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NO. COA10-569

NORTH CAROLINA COURT OF APPEALS

Filed: 15 February 2011

TERRI JOHNSON-WHITE,

Plaintiff

v.

New Hanover County
No. 08 CVD 438

LARRY ALLEN WHITE,

Defendant

Appeal by defendant from order entered 24 August 2009 by Judge J. H. Corpening, II, in New Hanover County District Court. Heard in the Court of Appeals 17 November 2010.

Johnson, Lambeth & Brown, by Maynard M. Brown and Carlton S. Prickett, Jr., for plaintiff-appellee.

Lea, Rhine & Rosbrugh, by James W. Lea, III, and Lori W. Rosbrugh, for defendant-appellant.

CALABRIA, Judge.

Larry Alen White ("defendant") received an unequal distribution of property in his favor and appeals portions of the trial court's equitable distribution order. Defendant also appeals the trial court's order awarding alimony to Terri Johnson-White ("plaintiff") and awarding plaintiff's attorney's fees. We affirm.

I. BACKGROUND

On 27 December 2002, plaintiff and defendant (collectively, "the parties") were married. There were no children born during the marriage. At the time of the marriage, plaintiff was 42 years old and defendant was 47 years old. Both parties owned property prior to their marriage and acquired property during the marriage. Prior to and during the marriage, defendant owned, operated, and managed A&P Hydraulics, Inc. ("A&P Hydraulics" or "the business"), which fabricated and sold hydraulic power test units for use on the maintenance of aircraft. Prior to the marriage, plaintiff was employed. However, during the marriage, plaintiff pursued an education and was not employed. On 30 August 2007, the parties separated.

On 29 January 2008, plaintiff filed a complaint in New Hanover County District Court seeking post-separation support ("PSS"), alimony, equitable distribution, and attorney's fees. Defendant filed an answer and counterclaim, seeking an equitable distribution of the parties' marital property with an unequal distribution in his favor. On 2 June 2008, the trial court entered a consent order requiring defendant to pay plaintiff \$1,500.00 in monthly PSS, and a \$3,000.00 lump sum payment as an interim distribution to be credited toward the amount defendant would subsequently owe plaintiff in the equitable distribution of their property. On 21 November 2008, the trial court granted the parties an absolute divorce.

On 24 August 2009, the trial court entered orders for an equitable distribution of property and alimony. In the trial

court's unequal distribution of the marital property, defendant received 59% of the marital estate, and plaintiff received 41% after defendant's payment of a distributional payment. For alimony, defendant was ordered to pay plaintiff the sum of \$2,500.00 per month for 48 months, beginning 1 July 2009 and ending 1 June 2013. The trial court also awarded plaintiff \$3,500.00 for attorney's fees. Defendant appeals.¹

II. EQUITABLE DISTRIBUTION

Defendant argues that the trial court erred in determining the date of separation value of the marital interest in a parcel of real property. Defendant also argues that the trial court erred in determining the marital interest in an automobile, a boat, and a money market account. We disagree.

A. Classification

"The trial court must classify and identify property as marital or separate 'depending upon the proof presented to the trial court of the nature' of the assets." *Atkins v. Atkins*, 102 N.C. App. 199, 206, 401 S.E.2d 784, 787 (1991) (quoting *Johnson v. Johnson*, 317 N.C. 437, 455, 346 S.E.2d 430, 440 n.4 (1986)). The burden of showing the property to be marital is on the party seeking to classify the asset as marital and the burden of showing the property to be separate is on the party seeking to classify the asset as separate. *Id.*

¹On 16 September 2009, plaintiff gave notice of cross-appeal from the trial court's order. However, in her brief, plaintiff gave notice of dismissal of her notice of cross-appeal.

