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NO. COA09-501

NORTH CAROLINA COURT OF APPEALS

Filed: 17 August 2010

KELLY B. CROCKER,
Plaintiff,

v.

Catawba County
No. 05 CVD 321

GREGORY S. CROCKER,
Defendant.

Appeal by plaintiff from orders entered 21 October 2008 and 7 January 2009 by Judge Amy R. Sigmon in Catawba County District Court. Heard in the Court of Appeals 16 November 2009.

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

Crowe & Davis, P.A., by H. Kent Crowe, for defendant-appellee.

GEER, Judge.

Plaintiff Kelly B. Crocker appeals from amended orders for postseparation support and alimony entered on remand following her prior appeal to this Court in *Crocker v. Crocker*, 190 N.C. App. 165, 660 S.E.2d 212 (2008) ("*Crocker I*"). With respect to the amended order for postseparation support, we hold that the order still does not include sufficient findings of fact regarding plaintiff's reasonable expenses. As for the amended alimony order, there appears to be a discrepancy in how the trial court treated income received from rental property owned by plaintiff as opposed

to rental property owned by defendant. Further, the trial court still has not made findings of fact explaining the reason for the duration and manner of the alimony payments. We must, therefore, remand for further findings as to each order.

Facts

Plaintiff and defendant married on 1 July 1989 and had four children. The parties separated on 6 September 2004 and divorced in November 2005. Plaintiff is a pediatrician, and defendant is self-employed, earning income through his ownership and management of rental properties. On 2 February 2005, plaintiff filed a complaint seeking divorce from bed and board, an interim distribution, equitable distribution, child custody, and child support. On 7 April 2005, defendant filed an answer and counterclaims, seeking divorce from bed and board, postseparation support, alimony, equitable distribution, child custody, and child support.

The trial court heard the issues of temporary custody, child support, and postseparation support on 28 June 2005. On 17 August 2005, the trial court entered a postseparation support order, awarding defendant \$2,000.00 per month in postseparation support. On 10 July 2006, the parties entered into a consent judgment regarding equitable distribution. The trial court entered the child custody and child support order on 25 September 2006, granting joint legal custody and shared physical custody. Plaintiff was ordered to pay defendant \$744.00 per month in child support.

Subsequently, on 20 October 2006, the trial court held a hearing on alimony, at which the court heard testimony and received evidence. The court announced its decision regarding alimony in open court on 13 February 2007 and directed counsel for defendant to prepare the order. On 7 March 2007, plaintiff filed a request for additional findings of fact and amendment of the order although the order had not yet been filed. That order was ultimately entered on 23 March 2007.

In the order, the trial court took judicial notice of and incorporated by reference the postseparation support order, the parties' consent judgment regarding equitable distribution, the child custody and support order, and the parties' wage affidavits and amended alimony affidavits. After concluding that plaintiff is a supporting spouse with the ability to pay alimony and that defendant is a dependent spouse substantially in need of maintenance and support from plaintiff, the trial court awarded defendant \$2,000.00 per month in alimony for a period of 16 years. On 29 March 2007, the trial court denied plaintiff's motion for additional findings of fact and amendment of the order.

Plaintiff appealed both the postseparation support order and the alimony order. In *Crocker I*, 190 N.C. App. at 172, 660 S.E.2d at 217, this Court reversed both orders and remanded for further findings of fact. On remand, the trial court held a non-evidentiary hearing on 4 August 2008. On 21 October 2008, the court entered amended orders for postseparation support and alimony. Both of the orders repeated many of the findings of fact

contained in the original orders, but added numerous new findings of fact. Plaintiff was again ordered to pay defendant \$2,000.00 per month in both postseparation support and alimony, with payment extending "for a period of 16 years (the duration of the marriage)."

Plaintiff filed notice of appeal from both orders on 18 November 2008. Subsequently, the trial court entered an order amending the amended alimony order to correct the figure reciting the amount of defendant's rental income. Plaintiff filed notice of appeal from the second alimony order on 15 January 2009.

Postseparation Support

N.C. Gen. Stat. § 50-16.2A(c) (2009) provides that, except in cases of marital misconduct, "a dependent spouse is entitled to an award of postseparation support if, based on consideration of the factors specified in [N.C. Gen. Stat. § 50-16.2A(b)], the court finds that the resources of the dependent spouse are not adequate to meet his or her reasonable needs and the supporting spouse has the ability to pay." Under N.C. Gen. Stat. § 50-16.1A(2) (2009), a dependent spouse "is actually substantially dependent upon the other spouse for his or her maintenance and support or is substantially in need of maintenance and support from the other spouse." A supporting spouse is the spouse "upon whom the other spouse is actually substantially dependent for maintenance and support or from whom such spouse is substantially in need of maintenance and support." N.C. Gen. Stat. § 50-16.1A(5).

Under N.C. Gen. Stat. § 50-16.2A(b), the trial court is required to base its award "on the financial needs of the parties, considering the parties' accustomed standard of living, the present employment income and other recurring earnings of each party from any source, their income-earning abilities, the separate and marital debt service obligations, those expenses reasonably necessary to support each of the parties, and each party's respective legal obligations to support any other persons." The court must "find specially 'those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached.'" *Crocker I*, 190 N.C. App. at 168, 660 S.E.2d at 214 (quoting *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982)).

