

IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-783

Filed: 7 May 2019

Union County, No. 14CVD118

TRACY SUSAN THOMAS, Plaintiff,

v.

JEFFRY PAUL BURGETT, Defendant.

Appeal by Defendant from order entered 19 January 2018 by Judge Hunt Gwyn in Union County District Court. Heard in the Court of Appeals 13 February 2019.

*Collins Family Law Group, by Rebecca K. Watts, for Defendant-Appellant.*

*Arnold & Smith, PLLC, by Matthew R. Arnold, for Plaintiff-Appellee.*

INMAN, Judge.

Defendant Jeffry Paul Burgett (“Mr. Burgett”) appeals the district court order requiring him to pay his ex-spouse, Tracy Susan Thomas (“Ms. Thomas”), retroactive and prospective child support and attorney’s fees. Mr. Burgett argues that the trial court: (1) failed to deduct expenses incurred from his rental property when calculating his gross monthly income; (2) abused its discretion in ordering him to pay \$500 per month for his child’s band expenses; (3) failed to make sufficient findings of fact when it deviated from the child support guidelines; and (4) erred in awarding Ms. Thomas attorney’s fees. After careful review of the record and applicable law, we reverse in part, vacate in part, and remand.

**I. Factual and Procedural Background**

The record reflects the following facts:

Ms. Thomas and Mr. Burgett married on 14 July 2001, separated on 29 September 2013, and are now divorced. During their marriage, they adopted a minor child, D.N.B.,<sup>1</sup> who was born in 2004.

Following their separation, Ms. Thomas filed a complaint in Union County for, among other things, child custody, child support, equitable distribution, and attorney's fees. After a hearing, the district court (1) awarded Ms. Thomas temporary joint legal and primary physical custody, and Mr. Burgett temporary visitation rights; and (2) ordered Mr. Burgett to pay Ms. Thomas \$1,036 per month in temporary child support, with an additional \$12,700 in total arrears in child support to be paid in monthly \$50 installments. The trial court deferred for a further hearing regarding Ms. Thomas' claim for equitable distribution and attorney's fees. Mr. Burgett moved to Wisconsin shortly after the temporary order.

Mr. Burgett began receiving social security benefits after retiring as a pilot in 2015. In December 2015, he filed a motion to modify child support. Before the motion was heard, starting in November 2016, Mr. Burgett unilaterally reduced his monthly child support payments to \$446.46 per month, without receiving court permission, in accordance with what he believed to be consistent with the North Carolina Child

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<sup>1</sup> We use the above pseudonym to preserve the juvenile's anonymity.

Support Guidelines (“the Guidelines”). Mr. Burgett contended that Ms. Thomas was receiving \$1,251 per month directly from the Social Security Administration for the benefit of D.N.B. and that the child support amount should be recalculated to reflect that additional income. Ms. Thomas opposed the motion.

On 24 August 2016, the parties resolved their disputes on equitable distribution, permanent child custody, and alimony, but could not reach an agreement regarding permanent child support.<sup>2</sup> Following hearings in May and July 2017 in Union County District Court, on 19 January 2018, the trial court ordered Mr. Burgett to pay: (1) \$1,679.91 per month in ongoing child support; (2) \$21,176.74 in retroactive child support at \$50 per month; and (3) \$15,000 for a portion of Ms. Thomas’ attorney’s fees. Mr. Burgett timely appealed.

## **II. Analysis**

### *A. Rental Property Expenses Attributable to Gross Income*

Mr. Burgett first argues that the trial court erred in failing to deduct rental property expenses from its calculation of his monthly gross income. In child support cases, determinations of gross income are conclusions of law reviewed *de novo*, rather than findings of fact. *Lawrence v. Tise*, 107 N.C. App. 140, 145 n.1, 419 S.E.2d 176, 179 n.1 (1992). If the trial court labels a conclusion of law as a finding of fact, the appellate court still employs *de novo* review. *Carpenter v. Brooks*, 139 N.C. App. 745,

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<sup>2</sup> The trial court’s order pursuant to the parties’ settlement inadvertently states that permanent child support was resolved.

752, 534 S.E.2d 641, 646 (2000); *Eakes v. Eakes*, 194 N.C. App. 303, 311, 669 S.E.2d 891, 897 (2008).