The party claiming the property to be marital must meet her burden by showing by the preponderance of the evidence that the property: (1) was "acquired by either spouse or both spouses"; and (2) was acquired "during the course of the marriage"; and (3) was acquired "before the date of the separation of the parties"; and (4) is "presently owned." N.C.G.S. § 50-20(b)(1). If this burden is met and a party claims the property to be separate, that party has the burden of showing the property is separate. This burden is met by showing by the preponderance of the evidence that the property was: (1) "acquired by a spouse by bequest, devise, descent, or gift during the course of the marriage" (third-party gift provision); or (2) "acquired by gift from the other spouse during the course of marriage" and the intent that it be separate property is "stated in the conveyance" (inter-spousal gift provision); or (3) was "acquired in exchange for separate property" and no contrary intention that it be marital property is "stated in the conveyance" (exchange provision). N.C.G.S. § 50-20(b)(2). If both parties meet their burdens, then under the statutory scheme of N.C.G.S. § 50-20(b)(1) and (b)(2), the property is excepted from the definition of marital property and is, therefore, separate property.

Id. at 206, 401 S.E.2d at 787-88.

B. Valuation of Property

Once the trial court classifies the property, "[u]nder N.C. Gen. Stat. Sec. 50-20(c), only marital property is subject to distribution." *Rogers v. Rogers*, 90 N.C. App. 408, 409, 368 S.E.2d 412, 413 (1988).

Under N.C. Gen. Stat. § 50-20(c) (2003), equitable distribution is a three-step process; the trial court must (1) determine what is marital and divisible property; (2) find the net value of the property; and (3) make an equitable distribution of that property. . . . A trial court must value all marital and divisible property - collectively termed distributable property - in order to

reasonably determine whether the distribution ordered is equitable.

Cunningham v. Cunningham, 171 N.C. App. 550, 555-56, 615 S.E.2d 675, 680 (2005) (citation, quotation marks, ellipses, and brackets omitted). Under N.C. Gen. Stat. § 50-20(b)(4):

“Divisible property” means all real and personal property as set forth below:

a. All appreciation and diminution in value of marital property and divisible property of the parties occurring after the date of separation and prior to the date of distribution, except that appreciation or diminution in value which is the result of postseparation actions or activities of a spouse shall not be treated as divisible property.

b. All property, property rights, or any portion thereof received after the date of separation but before the date of distribution that was acquired as a result of the efforts of either spouse during the marriage and before the date of separation, including, but not limited to, commissions, bonuses, and contractual rights.

c. Passive income from marital property received after the date of separation, including, but not limited to, interest and dividends.

d. Increases and decreases in marital debt and financing charges and interest related to marital debt.

N.C. Gen. Stat. § 50-20(b)(4) (2008). “If the court determines that an equal division is not equitable, the court shall divide the marital property and divisible property equitably.” N.C. Gen. Stat. § 50-20(c) (2008).

C. Standard of Review

"The division of property in an equitable distribution is a matter within the sound discretion of the trial court." *Cunningham*, 171 N.C. App. at 555, 615 S.E.2d at 680 (internal quotations and citation omitted). "When reviewing an equitable distribution order, the standard of review 'is limited to a determination of whether there was a clear abuse of discretion.'" *Petty v. Petty*, ___ N.C. App. ___, ___, 680 S.E.2d 894, 898 (2009) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). "A trial court may be reversed for abuse of discretion only upon a showing that its actions are manifestly unsupported by reason." *White*, 312 N.C. at 777, 324 S.E.2d at 833. "Further, '[i]t is well established that a trial court's conclusions of law must be supported by its findings of fact.'" *Squires v. Squires*, 178 N.C. App. 251, 256, 631 S.E.2d 156, 159 (2006) (quoting *Robertson v. Robertson*, 167 N.C. App. 567, 574, 605 S.E.2d 667, 671 (2004)). "[T]he findings of fact are conclusive [on appeal] if they are supported by any competent evidence from the record." *Beightol v. Beightol*, 90 N.C. App. 58, 60, 367 S.E.2d 347, 348 (1988).

In addition, "[a] finding of fact not excepted to is binding on appeal." *Williams v. Williams*, 97 N.C. App. 118, 121, 387 S.E.2d 217, 219 (1990). As an initial matter, defendant challenges only certain findings of fact in the trial court's order. Therefore, all other unchallenged findings are binding on appeal.

1. The Long Beach Property

Defendant does not dispute that the unimproved real property in Long Beach, North Carolina ("the Long Beach property"), is marital property. Defendant argues that the trial court erred in the valuation of plaintiff's marital interest in the Long Beach property. On the date of separation, the value was \$52,500.00 and on the date of the hearing it decreased to \$37,500.00.