A. Parties' Accustomed Standard of Living

Plaintiff first argues that the trial court did not comply with the Court's mandate that the trial court make findings of fact in accordance with N.C. Gen. Stat. § 50-16.2A(b) as to the parties' accustomed standard of living. "The trial court must determine the standard of living, socially and economically, to which the parties *as a family unit* had become accustomed during the several years prior to their separation." *Williams v. Williams*, 299 N.C. 174, 183, 261 S.E.2d 849, 856 (1980). The leading treatise on North Carolina family law has noted that "[p]arties usually rely on income and living expenses to determine the standard of living of

the family as a unit." 2 Suzanne Reynolds, *Lee's North Carolina Family Law* § 9.28 (5th ed. 1999).

In *Barrett v. Barrett*, 140 N.C. App. 369, 372-73, 536 S.E.2d 642, 645 (2000), where the defendant challenged the sufficiency of the trial court's findings as to the parties' standard of living, the Court held that the court's "explicit findings as to the parties' respective incomes during the marriage, the type of home in which they lived, and the types of family vacations they enjoyed," as well as a list of bills paid by the defendant prior to separation, "were sufficient for an *overall portrayal* of the parties' accustomed standard of living." (Emphasis added.) This Court has also found that a trial court sufficiently addressed the parties' standard of living when the order contained findings as to a husband's "monthly gross income and his reasonable living expenses, coupled with the findings as to [the wife's] monthly income and her expenses during the last year of the marriage." *Adams v. Adams*, 92 N.C. App. 274, 279-80, 374 S.E.2d 450, 453 (1988), *superseded on other grounds by statute as stated in Brannock v. Brannock*, 135 N.C. App. 635, 523 S.E.2d 110 (1999), *disc. review denied*, 351 N.C. 351, 543 S.E.2d 123 (2000).

Here, the trial court found on remand that throughout the marriage, defendant had been the children's primary caregiver and spent the majority of his time at home with the children, although he also worked part-time several days a week on his rental properties in Boone, North Carolina. The court found that defendant had a gross income of \$4,800.00 per month and net monthly

income of \$900.00. Plaintiff worked as a pediatrician three days each week, worked on weekends every six weeks, and was on call one night per week. The trial court found that plaintiff had a gross income of \$13,444.00 per month and net income of \$7,700.00 per month. The parties deposited their earnings into a joint account. During the marriage, the parties took family vacations and trips paid by joint marital funds.

At the date of separation, the parties owned real estate worth \$465,000.00 with mortgage debt of \$156,167.00, including both a marital residence and a house on lake front property. The parties had a vehicle valued at approximately \$40,000.00 and one valued at approximately \$5,000.00. No debt was owed on either vehicle. In addition, on about the date of separation, plaintiff gave defendant half the funds in the joint bank accounts, amounting to approximately \$21,180.00.

In light of the Court's holdings in *Barrett* and *Adams*, we conclude that the trial court's findings on remand – which included the ability of defendant to work part-time, the parties' monthly gross and net incomes, the ownership of two homes and cars with limited debt, the ability of the family to take family vacations, and the amount of savings – sufficiently portrayed their standard of living prior to separation for purposes of the postseparation support order. Thus, these findings satisfied the mandate of *Crocker I* with respect to making findings about the parties' standard of living.

Plaintiff further contends, however, that any findings as to the parties' standard of living were not supported by the evidence. On appeal, we review "'whether there was competent evidence to support the trial court's findings of fact.'" *Lee v. Lee*, 167 N.C. App. 250, 253, 605 S.E.2d 222, 224 (2004) (quoting *Shear v. Stevens Building Co.*, 107 N.C. App. 154, 160, 418 S.E.2d 841, 845 (1992)). Plaintiff asserts that although the court noted on remand that it was relying on evidence from the parties' earlier child custody hearing, "the Child Custody hearing did not occur until July 2006. Post-separation Support was heard in *June 2005*. Thus, the trial court could not have relied on the evidence from the custody hearing for purposes of post-separation support."

It appears that plaintiff is assuming that the trial court, on remand, was limited to considering only evidence presented at the original June 2005 hearing on postseparation support. She has not, however, cited any authority supporting that position. This Court's order in *Crocker I* did not preclude the trial court from considering additional evidence on remand if necessary to make the findings of fact missing from the original order.

At the hearing on remand, when the trial court indicated that it intended to rely upon evidence received at the child custody hearing, plaintiff did not object. See N.C.R. App. P. 10(b)(1) (2008) ("In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion It is also necessary for the complaining party to obtain a ruling upon the party's request,

objection, or motion."). See also *In re W.L.M. & B.J.M.*, 181 N.C. App. 518, 522, 640 S.E.2d 439, 442 (2007) ("At trial, respondent did not object to the trial court's taking judicial notice of the underlying juvenile case files for W.L.M. and B.J.M. and, therefore, has waived appellate review of this issue."). Plaintiff's counsel merely informed the court, "I don't see any effort by the moving [sic], who has the burden of proof here, Mr. Crocker, to introduce the transcripts of the custody hearing," to which the court responded, "I will take into consideration what you've argued to me today." Nor, on appeal, does plaintiff argue that the trial judge, who had also presided over the child custody hearing, could not consider in the alimony proceeding what she had heard in the custody hearing without transcripts.

