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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA17-170

Filed: 17 October 2017

Catawba County, No. 15 CVD 2135

KELLY LEE BURRIS BOLDON, Plaintiff,

v.

DAVID MICHAEL BOLDON, Defendant.

Appeal by Defendant from orders and judgment entered 26 August 2016 by Judge Sherri Wilson Elliott in Catawba County District Court. Heard in the Court of Appeals 24 August 2017.

No brief filed for Plaintiff-Appellee.

Wesley E. Starnes, PC, by Wesley E. Starnes, for Defendant-Appellant.

HUNTER, JR., ROBERT N., Judge.

David Michael Boldon (“Defendant”) appeals an alimony order, an equitable distribution order, and a child support order. Defendant argues: (1) the trial court erred in not allowing Defendant to put on evidence during the equitable distribution hearing when Defendant had an entry of default against him; (2) the trial court’s act of not allowing Defendant to put on evidence during the hearing amounted to a

sanction against Defendant; (3) the trial court erred in accepting Plaintiff's equitable distribution affidavit as its pre-trial order; (4) Defendant did not have notice of the trial court's order accepting Plaintiff's equitable distribution affidavit as its pre-trial order; (5) the trial court erred in finding Defendant acted "to waste, neglect, devalue or convert the marital property;" (6) the trial court erred in failing to make a finding regarding Defendant's income in its child support order; (7) the trial court erred in allowing Plaintiff to testify as to her financial situation in the alimony hearing without filing an affidavit; (8) the trial court erred in failing to consider Defendant's child support obligations in determining Plaintiff's award of alimony; (9) the trial court's findings of fact concerning alimony are not supported by the evidence; (10) the trial court erred in allowing Plaintiff to speculate about her current utility costs; and (11) the trial court erred in awarding alimony to the Plaintiff when there insufficient evidence of the parties' lifestyle prior to the date of separation. We conclude the trial court's findings of fact are supported by competent evidence and the trial court did not abuse its discretion in its awards of equitable distribution, child support and alimony.

I. Factual and Procedural Background

Defendant and Kelly Lee Burris Bolden "(Plaintiff)" married on 21 June 1997. Plaintiff and Defendant had three children between 1997 and 2008. During the marriage and prior to the date of separation, Defendant fathered a child with another

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woman in 2008. The parties separated on 6 February 2012. After separation, the children continued to reside primarily with Plaintiff.

On 28 August 2015, Plaintiff filed a complaint seeking divorce from bed and board, post-separation support, alimony, equitable distribution, child custody, child support, attorneys' fees and absolute divorce. The Catawba County Clerk of Court issued a Civil Summons to Defendant that same day. The summons states Defendant was personally served with the summons and complaint by the McDowell County Sherriff's Department on 15 September 2015, at his home in Marion, North Carolina.

On 28 August 2015, the trial court entered an order requiring Plaintiff and Defendant to attend a child custody mediation on 29 September 2015. This order was served on Defendant via certified mail, at his Marion, North Carolina address. Both Plaintiff and Defendant failed to attend the child custody mediation on 29 September 2015. On 30 September 2015, the trial court entered another order requiring Plaintiff and Defendant to attend child custody mediation on 20 October 2015. This order was mailed to Defendant via U.S. Mail to Defendant's address in Marion, North Carolina. The order was also faxed to Plaintiff's attorney.

Defendant failed to answer or otherwise respond to Plaintiff's complaint within thirty days, and Plaintiff filed a motion for entry of default on 16 October 2015. That same day, Plaintiff served Defendant with the motion for entry of default by depositing a copy of the motion in the U.S. Mail to Defendant's address in Marion,

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North Carolina. On 20 October 2015, the assistant clerk of court filed an entry of Default against Defendant.

Also on 20 October 2015, Plaintiff appeared for child custody mediation, but Defendant failed to appear. An order to appear and show cause was entered against Defendant for failure to appear for child custody mediation on 23 October 2015.¹ Service upon Defendant was unsuccessful, and the McDowell County Sheriff's Department filed an alias and pluries civil summons for the show cause order on 27 October 2015. On 9 November 2015, the alias and pluries summons was returned due to an inability to locate Defendant.² Subsequently, on 17 November 2015, the trial court exempted the parties from further child custody mediation.

Pursuant to the local rules and practice in Catawba County, on 17 November 2015, the trial court entered an order requiring Plaintiff to file her equitable distribution affidavit on 28 December 2015, and requiring Defendant to file his equitable distribution affidavit on 20 January 2016. In this same order, the trial court required Plaintiff to file her Alimony and Post-Separation support affidavit by 28 December 2015.³ On 17 November 2015 the parties divorced, and the trial court entered an order for temporary child custody and temporary child support to the Plaintiff to be reviewed at a later date. The trial court ordered Defendant to pay

¹ The return of service portion of this order to appear and show cause is blank.