Prior to the marriage, plaintiff owned a one-half interest in the Long Beach property which she inherited from her father.² On 19 February 2003, approximately two months after the marriage, plaintiff conveyed her one-half interest in the Long Beach property to the parties as tenants by the entirety. Since there was no dispute regarding the classification of the Long Beach property as marital property, the trial court heard testimony regarding the value of the Long Beach property.

Sandy Hall ("Hall"), a real estate agent with more than 20 years of experience, testified on plaintiff's behalf. Hall testified, without objection, that the fair market value of the Long Beach property on the date of separation was \$125,000.00. Hall explained that the consequences of owning properties that do not "perk" include the difficulty of receiving a septic tank permit ("a permit"), and without a permit, property values decrease. Hall further testified that the Long Beach property had not perked as of the date of the hearing and that, in his opinion, it would not perk. Hall stated that the fair market value of the Long Beach

²The other one-half interest was owned by plaintiff's sister and brother-in-law, and is not at issue in the instant case.

property on the date of the hearing was \$75,000.00. Hall also explained that the decline in the value of the Long Beach property was due both to the inability of the property to "perk," and to the economic recession.

Plaintiff testified that the official tax value of the Long Beach property was \$200,000.00, but that she did not believe that was the Long Beach property's true value because of its inability to perk. Plaintiff testified that no "perk test" had been performed on the Long Beach property, and that she was unsure if water and sewer services would be extended to the Long Beach property by December 2009. Defendant offered no testimony regarding the value of the Long Beach property.

Defendant contends that the trial court should have accepted the value of the Long Beach property as assigned by the "taxing authorities" rather than the value given by Hall. However, "[w]here, as here, a case is tried without a jury, the fact-finding responsibility rests with the trial court." *Pulliam v. Smith*, 348 N.C. 616, 625, 501 S.E.2d 898, 903 (1998) (internal quotation and citation omitted). "'The trial court's findings of fact are binding on appeal as long as competent evidence supports them, despite the existence of evidence to the contrary.'" *Stovall v. Stovall*, ___ N.C. App. ___, ___, 698 S.E.2d 680, 683 (2010) (quoting *Pegg v. Jones*, 187 N.C. App. 355, 358, 653 S.E.2d 229, 231 (2007)).

Hall's testimony is competent evidence to support the trial court's finding that the value of the parties' one-half interest in

the Long Beach property on the date of separation was \$52,500.00 and on the date of the hearing was \$37,500.00, despite any evidence to the contrary. This finding regarding value supports the trial court's conclusion regarding the decrease in value in the Long Beach property after the date of separation.

2. The Porsche

Defendant does not dispute that the trial court classified a Porsche automobile ("the Porsche") as marital property, although he owned the Porsche prior to the parties' marriage. Defendant argues that the trial court erred in finding and concluding that the marital interest in the Porsche was equal to the amount paid toward the loan on the Porsche during the marriage. We disagree.

Prior to the marriage, defendant purchased the Porsche and financed the purchase price initially with separate funds. On the date of marriage, the balance of the loan on the Porsche was \$6,008.00. After the date of marriage, the loan was paid in full with marital funds. Plaintiff produced evidence that the loan payments were paid from marital funds. While defendant produced some evidence indicating the Porsche had substantially depreciated from the original date of purchase to the sale of the vehicle shortly before the date of separation, defendant stated that he did not know the value of the Porsche when he purchased it in 2002. Although defendant sold the Porsche on 16 July 2007 shortly before the date of separation for approximately \$8,000.00, the court found that the value of the Porsche on the date of separation was \$6,008.00.

The trial court found there was no evidence to contradict plaintiff's testimony that the value of the Porsche was \$6,008.00 on the date of separation and distributed the Porsche to defendant. Therefore, plaintiff's evidence was competent evidence to support the trial court's finding and conclusion that the value of the marital portion of the Porsche on the date of separation was \$6,008.00.

3. The Boat

Although the trial court distributed the boat to defendant, he argues that the trial court erred in finding and concluding that the marital interest in the center console boat ("the boat") was \$8,268.00. We disagree.

