

An unpublished opinion of the North Carolina Court of Appeals does not constitute controlling legal authority. Citation is disfavored, but may be permitted in accordance with the provisions of Rule 30(e)(3) of the North Carolina Rules of Appellate Procedure.

NO. COA08-76

NORTH CAROLINA COURT OF APPEALS

Filed: 21 October 2008

VALERIE CLASEN HUDSON,
Plaintiff,

v.

Alamance County
No. 04 CVD 107

BERNARD JOHN HUDSON,
Defendant.

Court of Appeals

Appeal by Defendant from orders entered 2 August 2007 and 8 October 2007 by Judge G. Wayne Abernathy in Alamance County Superior Court. Heard in the Court of Appeals 20 August 2008.

Walker & Bullard, P.A., by Daniel S. Mullard, for Plaintiff-Appellee.

Slip Opinion

Wyrick Robbins Yates & Ponton LLP, by K. Edward Greene and Tobias S. Hampson, for Defendant-Appellant.

ARROWOOD, Judge.

Defendant appeals from the trial court's orders reducing Defendant's child support payment to \$978.00 per month, reducing Defendant's alimony payment to \$1,400.00 per month, and holding Defendant in civil contempt. We affirm in part and reverse and remand in part.

Valerie Clasen Hudson (Plaintiff) and Bernard John Hudson (Defendant) married on 22 June 1985 and separated on 29 July 2004. On 22 May 2006, the trial court ordered Defendant to pay alimony in the amount of \$2,000.00 per month commencing 1 March 2006 for a

term of 10 years. The court also ordered Defendant to pay \$1,145.00 in child support per month commencing 1 March 2006.

At the time of the hearing on 22 May 2006, Defendant worked for Avaya, earning a gross income of \$9,020.00 per month. Plaintiff's gross income from Advanced Services an in-home respiratory therapist was \$3,250.00 per month. In May 2006, Defendant learned that his job would be reassigned to another group in Avaya, and Defendant immediately began searching for a new job. Defendant discovered that "due to his longevity with his current company and seniority that he was earning more than the market would pay in the telecommunications industry." Defendant was offered a job with Newport News, Virginia, and a salary of \$84,132.00, and although Defendant did not wish to relocate, he did. Defendant received his last paycheck from Avaya on 31 May 2006 for \$9,020.00. At Defendant's new job with Newport News, his gross income was \$7,011.00 per month.

On 30 June 2006, Defendant filed a motion to reduce his alimony and child support obligation based on the loss of his job and new employment at a reduced salary. The trial court found that "[D]efendant is living substantially below the accustomed standard of living established during the marriage." The trial court ruled that an appropriate amount of alimony for Defendant to pay to Plaintiff is \$1,400.00 per month for the remainder of the term of alimony as set by the trial court. The court also ruled that based upon the North Carolina Child Support Guidelines, Defendant's child

support payment should be decreased to \$978.00 per month. From this order, Defendant appeals.

"Decisions regarding the amount of alimony are left to the sound discretion of the trial judge and will not be disturbed on appeal unless there has been a manifest abuse of that discretion." *Bookholt v. Bookholt*, 136 N.C. App. 247, 249-50, 523 S.E.2d 729, 731 (1999) (citing *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982)). The review of the trial court's findings are limited to "whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law.'" *Hartsell v. Hartsell*, 99 N.C. App. 380, 385, 393 S.E.2d 570, 573 (1990) (quoting *Adkins v. Adkins*, 82 N.C. App. 289, 292, 346 S.E.2d 220, 222 (1986)).

Statutory Factors

In Defendant's first argument, he contends that the trial court failed to properly consider the statutory factors required by N.C. Gen. Stat. § 50-16.3A in calculating its reduction of Defendant's alimony obligation. We disagree as to N.C. Gen. Stat. § 50-16.3A(b), but agree as to N.C. Gen. Stat. § 50-16.3A(c).

Specifically, Defendant argues that the trial court erred by entering the modified award without a proper consideration of the required alimony factors which determine the amount, duration, and manner of payment of alimony. Defendant contends that the trial court failed to make the following findings as required by N.C.