² The summons states "subject lives in Athens, Tennessee" with an unknown address.

³ This order stated Defendant was served at his Marion, North Carolina address.

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temporary child support in the amount of \$987.50 per month. Defendant was served with a copy of the order for temporary child custody and temporary child support by depositing the orders in the U.S. Mail to Defendant's address in Marion, North Carolina. This order was returned to the McDowell County Sheriff's Office on 16 September 2015 by the postal authorities due to "[i]nvalid service to the wrong person."

On 1 February 2016, attorney Erik R. Ashman ("Ashman") filed a notice of limited representation of Defendant solely limiting his appearance to contest the service of process in this case. On 2 February 2016, Defendant filed a motion to dismiss for insufficiency of process, insufficiency of service of process, lack of personal jurisdiction and a motion to set aside all prior orders.⁴ In this motion, Defendant contends:

5. That the civil summons issued on the 28th day of August 2015 was returned to the Catawba County Clerk of Court, indicating that it and a copy of the complaint were received and served on the Defendant, David Boldon, on the 15th day of September 2015 at 10:04 p.m. That the box was marked next to the statement "By delivering to the defendant named above a copy of the summons and complaint" and said summons appears to been signed by Deputy Patrick Guion, also known as William P. Guion of the McDowell County Sheriff's Office.

6. That the summons issued on August 28th, 2015 lists the address of Defendant as 2669 Old Greenlee Road, Marion NC 28752.

⁴ Attached to Ashman's motion is a return of service issued for 28 August 2015, stating "invalid service to wrong person."

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7. That Defendant does not reside at 2669 Old Greenlee Road, Marion NC 28752.

8. That upon information and belief, the Defendant's neighbor was served with the summons and complaint at 2669 Old Greenlee Road, Marion, NC 28752.

9. That Defendant rents a house at 2969 Old Greenlee Road, Marion, NC 28752, but currently resides in the state of Texas. **[R. 53-54]**

....

13. That on October, 27th 2015 an alias and pluries summons was issued by the Catawba County Clerk of Court's Office, and on the 9th day of November 2015 said alias and pluries summons was returned to the Catawba County Clerk of Court's Office without being served on the Defendant in compliance with Rule 4(j).

14. That the record indicates no alias and pluries summons have issued since the issuance of the October 27th, 2015 summons.

15. That the time to file a subsequent alias and pluries summons has expired and that last day to issue said alias and pluries summons was January 25th, 2016.

....

19. That the failure to serve Defendant in compliance with the North Carolina Rules of Civil Procedure – Rule 4(j) causes all Orders entered in this matter to be void.

On 8 April 2016, Defendant, through his attorney Ashman, filed a voluntary dismissal of the claims set forth in his 2 February 2016 motion. This action theoretically would have ended Ashman's representation of Defendant.

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On 4 February 2016, the trial court ordered Plaintiff to file her equitable distribution and alimony affidavits on 14 March 2016 and Defendant to file his equitable distribution and alimony affidavits on 11 April 2016. The trial court's order indicates Defendant's attorney Ashman was served with this order.⁵ On 14 April 2016, the trial court extended the period for filing affidavits for Plaintiff and Defendant to 30 April 2016 and 18 May 2016, respectively. Again, this order indicates Defendant's attorney was served with this order.⁶

A hearing for custody, child support and contempt was set for 18 May 2016. On that day, the matter was continued and the trial court entered a "pending order" for Plaintiff's attorney to "prepare the Order, due by June 13, 2016[.]" Plaintiff, Plaintiff's counsel and Defendant's counsel, Ashman, appeared without limitation at this hearing. Defendant did not personally appear.⁷

On 19 May 2016, the trial court extended the affidavit filing period for equitable distribution and alimony for both parties to 31 May 2016. Also in this 19 May 2016 order, the trial court ordered Plaintiff to prepare the Pre-Trial Order by 13 June 2016.⁸

⁵ Only Plaintiff, Plaintiff's counsel, and Defendant's counsel appeared at this hearing.

⁶ Defendant did not personally appear at this hearing.

⁷ Mr. Ashman's appearance at this hearing exceeded his limited appearance notice and, based on the record, we take this action to be a general appearance.

