly be considered in construing V.I. R. E. 201. *See, e.g.*, *Haynes v. Ottley*, 61 V.I. 547, 568 (2014) (observing that "when the Virgin Islands Legislature models a local [law] after a statute adopted by another jurisdiction, judicial decisions interpreting that statute shall assist this Court in interpreting the same clause found in our local [law]"); *People v. Pratt*, 50 V.I. 318, 322 (2008) (explaining that "[b]ecause [a Virgin Islands statute] is modeled after its federal equivalent, 18 U.S.C. § 3731, which contains virtually identical language, judicial

decisions interpreting the federal statute shall assist this Court in interpreting the same clause found in our local statute") (citing *Brown v. People*, 49 V.I. 378, 381 (V.I. 2008)).

It is well established that statutes, regulations, and case law constitute "legislative facts" that fall outside the scope of Rule 201 of the Federal Rules of Evidence, which, like its Virgin Islands equivalent, is expressly limited to "adjudicative facts." *Compare* FED. R. EVID. 201(a) ("This rule governs judicial notice of an adjudicative fact only, not a legislative fact.") with V.I. R. E. 201(a) (featuring identical language).[4] Indeed, federal appellate courts construing and applying Federal Rule 201(a) have succinctly stated that "[j]udicial notice of legislative facts such as these is unnecessary," *Von Saher v. Norton Simon Museum of Art*, 592 F.3d 954, 960 (9th Cir. 2010), and that because judicial notice of a statute is unnecessary, the court may simply consider it, based on the judicial obligation to determine what law applies in the case being considered. *United States v. Dedman*, 527 F.3d 577, 587 (6th Cir. 2008) (noting that "judicial notice is generally not the appropriate means to establish the legal principles governing the case" and that the law applicable to a case "is simply a matter for the judge to determine"). *See also, e.g.*, *Lemieux v. CWALT, Inc.*, No. CV 15-77-BU-JCL, 2017 U.S. Dist. LEXIS 10556, at *2 (D. Mont. Jan. 25, 2017) (noting that "statutes, regulations, and published court decisions . . . . are 'legislative facts' rather than 'adjudicative facts,'" and that as a result, "they are not appropriate for judicial notice") (citations omitted). Because the language of V.I. R. E. 201(a) is identical to that found in FED. R. EVID. 201(a), statutes, regulations, and case law constitute "legislative facts" that likewise fall outside the scope of V.I. R. E. 201(a). As a result, the Superior Court, and this Court, need not take

[4] "Adjudicative facts are simply the facts of the particular case. Legislative facts, on the other hand, are those which have relevance to legal reasoning and the lawmaking process, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body." FED. R. EVID. 201(a) advisory committee's note.

formal judicial notice of a statute, rule, regulation, or judicial opinion; such sources may simply be applied to the case at hand.

Under this standard, the court may properly recognize and acknowledge the Virgin Islands' statutory provisions requiring that all government employees be members of GERS, as those requirements are prescribed in title 3, chapter 27 of the Virgin Islands Code. However, it would be improper to take judicial notice of the adjudicative fact whether Rudolph and his employer have complied with those requirements. This is so because this particular adjudicative fact is neither a matter that is "not subject to reasonable dispute [in that] it is generally known within the trial court's territorial jurisdiction," nor is it capable of ready determination because it would require examination of documents—for example, Rudolph's paycheck stubs or other internal accounting or payroll records in the possession of the Department of Education—that were not introduced at trial and not made a part of the appellate record, and are therefore not readily accessible. V.I. R. E. 201(b)(1)-(2); *see also, e.g., Leffel v. Kansas Dept. Revenue,* 138 P.3d 784, 788 (Kan. App. 2006) (refusing to notice internal documents of Kansas Department of Health & Environment because they were not readily accessible); 21B KENNETH W. GRAHAM, JR., CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE & PROCEDURE--EVIDENCE § 5106.1 (2d ed., rev. Apr. 2018). Thus, even though the Superior Court may recognize that all government employees are required, by statute, to possess and contribute to GERS retirement plans, the court may not take judicial notice of the existence of a specific individual's retirement account. Simply put, "deductive reasoning" is no substitute for competent evidence, and the existence of a particular individual's pension account is not a proper subject of judicial notice.