The Guidelines define “income” as a “parent’s actual gross income from any source, including but not limited to . . . rental of property.” N.C. Child Support Guidelines 2018 Ann. R. 53. The calculation of actual gross income derived from rental of property is “gross receipts minus ordinary and necessary expenses required for self-employment or business operation.” *Id.* Although the Guidelines do not define “ordinary and necessary expenses,” this Court has explained that such expenses include “repairs, property management and leasing fees, real estate taxes, insurance, and mortgage interest. Mortgage principal payments, however, are not an ‘ordinary and necessary expense’ within the meaning of the Guidelines.” *Lawrence*, 107 N.C. App. at 149, 419 S.E.2d at 182.

In our case, Mr. Burgett’s financial affidavit lists his total monthly gross income at \$9,205.24—an accumulation of wages, rent, and social security and pension benefits. The affidavit goes on to provide that Mr. Burgett—paralleling his testimony at trial—owns a rental property which he leases to his adult son for \$1,137.63 per month. The monthly \$1,137.63 payment, however, is offset by \$333.32 in property tax payments and \$44.08 per month in renter’s insurance.<sup>3</sup>

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<sup>3</sup> Mr. Burgett also has a monthly mortgage payment equal to the rent charged to his son. While the record does not reveal whether that payment encompasses both principal and interest, upon remand, if any portion of that payment includes interest, it is an expense that can be deducted from

In finding of fact 18, “per his Financial Affidavit,” the trial court calculated Mr. Burgett’s gross monthly income at \$9,205, noting that the rent his son paid was used for the mortgage payment. Mr. Burgett contends that the trial court did not factor in the other required rental expenses into its calculation of gross income. We agree that insurance and property tax expenditures should be deducted in calculating gross income, as the Guidelines provide. N.C. Child Support Guidelines 2018 Ann. R. 53; *Lawrence*, 107 N.C. App. at 149, 419 S.E.2d at 182. But on the record before us, it appears the trial court did not deduct those expenses from Mr. Burgett’s income when calculating his gross income. *See Burnett v. Wheeler*, 128 N.C. App. 174, 176, 493 S.E.2d 804, 806 (1997) (reversing and remanding a child support order because it was unclear whether the trial court deducted expenses in calculating a supporting parent’s gross income).

“In orders of child support, the trial court should make findings specific enough to indicate to the appellate court that due regard was taken of the requisite factors.” *Id.* at 176, 493 S.E.2d at 806 (citing *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980)). “In the absence of such findings, this Court has no means of determining whether the order is adequately supported by competent evidence.” *Coble*, 300 N.C. at 712, 268 S.E.2d at 189.

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Mr. Burgett’s income for purposes of the Guidelines. *Lawrence*, 107 N.C. App. at 149, 419 S.E.2d at 182.

The trial court’s finding of fact 18 is the sole finding related to Mr. Burgett’s rental property. There are no findings indicating how the trial court treated the insurance and tax expenses associated with the rental property. Because the Guidelines include insurance and taxes as ordinary and necessary expenses, the trial court was required to explain its decision relative to the evidence of such expenses submitted by Mr. Burgett. Without any evidence indicating the trial court’s contemplation of those expenses, we do not have enough findings to conduct adequate review. We thus vacate and remand back to the trial court for more specific findings.

We are unpersuaded by Ms. Thomas’ arguments that the trial court did not err in calculating Mr. Burgett’s monthly gross income. Ms. Thomas contends that the trial court “determine[d] the weight and credibility” of Mr. Burgett’s evidence and adequately decided not to include certain expenses in its calculation. However, as in *Burnett*, even “if the trial court chose not to find [Mr. Burgett’s evidence] credible at all and therefore did not factor it into its computation,” its findings do not provide its rationale for doing so.<sup>4</sup> 128 N.C. App. at 176, 493 S.E.2d at 806; *see also Coble*, 300 N.C. at 714, 268 S.E.2d at 190 (“What all this evidence *does* show, however, is a

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<sup>4</sup> In the same vein, Ms. Thomas also points out that portions of Mr. Burgett’s financial affidavit conflict with one another. Part I of his financial affidavit fails to indicate any ordinary and necessary expenses associated with the rental property. Yet, in Part III, Mr. Burgett lists the expenses in dispute. Any apparent discrepancy argued by Ms. Thomas was for the trial court to weigh and resolve, which it failed to acknowledge in its order.

matter for the trial court to determine in appropriate factual findings.” (emphasis in original)).