⁸ It is unclear whether Plaintiff was only to prepare the pre-trial order for equitable distribution, or also for alimony and post-separation support. Defendant did not personally appear at this hearing, but his counsel did appear.

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Plaintiff filed her equitable distribution affidavit on 25 May 2016.

On 14 June 2016, the trial court reviewed its previous temporary custody order and entered a second temporary order for contempt, child custody and child support. In this order, the trial court again awarded the “sole legal and physical care, custody, and control of the minor children” to Plaintiff. The trial court also ordered Defendant to pay child support in the amount of \$1,001.81 per month[.]” Additionally, the trial court ordered:

5. The Defendant . . . is hereby held in civil contempt for his failure to comply with the terms of the November 17, 2015 Order. He shall be arrested and incarcerated in the custody of the Catawba County Sheriff’s Department after 5:00 p.m. Friday, May 20, 2016 and held until he meets the following conditions of purge:

- a) He shall pay \$8,412.50 in temporary child support arrearage; and,
- b) He shall pay \$1,500.00 in Plaintiff’s attorney fees; and,
- c) He shall provide to the Plaintiff and keep her informed at all times of his work name and location, his actual residence address, the address of any place where he is temporarily living for work purposes, and his contact information.⁹

On 29 June 2016, the trial court continued Plaintiff’s date to file her alimony affidavit to 11 July 2016. The trial court also continued Defendant’s date to file his equitable distribution affidavit to 30 June 2016, and continued his alimony affidavit filing date

⁹ The Defendant tendered the amount of \$9,912.50 to Rachel LeClair Law Office, P.L.L.C. and provided the information for paragraph 5(c) prior to the entry of this order.

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to 31 July 2016. The trial court also ordered Plaintiff to prepare the Pre-Trial Order by 11 July 2016.

In an order filed 19 July 2016, the trial court found “Defendant has failed to comply with prior orders regarding filing of his [equitable distribution affidavit].” In this order, the trial court further stated, the “Court accepts Plaintiff’s [equitable distribution] order as the [pre-trial Order.] A copy of the trial court’s order is contained in our Record on Appeal. At the bottom of the order is a certification that the Order was served on the Defendant’s counsel:

[Def] Erik R. Ashman
827 Highland Ave NE
Hickory, N.C. 28601

On 22 July 2015, Defendant’s counsel, Ashman, entered a motion to withdraw as Defendant’s counsel. Ashman stated in this motion, “Defendant has failed to comply with my terms of representation and to respond to communication with attorney’s office.” There is no indication in the record the trial court granted Ashman’s motion to withdraw.

The case came on for trial on 23 August 2016. Plaintiff and her attorney were present, as well as Defendant and his counsel, Mr. Ashman. The trial consisted of two phases, a default and inquiry to establish the quantum for equitable distribution, as well as an alimony phase. At the hearing’s opening, the following exchange occurred:

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[PLAINTIFF'S COUNSEL]: And then, also, I just wanted to bring to Your Honor's attention and remind you that there's an entry of default against [Defendant], um, from October 20th, 2015, which I believe would preclude his presenting any evidence.

THE COURT: Correct.

[PLAINTIFF'S COUNSEL]: [It] does not extend to cross-examination, but in terms of active presentation, um, that October 20th, 2015, was that entry.

....

[DEFENSE COUNSEL]: [W]e understand there's an entry at default. Um, it's our position that, um, the entry of default would prevent us from, um, presenting evidence if there were damages, and I believe in this case, really, uh, the entry of default, really, would only apply to, um, the – the request to, uh, to have an uneven distribution. . . . [A]nd that's our stance; that it would only preclude us from having an unequal distribution; not from presenting evidence.

THE COURT: Um, with the entry of default being entered October the 20th, 2015, it will preclude you from pre-, presenting evidence; um, however, you may cross-examine any witnesses; and furthermore, since the plaintiff's equitable distribution affidavit has already been accepted as the pretrial order, um, in that – in this matter, then, as it relates to certain issues that may or may not come out therein, um, that – that is the order; not just the affidavit.

Following this exchange, Plaintiff admitted sixteen exhibits into evidence and offered testimony as to her belief of the value of the items. Defense counsel cross-examined Plaintiff as to a few loans made by Defendant's father to Defendant, as well

as questioned the value of some of the items pictured in Plaintiff's exhibits. The trial court reserved judgment on the equitable distribution award and moved on to the alimony phase of the trial. Plaintiff admitted one exhibit during the alimony phase of the trial. Defendant took the stand and testified regarding his employment history and financial status.¹⁰ The trial court again reserved judgment until there was time to "run the numbers."