Gen. Stat. § 50-16.3A(b): (a) the parties' ability to pay and shared economic burden; (b) the relative earnings and earning capacity of the parties; (c) the accustomed standard of living of the parties; (d) the relative needs of the parties; (e) the relative estates of the parties; (3) and generally, the reasons for the amount, duration and manner of payment as required by N.C. Gen. Stat. § 50-16.3A(c).

N.C. Gen. Stat. § 50-16.9(a) (2007) requires, in pertinent part, the following: "An order of a court of this State for alimony or postseparation support, whether contested or entered by consent, may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." In general, the change of circumstances required for modification of an alimony order "must relate to the financial needs of the dependent spouse or the supporting spouse's ability to pay." *Rowe v. Rowe*, 305 N.C. 177, 187, 287 S.E.2d 840, 846 (1982). "The same factors used in making the initial alimony award should be used by the trial court when hearing a motion for modification." *Bailey v. Bailey*, __ N.C. App. __, __, __ S.E.2d __, __ (2008) (COA07-1340, filed 15 April 2008).

The trial court is required to "consider all relevant factors" in determining the amount and duration of alimony. N.C. Gen. Stat. § 50-16.3A(b) (2007). Section 50-16.3A(b) enumerates fifteen relevant, but non-exclusive, factors. "The trial court must at least make findings sufficiently specific to indicate that the trial judge properly considered each of the factors . . . for a

determination of an alimony award." *Rhew v. Rhew*, 138 N.C. App. 467, 470, 531 S.E.2d 471, 473 (2000) (internal quotation marks omitted). N.C. Gen. Stat. § 50-16.3A (2007) requires, in pertinent part, the following:

(b) The court shall exercise its discretion in determining the amount, duration, and manner of payment of alimony. The duration of the award may be for a specified or for an indefinite term. In determining the amount, duration, and manner of payment of alimony, the court shall consider all relevant factors, including:

. . . .

(2) The relative earnings and earning capacities 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;

. . . .

(8) The standard of living of the spouses established during the marriage;

. . . .

(10) The relative assets and liabilities of the spouses and the relative debt service requirements of the spouses, including legal obligations of support;

. . . .

(13) The relative needs of the spouses;

- (c) The court shall set forth the reasons for its award or denial of alimony and, if making an award, the reasons for its amount, duration, and manner of payment. Except where there is a motion before the court for summary judgment, judgment on the pleadings, or other motion for which the Rules of Civil Procedure do not require special findings of fact, the court shall make a specific finding of fact on each of the factors in subsection (b) of this section if evidence is offered on that factor.

"Findings of fact are sufficient to 'support the determination' an equitable division has been made when findings of fact have been made on the ultimate facts at issue in the case, and the findings of fact show the trial court properly applied the law in the case."

Friend-Novorska v. Novorska, 143 N.C. App. 387, 395, 545 S.E.2d 788, 793 (2001).

The findings of fact need not set forth the weight given to the factors in section 50-16.3A(b) by the trial court when determining the appropriate amount, duration, and manner of payment, as the weight given the factors is within the sound discretion of the trial court.

Id. When a statute requires the court to consider certain factors in making an award, "[t]he trial court must at least make findings sufficiently specific to indicate that the trial judge properly considered each of the [statutory] factors[.]" *Skamarak v. Skamarak*, 81 N.C. App. 125, 128, 343 S.E.2d 559, 561 (1986) (citing *Quick*, 305 N.C. 446, 290 S.E.2d 653).

In the instant case, the trial court made the following pertinent findings of fact:

5. The court entered an Order on May 22, 2006 which addressed alimony, child support, custody, equitable distribution and attorney fees. The defendant was ordered to pay alimony in the amount of \$2,000.00 per month commencing March 1, 2006 and on the first of each month thereafter for a term of 10 years. The defendant was ordered to pay the plaintiff \$1,145.00 per month as child support commencing March 1, 2006 and on the first of each month thereafter.

6. At the time of hearing for the May 22, 2006 Order, the court made the following findings regarding the incomes and expenses of the parties:

a. The defendant was working at Avaya and earning gross income of \$9,020.00 per month. The plaintiff's income was \$3,250.00 gross per month from Advanced Services. The plaintiff was also receiving \$600.00 per month net from rental income although the court did not include that amount in the plaintiff's income for child support purposes.

b. The defendant was paying \$122.00 per month in medical insurance premiums for the children.

c. The plaintiff had individual expenses of \$2,600.00 per month and fixed expenses of \$3,350.00 per month which included at least \$1,100.00 per month for a mortgage payment, \$400.00 in utilities, \$450.00 in automotive expenses, \$100.00 in phone expenses, tax and insurance expenses of \$350.00 and additional miscellaneous expenses of no less than \$1,000.00.