Ms. Thomas also argues that the trial court properly “exercised its discretion to impute income from [Mr. Burgett’s] rental property” because there was evidence that he was “renting the property to his adult son at a below market rate. . . . [and] was not making a good faith effort to obtain the highest and best rental income from the property.” Ms. Thomas contends that because the trial court “failed to include specific findings of fact regarding this imputation,” this case “should be remanded only for the limited purpose of making additional findings of fact consistent with the imputation of rental income.” But the record does not reflect that Ms. Thomas raised this issue at trial or that it was ever contemplated by the trial court. Our review of the record reveals no evidence concerning the fair market rate of the rental property or Mr. Burgett’s effort in obtaining the appropriate amount of rental income. As such, in remanding this issue back to the trial court regarding the proper findings as to ordinary and necessary expenses, we decline to remand for findings concerning the appropriate valuation of rental income.

*B. Extraordinary Expenses*

Mr. Burgett next argues that the trial court erred in finding that Ms. Thomas incurs an extraordinary expense of \$500 per month for D.N.B.’s participation in a school band program. “Child support orders entered by a trial court are accorded

substantial deference by appellate courts and our review is limited to a ‘determination of whether there was a clear abuse of discretion.’” *Biggs v. Greer*, 136 N.C. App. 294, 296, 524 S.E.2d 577, 581 (2000) (quoting *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985)). We “review whether the trial court’s findings are supported by competent evidence.” *Doan v. Doan*, 156 N.C. App. 570, 572, 577 S.E.2d 146, 148 (2003).

The Guidelines allow a trial court, in its discretion, to add to the basic child support obligation for “extraordinary expenses,” which include:

- (1) expenses related to special or private elementary or secondary schools to meet a child’s particular education needs, and (2) expenses for transporting the child between the parent’s homes . . . if the court determines the expenses are reasonable, necessary, and in the child’s best interest.

N.C. Child Support Guidelines 2018 Ann. R. 55. Although the Guidelines only reference two instances of extraordinary expenses, we have held that “the list of extraordinary expenses . . . is not exhaustive of the expenses that can be included.”<sup>5</sup> *Mackins v. Mackins*, 114 N.C. App. 538, 549, 442 S.E.2d 352, 359 (1994) (quotation marks and citation omitted).

In findings of fact 20 and 21, the trial court found:

The minor child, [D.N.B.], has special needs, and her participation in therapy/counseling and in band are legitimate and reasonable extraordinary expenses, given

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<sup>5</sup> We do not need to address whether the expenses related to D.N.B.’s band participation were appropriately considered an extraordinary expense by the trial court, as that issue was not raised by Mr. Burgett.



her special needs.

[Ms. Thomas] incurs out of pocket expenses for the minor child's therapy at a rate of \$40.00 per week (\$173.20 per month), and *an average of \$500.00 per month on band and related expenses.*

(emphasis added). During the May 2017 trial, Ms. Thomas testified that D.N.B. suffers from dyspraxia—a neurological disorder generally affecting her motor skills—sensory integration dysfunction, and reactive attachment disorder.<sup>6</sup> D.N.B. has participated in occupational therapy since she was in second grade to improve her physical and social skills. D.N.B.'s therapist recommended that she get involved in music therapy to help her hand-eye coordination and social skills, and to experience “more fun” compared to occupational therapy sessions.

In May 2017, D.N.B. was about to begin eighth grade and was a band member and a member of color guard at her school. Ms. Thomas testified that band participation cost \$500 per year. Ms. Thomas further testified that D.N.B.'s prospective additional participation in the “honor band” would cost “approximately [\$500] per month” based on a fee sheet given to her by a person affiliated with band registration.<sup>7</sup> However, Ms. Thomas also admitted that these costs were conditioned on D.N.B. successfully auditioning for a spot in the honor band.

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<sup>6</sup> Mr. Burgett did not object at trial nor does he contest on appeal D.N.B.'s medical conditions.

<sup>7</sup> While Ms. Thomas testified that she had “written the secretary,” the record discloses that she was also in contact with a “band treasurer,” by email and telephone. It is unclear whether Ms. Thomas spoke to two separate people or only one.