As a trier of fact, the trial court assesses the credibility of the witnesses and determines the weight to be afforded to their testimony. *Nix v. Nix*, 80 N.C. App. 110, 115, 341 S.E.2d 116, 119 (1986). Prior to the marriage, defendant purchased the boat for \$31,000.00, and financed \$15,000.00 of this price initially with separate funds. After the date of marriage, the loan payments of \$373.06 per month were paid with marital funds. On 23 March 2005, the loan was paid in full. Plaintiff testified that during the marriage, \$8,286.00 of marital funds paid the balance of the loan on the boat in full, and that the marital value of the boat was \$8,286.00. The trial court found that the value of the marital portion of the boat was \$8,286.00.

Defendant contends that the value of the boat on the date of separation was \$15,000.00, that it had depreciated to \$10,000.00 by

the date of trial, and that 30% of its total value on date of trial was marital. However, defendant did not present evidence regarding the date the boat was purchased or the pre-marriage depreciation of the boat. Although defendant presented evidence regarding the boat's sales price as well as his opinion as to the fair market value of the boat on the date of separation, there is nothing in the record which shows the pre-marriage depreciation of the boat. Since defendant failed to meet his burden of proving the separate nature of the boat, the trial court was left to speculate as to the value of the marital portion of the boat.

Plaintiff testified as to the value of the marital component of the boat, thus satisfying her burden of proving the boat's marital nature and value. The trial court determined that plaintiff's testimony was credible and gave it considerable weight. Plaintiff put forth competent evidence as to the marital portion of the boat. Defendant failed to meet his burden of showing that the trial court abused its discretion in classifying and valuing the boat.

4. The Money Market Account

Defendant argues that the trial court erred in finding and concluding that the balance of the money market account on the date of separation was marital property. We disagree.

Commingling of separate property with marital property occurring between the date of marriage and date of separation does not necessarily transmute separate property into marital property. *Fountain v. Fountain*, 148 N.C. App. 329, 559 S.E.2d 25 (2002).

Separate property transmutes into marital property if the party claiming the property is separate cannot trace the initial deposit into its form at the date of separation. *Id.* "North Carolina has adopted the 'source of funds' rule in determining whether property is marital or separate." *McIver v. McIver*, 92 N.C. App. 116, 124, 374 S.E.2d 144, 149 (1988). According to this rule, "when both the marital and separate estates contribute assets towards the acquisition of property, each estate is entitled to an interest in the property in the ratio its contribution bears to the total investment in the property." *Wade v. Wade*, 72 N.C. App. 372, 382, 325 S.E.2d 260, 269 (1985).

It is presumed that all property acquired after the date of marriage and before the date of separation is marital property. N.C. Gen. Stat. § 50-20(b)(1). The party claiming property as marital must show that it was acquired by one or both spouses between the date of marriage and the date of separation and is presently owned. *Atkins*, 102 N.C. App. at 206, 401 S.E.2d at 787-88.

Prior to the marriage, defendant owned several bank accounts at First Citizens Bank, specifically a money market account ("the money market account") and a checking account ("the checking account"). The parties stipulated that the checking account was to be distributed to defendant. The money market account had a balance of \$46,501.00 on the date of marriage. During the marriage, the following deposits were made into the money market account: \$85,000.00 on 7 July 2005; \$9,000.00 on 28 September 2005;

\$45,000.00 on 23 February 2006; \$25,000.00 on 31 May 2006. During the marriage, checks in the following amounts were drawn on the money market account: \$20,000.00 on 9 April 2003; \$9,000.00 on 24 October 2005; \$11,097.00 on 22 November 2005; \$20,000.00 on 24 January 2006; \$199.00 on 21 March 2006; \$23,500.00 on 23 January 2007. By February 2006, \$60,097.00 was withdrawn from the money market account, \$13,596.00 in excess of the balance in the account on the date of marriage. On the date of separation, the money market account had a balance of \$133,469.00.

Defendant argues that the \$85,000.00 deposit to the money market account on 7 July 2005 came from funds in the checking account. On the date of marriage, the checking account had a balance of \$45,187.90. In January 2003, shortly after the date of marriage, defendant deposited \$18,329.00 into the checking account. This amount represented defendant's 2002 pre-marriage earnings from A&P Hydraulics. In November 2003, nearly one year after the date of marriage, defendant deposited \$30,060.12 into the checking account, representing the net proceeds from the sale of a house defendant owned prior to marriage.