Plaintiff does not suggest that the evidence at the custody hearing was insufficient to support the findings in the amended postseparation support order. We, therefore, hold that the trial court made sufficient findings of fact regarding the parties' accustomed standard of living. Those findings of fact, in turn, are supported by competent evidence.

B. Plaintiff's Reasonable Expenses

Plaintiff next challenges the adequacy of the trial court's findings of fact regarding plaintiff's reasonable expenses. In the original postseparation support order, the trial court had failed to make any findings at all regarding plaintiff's reasonable expenses. In *Crocker I*, 190 N.C. App. at 169, 660 S.E.2d at 215, part of the basis for the Court's remand as to the postseparation

support order was the trial court's failure to "make necessary findings of . . . the expenses reasonably necessary to support each of the parties."

On remand, the trial court made the following findings regarding the parties' reasonable expenses:

31. That the Plaintiff's reasonable expenses for herself are approximately \$5,103.00 per month. That the Court reviewed the Alimony Affidavit of the Plaintiff and found some of the stated monthly expenses to be excessive or not reasonable in the items listed. Specifically monthly clothing expenses, monthly tuition and book expenses, prescription medical expenses, and doctor bills, monthly hobby expenses, monthly savings contributions, ADT security and XM radio.

. . . .

33. That the Defendant's reasonable monthly expenses for himself are approximately \$2,850.00 per month. That the Court reviewed the Alimony Affidavit of the Defendant and found that some of is [sic] listed expenses were not reasonable or necessary in the amount listed. Specifically, food, medical insurance, and uninsured doctor bills.

Plaintiff argues that the finding with respect to her expenses is inadequate because it provides no explanation of why the trial court found some of her expenses unreasonable or excessive or how it calculated plaintiff's expenses.

The trial court was not, of course, required to accept the figures set out in plaintiff's affidavit detailing her expenses. In *Bookholt v. Bookholt*, 136 N.C. App. 247, 250, 523 S.E.2d 729, 731 (1999), *superseded on other grounds by statute as stated in Williamson v. Williamson*, 142 N.C. App. 702, 543 S.E.2d 897 (2001), the defendant argued that the trial court erred in finding that his

monthly expenses were lower than what the defendant listed on his financial affidavit. This Court disagreed, explaining:

"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, and he is not required to accept at face value the assertion of living expenses offered by the litigants themselves." *Whedon v. Whedon*, 58 N.C. App. 524, 529, 294 S.E.2d 29, 32, *disc. review denied*, 306 N.C. 752, 295 S.E.2d 764 (1982). Implicit in this is the idea that the trial judge may resort to his own common sense and every-day experiences in calculating the reasonable needs and expenses of the parties. Here, the trial court apparently felt the \$2100 in projected housing costs was unreasonable and then reduced that figure to an amount it felt was more reasonable. By doing so, we find no abuse in the exercise of its discretion.

Id.

Based on *Bookholt*, the trial judge in this case had the discretion, after hearing the testimony and viewing the exhibits presented by the parties, to decide, based on her own common sense and experience, that some of the expenses set out in plaintiff's affidavit – specifically pertaining to clothing, tuition and books, medical prescriptions, doctor bills, hobbies, savings contributions, ADT security, and XM radio – were not reasonable and should be reduced. Nevertheless, when the trial court exercises this discretion, it must provide some explanation as to how it has calculated the parties' incomes and expenses. In the absence of any explanation, this Court cannot effectively review the decision.

As our Supreme Court has explained:

Effective appellate review of an order entered by a trial court sitting without a jury is largely dependent upon the specificity by

which the order's rationale is articulated. Evidence must support findings; findings must support conclusions; conclusions must support the judgment. Each step of the progression must be taken by the trial judge, in logical sequence; each link in the chain of reasoning must appear in the order itself. Where there is a gap, it cannot be determined on appeal whether the trial court correctly exercised its function to find the facts and apply the law thereto.

Coble v. Coble, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980). In *Bookholt*, this Court was able to determine from the findings of fact that the trial court had reduced the housing costs figure. 136 N.C. App. at 250, 523 S.E.2d at 731.

Here, the order contains no indication how the trial court derived the figure of \$5,103.00 in determining plaintiff's reasonable expenses. If we assume, since this order related to postseparation support, that the trial court used plaintiff's 28 June 2005 financial affidavit, plaintiff reported necessary expenses of \$12,234.00 for plaintiff herself. If we then deduct completely the amounts listed in that affidavit for each of the expenses found by the trial court to be unreasonable, the total expense amount is reduced by \$4,474.00 per month: clothing (\$310.00 for purchase and cleaning), tuition and books (\$58.00 for tuition and \$40.00 for books), prescription medications (\$40.00), doctor bills (\$62.00), hobbies (\$217.00), savings account deposits (\$3,697.00), ADT security (\$33.00), and XM radio (\$17.00). The total necessary expenses would then be \$7,760.00.

Since the trial court found that "[p]laintiff's reasonable expenses for herself are approximately \$5,103.00 per month," and

the trial court gave no indication that it believed that plaintiff did not need to spend any amount at all for clothing, prescription medications, or uninsured doctor bills, we are left with a discrepancy of more than \$2,657.00 per month between the amount sought and the amount found as reasonably needed. The trial court's failure to explain this gap precludes us from effectively reviewing this decision.