We agree with Mr. Burgett that Ms. Thomas' cost estimates are too hypothetical and speculative to be considered competent evidence to allow the trial court to find that D.N.B. requires \$500 per month for band expenditures. While the "trial court has wide discretion in the determination of extraordinary expenses, there must nevertheless exist some evidence to support the court's determination." *Doan*, 156 N.C. App. at 573, 577 S.E.2d at 149. In *Witherow v. Witherow*, we dealt with a comparable issue involving a plaintiff who argued that the trial court erred in taking into its consideration rental payments which the defendant was not making at the time of the hearing, but which he testified he "*might make in the future* upon moving out of his parents' residence." 99 N.C. App. 61, 64, 392 S.E.2d 627, 630 (1990) (emphasis added). The defendant provided in his financial affidavit that he "pays \$500 per month as rent[]," but testified that he had lived in his parents' home since his separation with the plaintiff and paid no rent. *Id.* In denying the defendant's argument that "he has a right to be able to afford to move from his parents['] home in the future," we concluded that the trial court erroneously "include[d] personal expenditures not yet made by a party with no concrete plans to make such an expenditure." *Id.* Although *Witherow's* issue involved the defendant's relative ability to pay child support—rather than determining the proper amount of extraordinary expenses—we are persuaded by the general proposition that "an award which takes

into consideration an unsubstantiated expense rather than a current expense is an abuse of the court’s discretion.” *Id.*

Here, much like in *Witherow*, at the time of the parties’ hearing, Ms. Thomas was not required to pay \$500 per month on band expenses as D.N.B. had yet to audition and acquire a spot on the honor band. The only actual band expense Ms. Thomas incurred by the July 2017 hearing was the annual fee of \$500. Further, scant evidence was introduced as to the person Ms. Thomas communicated with who provided her with the estimated costs that led to Ms. Thomas’ \$500 per month calculation.<sup>8</sup> Because the trial court lacked competent evidence to find that Ms. Thomas incurs a \$500 extraordinary expense for band and other related expenses, we reverse that finding and remand for further proceedings.

Ms. Thomas cites to our opinion in *Doan* and contends that, while D.N.B.’s band “expenses are estimated[,] [] the probability of incurring these expenses is high based on [her] reputation and progress during her time participating in” band. In *Doan*, we determined that a child’s figure-skating expenses could be an extraordinary expense but that there was no competent evidence to sustain the trial court’s calculated amount. 156 N.C. App. at 572-75, 577 S.E.2d at 148-50. Ms. Thomas argues, because we held in *Doan* that “the child ha[d] a unique talent for ice skating

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<sup>8</sup> The record contains email correspondence between Ms. Thomas and the “band treasurer” discussing band expenditures. But the band treasurer noted that certain fees were “not all inclusive nor [were those] fees set in stone.” There was also an apparent phone conversation between the two that is not recounted in the record.

and ha[d] both the drive and physical potential to become an Olympic-caliber skater, and that the monetary costs associated with the child’s skating [we]re high for a person of [the] defendant’s financial status,” it is consistent with D.N.B.’s apparent superior band participation. *Doan*, however, did not discuss the child’s skating prowess relative to the concrete nature of the purported expenses, but instead addressed whether skating could be labeled an extraordinary expense. Thus, Ms. Thomas’ reliance on *Doan* is misplaced. If, on remand, the trial court determines that D.N.B. is actually participating in the honor band, and receives nonspeculative evidence concerning the expense, it must make findings to support any award based on those expenses.

*C. Deviating from the Guidelines*

In finding of fact 30, the trial court determined:

This Court finds sufficient cause to justify a *deviation in the North Carolina Child Support Guidelines* in this case, and finds that it is in the best interest<sup>9</sup> of the minor child herein that *[Mr. Burgett] not receive a credit for the social security payments that [Ms. Thomas] receives on behalf of the minor child* against the appropriate worksheet A monthly child support amount, as shown.<sup>10</sup>

(emphasis added). Mr. Burgett argues that the trial court, with respect to his social security benefits, did not make sufficient findings of fact showing that a deviation of

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<sup>9</sup> We note that, while Mr. Burgett argues that the trial court here erroneously used the “best interests of the child” standard, we need not discuss it, as we conclude that it failed to make the requisite statutory findings in deviating from the Guidelines.

<sup>10</sup> The trial court reiterated this finding in conclusion of law 3.

the Guidelines was warranted.

Regarding social security benefits, the Guidelines mandate:

Social Security benefits received for the benefit of a child as a result of the . . . retirement of either parent are included as income attributed to the parent on whose earnings record the benefits are paid, but are deductible from that parent's child support obligation.