On the same day as the hearing, the trial court filed an amended order for contempt, child custody, and child support. On 26 August 2016, the trial court filed its order and judgment for equitable distribution. In its order, the trial court concluded the Plaintiff was "entitled to an unequal distribution of marital property in her favor." The trial court also ordered Defendant to "take all steps necessary to remove all encumbrances, including the March 2016 Deed of Trust, from the real property at 1602 Mays Chapel Road, and shall execute and deliver free and clear title . . . to the Plaintiff. . . . The Defendant . . . shall fully indemnify and hold the Plaintiff . . . harmless from any lien, debt or encumbrance related to, secured by or attached to said property."

In its alimony order entered that same day, the trial court ordered Defendant to pay Plaintiff alimony "in the amount of \$800.00 per month" for ten years. The trial

¹⁰ Defendant did not offer any exhibits into evidence.

court also ordered Defendant to pay Plaintiff's attorneys' fees in the amount of \$3,850.00.

Defendant timely entered notice of appeal on 22 September 2016.

II. Standard of Review

Defendant's issues on appeal concern alimony and equitable distribution. These two issues are reviewed under an abuse of discretion standard. *Wienczek – Adams v. Adams*, 331 N.C. 688, 691, 417 S.E.2d 449, 451 (1992). "Only a finding that the judgment was unsupported by reason and could not have been a result of competent inquiry, or a finding that the trial judge failed to comply with the statute . . . will establish an abuse of discretion." *Id.* at 691, 417 S.E.2d at 451 (internal citations omitted).

"In equitable distribution, findings by the trial court are binding on the appellate court when supported by competent evidence." *Edwards v. Edwards*, 110 N.C. App. 1, 9, 428 S.E.2d 834, 838, *cert. denied*, 335 N.C. 172, 436 S.E.2d 374 (1993). Findings of fact not challenged on appeal are binding. *Peltzer v. Peltzer*, 222 N.C. App. 784, 787, 732 S.E.2d 357, 360, *disc. rev. denied*, 366 N.C. 417, 735 S.E.2d 186 (2012). Conclusions of law are reviewable *de novo* on appeal. *Carpenter v. Brooks*, 137 N.C. App. 745, 752, 534 S.E.2d 641, 646, *disc. rev. denied*, 353 N.C. 261, 546 S.E.2d 91 (2000).

In the complex litigation involving equitable distribution, an appellate court will not remand for obviously insignificant errors. *Mishler v. Mishler*, 90 N.C. App. 72, 74, 367 S.E.2d 385, 387, *disc. rev. denied*, 323 N.C. 174, 373 S.E.2d 111 (1988).

The Court of Appeals presumes the proceedings in the trial court are correct until shown otherwise. *Lawing v. Lawing*, 81 N.C. App. 159, 162, 344 S.E.2d 100, 104 (1986). “The party asserting error must show from the record not only that the trial court committed error, but that the aggrieved party was prejudiced as a result. *Id.* at 162, 344 S.E.2d at 104. “[F]ormal errors in an equitable distribution judgment do not require reversal, particularly where the record reflects a conscientious effort by the trial judge to deal with complicated and extensive evidence.” *Id.* at 163, 344 S.E.2d at 104.

III. Analysis

A. Equitable Distribution

Defendant first contends the trial court erred in refusing to allow Defendant to offer evidence during the equitable distribution trial. We note Defendant never filed a pre-trial affidavit with the trial court, despite ample opportunities afforded him by the trial court.

N.C. Gen. Stat. § 50-21 governs the procedural requirements for equitable distribution claims and the trial court retains statutory authority to adjudicate equitable distribution cases. Pursuant to N.C. Gen. Stat. § 50-21(a) and (d), all

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parties are required to file inventory affidavits and attend a pretrial conference. The party who first asserts a claim for equitable distribution must file and serve upon the opposing party and inventory affidavit listing all property claimed to be marital and separate property, as well as an estimated date-of-separation fair market value of each item. *Id.* The opposing party must serve a responding inventory within thirty days after service of the filing party's inventory. *Id.* The court may extend the time for filing the inventories upon good cause shown. *Id.* The inventory affidavits are in the nature of answers to interrogatories propounded to the parties and are subject to the requirements of Rule 11. *Id.*

The trial court ordered Defendant to submit an inventory affidavit, and Defendant, despite having several opportunities, failed to do so. There is no evidence Defendant raised any objection, prior to trial, regarding the contents or values contained in Plaintiff's equitable distribution affidavit. "Because [D]efendant had the opportunity to contest the accuracy of the inventory but failed to do so until after the trial had begun, the court did not abuse its discretion in denying [D]efendant's request to offer evidence." *Chafin v. Chafin*, ___ N.C. App. ___, ___, 791 S.E.2d 693, 700 (2016).