The amount of plaintiff's reasonable monthly expenses is an important factor with respect to whether plaintiff is a supporting spouse and whether she has the ability to pay the amount of postseparation support awarded. If plaintiff's reasonable monthly expenses are \$7,760.00 – the figure reached by deducting the expenses found unreasonable by the trial court from the expenses itemized by plaintiff – then her monthly expenses exceed her net income as found by the trial court (\$7,656.00). We must, therefore, remand for further findings of fact as to plaintiff's reasonable expenses. *See Vadala v. Vadala*, 145 N.C. App. 478, 480, 550 S.E.2d 536, 538 (2001) (remanding for further findings of fact when trial court made finding as to amount of plaintiff's income, but gave "no indication as to how [plaintiff's income] was calculated" and Court, therefore, could not "confirm or deny this finding").

C. Plaintiff's Legal Obligation to Pay Child Support

Plaintiff also contends that the trial court failed to make sufficient findings regarding her respective legal obligations to support any other persons, as required under N.C. Gen. Stat. §

50-16.2A(b). We note that the original postseparation support order lacked any findings at all as to plaintiff's child support obligations although the temporary child support order was entered on the same day as the postseparation support order. On remand from this Court, the trial court added the following finding of fact: "That prior to the Post-Separation Support hearing the Court entered a Temporary Child Custody Order giving the Defendant primary custody of the minor children and that the Plaintiff was ordered to pay child support. That the Court incorporates the Temporary Child Support Order by reference. See Court # 1."

Plaintiff argues that "this Court held [in *Crocker I*] the incorporation of prior court documents was insufficient to show the trial court had properly considered the statutory factors." The Court's ruling in *Crocker I* was not as sweeping as articulated by plaintiff. Rather, the Court held: "The *general incorporation of all findings from other court documents* is not sufficiently specific to demonstrate whether the trial judge properly considered the statutory factors for awarding alimony." 190 N.C. App. at 170, 660 S.E.2d at 215 (emphasis added). Here, the trial court specifically found that plaintiff had been ordered to pay child support and referred to the actual child support order for the precise terms of that child support. We hold that this finding is sufficient to demonstrate that the trial court considered plaintiff's legal obligation to pay child support, as required by N.C. Gen. Stat. § 50-16.2A(b).

D. Findings of Fact Regarding Financial Needs of Parties

Plaintiff next argues that "[t]he ultimate requirement of N.C. Gen. Stat. § 50-16.2A is for the trial court to make a determination of the financial needs of the parties, considering the various required factors." Plaintiff points out that in *Crocker I*, this Court reversed the trial court's order in part because, according to plaintiff, "it had simply recited [d]efendant's testimony he needed \$3,500 per month as post-separation support." Plaintiff contends that the trial court erred on remand by concluding that defendant needed support by simply comparing his income with his expenses.

This Court found the original finding of fact inadequate: "[B]ecause the court's finding about husband's need for support merely recites husband's testimony, it is insufficient to show the court considered the other statutory factors for postseparation support." *Crocker I*, 190 N.C. App. at 169, 660 S.E.2d at 215. In other words, the problem with the trial court's finding of fact was that it described defendant's testimony without actually making a finding of fact regarding defendant's needs. The Court then held: "Coupled with the court's failure to make findings of fact about the parties' standard of living, we conclude the trial court failed to make necessary findings of the financial needs of the parties, considering the parties' accustomed standard of living and the expenses reasonably necessary to support each of the parties." *Id.*

As we have held, the trial court on remand made sufficient findings of fact regarding the parties' accustomed standard of living. The trial court also found that defendant has reasonable

expenses of approximately \$2,850.00 per month. As plaintiff notes, the trial court then determined defendant's financial needs by subtracting his reasonable expenses from his net income, resulting in a financial need of \$2,000.00.

Plaintiff argues that this approach is precluded by *Knott v. Knott*, 52 N.C. App. 543, 546, 279 S.E.2d 72, 75 (1981), in which this Court concluded: "It is clear then that a mere comparison of plaintiff's expenses and income is an improperly shallow analysis." Plaintiff has, however, overlooked the actual rationale that led to this conclusion:

The second phrase of G.S. 50-16.1(3) defines a "dependent spouse" as one who is *substantially in need of* maintenance and support. The determination that a plaintiff wife is dependent under this second phrase requires only that plaintiff establish that *she would be unable to maintain her accustomed standard of living, established prior to separation*, without financial contribution from defendant husband.

Id., 279 S.E.2d at 74-75 (first emphasis original; second emphasis added). When a trial court simply compares current expenses to current income, the court is not taking into account what the spouse needs in order to maintain the standard of living existing during the parties' marriage.

Here, the trial court's findings of fact establish that defendant enjoyed a higher standard of living when he was married than he had after the separation. If the trial court had calculated defendant's financial needs based on that standard of living, as *Knott* suggests, that figure would be higher than the figure obtained by deducting expenses from income. In other words,

plaintiff has benefitted from the trial court's method of calculating defendant's financial needs. This argument does not, therefore, provide a basis for reversing the trial court's order or ordering additional findings of fact. We, therefore, uphold the trial court's finding regarding defendant's needs.