On 7 July 2005, more than two years after the date of marriage, defendant withdrew \$85,000.00 from the checking account and deposited the same amount into the money market account. Plaintiff presented evidence that during the marriage, there were thirteen deposits and fifty-six withdrawals from the checking account. These multiple deposits and withdrawals from the checking

account make it impossible to trace the origin of the deposits to defendant's separate property.

In the instant case, plaintiff met her burden of proving that the deposits to the money market account, other than the original balance, were marital. The burden then shifted to defendant to prove by a preponderance of the evidence that the deposits to the money market account were from his separate property. *O'Brien v. O'Brien*, 131 N.C. App. 411, 508 S.E.2d 300 (1998). This means defendant had the burden of tracing the separate funds deposited in the money market account back to his separate property. Since defendant cannot trace with any particularity the origin of the deposits into the money market account, the funds are marital. The trial court was well within its discretion to determine that the monies paid out initially from the money market account, during the marriage, exhausted the balance of defendant's separate funds that existed on the date of marriage and that all remaining funds in the money market account were marital under N.C. Gen. Stat. § 50-20. Defendant's assignments of error are overruled.

III. ALIMONY

Defendant argues that the trial court erred in concluding that he had the financial means to pay alimony, that plaintiff was a dependent spouse, defendant was a supporting spouse, and plaintiff was entitled to alimony. We disagree.

A. Requirements for an Alimony Award

The requirements for an alimony award are set out in N.C. Gen. Stat. § 50-16.3A (2008). That statute states, in pertinent part:

The [trial] [c]ourt shall award alimony to the dependent spouse upon the 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 of the relevant factors . . .

N.C. Gen. Stat. § 50-16.3A(a). A dependent spouse is "a spouse, whether husband or wife, who 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." N.C. Gen. Stat. § 50-16.1A(2).

A spouse is "actually substantially dependent," if he or she is currently unable to meet his or her own maintenance and support. A spouse is "substantially in need of maintenance" if he or she will be unable to meet his or her needs in the future, even if he or she is currently meeting those needs.

Helms v. Helms, 191 N.C. App. 19, 23, 661 S.E.2d 609, 610 (2008).

In other words, to be "actually substantially dependent," the party seeking alimony must be entirely without the means to maintain the pre-separation accustomed standard of living. "[S]ubstantially in need" requires that the "spouse seeking alimony establish that he or she would be unable to maintain his or her accustomed standard of living (established prior to separation) without [some] financial contributions from the other."

Hunt v. Hunt, 112 N.C. App. 722, 726, 436 S.E.2d 856, 859 (1993).

"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[.]" *Whedon v. Whedon*, 58 N.C. App. 524, 529, 294 S.E.2d 29, 32 (1982).

In determining the amount of alimony, the trial court must evaluate and make detailed findings regarding "(1) the estates of the

parties; (2) the earnings of the parties; (3) the earning capacity of the parties; (4) the condition of the parties; and (5) the accustomed standard of living of the parties."

Hunt, 112 N.C. App. at 727, 436 S.E.2d at 860.

"Alimony is ordinarily determined by a party's actual income, from all sources, at the time of the order." *Kowalick v. Kowalick*, 129 N.C. App. 781, 787, 501 S.E.2d 671, 675 (1998) (emphasis and citation omitted); see also *Rhew v. Felton*, 178 N.C. App. 475, 484-85, 631 S.E.2d 859, 866 (2006) ("A supporting spouse's ability to pay an alimony award is generally determined by the supporting spouse's income at the time of the award.").

B. Standard of Review

The trial court's determination as to whether a spouse is entitled to alimony is reviewable *de novo*. *Barrett v. Barrett*, 140 N.C. App. 369, 371, 536 S.E.2d 642, 644 (2000). However, the trial court's decision as to the amount of alimony is left to the sound discretion of the trial court and will not be overturned on appeal absent a manifest abuse of discretion. *Bookholt v. Bookholt*, 136 N.C. App. 247, 249-50, 523 S.E.2d 729, 731 (1999).