Additionally, "in order for a party to preserve for appellate review the exclusion of evidence, the significance of the excluded evidence must be made to appear in the record and a specific offer of proof is required unless the significance of the evidence

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is obvious from the record.” *Joyce v. Joyce*, 180 N.C. App. 647, 652, 637 S.E.2d 908, 912 (2006) (quoting *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985)). Here, Defendant made no specific offer of proof as to the excluded evidence Defendant wished to introduce or its significance. Defendant has failed to offer proof of prejudicial effect of the trial court’s order thus impairing our appellate review, and we therefore dismiss Defendant’s assignment of error.

Nonetheless, we will address Defendant’s legal contention the trial court erred in refusing to allow Defendant to offer evidence during the equitable distribution trial because Defendant had an entry of default against him.

After being properly served with the complaint and summons in a civil action, the defendant typically has thirty days in which to respond or request an extension. N.C. R. Civ. P. 12(a) (2016). If the defendant fails to do so, the plaintiff may obtain judgment for “affirmative relief” against the defendant by default pursuant to a “two-step process requiring (1) the entry of default and (2) the subsequent entry of a default judgment.” *McIlwaine v. Williams*, 155 N.C. App. 426, 428, 573 S.E.2d 262, 264 (2002).

Our Supreme Court stated:

When a defendant suffers a judgment to go by default, he admits the cause of action. If the action is on a single bond, a covenant for the payment of money, bill of exchange, promissory note, or a signed account, the judgment is *final*, and the Clerk ascertains the interest due by law, without a writ of inquiry: Rev. Code, ch. 31, sec. 91.

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When the action sounds in damages, as in assumpsit, covenant, trespass, etc., a judgment by default is only *interlocutory*, and the amount of damages must be ascertained by a jury, upon a writ of inquiry: 1 Tidd. Pr., 573, 580.

Parker v. Smith, 64 N.C. 291, 291 (1870) (emphasis in original).

Rule 55(b)(1) provides two basic conditions which must be met before a clerk can enter default judgment: “(1) the plaintiff’s claim must be for a sum certain” or subject to precise computation, and “(2) the defendant must have been defaulted for failure to appear and he must not have been an infant or incompetent person.” *Beard v. Pembaur*, 68 N.C. App. 52, 54-55, 313 S.E.2d 853, ___, *review denied*, 311 N.C. 750, 321 S.E.2d 126 (1984) (quoting *Rowland v. W & L Motor Lines, Inc.*, 32 N.C. App. 288, 291, 231 S.E.2d 685, 687-88 (1977)).

The clerk can enter a default judgment against a defendant only if he has never made an appearance in the action. *North Carolina Nat’l Bank v. McKee*, 63 N.C. App. 58, 60, 303 S.E.2d 842, 844 (1983). Rule 55 of our Rules of Civil Procedure governs this process. This rule provides “the clerk shall enter default.” N.C. Gen. Stat. § 1A-1, Rule 55 (2016). Upon the entry of default, “the substantive allegations contained in plaintiff’s complaint are no longer in issue, and for the purposes of entry of default and default judgment, are deemed admitted.” *Luke v. Omega Consulting Group, LC*, 194 N.C. App. 745, 751, 670 S.E.2d 604, 609 (2009). Although the allegations of the complaint are deemed admitted, defendant is entitled to a hearing regarding

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damages. *Id.* at 751, 694 S.E.2d at 609.

As is the case with an entry of default, a motion to set aside a default judgment is within the sound discretion of the trial court. *McKee* at 61, 303 S.E.2d at 844. Where the defaulting party fails to show a meritorious defense, it is error to set aside a default judgment. *First Union Nat'l Bank v. Richards*, 90 N.C. App. 650, 652, 369 S.E.2d 620, 621 (1988).

A party must first move pursuant to Rule 55(d) and Rule 60(b) for relief from a default judgment in trial court before it can have the matter heard on appeal. *Golmon v. Latham*, 183 N.C. App. 150, 152, 643 S.E.2d 625, 626 (2007).

Here, Defendant only argues the trial court erred in not allowing Defendant to present evidence. The trial court did not err. If Defendant disagreed with Plaintiff's evidence, Defendant could have challenged Plaintiff's evidence by submitting his own equitable distribution affidavit, or at least made an offer of proof of the excluded evidence at trial. The fact Defendant now feels he deserves a new trial when he never filed an equitable distribution affidavit is no reason for this Court to vacate the trial court's judgment.