E. Amount of Postseparation Support Payment

Finally, plaintiff contends that the trial court made insufficient findings of fact to explain why it chose \$2,000.00 as the appropriate amount for postseparation support. "Only when an appellate court knows what the facts are can it determine whether the amount awarded was within the trial court's discretion." *Quick*, 305 N.C. at 457, 290 S.E.2d at 661.

It is apparent from the trial court's findings of fact that \$2,000.00 is the amount the court deemed necessary to permit defendant to meet his reasonable monthly expenses of \$2,850.00 given his net income of approximately \$834.00 per month. In any event, because the trial court made insufficient findings of fact regarding plaintiff's reasonable monthly expenses, we must vacate the amended postseparation support order and remand for further findings of fact. The trial court must, prior to entering any new postseparation support award, make conclusions of law based on those new findings of fact regarding whether plaintiff is a supporting spouse, the amount to be awarded, and plaintiff's ability to pay the amount awarded.

Alimony

N.C. Gen. Stat. § 50-16.3A(a) (2009) provides that "[t]he court shall award alimony to the dependent spouse upon a finding that one spouse is a dependent spouse, that the other spouse is a supporting spouse, and that an award of alimony is equitable after considering all relevant factors" This Court has explained:

As our statutes outline, alimony is comprised of two separate inquiries. First is a determination of whether a spouse is *entitled* to alimony. N.C. Gen. Stat. § 50-16.3A(a) (1999). Entitlement to alimony requires that one spouse be a dependent spouse and the other be a supporting spouse[.] *Id.* If one is entitled to alimony, the second determination is the *amount* of alimony to be awarded. N.C. Gen. Stat. § 50-16.3(b). We review the first inquiry de novo, *Rickert v. Rickert*, 282 N.C. 373, 379, 193 S.E.2d 79, 82 (1972), and the second under an abuse of discretion standard, *Quick v. Quick*, 305 N.C. 446, 453, 290 S.E.2d 653, 658 (1982).

Barrett, 140 N.C. App. at 371, 536 S.E.2d at 644. With respect to the determination whether a spouse is "dependent" or "supporting," the trial court must make "sufficiently specific" underlying findings of fact to permit appellate review. *Talent v. Talent*, 76 N.C. App. 545, 548-49, 334 S.E.2d 256, 259 (1985), *superseded on other grounds by statute as stated in Rhew v. Rhew*, 138 N.C. App. 467, 531 S.E.2d 471 (2000).

A. Incorporation of Amended Postseparation Support Order and Verbatim Findings of Fact from Child Custody and Support Order

Plaintiff first argues that the trial court ignored the mandate of *Crocker I* by incorporating the amended order for postseparation support in the amended order for alimony. In

Crocker I, 190 N.C. App. at 169, 170, 660 S.E.2d at 215, the Court explained that although the trial court had "purported to make extensive findings of fact by taking judicial notice of the postseparation support order," these findings could not stand because "[t]he general incorporation of all findings from other court documents is not sufficiently specific to demonstrate whether the trial judge properly considered the statutory factors for awarding alimony."

Crocker I did not hold that a trial court may not take judicial notice of a prior order. Indeed, as a general matter, "a court may take judicial notice of earlier proceedings in the same cause." *In re Byrd*, 72 N.C. App. 277, 279, 324 S.E.2d 273, 276 (1985) (emphasis added). Nor does *Crocker I* preclude a trial court from incorporating by reference that prior order rather than setting out the specific terms of that order. *Crocker I* holds, instead, that a trial court cannot abdicate its responsibility for making specific statutorily-required findings of fact in a particular proceeding by incorporating by reference a prior order in lieu of making its own findings of fact.

Here, while reciting basic background facts – including jurisdictional facts, the date the parties married and separated, the ages of their children, and prior proceedings – the trial court found: "That the Plaintiff was ordered to pay the Defendant Post-Separation Support in the amount of \$2,000.00 per month. That the Court takes judicial notice of the said Post-Separation Support Order and incorporates the order by reference. Aforementioned

order is attached as Court # 1." This finding of fact is only one of 81 findings of fact and was not included as a substitute for any findings required in connection with an award of alimony.

The trial court's finding of fact regarding the amended postseparation support order specified the one fact pertinent to the amended alimony order: the amount that plaintiff had been paying in postseparation support. The trial court did not then unnecessarily increase the length of the alimony order by summarizing the other findings of fact and conclusions of law contained in the postseparation support order, but rather simply attached that prior order to the alimony order as the court's own exhibit. This was an evidentiary finding of fact and not an ultimate finding of fact necessary for determination of the request for alimony.

In the original alimony order, the court took judicial notice of several documents related to the parties' divorce proceedings, but did not make sufficient independent findings of fact. On remand, however, the trial court cured this problem because although the court took judicial notice of the amended postseparation support order – making it part of the evidentiary record – it also made its own independent findings of fact related to the N.C. Gen. Stat. § 50-16.3A(a) factors.