N.C. Child Support Guidelines 2018 Ann. R. 53. In other words, “the Guidelines provide that Social Security benefits received on behalf of a child are included as income to the parent,” but “once the child support obligation has been determined, [those] benefits are deducted from that parent's support obligation” that he or she actually pays out month to month. *New Hanover Child Support Enforcement v. Rains*, 193 N.C. App. 208, 212, 666 S.E.2d 800, 803 (2008).

Although the trial court is obligated to “determine the amount of child support payments by applying the presumptive guidelines,” it may deviate from the Guidelines under the following circumstances:

If, after considering the evidence, the Court finds by the greater weight of the evidence that the application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate the Court may vary from the guidelines.

N.C. Gen. Stat. § 50-13.4(c) (2017). If the trial court does deviate from the Guidelines, “the court shall make findings of fact as to the criteria that justify varying from the [G]uidelines and the basis for the amount ordered.” *Id.*

This Court has stated that the trial court must adhere to a four-step process to deviate from the Guidelines:

*First*, the trial court must determine the presumptive child support amount under the Guidelines. *Second*, the trial court must hear evidence as to the reasonable needs of the child for support and the relative ability of each parent to provide support. *Third*, the trial court must determine, by the greater weight of this evidence, whether the presumptive support amount would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate. *Fourth*, following its determination that deviation is warranted, in order to allow effective appellate review, the trial court must enter written findings of fact showing the presumptive child support amount under the Guidelines; the reasonable needs of the child; the relative ability of each party to provide support; and that application of the Guidelines would exceed or would not meet the reasonable needs of the child or would be otherwise unjust or inappropriate.

*Sain v. Sain*, 134 N.C. App. 460, 465-66, 517 S.E.2d 921, 926 (1999) (emphasis added) (internal quotation marks and citations omitted). When the trial court is to make findings pertaining to the child's reasonable needs and the relative ability of each parent to provide support, we have stated that, pursuant to N.C. Gen. Stat. § 50-13.4(c1), it must consider and include in its findings:

[T]he reasonable needs of the child for health, education, and maintenance, having due regard to the estates, earnings, conditions, accustomed standard of living of the child and the parties, the child care and homemaker contributions of each party, and other facts of the particular case.

N.C. Gen. Stat. § 50-13.4(c1) (2017); *accord Spicer v. Spicer*, 168 N.C. App. 283, 293, 607 S.E.2d 678, 685 (2005) (“These ‘factors should be included in the findings if the trial court is requested to deviate from the [G]uidelines.’” (quoting *Gowing v. Gowing*, 111 N.C. App. 613, 618, 432 S.E.2d 911, 914 (1993))).<sup>11</sup>

As discussed *supra* in Part B, we also review “[a] trial court’s deviation from the Guidelines . . . under an abuse of discretion standard.” *State ex rel. Fisher v. Lukinoff*, 131 N.C. App. 642, 644, 507 S.E.2d 591, 593 (1998). But, before we can “determine from the record whether the judgment—and the legal conclusions which underlie it—represent a correct application of the law,” the trial court’s “findings of fact must show justification for the deviation and a basis for the amount ordered.” *Id.* at 644-45, 507 S.E.2d at 593 (quotation marks and citations omitted).

Mr. Burgett argues that the trial court failed to address the third and fourth steps necessary to deviate from the Guidelines.<sup>12</sup> We agree. The record before us is akin to the record in *Spicer* and *Lukinoff*, in which we held that the trial court’s order lacked findings necessary for us to review whether it abused its discretion in

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<sup>11</sup> As Ms. Thomas requested that the trial court deviate from the Guidelines by written notice of intent on 26 January 2016 pursuant to Section 50-13.4(c), the trial court was encouraged to make these findings.

<sup>12</sup> Contrary to Mr. Burgett’s and Ms. Thomas’ concessions that the trial court determined the presumptive support amount, the order does not include that calculation. The order references a child support worksheet that is not included in the record. The only amounts of support the trial court determined were the final amount of \$1,679.91 per month and the \$21,176.74 in back child support that Mr. Burgett was ordered to pay. These amounts, however, are calculations derived *after* the trial court deviated from the Guidelines in refusing to deduct Mr. Burgett’s social security income. However, because both parties do not argue this issue, we do not address it on appeal.

deviating from the Guidelines. *Spicer*, 168 N.C. App. at 292-95, 607 S.E.2d at 684-86; *Lukinoff*, 131 N.C. App. at 645-46, 507 S.E.2d at 594.