7. In May 2006, the defendant learned that his job was to be reassigned to another group in Avaya. The defendant immediately began to attempt to locate a new job. The defendant applied for jobs at other locations within the company as well as with other employers in North Carolina including Alamance County. The defendant discovered

that due to his longevity with his current company and seniority that he was earning more than the market would pay in the telecommunications industry. The defendant was able to locate a job in Newport News, Virginia with Northrup Gruman and was fortunate to obtain a salary of \$84,132.00. Although the defendant did not want to relocate, he did so as soon as possible. The defendant's change of jobs was involuntary and not done with any bad faith.

8. The defendant received his last full paycheck of \$9,020.00 on May 31, 2006 from Avaya. The defendant received a partial paycheck in June which included accrued vacation time; he netted \$2,666.00. The defendant began to draw unemployment benefits in the amount of \$884.00 a week. The defendant received his first paycheck from his new job on July 15, 2006 which was a partial paycheck in the amount of \$1,708.00 gross and \$1,192.15 net. The defendant's gross income is now \$7,011.00 per month and his net is \$4,754.42 after adding back \$129.43 for a 401(k) deduction per week. Although the defendant works overtime, he receives no extra pay as he is an exempt employee.

9. The plaintiff is employed with Advanced Services as an in-home respiratory therapist. She works out of High Point, North Carolina and covers a large geographical, multi-county area. The plaintiff must be on call and at times works in excess of 10 to 12 hours per day. The plaintiff has the added responsibility of raising 2 children who need her presence at least in the late afternoon /evening. Working as much overtime/on call as the plaintiff is was not part of her accustomed standard of living as she cares for the parties' minor children. Although the plaintiff's average pay often exceeds 40 hours per week, it is not in the children's best interest to require the plaintiff to work more than 40 hours per week and the Plaintiff is working these hours only [as necessary] as a result of [in]sufficient

alimony being paid. The plaintiff's gross income for purposes of alimony is established at \$19.90 per hour for a 40 hour work week which is \$3,449.00 gross per month. This is 40 cents more an hour more than the plaintiff made at the time of the last hearing which is only a \$33.00 per month increase. The Court also considers \$600.00 per month as rental income to be attributable to the Plaintiff for child support purposes.

10. The defendant's expenses on his affidavit of financial standing are reasonable. The expenses associated with the 302 Georgetown Drive house will be eliminated upon the sale of the house and the court considers this in setting alimony (housing expenses of monthly mortgage payment of \$1,180.00 and monthly utilities of \$325.00). The defendant's expenses excluding his attorney fees and the Georgetown house expenses, are \$5,005.00 per month which includes child support of \$1,145.00. This amount exceeds his net income and does not include alimony.

11. The plaintiff's expenses on her affidavit of financial standing exceed the amount available to maintain the standard of living the parties were accustomed to while married based upon the defendant's income at that time. During the period between January, 2003 and June, 2004, the parties spent \$5,080.00 per month for a household of five. However, her reasonable expenses based upon the standard of living during the marriage as set forth below exceed her income. The expenses for her individual needs are adopted as set forth in her affidavit with the following modifications: food away \$280, clothing \$100, dues \$57.53, recreation \$80, donations (omitted for purposes of what defendant must pay in alimony), gifts \$100, trips \$40, miscellaneous \$200, child support \$400 (a portion is for fixed expenses/ housing included elsewhere). Her reasonable individual expenses are \$2,126.02. Her

reasonable fixed expenses as set out in her affidavit (except for alimony taxes) are \$2,855.89. Her reasonable debt payments, other than legal fees, are \$300.00 a month. Her total expenses are \$5,281.91.

12. The plaintiff's approximate net income (based on 40 hours per week) is \$2398.80 per month. Additionally the plaintiff receives \$1,320.00 a month in rental income from a very old beach cottage, when it is rented. She has a shortfall of \$1,563.00 a month. However, she does receive the benefit of some of the shared expenses with her children for whom she receives \$1,145.00 a month child support from the defendant.