Plaintiff, however, cites various appellate decisions holding that a trial court's findings of fact and conclusions of law are not binding on the trial court when deciding the question of alimony. There is, however, nothing in the amended alimony order

that suggests that the trial court viewed its prior order as binding and, therefore, the cited decisions are irrelevant to the issues in this appeal. We hold that the trial court did not violate *Crocker I* when it incorporated by reference its amended postseparation support order. See also *Carlton v. Carlton*, 145 N.C. App. 252, 261-62, 549 S.E.2d 916, 923 (Tyson, J., dissenting) (concluding that trial court's "incorporation of a prior order and evidence is well within the trial court's discretion"), *rev'd per curiam for reasons stated in dissent*, 354 N.C. 561, 557 S.E.2d 529 (2001), *cert. denied*, 536 U.S. 944, 153 L. Ed. 2d 811, 122 S. Ct. 2630 (2002).

Plaintiff further argues that the trial court's new findings of fact violate *Crocker I* because these findings – although set out specifically in the order – were taken verbatim from the child custody and support order. The error addressed in *Crocker I*, however, was the trial court's failure to specifically include within the alimony order findings of fact addressing the statutorily-required factors. When the trial court merely incorporated *by reference* other orders wholesale, this Court could not determine that the trial court had considered those factors even if there were, within the separate prior orders, findings of fact pertinent to those factors.

Plaintiff does not cite any authority and *Crocker I* does not hold that the trial court was barred on remand from including within its amended alimony order specific findings of fact relating to the statutory factors that were copied verbatim from any other

order – so long as those findings of fact were supported by evidence properly before the trial court in connection with the request for alimony. *Cf. United Leasing Corp. v. Guthrie*, 192 N.C. App. 623, 633, 666 S.E.2d 504, 510 (2008) (observing that verbatim adoption of party's proposed findings of fact "'will be set aside on appeal only where there is no competent evidence in the record to support them'" (quoting *Weston v. Carolina Medicorp, Inc.*, 102 N.C. App. 370, 381, 402 S.E.2d 653, 660, *appeal dismissed and disc. review denied*, 330 N.C. 123, 409 S.E.2d 611 (1991))).

Although plaintiff argues that no evidence was presented during the hearing on remand to support these findings – including the parties' accustomed standard of living prior to separation – we have already addressed that issue in connection with the amended postseparation support order. We, therefore, hold that the trial court did not violate *Crocker I* on remand in making its new findings of fact in the amended alimony order.

B. Plaintiff's Supporting Spouse and Defendant's Dependent Spouse Status

We next consider plaintiff's argument that the trial court on remand again failed to make sufficient findings of fact supported by the evidence to support its conclusions that plaintiff is a supporting spouse and defendant is a dependant spouse. This Court, in *Crocker I*, held, based on *Williams*, 299 N.C. at 182-83, 261 S.E.2d at 855-56, that "in order to support its finding that husband was actually substantially dependent, the trial court should have made findings of the parties' incomes and expenses and the standard of living of the family unit." 190 N.C. App. at 170-

71, 660 S.E.2d at 216. The Court concluded that "[a]lthough the court made findings of fact of the parties' incomes, it did not make any findings of fact to show it considered their expenses or their standard of living. Accordingly, the court's findings of fact were insufficient to support a finding that husband was actually substantially dependent." *Id.* at 171, 660 S.E.2d at 216.

Plaintiff argues that the trial court failed to comply with this mandate. With respect to the parties' standard of living, plaintiff argues only that no evidence was presented at the alimony hearing to support the new findings of fact, a contention that we have already rejected.

As for the parties' expenses, plaintiff contends that "[t]he trial court also made no findings as to either [plaintiff] or [d]efendant's living expenses" While this statement was true with respect to the original alimony order, in the amended order, the trial court specifically found:

74. That the Plaintiff's monthly expenses that are reasonable and necessary are approximately \$6,000.00 per month.

. . . .

77. That the Defendant's reasonable needs and expenses to maintain his accustomed standard of living that he and the Plaintiff shared during the marriage is approximately \$4,300.00 per month.

The trial court's findings of fact indicate that plaintiff's expenses were supporting a standard of living higher than that shared during the parties' marriage. Plaintiff has not explained

in what way these findings are inadequate to comply with this Court's mandate in *Crocker I*.

This Court in *Crocker I* also held that the trial court's findings of fact were insufficient to find that defendant was substantially in need of maintenance or support because "the court made no findings of the standard of living of the parties, husband's need for financial contribution, or the parties' estates." 190 N.C. App. at 171, 660 S.E.2d at 216. The Court further agreed with plaintiff, with respect to N.C. Gen. Stat. § 50-16.3A(b)(10) (requiring consideration of "[t]he relative assets and liabilities of the spouses and the relative debt service requirements of the spouses, including legal obligations of support"), that the trial court failed to make findings regarding "husband's real estate assets." *Crocker I*, 190 N.C. App. at 172, 660 S.E.2d at 216.

Plaintiff argues that the trial court, on remand, again failed to make adequate findings of fact regarding the parties' estates because the court erred in its findings as to the husband's real estate holdings. The trial court found on remand "[t]hat the tax value on the property that the Defendant owns in Boone is in excess of \$800,000. That the Defendant derives rental income from this property and has throughout the marriage. That if the Defendant were to sell the property he would be without the benefit of regular monthly income."

Plaintiff insists that the trial court, in making this finding, erred in excluding the portion of plaintiff's exhibit 12,

which included a valuation of defendant's assets as being worth in excess of \$1.4 million. At the original alimony hearing, when the trial court declined to admit plaintiff's exhibit 12, plaintiff's counsel responded:

Your Honor, on Exhibit 12, half of that is [plaintiff's] listing of her assets.