In *Spicer*, we concluded that the trial court did not make any specific findings regarding the reasonable needs of the child because it “simply found, without further explanation, that the child’s reasonable needs and expenses totaled \$1,260.10 per month.” *Spicer*, 168 N.C. App. at 293, 607 S.E.2d at 685-86. The trial court lacked “specific consideration of what amount [was] necessary for the child’s health, education, and maintenance” and omitted analysis considering “the accustomed standard of living of the child and the parties.” *Id.* at 293-94, 607 S.E.2d at 685-86 (quotation marks and citation omitted). Similarly, in *Lukinoff*, we held that the trial court failed to make any findings regarding the child’s reasonable needs, “including his education, maintenance, or accustomed standard of living.” *Lukinoff*, 131 N.C. App. at 645-46, 507 S.E.2d at 594. Moreover, the trial court’s findings failed to “indicate . . . whether the presumptive amount . . . would not meet or would exceed the reasonable needs of the child.” *Id.* at 646, 507 S.E.2d at 594 (emphasis omitted) (quotation marks and citation omitted).

As in *Spicer* and *Lukinoff*, the trial court here failed to satisfy steps three and four of the four-step process when it deviated from the Guidelines. There is a dearth of findings concerning D.N.B.’s health and maintenance relative to the well-being and accustomed standard of living of her and her parents, which appear below, in relevant



part:

[Ms. Thomas] works for US Airways/American Airlines, where she is employed as a flight attendant.

[Ms. Thomas] earns an average gross monthly income of \$2,493.00 per month.

[Mr. Burgett] earns a gross monthly income of \$9,205.00 per month from all combined sources, per his Financial Affidavit . . . .

[Ms. Thomas] and . . . [D.N.B.] live in a home owned by [Ms. Thomas'] mother, and [Ms. Thomas] struggles to make ends meet.

The minor child, [D.N.B.], has special needs, and her participation in therapy/counseling and in band are legitimate and reasonable extraordinary expenses, given her special needs.

[Ms. Thomas] incurs out of pocket expenses for the minor child's therapy at a rate of \$40.00 per week (\$173.20 per month), and an average of \$500.00 per month on band and related expenses.

There is a significant disparity in income between the parties. . . .

On average, [D.N.B.] spends three-hundred and eight (308) overnights per year with [Ms. Thomas], and approximately fifty-seven (57) overnights per year with [Mr. Burgett]. . . .

[Mr. Burgett] qualifies for social security payments, and a portion of those payments are paid for the benefit of [D.N.B.]; [Ms. Thomas] is the payee of those funds, which total \$1,255.00 per month.

The trial court made no findings regarding D.N.B.'s educational expenses or

whether application of the presumptive guidelines would exceed or not meet the reasonable needs of D.N.B. or whether the presumptive support would be unjust or inappropriate. *See Lukinoff*, 131 N.C. App. at 646, 507 S.E.2d at 594 (“An award other than that set forth in the Guidelines is proper only when the trial court determines that the greater weight of the evidence establishes ‘the [G]uidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate.’ ” (emphasis omitted) (quoting N.C. Gen. Stat. § 50-13.4(c)). Further, the trial court failed to calculate D.N.B.’s reasonable needs and expenses. *See Beamer v. Beamer*, 169 N.C. App. 594, 599, 610 S.E.2d 220, 224 (2005) (“Without knowing what the children’s reasonable expenses are, we cannot review the trial court’s decision to deviate from the Guidelines or the amount ultimately awarded.”).

While the trial court may have been correct in deviating from the Guidelines, “[i]t is not enough that there may be evidence in the record sufficient to support findings which *could have been made*. The trial court must itself determine what pertinent facts are actually established by the evidence before it[.]” *Coble*, 300 N.C. at 712, 268 S.E.2d at 189 (emphasis in original). Absent such specific findings, “we are precluded from reviewing the basis of the award.” *Spicer*, 168 N.C. App. at 294-95, 607 S.E.2d at 686. We thus vacate and remand this issue to the trial court for more specific findings pursuant to Section 50-13.4(c) and this Court’s precedents.

*D. Attorney's Fees*

Mr. Burgett's last challenge is to the trial court's order that he pay \$15,000 for Ms. Thomas' attorney's fees.

Mr. Burgett makes three arguments to support his contention that the trial court erred in awarding Ms. Thomas attorney's fees, and we discuss each one in turn.