Additionally, Defendant's argument the trial court's decision to not allow Defendant to put on new evidence due to the entry of default now amounts to a sanction by the trial court is without merit. Defendant did not receive a sanction pursuant to our General Statutes. Again, Defendant does not argue the entry of

default was error, or that the trial court abused its discretion. These contentions are without merit.

Defendant next argues the trial court erred in accepting Plaintiff's equitable distribution affidavit as its pre-trial order. Defendant also argues he had no "actual notice" Plaintiff's affidavit would serve as the pre-trial order.

Pursuant to N.C. Gen Stat. § 50-21(a) (2016) a party who first asserts a claim for equitable distribution must file and serve upon the opposing party an inventory affidavit listing all the property claimed to be marital and separate property, as well as an estimated date-of-separation fair market value of each item, within 90 days of filing the claim. The responding party must serve a responding inventory within 30 days after service of the filing party's inventory. *Id.*

Here, Plaintiff and Defendant both received several continuances to allow them time to file their equitable distribution affidavits. Plaintiff ultimately filed her equitable distribution affidavit on 25 May 2016. After five continuances, the trial court ordered Defendant to file his equitable distribution affidavit by 30 June 2016.

In an order filed 19 July 2016, the trial court found "Defendant has failed to comply with prior orders regarding filing of his [equitable distribution affidavit]." In this order, the trial court further stated, the "Court accepts Plaintiff's [equitable distribution] order as the [pre-trial Order.] A copy of the trial court's order is contained in our Record on Appeal. At the bottom of the order is a certification that

the Order was served on the Defendant's Counsel:

[DEF] Erik R. Ashman
827 Highland Ave. NE
Hickory, N.C. 28601

The transcript states, Erik Rand Ashman appeared for Defendant at the equitable distribution and alimony hearing. We conclude Defendant had actual adequate notice of the requirement he file affidavits with the court. His self-defeating strategy of not following the legal procedures for the introduction of evidence is meritless. He had ample opportunity to comply and failed to do so.

On 18 July 2016, Plaintiff's attorney executed a motion requesting the trial court to adopt Plaintiff's equitable distribution affidavit as the pretrial order in this case since Defendant consistently failed to timely file his equitable distribution affidavit. This motion was filed on 21 July 2016.

In that motion, Plaintiff alleged:

11. Further delay in the disposition of the parties' equitable distribution matter will be prejudicial to the Plaintiff . . . including but not limited to for the following reasons: The Plaintiff Kelly Burris Boldon does not have in her possession and/or control several assets of real property; and, upon information and belief, the Defendant . . . has encumbered at least one marital asset since the date of separation, that being real property located on Mays Chapel Church Road, Catawba County.

This motion also has a certificate of service for Mr. Ashman.

There is no evidence in the Record Defendant opposed Plaintiff's motion for

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Plaintiff's equitable distribution affidavit to serve as the pre-trial order. The trial court held an equitable distribution hearing on 23 August 2016. Following the hearing, the trial court entered an order and judgment for equitable distribution on 26 August 2016. On appeal, if Defendant is unsatisfied with this Order Defendant can argue the trial court's findings are not supported by competent evidence in the record, or the trial court's findings do not support its conclusions. Defendant may also argue abuse of discretion. This Court's standard of review is limited to these issues in reviewing an equitable distribution order. However, Defendant fails to argue any of these issues. "It is not the role of the appellate courts . . . to create an appeal for an [A]ppellant." *Krause v. RK Motors, LLC*, ___ N.C. App. ___, ___, 797 S.E.2d 335, 339, *appeal dismissed*, ___ N.C. ___, 797 S.E.2d 335 (2017). Defendant's contention is without merit.

Defendant next argues the trial court erred in finding Defendant acted "to waste, neglect, devalue or convert the marital property or divisible property." The trial court found:

12. In 2005 the parties acquired real property located at 1602 Mays Chapel Road, Maiden, North Carolina, consisting of approximately 56 acres of undeveloped land. . . . The Plaintiff's asserted gross fair market value of \$285,000.00 is reasonable and the Court finds that to be the value as of the date of separation and the date of distribution.

13. As of the date of separation, there was minimal debt, \$30,000.00 owing to Mr. Frank Boldon, and \$6,070.00 of

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tax liens encumbering this property. After the parties received notice in 2015 that the tax liens on this parcel had grown to \$7,460.94. . . . Mr. Frank Boldon assisted the parties by setting up a payment plan with Catawba County for their unpaid property taxes. Catawba County agreed to accept \$300.00 per month in order to forego foreclosure proceedings. The Plaintiff Kelly Lee Burris Boldon has consistently paid not only her \$150.00/month share, but also the Defendant David Michael Boldon's \$150/month share. The Defendant has never paid toward the tax debts since separation, thereby jeopardizing the major assets of the marital estate.