I would ask the Court to consider at least [plaintiff's] listing of her assets, because she's testified to it, and you can just mark through and disregard the other.

The court agreed to plaintiff's request, noting that it would allow the portion of exhibit 12 which pertained to plaintiff's assets, but that it would not consider the portion related to defendant's assets.

Plaintiff argues that the trial court erroneously based its exclusion on the fact that the assets had been distributed by the consent equitable distribution order, in which the parties' had agreed that the judgment – giving defendant, among other assets, "all real property in his name" and giving plaintiff, among other assets, "her interest in Catawba Pediatrics, Kinder Corporation and her retirement" – was a "fair and equal division of marital assets." Defendant contends that this consent judgment establishes that the parties' assets were equal in value.

Plaintiff has, however, cited no authority specifically addressing either the admissibility of exhibit 12 or the trial court's rationale in excluding it. The issue is not, therefore, properly before this Court. The version of Rule 28(b)(6) of the Rules of Appellate Procedure applicable to this appeal provides:

"Assignments of error . . . in support of which no reason or argument is stated *or authority cited*, will be taken as abandoned."
(Emphasis added.)

Plaintiff further argues that although the court found "the tax value on the property that the Defendant owns in Boone is in excess of \$800,000," the evidence showed that the real estate was worth over \$900,000.00. Defendant's own testimony indicated that the value of his rental properties totaled approximately \$874,700.00, thus supporting the trial court's finding of fact. "A trial court's findings of fact are conclusive on appeal if the trial court sits as the trier of fact and they are supported by competent evidence, even if there exists evidence that might sustain a finding to the contrary." *Schroader v. Schroader*, 120 N.C. App. 790, 796, 463 S.E.2d 790, 794 (1995).

Moreover, plaintiff has failed to demonstrate that the trial court needed to be more precise in its valuation of the real estate. The court found that this property was held for its rental value and that if defendant sold the property, he would have no regular monthly income. In light of this finding, which plaintiff does not challenge, we cannot see how it is material whether the property is valued at "in excess of \$800,000," as the trial court found, or more than \$900,000.00 or even \$1.4 million, as plaintiff contends. For this same reason, we cannot see how plaintiff was prejudiced by the exclusion of exhibit 12. We, therefore, hold that the trial court made the findings regarding defendant's real estate required by *Crocker I*.

C. Plaintiff's Income

On remand, the trial court recalculated plaintiff's monthly income to include monthly rental income from Kinder Corporation Associates ("KinderCorp"), a rental property owned by plaintiff's medical practice. The effect of this adjustment was to increase plaintiff's monthly income from \$13,000.00 in the original order to \$16,427.00 in the amended order.

Plaintiff argues that the modification violated *Lea Co. v. N.C. Bd. of Transp.*, 323 N.C. 697, 699, 374 S.E.2d 866, 868 (1989), in which our Supreme Court explained that a "decision of this Court on a prior appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal." In *Lea*, the Court held that because the Court's previous mandate affirmed the trial court's judgment awarding the plaintiff 11% simple interest with respect to compensation for the State's taking of his property, and did not include a remand for consideration of an award of compound interest, the trial court subsequently "'had no authority to modify or change in any material respect the decree affirmed.'" *Id.* at 700, 374 S.E.2d at 868 (quoting *Murrill v. Murrill*, 90 N.C. 120, 122 (1884)). There is a critical distinction between this case and *Lea*: this Court, in *Crocker I*, did not affirm the trial court in any respect, but rather reversed the trial court and remanded for further findings of fact.

The plaintiff in *Crowder v. Crowder*, 147 N.C. App. 677, 682, 556 S.E.2d 639, 642-43 (2001), similarly argued that when this

Court reversed and remanded an equitable distribution order, the trial court lacked authority, on remand, to reconsider the value of a logging company when not specifically directed to do so. This Court held that because the opinion from the first appeal "did not explicitly affirm or uphold any part of the court's order, findings, or conclusions," but rather made "a blanket reversal," the trial court was authorized to reconsider the logging company's value. *Id.* See also *Friend-Novorska v. Novorska*, 143 N.C. App. 387, 393-94, 545 S.E.2d 788, 793 (holding that vacated portions of original order "were void and of no effect," meaning that trial court, on remand, "was free to reconsider the evidence before it and to enter new and/or additional findings of fact based on the evidence, with the exception that the trial court was bound on remand by any portions of the [original] order affirmed by this Court in *Friend-Novorska I*"), *aff'd per curiam*, 354 N.C. 564, 556 S.E.2d 294 (2001).

Here, the Court reversed and remanded the original alimony order, affirming no part of the order. The trial court was, therefore, free on remand to reconsider the evidence and make different findings of fact. Accordingly, *Crocker I* did not bar the trial court from revisiting its findings regarding plaintiff's income.

Plaintiff further claims, however, that the court erred by finding that "rental income earned by Kinder Corporation should be imputed to [plaintiff] as personal income." Plaintiff contends that the trial court in effect considered plaintiff's earning

capacity without making any finding that plaintiff was acting in bad faith or was intentionally depressing her income. See *Megremis v. Megremis*, 179 N.C. App. 174, 182, 633 S.E.2d 117, 123 (2006) ("It is well established that a trial court may consider a party's earning capacity only if the trial court finds the party acted in bad faith.").