13. The evidence on the alimony factors has been considered by the court including that the trial court set the amount of alimony for a fixed term, and the tax consequences of the alimony award, in that it will be taxable to the Plaintiff and deducted by the Defendant.

14. An appropriate amount of alimony for the defendant to pay to the plaintiff is \$1,400.00 per month for the remainder of the term of alimony as set by the trial court.

15. The defendant pays \$215.00 per month for health insurance for the minor children.

16. The defendant paid at least \$2,824.00 on his alimony arrearage prior to Judge Harviel's order finding that the defendant was not in contempt of court.

17. The defendant has been depleting the assets he received in equitable distribution. The defendant has spent \$17,806.00 from the entry of the Order through February 2007 of his assets. In equitable distribution the defendant was distributed a Dreyfus account with a balance of \$21,048.00 as of the date of separation. The current balance is now \$1,200.34. The defendant was distributed two BB&T CDS with a combined balance of \$22,000.00 at the date

of separation which now have a current balance of \$1,075.00. The defendant was distributed a Truliant checking account with a balance of \$8,586.00 at the date of separation which now has a balance of \$1,300.00. The defendant is living substantially below the accustomed standard of living established during the marriage. The defendant has only bought one shirt, one pair of pants, and one pair of tennis shoes since separation. The defendant has had and still has access to approximately \$30,000.00 in stock which he has not liquidated to satisfy his legal obligations.

18. The defendant has a house located at 302 Georgetown Drive which was distributed to him in equitable distribution. The house is listed for sale. The house is valued at \$325,000. It is listed for \$369,000. The first mortgage secured by the house is \$101,000 and the second deed of trust to Wishart, Norris, Henninger & Pittman is for \$54,000.00. The net equity is \$170,000.00.

19. The plaintiff was allowed to remain in the marital residence through August 2006. By agreement of the parties, she remained there until January 18, 2007 and the defendant paid the mortgage saving the plaintiff the cost of housing of the monthly mortgage payment of \$1,180.00 per month of which approximately \$500.00 was applied to principal. The plaintiff saved at least \$4,000.00 in housing costs from August 2006 to January 2007.

20. The plaintiff's estate has not been depleted to the extent that the defendant's estate has. She has sold all of her bonds and has converted these and some other assets to real estate inasmuch as she used the proceeds for a down payment on a house.

21. Based upon the North Carolina Child Support Guidelines, Worksheet A, which is attached hereto and incorporated herein by reference, the defendant owes \$978.00 per month in child support.

22. The defendant failed to execute the Qualified Domestic Relations Order prior to the hearing although he has had the means and ability to do so.

23. The defendant has failed to pay anything toward the distributive award of \$60,186.00 notwithstanding the fact he owns in excess of \$30,000.00 in stock.

24. The defendant did not make the \$7,000 second installment payment for attorney fees as required notwithstanding that he has sufficient assets, if not income, to pay something.

25. The defendant was found not to be in contempt of court by Judge Harviel's order of June 20, 2006. The defendant filed his motion to decrease on June 20, 2006. By Judge Harviel's order the defendant was current at that time. He paid \$2,000.00 in July, \$320.00 for August 2006 through January 2007 and nothing since then (\$54.00 was for pictures). Based on the amount of \$1,400.00 and effective date of July 1, 2006, defendant's alimony arrearage is calculated as follows:

10 months at \$1,400.00	14,000
Payments made since 7/1/06	3,920
Excess child support (1 145-978 times 10)	1,670

	8,410.00

26. The plaintiff's attorney, Daniel Bullard, has expended 23 hours in the representation of the plaintiff on these motions.

The trial court addresses the relative earnings and earning capacities of the spouses in findings of fact 6a, 7, 8, 9, and 12. The trial court considers 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; in findings of fact 6a, 8, 12, 17, 18, and 20. The standard of living of the spouses established during the marriage is addressed in finding of fact 11. The trial court addresses the relative assets and liabilities of the spouses and the relative debt service requirements of the spouses, including legal obligations of support in findings of fact 10, 11, 12, 13, 16, 17, 18, 19, 20, 23, and 25. Finally, the relative needs of the spouses are addressed in findings of fact 6c, 9, 10, 11, 17, and 20.