That said, Donna also argues that although Rudolph did, at one point, deny having a retirement account, he "later clarified that money was taken out of his biweekly paychecks for

retirement," and that upon his retirement, he would receive a retirement check every two weeks. Thus, Donna contends that there was sufficient testimony from Rudolph "to establish that he had a retirement fund administered through his employment." Indeed, at the January 20, 2016 hearing, Rudolph testified that "[t]hey take money out of my paycheck every month, two weeks and they put it some place for retirement." Given Rudolph's testimony, the Superior Court clearly erred when it found that "there is no evidence of record, aside from Mrs. Slack's averment, to support Mrs. Slack's claim of a pension." While it is true that Rudolph did appear to contradict himself in the course of his testimony,[5] the presence of contradictory evidence supporting each side of a contested issue of fact is not equivalent to an absence of evidence on one side of the issue. Indeed, based on Rudolph's testimony, a rational trier of fact could reasonably infer either that he did, or that he did not possess a GERS retirement account, depending on the weight and credibility the court ascribed to Rudolph's various statements. On this record, the Superior Court was required to consider and weigh each of Rudolph's apparently contradictory statements and, in its discretion, determine whether his testimony established, by a preponderance of the evidence, that he possessed a GERS retirement account. *In re D.A.B.*, 63 V.I. 623, 628 (V.I. 2015) (explaining that "it was the duty of the Superior Court, when sitting as the finder of fact, to resolve the factual dispute."). Accordingly, we conclude that the Superior Court clearly erred by failing to consider the relevant, although contradictory, evidence and by making instead the clearly erroneous finding that the record contained no evidence proving the existence of Rudolph's GERS account.

[5] We note that the apparent contradiction in Rudolph's testimony concerning his GERS retirement account appears to flow, in large part, from confusion caused by the nature of the questions asked by Donna's counsel on cross-examination, which began with counsel asking Rudolph, not if he has a GERS account, but instead asking if he has a 401(k).

However, on the record before us, the Superior Court's error was harmless. Even if the court had properly considered the contradictory evidence and concluded that Donna both successfully proved the existence of Rudolph's GERS pension and established that she possessed an equitable interest therein,[6] Donna failed to introduce essential evidence without which the court could not make a reasoned determination as to the equitable distribution of Rudolph's pension. Donna urges us to order the Superior Court to apply the "strict time rule" as adopted in *Smith v. Henley*, 65 V.I. 179, 206-11 (V.I. Super. Ct. 2016), and declare that Donna is entitled to 12.5% of Rudolph's future GERS distributions. But, assuming, for the sake of Donna's argument, that application of the strict time rule is appropriate in this case,[7] application of that rule requires the party seeking distribution of GERS benefits to introduce evidence to establish the pension holder's: (1) years of government service during the marriage, (2) total years of government service, and (3) monthly pension benefit after taxes. *See id.* at 210-11 (citing *Fuentes v. Fuentes*, 41 V.I. 86, 90 (V.I. Super. Ct. 1999)). Here, Donna failed to introduce any evidence to establish the projected value of Rudolph's monthly GERS pension benefit, and consequently failed to prove the third element necessary for equitable distribution of those benefits under the strict time rule.

Donna argues that her failure of proof is attributable to Rudolph, because "[p]rior to trial Rudolph refused to comply with Donna's discovery requests for the GERS account information,"

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[6] We recently examined the law pertaining to the equitable division of GERS pension funds in *Smith v. Henley*, 67 V.I. 965, 975 (V.I. 2017), where we explained: "Henley's interest in Smith's GERS pension vested with each year it was earned during their marriage. Throughout her marriage to Smith, Henley indirectly contributed to and invested in the pension's future returns by being deprived of Smith's financial contribution to the marital household which were instead partially invested in the GERS pension benefits. And most significantly, because under section 109(a)(7) [of Title 16], all real and personal property earned by one spouse during a marriage is jointly owned by both spouses, the Superior Court correctly determined that Henley had an equitable interest in Smith's GERS pension."