Our review of the order does not indicate that the trial court was imputing income. The court made the following findings as to the KinderCorp rental income:

32. That during the marriage and prior to Date of Separation the Plaintiff received income from Kinder Corporation Associates which was a rental property owned by her medical practice. That in 2004 the net rental income received from the Kinder Corporation Associates was approximately \$23,935.00.

33. That the Plaintiff uses the income received from Kinder Corporation Associates rental to pay off the mortgage owed on building use by Kinder Corporation. That this money is still considered income for the Plaintiff.

. . . .

66. That through her partnership at Catawba Pediatrics the Plaintiff receives rental income from Kinder Corporation on an average of \$30,000.00 per year.

Based on these findings of fact, the trial court was treating the rental income as actual income. The fact that "income" may have never been paid to plaintiff because it was used to pay off the mortgage does not alter the fact that it was income.

We agree with plaintiff, however, that there appears to be a disparity in how the trial court treated rental income "received"

by plaintiff and rental income earned by defendant from the properties he owned. With respect to defendant's rental properties, the court found:

31. That in 2004 the Defendant's gross income from his rental properties in Boone was approximately \$32,000. That the Defendant's NET income from said properties in 2004 was approximately \$8,700.00[.] That the Defendant must use some of the income received in rent to use [sic] for maintenance, upkeep, and improvement of rental properties.

. . . .

48. That the Defendant receives gross monthly income in the amount of \$750.00 [per] month in dividends; [\$4,500.00] in rent; post-separation support of \$2,000.00 and \$770.00 for support of the minor children.

49. That after deductions from this income the Defendant receives approximately \$4,282.00 per month in income for himself and the minor children.

Although it is not completely clear, it appears that the trial court deducted defendant's expenses in maintaining and improving the rental property from his income before determining his net monthly income. Yet, it does not appear that the trial court performed a similar deduction for the mortgage payment made on the KinderCorp rental property.

While the trial court may have had a reason for the differing treatment, the amended alimony order does not set out any rationale for the trial court's approach. Without knowing why the trial court proceeded as it did, we cannot determine whether its findings are supported by evidence or whether it abused its discretion in distinguishing between the two parties. Therefore, we must remand

this issue for the trial court to clarify its rationale. See *Bryant v. Bryant*, 139 N.C. App. 615, 619, 534 S.E.2d 230, 233 ("We . . . find the trial court's inclusion of this investment income amount as an expense for the plaintiff but not for the defendant constituted an abuse of discretion. It is not logical that the trial court could properly characterize this investment income, earned and reinvested during the course of the marriage, as an expense for one spouse but not for the other."), *disc. review denied*, 353 N.C. 261, 546 S.E.2d 91 (2000).

D. Amount, Duration, and Manner of Alimony Payment

Lastly, plaintiff contends that the trial court violated N.C. Gen. Stat. § 50-16.3A(c), which requires that a trial court awarding alimony "set forth . . . the reasons for its amount, duration, and manner of payment," as well as the Court's mandate in *Crocker I*: "The trial court failed to state any reason for the amount of alimony, its duration, or the manner of payment. On remand, we direct the court also to make findings of fact in accordance with § 50-16.3A(c)." 190 N.C. App. at 172, 660 S.E.2d at 217. Plaintiff contends that the trial court again failed to give an explanation for awarding the amount of \$2,000.00 per month, for the 16-year duration of the award, or for ordering that payment be made in either cash or certified funds.

As with the amended postseparation support order, even though the trial court did not – as would be the better practice – specify the rationale underlying its determination that the figure of \$2,000.00 per month was appropriate for alimony, the court's basis

can be determined by reviewing the findings of fact. The trial court found that defendant's reasonable needs and expenses amount to \$4,300.00 per month, while his net monthly income is approximately \$2,284.75 per month, leaving a difference of just over \$2,000.00. Nevertheless, since we must send the order back for further findings as to plaintiff's income, the court can address this issue on remand.

With respect to the duration of the alimony, the trial court again failed to explain its reason for the 16-year duration of the award, other than to note that the parties were married 16 years. Neither the trial court nor defendant have explained the significance of that fact for the duration of alimony.

In addition, the trial court still did not explain why it was requiring plaintiff to pay the alimony in cash or certified funds. Although defendant suggests that this provision regarding the manner of payment was for plaintiff's benefit – to ensure that she was not held in contempt as a result of a bounced check – the trial court never said so.

We are, therefore, required to set aside the amended alimony order and remand to the trial court again for findings of fact as to this issue. *See, e.g., Williamson*, 140 N.C. App. at 365, 536 S.E.2d at 339 (remanding where court "failed to provide any reasoning for the \$1,500.00 monthly amount, why the award was permanent, or why it would be paid directly to the Union County Clerk of Court").

Conclusion

On remand, as to the amended postseparation support order, the trial court must make additional findings setting out its basis for the calculation of plaintiff's reasonable monthly expenses. With respect to the amended alimony order, the trial court must make additional findings (1) regarding its treatment of the KinderCorp rental income and (2) explaining the reason for the duration and manner of payment of the alimony award.

Reversed and remanded.

Chief Judge MARTIN and Judge ELMORE concur.

Report per Rule 30(e).