C. Unchallenged Findings of Fact

As an initial matter, we note that in the instant case, the issue of alimony was considered after the court heard evidence on the issue of equitable distribution. Defendant does not challenge the trial court's findings that: (1) plaintiff was currently unemployed and had only been able to work sporadically during the twelve months preceding the hearing and been looking for full-time employment during that time; (2) plaintiff received her teacher's

certificate and was looking for teaching jobs in and around New Hanover and Guilford Counties, but was ultimately unsuccessful in obtaining employment; (3) plaintiff was not employed during the marriage, having relinquished her pet-sitting service upon defendant's request; (4) plaintiff's tax returns showed that she earned only \$8,388.00 in 2008 and \$909.00 in 2007; (5) plaintiff's current income as a substitute teacher was \$125.00 per month; (6) plaintiff's current vehicle was inefficient and a suitable replacement would cost \$350.00 per month; (7) plaintiff had reasonable monthly expenses of \$4,000.00, which were similar to her monthly expenses during the marriage; and (8) due to plaintiff's lack of financial support and income after the date of separation, plaintiff was unable to maintain her previous standard of living.

Defendant also does not challenge the trial court's findings that: (1) defendant was the owner and operator of A&P Hydraulics; (2) in 2007, defendant earned \$178,017.00 and in 2006, he earned \$144,758.00; (3) at the date of the hearing, defendant had liquid assets in excess of \$250,000.00 in various financial accounts and was able to pay \$50,000.00 toward the purchase of a home in 2008; and (4) defendant's monthly expenses were \$5,000.00 per month. Furthermore, the parties stipulated that the value of A&P Hydraulics on the date of separation was \$122,579.00. Therefore, all of these unchallenged findings are binding on appeal.

D. Defendant's Challenges

1. Defendant's Credibility

The trial court set forth exhaustive findings of fact regarding the parties' income and expenses and the factors required to be considered by the court under N.C. Gen. Stat. § 50-16A.3(b) when ordering alimony. Defendant challenges the following findings regarding his credibility:

12) **Defendant's income:**

C) In Defendant's 8/6/08 Answers, under oath, to Interrogatories, he stated that his then current monthly gross income from all sources was only \$2,500.00 per month. *This answer was not credible.*

F) Although Defendant presented testimony that he had only earned \$59,405 (rounded) from 1/1/08 through 11/30/08, *the Court finds this reported income to be unreliable based on the history of Defendant's income and the personal expenses paid out of his business.*

(emphasis added). However, in a bench trial, "[a] trial judge 'passes upon the credibility of the witnesses and the weight to be given their testimony and the reasonable inferences to be drawn therefrom.'" *Phelps v. Phelps*, 337 N.C. 344, 357, 446 S.E.2d 17, 25 (1994) (quoting *Knutton v. Cofield*, 273 N.C. 355, 359, 160 S.E.2d 29, 33 (1968)). Therefore, defendant's argument as to these findings is overruled and these findings are binding on appeal.

2. Defendant's Income, Expenses, and Statutory Factors under
N.C. Gen. Stat. § 50-16A.3

Defendant also challenges the following findings regarding his income and expenses: (1) defendant paid personal expenses out of the business; (2) defendant's true income was greater than the amount reflected on his income tax returns; and (3) that

defendant's current income exceeded \$100,000.00 per year "at a minimum." In addition, defendant challenges the following findings regarding the statutory factors required by N.C. Gen. Stat. § 50-16A.3: (1) defendant had a substantially greater earning capacity than plaintiff; (2) plaintiff was actually and substantially dependent on defendant for her maintenance and support and remained actually and substantially in need of maintenance and support from defendant; (3) defendant derived substantial benefits from A&P Hydraulics because the business paid for many of his personal expenses; and (4) defendant had the financial means, estate and income with which to pay alimony in the amount of \$2,500.00 per month for the 48-month period of 1 July 2009 to 1 June 2013. The findings not challenged by defendant are binding on this Court.

E. Evidence of Plaintiff's Earning Capacity and Need for Maintenance and Support

Plaintiff testified that prior to the marriage, she supported herself through a variety of jobs, including a pet-sitting service. After her marriage to defendant, plaintiff was no longer employed outside the home at defendant's request. However, during the marriage, plaintiff attended classes to obtain a North Carolina Teaching Certificate. Plaintiff was able to pursue education because defendant paid for her educational expenses while she attended school to obtain this certification.