We conclude that the trial court made findings sufficiently specific to indicate that the trial judge properly considered each of the factors under N.C. Gen. Stat. § 50-16.3A(b), for its determination of the alimony award. *Rhew*, 138 N.C. App. at 470, 531 S.E.2d at 473. This assignment of error is overruled.

However, the trial court did not make the required findings as to the reasons for making the duration of the alimony ten years. This Court has held that a trial court's failure to make any findings regarding the reasons for the amount, duration, and the manner of payment of alimony violates N.C. Gen. Stat. § 50-16.3A(c). See *Williamson v. Williamson*, 140 N.C. App. 362, 365, 536 S.E.2d 337, 339 (2000) (trial court must make ultimate findings of fact to support the amount of alimony awarded); *Fitzgerald v. Fitzgerald*, 161 N.C. App. 414, 421, 588 S.E.2d 517, 522 (2003). Although we conclude that the trial court in this case made sufficient findings to support the amount of the alimony award

under N.C. Gen. Stat. § 50-16.3A(b), we remand the alimony portion of the order to the trial court to make further findings of fact explaining its reasoning for the duration of the alimony award and its manner of payment as required by N.C. Gen. Stat. § 50-16.3A(c).

In Defendant's next argument, he contends that the trial court erred by entering an order awarding alimony requiring an immediate depletion of Defendant's estate and reducing him to poverty. We agree.

"Ordinarily, the parties will not be required to deplete their estates to pay alimony or to meet personal expenses[,]" *Beaman v. Beaman*, 77 N.C. App. 717, 722, 336 S.E.2d 129, 132 (1985), and "[a] spouse cannot be reduced to poverty in order to comply with an alimony decree." *Quick*, 305 N.C. at 457, 290 S.E.2d at 661. Our Supreme Court has noted:

It is entirely possible, for example, that the trial court might determine a spouse dependent under the guidelines noted above and then find that it cannot order the amount of alimony needed from the other spouse because the latter is incapable of providing that total amount of support for any number of reasons.

Williams v. Williams, 299 N.C. 174, 186, 261 S.E.2d 849, 858 (1980). "[T]he 'overriding principle' in cases determining the correctness of alimony is 'fairness to all parties.'" *Marks v. Marks*, 316 N.C. 447, 460, 342 S.E.2d 859, 866 (1986) (quoting *Beall v. Beall*, 290 N.C. 669, 679, 228 S.E.2d 407, 413 (1976)); see also *Swain v. Swain*, 179 N.C. App. 795, 799, 635 S.E.2d 504, 507 (2006), *disc. review denied*, 361 N.C. 437, 649 S.E.2d 897 (2007). Thus, we

consider whether the court's award in the present case is fair to all of the parties.

In the instant case, the trial court found the following with regard to Defendant's income and reasonable expenses: Defendant's net income is now \$4,754.42 per month after adding back \$129.43 for a 401(k) deduction per week; Defendant's reasonable expenses are \$5005.00 per month, which includes \$1,145.00 for child support, \$1,180.00 for Defendant's mortgage payment, and \$325.00 for utilities. The court stated, "[t]he expenses associated with the [marital home] will be eliminated upon the sale of the house and the court considers this in setting alimony[.]" The trial court found as fact the amount of Defendant's reasonable expenses "exceeds his net income and does not include alimony[.]" and Defendant "has been depleting the assets he received in equitable distribution." The Court stated:

In equitable distribution the defendant was distributed a Dreyfus account with a balance of \$21,048.00 as of the date of separation. The current balance is now \$1,200.34. The defendant was distributed two BB&T CDS with a combined balance of \$22,000.00 at the date of separation which now have a current balance of \$1075.00. The defendant was distributed a Truliant checking account with a balance of \$8,586.00 at the date of separation which now has a balance of \$1,300.00. The defendant is living substantially below the accustomed standard of living established during the marriage. . . . The defendant has and still has access to approximately \$30,000.00 in stock which he has not liquidated to satisfy his legal obligations.

Between May 2006 and February 2007, Defendant has substantially depleted his estate. On the other hand, "[t]he plaintiff's estate

has not been depleted to the extent that the defendant's estate has."