[7] In *Henley*, we affirmed a decision of the Superior Court awarding equitable distribution of GERS pension benefits. However, in that case, the parties did not challenge the trial court's decision to apply the strict time rule in the first instance, arguing instead that any equitable distribution of GERS benefits was prohibited by statute. 67 V.I. 965. As such, this Court has not yet had the opportunity to squarely examine the applicability of the strict time rule in the Virgin Islands.

and asserts that the Superior Court "erred when it allowed Rudolph to benefit from his own malfeasance of refusing to produce the requested documents." Additionally, Donna suggests that "[e]ven without evidence of the exact amount of the contributions, the Superior Court should have ordered an accounting of the contributions and a percentage distribution of the share of the fund." But examination of the record reveals that Donna failed to specifically request information about Rudolph's GERS pension in discovery,[8] and only submitted her request for an accounting for the first time in her post-trial closing brief. Consequently, we are not persuaded by Donna's attempt to shift the blame for her failure of proof, and conclude that the Superior Court's error in failing to weigh the conflicting evidence concerning the existence of Rudolph's GERS pension was harmless because Donna failed to introduce any evidence to establish the value of Rudolph's pension benefits without which the court could not make any determination as to the equitable distribution of those benefits under the strict time rule. Accordingly, because Donna failed to prove the value of Rudolph's GERS benefits, we affirm the Superior Court's denial of Donna's request for equitable distribution of Rudolph's GERS pension. *See* V.I. R. APP. P. 4(i) ("No error or defect in any ruling or order in anything done or omitted by the Superior Court or by any of the parties is ground for granting relief or reversal on appeal where its probable impact, in light of all the evidence in the case, is sufficiently minor so as not to affect the substantial rights of the parties.").

C. Credit Card Debt

Donna argues that the Superior Court erred by failing to address or account for her credit card debt in its final decree of divorce. Thus, Donna requests "that this Court remand the matter to

[8] Although Donna requested, and later moved to compel production of, records concerning "checking and/or savings accounts, including credit union accounts, certificates of deposit, 401(k) accounts and IRA's," she failed include any specific request for the production of documents related to Rudolph's pension. In any event, Donna does not argue on appeal that the Superior Court erred in denying her motion to compel.

the Superior Court with instruction to equitably distribute the credit card debt," [9] or alternatively, to "remand with instructions that the credit card interest be calculated as a necessary expense," in the determination of Donna's monthly financial need.[10] In response, Rudolph contends that the Superior Court properly exercised its discretion by declining to address the distribution of her credit card in the absence of any evidence that Donna's post-separation credit card debt was incurred for the joint benefit of the parties. However, we need not address the merits of Donna's arguments on this issue, as they were never raised before the Superior Court, and are therefore waived on appeal. V.I. R. APP. P. 22(m).

In her brief on appeal, Donna mistakenly asserts that she "requested distribution of the debt" in her closing brief submitted to the Superior Court. Additionally, she cites caselaw from New York and New Jersey in support of her argument that credit card debt incurred before issuance of an order granting *pendente lite* support is considered joint marital debt subject to equitable distribution. However, upon inspection, Donna's closing brief neither argued that her credit card debt should be considered joint marital debt, nor requested that the debt be equitably distributed. Instead, Donna argued that she was forced to incur the post-separation credit card debt in order to "maintain the lifestyle the couple had attained while married," and therefore requested that she be awarded $30,000 as a one-time, "retroactive alimony" payment to cover those expenses.[11] Thus,

[9] We have previously recognized that "debts incurred for the benefit of both spouses during a marriage . . . constitute[] 'marital debt' that is subject to equitable distribution during divorce proceedings." *Drayton v. Drayton*, 65 V.I. 325, 346 (V.I. 2016).