After the parties separated, plaintiff completed a teaching internship at a local high school and received her certification in June 2008. From January 2008 to May 2008, plaintiff was employed

as a teacher's assistant, and from May 2008 to July 2008, plaintiff was employed as a park attendant. In 2008, plaintiff earned a total income of \$8,388.00. When her job as a park attendant ended, plaintiff unsuccessfully sought employment at a first-year teacher's salary in New Hanover and Guilford Counties in North Carolina.

Furthermore, plaintiff testified that after the date of separation, she largely supported herself with PSS and money she borrowed against an equity line of credit on her property. Plaintiff also received help from family members for food. In 2008, plaintiff reported \$8,909.00 in total income, \$8,000.00 of which was attributable to PSS.

F. Evidence of Defendant's Income, Earning Capacity, Expenses, and Financial Ability to Pay

Defendant owned, operated, and managed A&P Hydraulics. In 2006, A&P Hydraulics reported gross sales of \$977,939.00, and ordinary business income of \$172,373.00 on its corporate tax returns. In 2007, the business reported gross sales of \$843,969.00 and ordinary business income of \$98,551.00. An evaluation of A&P Hydraulics' business records revealed that defendant made substantial personal payments from business accounts, effectively reducing the taxable profits of the business. In their joint tax return for 2006, the parties reported total income of \$144,758.00. In 2007, defendant reported \$178,017.00 in total income.

Plaintiff introduced into evidence, without objection, a report from a court-appointed valuator of A&P Hydraulics. The

report stated that "credit card statements and checking statements revealed a pattern of writing off personal checks as [defendant's] business expenses, and that "there may be substantial IRS liability in the future if the business was audited."

Furthermore, defendant owned two boats, a vintage airplane, and a Porsche prior to the marriage. During the marriage, he furnished plaintiff with a vehicle and took numerous "business trips" to various locations both within the United States and abroad. Defendant does not challenge the trial court's findings that he had liquid assets of \$250,000.00 and recently made a \$50,000.00 down payment toward the purchase of a new home for himself. In addition, the trial court found that defendant's contention that he earned only \$59,405.00 during the first seven months of 2008 was "unreliable" because of his history of paying personal expenses from the business' accounts.

G. Conclusion as to Alimony

Competent evidence supports the trial court's findings that: (1) defendant had a substantially greater earning capacity than plaintiff and that plaintiff was actually and substantially dependent on defendant for her maintenance and support and remained actually and substantially in need of maintenance and support from defendant; (2) defendant had a substantially greater earning capacity than plaintiff; and (3) plaintiff was actually and substantially dependent on defendant for her maintenance and support and remained actually and substantially in need of maintenance and support from defendant. Competent evidence also

supports the trial court's findings that (1) defendant paid personal expenses out of the business; (2) defendant's true income was greater than the amount reflected on his income tax returns; (3) defendant's current income exceeded \$100,000.00 per year "at a minimum"; (4) defendant derived substantial benefits from A&P Hydraulics because the business paid for many of his personal expenses; and (5) defendant had the financial means, estate and income with which to pay alimony in the amount of \$2,500.00 per month for the 48-month period of 1 July 2009 to 1 June 2013.

These findings, along with the trial court's other unchallenged findings, support the trial court's conclusions that: (1) plaintiff was a dependent spouse; (2) plaintiff was in substantial need of financial support from defendant to meet her living expenses; (3) an award of alimony was equitable; (4) plaintiff was entitled to alimony; and (5) defendant was financially capable of paying the alimony award to plaintiff. The trial court properly exercised its discretion in ordering defendant to pay plaintiff \$2,500.00 per month in alimony for 48 months, beginning on 1 June 2009.

IV. ATTORNEY'S FEES

Defendant argues that the trial court's award of attorney's fees to plaintiff in the amount of \$3,500.00 was an abuse of discretion and contrary to law. We disagree.

At any time that a dependent spouse would be entitled to alimony pursuant to G.S. 50-16.3A, . . . the court may, upon application of such spouse, enter an order for reasonable counsel fees for the benefit of such spouse, to be

paid and secured by the supporting spouse in the same manner as alimony.