With regard to Plaintiff's income and expenditures, the trial court found that plaintiff's "reasonable individual expenses are \$2,126.02[;] [h]er reasonable fixed expenses as set out in her affidavit (except for alimony taxes) are \$2,855.89[;] [h]er reasonable debt payments, other than legal fees, are \$300.00 a month[;] [h]er total expenses are \$5,281.91 [per month]." Plaintiff's approximate net income is \$2,398.80 per month. Plaintiff sometimes receives \$1,320.00 per month in rental income from "a very old beach cottage, when it is rented." Plaintiff also "receive[s] the benefit of some of the shared expenses with her children for whom she receives \$1,145.00 [per] month [in] child support from the defendant." The court found that Plaintiff "ha[d] a shortfall of \$1,563.00 [per] month." Plaintiff "sold all of her bonds and has converted these and some other assets to real estate inasmuch as she used the proceeds for a down payment on a house.

Quick is instructive here, in which our Supreme Court reasoned:

According to the findings made by the trial court defendant "can afford" to pay \$1,275 in alimony out of his \$2,151 monthly income. This leaves defendant only \$876 with which to meet his reasonable monthly living expenses of \$3,800. Under this set of facts, defendant must delve into his estate to make up the \$2,924 monthly deficit and, within five years, will have depleted the "known value" of his estate. A spouse cannot be reduced to poverty in order to comply with an alimony decree.

Quick, 305 N.C. at 457, 290 S.E.2d at 661. As in *Quick*, Defendant's net monthly income is \$4,754.42 and his reasonable expenses are \$5,005.00, which creates a deficit before alimony is even considered. In order to comply with the trial court's order, Defendant must draw upon his estate to make up the \$1,650.58 monthly deficit.

Plaintiff argues, however, that *Swain*, 179 N.C. App. 795, 635 S.E.2d 504, is binding precedent, because the award was fair to both parties. She reasons that the award was fair because both Plaintiff and Defendant have a monthly deficit. We conclude that *Swain* is distinguishable from the instant case.

The supporting spouse in *Swain* was 58 years old and at the time of entry of the consent order awarding alimony, was employed as a vice president by Pentair Pool Products (Pentair). "[The supporting spouse] had a gross annual salary of approximately \$130,000 and received bonuses of \$20,000 to \$40,000 from his employment each year." However, "[the supporting spouse] was terminated from employment at Pentair due to a reorganization of the management group . . . [and] received a one-year severance package of \$145,320 paid in twelve monthly installments, plus stock and stock options." At the time of the hearing, the supporting spouse in *Swain* was employed by North Carolina State University at an annual salary of \$62,000, from which he received gross monthly earnings of \$4,920. The supporting spouse also received income of \$147 per month from a rental property, and his net monthly income was \$3,791.95. The supporting spouse's total monthly living

expenses were \$3,193, and his estate at the time of the hearing was \$449,000.

In *Swain*, this Court distinguished *Quick* and *Beaman*, stating that "the alimony awarded in the present case would not deplete the plaintiff's estate for almost 12 years based on his current financial situation, and could last substantially longer if plaintiff's income increases in accordance with the earning potential he has demonstrated. Thus, the award does not leave the plaintiff impoverished." *Swain*, 179 N.C. App. at 799, 635 S.E.2d at 507. The Court further held that "[b]ecause the award requires both parties to deplete their estates to meet their living expenses, the trial court's reduction of alimony was fair to both parties, and the trial court did not abuse its discretion." *Id.*

We find the reasoning *Swain* to be distinguishable from the case *sub judice*. Here, Defendant is currently depleting his already substantially diminished estate at a rate three times faster than Plaintiff. Defendant's net monthly income of \$4,754.42 and his reasonable expenses of \$5,005.00, creates a deficit before alimony is even considered. Plaintiff's net expenses also exceed her income. Both parties have a monthly deficit; however, Defendant is required to draw upon his estate three times more than Plaintiff, after alimony and child support are considered, to make up the \$1650.58 monthly deficit. Unlike in *Swain*, Defendant is rapidly depleting the value of his estate, and his estate has already been reduced, by more than \$48,000. Here, the depletion of Defendant's estate is not speculative; but is a fact which if

continued will reduce Defendant to poverty. Therefore, we find that the court's order is unfair and violative of *Quick*. We reverse and remand this portion of the trial court's order.