[10] 16 V.I.C. § 345(a) provides that an award of alimony "shall be proportioned to the resources of the person giving such support and to the *necessities* of the party receiving it. . . ." (emphasis added).

[11] Donna consistently argued in proceedings before the Superior Court that she was entitled to an award of "retroactive alimony" with respect to her credit card debt, beginning with her motion for *pendente lite* support, filed July 10, 2014.

because Donna never requested or argued in the Superior Court that the credit card debt should be equitably distributed as marital debt, this argument is waived. V.I. R. APP. P. 22(m).

We note that while these two arguments—for equitable distribution of the debt and for an award retroactive alimony equal to the amount of the debt—are undeniably related in that they both pertain to Donna's credit card debt, they nonetheless constitute separate and distinct legal arguments, representing alternative avenues for addressing the debt. And while Donna raised the credit card debt issue by way of her request for retroactive alimony before the Superior Court, she failed to raise this argument in her brief on appeal. Conversely, although Donna's brief on appeal argues that the credit card debt should be equitably distributed, this argument was never raised before the Superior Court. And because "[i]ssues that were [either] not raised… before the Superior Court, [or] raised … but not briefed… are deemed waived for purposes of appeal…" both of these arguments are waived. V.I. R. APP. P. 22(m).

Donna also argues on appeal that, if the debt is not to be distributed, this Court should nevertheless conclude that the Superior Court erred by failing to account for Donna's credit card debt and "remand with instructions that the credit card interest [of approximately $300 per month] be calculated as a necessary expense."[12] A review of the record makes clear that Donna identified her credit card interest payments as regular monthly expenses both in her responses to interrogatories and in her renewed motion for *pendente lite* support, filed November 15, 2016. However, the Superior Court's February 10, 2017 opinion is entirely silent on this issue. The Superior Court listed Donna's monthly essential expenses as follows: mortgage ($1,120); food ($800); clothing ($400); medical and dental ($25); transportation ($250); insurance ($565); taxes

[12] It is unclear from her brief whether Donna seeks to have the credit card interest considered as a necessary expense with respect to her award of *pendente* lite support, or with respect to her award of prospective alimony, or both.

($120); telephone ($300); and utilities ($170).[13] And although the opinion notes Donna's assertion that her credit card debt increased from about $3,000 to approximately $30,000 following her separation from Rudolph, the Superior Court failed to recognize, let alone address, Donna's argument that her monthly credit card interest payments constitute necessary expenses.

In the absence of any discussion or explanation as to why the Superior Court concluded that Donna's monthly credit card interest payments did not constitute necessary expenses, meaningful review of the court's decision is not possible. *See Demming v. Demming*, 66 V.I. 502, 511 (V.I. 2017) ("[W]ithout some explanation in the form of express findings and rulings, we are not in a position to meaningfully review whether the court erred."). Therefore, we conclude that the Superior Court erred in failing to address this issue, and remand the record in this matter for the court to clarify its decision to exclude Donna's monthly interest payments on her credit card debt from the list of necessary expenses it used to compute Donna's alimony and *pendente lite* support.

D. 50% Reduction of *Pendente Lite* Support

In its February 10, 2017 opinion, the Superior Court retroactively awarded Donna *pendente lite* support in the amount of $12,000—$500 per month from the date of commencement of the action—in accordance with 16 V.I.C. § 108. Referring to its earlier discussion on the award of alimony, the court found that Donna had a monthly financial shortfall of $1,000 but, "based on a number of factors, found that [Rudolph] should only be responsible for [50%] of the monthly shortfall." This decision was based mainly on the court's findings that: 1) Donna owns and operates

[13] In an accompanying footnote, the court explicitly found that Donna's testimony concerning the existence of two alleged personal loans was not credible, and on that basis, excluded the loans from its calculation of Donna's debt. However, the court made no finding as to the credibility of Donna's testimony regarding her credit card debt, failing to address this issue entirely.

a travel agency with potential for future growth, and over the course of her extensive employment history has developed skills "which would permit her to find other employment opportunities," and allow her to be self-sufficient; and 2) Rudolph's earning potential is limited by his age (then 74) and his "imminent retirement." The Superior Court explained that it calculated its award of $500 per month for five years to provide Donna with a chance to "reach full self-sufficiency." On appeal, Donna argues that the court erred by reducing her *pendente lite* support because of Rudolph's impending retirement.