N.C. Gen. Stat. § 50-16.4. In order to establish that a spouse is entitled to attorney's fees, he or she must be "(1) the dependent spouse, (2) entitled to the underlying relief demanded (e.g., alimony and/or child support), and (3) without sufficient means to defray the costs of litigation." *Barrett*, 140 N.C. App. at 374, 536 S.E.2d at 646. This also extends to appeals in which the supporting spouse is the appellant. *Fungaroli v. Fungaroli*, 53 N.C. App. 270, 273, 280 S.E.2d 787, 790 (1981). "The decision regarding whether to award attorney's fees 'lies solely within the discretion of the trial judge, and that such allowance is reviewable only upon a showing of an abuse of the judge's discretion.'" *Kelly v. Kelly*, 167 N.C. App. 437, 448, 606 S.E.2d 364, 372 (2004) (quoting *Rickert v. Rickert*, 282 N.C. 373, 378, 193 S.E.2d 79, 82 (1972)).

We initially note that defendant does not challenge any of the trial court's findings of fact regarding payment of attorney's fees. Therefore, these findings are binding on this Court, including the trial court's finding that plaintiff's attorney "presented to the Court an Affidavit which addressed Plaintiff's request that her attorney fees and costs on the alimony issue be paid by Defendant."

According to the affidavit, plaintiff's counsel's hourly rate was \$250.00 and her attorney devoted fourteen hours to plaintiff's alimony claims. The trial court found this fee reasonable and consistent with such fees charged by attorneys within the region

based on the attorney's years of experience, and more importantly, based on the attorney's practice "being exclusively a domestic relations-family law practice." Furthermore, defendant did not challenge the trial court's findings that plaintiff was a dependent spouse and defendant was a supporting spouse, and that plaintiff "[did] not have the income nor [did] she have sufficient means to pay in full the attorney fees incurred by her on the issue of alimony." Defendant challenges only the trial court's conclusions of law that: (1) plaintiff "incurred substantial attorney fees in her attorney's representation on the issue of alimony"; (2) plaintiff was a dependent spouse and defendant was a supporting spouse; (3) plaintiff was unable to pay attorney's fees incurred by her in her prosecution of her claim for alimony; and (4) plaintiff incurred "substantial out-of-pocket expenses" in her prosecution of her claim for alimony.

In the portion of its order addressing alimony, the trial court properly concluded that plaintiff was a dependent spouse, defendant was a supporting spouse, and that an award of alimony was equitable. Therefore, plaintiff was entitled to alimony. N.C. Gen. Stat. § 50-16.3A(a). These conclusions support the trial court's conclusion in the portion of its order addressing attorney's fees that plaintiff was a dependent spouse and defendant was a supporting spouse.

In its unchallenged findings of fact addressing attorney's fees, the court found that plaintiff did not have the income or estate to defray the costs of this case. This finding, and the

trial court's findings as to plaintiff's income and expenses in the portion of the order addressing alimony, support the trial court's conclusion that plaintiff was unable to pay attorney's fees incurred by her in her prosecution of her claim for alimony. Therefore, since plaintiff was a dependent spouse, defendant was a supporting spouse, plaintiff was entitled to alimony, and plaintiff did not have sufficient means to defray the costs associated with her alimony claim, the trial court had the discretion to award attorney's fees pursuant to N.C. Gen. Stat. § 50-16.4.

The trial court's unchallenged findings, particularly its findings regarding plaintiff's affidavit, support the trial court's conclusion that plaintiff "incurred substantial attorney fees in her attorney's representation on the issue of alimony." The costs incurred by plaintiff's counsel were reasonable in amount. Accordingly, the trial court properly exercised its discretion in awarding plaintiff attorney's fees in the amount of \$3,500.00.

V. CONCLUSION

Assignments of error not argued in defendant's brief are abandoned. N.C.R. App. P. 28(b)(6) (2008). The trial court's order providing for an equitable distribution of the parties' property, ordering defendant to pay plaintiff alimony, and awarding plaintiff attorney's fees, is affirmed.

Affirmed.

Judges HUNTER, Robert C., and ELMORE concur.

Report per Rule 30(e).