14. On or about March 14, 2016 the Defendant David Michael Boldon and his current wife Natasha . . . executed a Deed of Trust for \$200,000.00 in favor of Mr. Frank K. Boldon, the Defendant's father. The Defendant was facing lawsuits and/or judgments from civil actions including in Johnston County, North Carolina at the time. . . .

15. The Plaintiff Kelly Lee Burris Boldon was not consulted, did not execute, and was not aware of the March 14, 2016 Deed of Trust until close to trial. The Defendant David Michael Boldon's sole purpose in mortgaging the Mays Chapel Road property and the Deed of Trust was to avoid judgment creditors, as the Defendant testified, "to protect that property" from the Johnston County action against him.

16. There was no consideration for the March 2016 Deed of Trust, and no evidence of funds actually being transferred from Mr. Frank Boldon to the Defendant and/or his new wife related to this Deed of Trust. This property had been basically unencumbered for quite some time before March 2016. The Defendant . . . attempted to encumber marital property during active litigation of equitable distribution in this case. The Defendant was deceitful and dishonest in these actions as it related to the Mays Chapel Road property.

We conclude these findings support the trial court's finding Defendant acted to "waste, neglect, devalue or convert the marital property or divisible property." Defendant cannot show the trial court's findings or conclusions are unsupported by reason and could not have been the result of a competent inquiry. This contention is without merit.

Defendant next contends the trial court erred in failing to find the Defendant's income in the child support order. This contention is without merit because the trial court did make a finding as to Defendant's income in its child support order:

9. The Defendant . . . is now employed at a nuclear power plant in Texas. Through a text communication with Plaintiff, he revealed that he makes \$25.00 at his job, which is consistent with the evidence at the temporary hearing and consistent with his earlier employment at an oil refinery and in South Carolina.

B. Alimony

Defendant next argues the trial court erred in allowing Plaintiff to present evidence in support of alimony without filing an affidavit. The Catawba County local rules require a party seeking alimony to file an affidavit. Even though it appears from the record Plaintiff did not file such an affidavit, the trial court allowed Plaintiff to testify regarding her financial circumstances:

[PLAINTIFF'S COUNSEL]: [Plaintiff] would like to put on some evidence about her changed, uh, financial situation; and I apologize that that affidavit is not filed, but, honestly, she just closed on that house. . . . We can proceed – we're prepared to proceed with that oral evidence rather than an

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affidavit, because I know we need to finish this case. It's almost exactly a year; we filed . . . that's not the preferable way to do it, but just given the circumstances of that sale and her having to move with the kids this month, um, we're only prepared to do that by oral evidence and not by affidavit[.]

[THE COURT]: All right.

. . . .

[DEFENSE COUNSEL]: We – we're ready to go forward with, um, you know, oral testimony with ----

[THE COURT]: Okay.

[DEFENSE COUNSEL]: ---- without the affidavit.

Because Defendant failed to object to the absence of an alimony affidavit, Defendant cannot argue error now on appeal. *State v. Alford*, 339 N.C. 562, 569, 453 S.E.2d 512, 515-16 (1995). This assignment of error is dismissed as not properly preserved.

Defendant next argues the trial court “erred in the alimony award in allowing expenses for Plaintiff for the parties’ minor and adult children, while excluding these expenses for Defendant’s step children and by failing to find and consider Defendant’s payment of child support.”

In its alimony order, the trial court mentions Plaintiff’s and Defendant’s children and their “expenses” in two paragraphs:

9. The Plaintiff . . . lives . . . with the parties’ three (3) children. Their daughter KB goes to school at CVCC and

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has a part time job at Mega Tan, whereby she contributes to her own living expenses. KB also assists with the care of the two minor children.

. . . .

11. The Plaintiff . . . has reasonable and necessary monthly expenses of \$5,401.00. This amount includes an amount for her to begin to pay down principal on her mortgage loan, which is currently principal-only payments; \$300.00/month for gifts and celebrations with her children and family which she recently has not had the capability to do; \$200.00/month for vacation, since she has not been on a vacation since the date of separation some four (4) years ago, and the Defendant has done so with his new wife and her children; and \$100.00/month for activities and entertainment for herself and the girls. She does not have the means to meet her reasonable expenses and has a deficit of at least \$1,1818.00 per month.