Clearly, the Superior Court's findings about the future earning potential of the parties are relevant in determining the proper amount of alimony to be awarded to Donna—the party in need. Indeed, one primary goal of the court in fixing an alimony award is to strike an appropriate balance between the party's need for support and the other party's ability to pay. *See Berrios-Rodriguez v. Berrios*, 58 V.I. 477, 485 (V.I. 2013). But while the determination to award alimony is necessarily forward looking—providing for the future support of the party in need based on consideration of the parties' respective future financial positions—the determination to award *pendente lite* support is generally more concerned with the immediate, present financial circumstances of the parties. *See, e.g.*, *Malek v. Malek*, No. FM-15-1028-16W, 2016 WL 5718240, at *2 (N.J. Super. Ct. Ch. Div. Aug. 5, 2016) (unpublished) ("[T]he purpose of a *pendente lite* support application is to help financially bridge the gap in time between the beginning and the end [of the litigation], in an orderly fashion . . . to provide the means for a supported spouse to survive at the start of an action.").

Here, the Superior Court, for unexplained reasons, failed to consider Donna's July 2014 motion for *pendente lite* support until after trial, and only granted her request retroactively in its

final opinion.[14] Thus, when the Superior Court ruled on the *pendente lite* motion, the determination of Donna's financial need during the course of the litigation was no longer a matter of future speculation, but of historical fact. The future possibilities that Donna might grow her business or otherwise increase her income, or that Rudolph would retire, though relevant to the consideration of an award of prospective alimony, are irrelevant in the context of ascertaining Donna's past financial need during the pendency of the litigation. Therefore, we conclude that the Superior Court abused its discretion by reducing its award of *pendente lite* support by 50% on the basis of its findings concerning the probable future financial positions of the parties. *See, e.g.*, *Gnall v. Gnall*, 74 A.3d 58, 77 (N.J. Super. Ct. App. Div. 2013), *rev'd on other grounds*, 119 A.3d 891 (N.J. 2015) (holding that "the judge abused his discretion by immediately imputing a prospective salary attainable only upon retraining" in fixing amount of *pendente lite* support). Accordingly, we reverse that portion of the opinion and remand with instructions to fix an appropriate amount of *pendente lite* support consistent with this opinion.

IV. CONCLUSION

Because the Superior Court erred by failing to explain its decisions with respect to either Donna's credit card debt interest or her legal fees and costs, we remand the record in this matter for the court to clarify its decisions with respect to those issues. And, although the court's finding that the record contained no evidence supporting the existence of Rudolph's GERS pension was clearly erroneous, the error was harmless in light of Donna's failure to introduce any evidence with respect to the value of Rudolph's GERS pension benefits and we therefore affirm the Superior

[14] Because the very purpose of *pendente lite* support is to provide the spouse in need with the financial means to survive *during* the litigation, we find the Superior Court's failure to promptly rule on the motion disconcerting. However, because Donna presented no argument on this issue, we need not determine here whether the Superior Court's extreme delay in ruling on the motion for *pendente lite* support, itself, constituted error.

Court's decision to deny Donna's request for distribution of the pension for failure of proof. Finally, because the Superior Court abused its discretion by considering the parties' future earning potential in its determination of Donna's past, *pendente lite*, financial need, we reverse that portion of the opinion and remand for further proceedings on that issue. Accordingly, we affirm in part, and reverse in part, the Superior Court's February 10, 2017 opinion and order, and remand the matter for further proceedings consistent with this opinion.

Dated this 5th day of July, 2018.

BY THE COURT:

/s/ Maria M. Cabret
MARIA M. CABRET
Associate Justice

ATTEST:
VERONICA J. HANDY, ESQ.
Clerk of the Court