Civil Contempt

In Defendant's second argument, he contends that the trial court erred in finding Defendant in civil contempt.

"Any order for the payment of alimony or postseparation support is enforceable by proceedings for civil contempt[.]" N.C. Gen. Stat. § 50-16.7(j) (2007). "The scope of review in contempt proceedings is limited to whether the findings of fact by the trial judge are supported by competent evidence and whether those factual findings are sufficient to support the judgment." *McMiller v. McMiller*, 77 N.C. App. 808, 810, 336 S.E.2d 134, 135 (1985).

"Criminal contempt is a term applied where the judgment is in punishment of an act already accomplished, tending to interfere with the administration of justice." *Mauney v. Mauney*, 268 N.C. 254, 256, 150 S.E.2d 391, 393 (1966) (internal quotation marks omitted). "Civil contempt is a term applied where the proceeding is had to preserve and enforce the rights of private parties to suits and to compel obedience to orders and decrees made for the benefit of such parties." *Id.* (internal quotations omitted). Civil contempt is designed to coerce compliance with a court order, and a party's ability to satisfy that order is essential. *Adkins*, 82 N.C. App. at 293, 346 S.E.2d at 222. "Because civil contempt is based on a willful violation of a lawful court order, a person does not act willfully if compliance is out of his or her power."

Watson v. Watson, __ N.C. App. __, __, 652 S.E.2d 310, 318 (2007) (citing *Henderson v. Henderson*, 307 N.C. 401, 408, 298 S.E.2d 345, 350 (1983)), *disc. review denied*, 362 N.C. 373, 662 S.E.2d 551 (2008). "Willfulness constitutes: (1) an ability to comply with the court order; and (2) a deliberate and intentional failure to do so." *Sowers v. Toliver*, 150 N.C. App. 114, 118, 562 S.E.2d 593, 596 (2002). A general finding of present ability to comply is sufficient when there is evidence in the record regarding defendant's assets. *Adkins*, 82 N.C. App. at 292, 346 S.E.2d at 222.

In the instant case, the trial court concluded that Defendant "is in civil contempt prior to the hearing for not executing the QDRO[,]" and Defendant "is in civil contempt for paying nothing toward the distributive award or second installment of plaintiff's counsel fees." The trial court based its conclusions on the following findings of fact:

- (22) The defendant failed to execute the Qualified Domestic Relations Order prior to the hearing although he has had the means and ability to do so.
- (23) The defendant has failed to pay anything toward the distributive award of \$60,186.00 notwithstanding the fact he owns in excess of \$30,000.00 in stock.
- (24) The defendant did not make the \$7,000 second installment payment for attorney fees as required notwithstanding that he has sufficient assets, if not income, to pay something.

Defendant argues that because the findings "are not competent [that Defendant] has the present ability to pay the full amount . . . owed[,]'" the trial court erred by holding Defendant in civil contempt. Defendant also argues that the trial court made no findings regarding Defendant's "willfulness" in failing to make the payments. We disagree with both contentions.

Defendant was ordered to pay attorneys fees in the initial alimony order with an installment of \$7,000.00 due on 31 July 2006. According to the trial court's findings, Defendant certainly had assets that could satisfy this obligation; yet, Defendant paid nothing. The record clearly shows that Defendant could have paid the entire obligation by selling stock, which he held in his sole name, valued above \$30,000 and well in excess of the amount owed for attorneys fees. Defendant made the willful choice not to dispose of any of his assets to pay attorneys fees or even partially comply with any other of the remaining bases for which the court held Defendant in contempt. Defendant's failure to comply with the attorneys fees portion of the trial court's order, in and of itself, is a sufficient basis upon which the trial court properly found Defendant in civil contempt. Therefore, we need not review the remaining two bases. This assignment of error is overruled.

For the reasons stated above, we reverse and remand the trial court's order in part and affirm in part. The trial court shall conduct a new hearing for determination of an alimony award not inconsistent with this opinion, and the trial court shall make

appropriate and sufficient findings of fact and conclusions of law to support its new determination.

Affirmed in part; reversed and remanded in part.

Judges BRYANT and JACKSON concurs.

Report per Rule 30(e).