The amount of alimony is a question for the trial court. *Quick v. Quick*, 305 N.C. 446, 450, 290 S.E.2d 653, 657, *rev'd on other grounds*, 305 N.C. 446, 290 S.E.2d 653 (1982). “The determination of what constitutes the reasonable needs and expenses of a party in an alimony action is within the discretion of the trial judge[.]” *Bryant v. Bryant*, 139 N.C. App. 615, 618, 534 S.E.2d 230, 232, *review denied*, 353 N.C. 261, 546 S.E.2d 91 (2000).

N.C. Gen. Stat. § 50-16.3A sets out the relevant factors the trial court should consider in determining the amount, duration, and manner of payment of alimony:

- (1) The marital misconduct of either of the spouses. . . .
- (2) The relative earnings and earning capacity of the spouses;

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- (3) The ages and the physical, mental, and emotional conditions of the spouses;
- (4) The amount and sources of earned and unearned income of both spouses, including, but not limited to, earnings, dividends, and benefits such as medical, retirement, insurance, social security, or others;
- (5) The duration of the marriage;
- (6) The contribution by one spouse to the education, training, or increased earning power of the other spouse;
- (7) The extent to which the earning power, expenses, or financial obligations of a spouse will be affected by reason of serving as the custodian of a minor child;
- (8) The standard of living of the spouses established during the marriage;
- (9) The relative education of the spouses and the time necessary to acquire sufficient education or training to enable the spouse seeking alimony to find employment to meet his or her reasonable economic needs;
- (10) The relative assets and liabilities of the spouses and the relative debt service requirements of the spouses, including legal obligations of support;
- (11) The property brought to the marriage by either spouse;
- (12) The contribution of a spouse as homemaker;
- (13) The relative needs of the spouses;
- (14) The federal, State, and local tax ramifications of the alimony award;
- (15) Any other factor relating to the economic circumstances of the parties that the court finds to be just

and proper.

(16) The fact that income received by either party was previously considered by the court in determining the value of a marital or divisible asset in an equitable distribution of the parties' marital or divisible property.

N.C. Gen. Stat. § 50-16.3A (2016).

Not one of these enumerated factors suggests the trial court must consider child support obligations in awarding alimony. We hold the trial court did not abuse its discretion in not considering Defendant's child support obligations in awarding alimony to Plaintiff.

Defendant next argues the trial court erred in allowing Plaintiff to speculate her utility expenses at her new home as evidence of her expenses. However, Defendant did not object to Plaintiff's testimony as to this issue. *Alford* at 569, 453 S.E.2d at 515-16. Defendant has not preserved review of this issue.

Finally, Defendant contends the trial court erred in awarding alimony to Plaintiff when "there was insufficient evidence of the life style of the parties prior to the date of separation." We disagree.

In its alimony order, the trial court took "judicial notice of the evidence, findings of fact and conclusions of law and order and judgment in the trial of the Plaintiff's claim for equitable distribution, and of the findings of fact, conclusions of law and order in the Amended Order of Contempt, Child Custody and Child Support."

The parties may establish the marital standard of living

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with evidence of these past expenditures. The parties may establish the marital standard of living also with evidence of current income and expenses. Evidence of current expenses alone may suffice if there is other evidence of the marital standard of living.

2 Suzanne Reynolds, *Lee's North Carolina Family Law* § 9.27, at 349 (5th ed. 1999).

However, the statutory factor of the marital standard of living is not as significant as it was prior to 1995:

The 1995 legislation refers to the standard of living of the marriage, as did the statutory predecessor. The 1995 legislation, however, downplays the factor by including it as but one in a much longer list of considerations. The marital standard of living will often provide a helpful benchmark in determining alimony and is set out for special consideration. . . . The increased statutory attention to other factors – needs, reimbursement, and rehabilitation, for example – means that the marital standard of living should no longer establish the ceiling in determining alimony.

Lee's Family Law § 9.27 at 347.

Here, the record is replete with evidence of the parties' past expenditures, especially with respect to purchases of real property. There is also ample evidence of the parties' current incomes. The trial court took judicial notice of this evidence in its alimony order. Defendant does not show how the trial court abused its discretion in awarding alimony to Plaintiff in this case.

Because Defendant has failed to show the trial court's judgment was unsupported by reason and could not have been the result of a competent inquiry, we

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conclude the trial court did not abuse its discretion in its award of equitable distribution and alimony in this case.

AFFIRMED.

Judges DILLON and ARROWOOD concur.

Report per Rule 30(e).