In actions involving child support:

[T]he court may in its discretion order payment of reasonable attorney's fees to an interested party acting in good faith who has insufficient means to defray the expense of the suit. Before ordering payment of a fee in a support action, the court must find as a fact that the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action or proceeding[.]

N.C. Gen. Stat. § 50-13.6 (2017); *see also Burr v. Burr*, 153 N.C. App. 504, 506, 570 S.E.2d 222, 224 (2002) (“[T]he trial court [is] required to make two findings of fact: that the party to whom attorney's fees were awarded was (1) acting in good faith and (2) has insufficient means to defray the expense of the suit.”). Because this is also an “action solely for child support, the court must make the required finding . . . that the party required to furnish adequate support failed to do so when the action was initiated.” *Spicer*, 168 N.C. App. at 296, 607 S.E.2d at 687 (citing *Stanback v. Stanback*, 287 N.C. 448, 462, 215 S.E.2d 30, 40 (1975)). “Whether these statutory requirements have been met is a question of law, reviewable on appeal.” *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 724 (1980).

In finding of fact 32, the trial court determined:

[Ms. Thomas] is an interested party, acting in good faith, without the means to pursue child support for [D.N.B.'s] benefit, but for an award of attorney's fees.

Mr. Burgett contends that this sole “finding” as to attorney’s fees is inadequate because the trial court failed to “determin[e] that [Ms. Thomas] ha[d] insufficient means to defray the costs of the action.”<sup>13</sup> *See Atwell v. Atwell*, 74 N.C. App. 231, 238, 328 S.E.2d 47, 51 (1985) (stating that a “finding” as to one’s ability to defray the costs of suit “is, in reality, a conclusion of law” that must be supported by adequate factual findings). Specifically, Mr. Burgett argues that there are no evidentiary findings concerning Ms. Thomas’ expenses nor is there a finding of the parties’ estates that help support the trial court’s determination that Ms. Thomas cannot independently pay for her action against him. We disagree.

When a trial court is making findings necessary to award attorney’s fees pursuant to Section 50-13.6, “there is no need to compare the parties’ relative estates when considering whether to award attorney’s fees in child custody and support actions.” *Taylor v. Taylor*, 343 N.C. 50, 57, 468 S.E.2d 33, 37 (1996). Mr. Burgett cites this Court’s holding in *Barrett v. Barrett* that “a court should generally focus on the disposable income and estate of just that spouse, although a comparison of the

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<sup>13</sup> Because Mr. Burgett does not argue that the trial court failed in making the appropriate findings regarding Ms. Thomas’ good faith or his failure to provide support at the time of the action, we need not address these issues.

two spouses' estates may sometimes be appropriate.” 140 N.C App. 369, 374, 536 S.E.2d 642, 646 (2000). *Barrett* does not mandate that the trial court compare the parties' estates. See *Van Every v. McGuire*, 348 N.C. 58, 60, 497 S.E.2d 689, 690 (1998) (holding that Section 50-13.6 “does not *require* the trial court to compare the relative estates of the parties” (emphasis in original)). Thus, we are unpersuaded that the trial court committed *per se* error by omitting findings discussing the parties' estates.

While “ ‘a bald statement that a party has insufficient means to defray the expenses of [a] suit’ ” is insufficient as a matter of law, the trial court here made related findings of fact that satisfy its statutory obligation. *Sarno v. Sarno*, \_\_ N.C. App. \_\_, \_\_, 804 S.E.2d 819, 827 (2017) (quoting *Cameron v. Cameron*, 94 N.C. App. 168, 172, 380 S.E.2d 121, 124 (1989)). The trial court made the following findings associated with Ms. Thomas' ability to pay her attorney's fees: (1) her monthly gross income is \$2,493; (2) she lives at her mother's residence with D.N.B. and “struggles to make ends meet;” (3) she incurs \$40 per week in medical expenses and \$500 per month on band expenses; (4) since February 2015, she has received \$1,255 per month from Mr. Burgett's social security payments; and (5) since November 2016, after Mr. Burgett unilaterally reduced his child support payment in contravention of the temporary child support amount of \$1,036 per month, as well as an additional \$50 per month in back child support, Ms. Thomas has received “a little less than \$500 per

month” from Mr. Burgett.

The trial court’s findings not only show that Ms. Thomas’ income is vastly inferior to Mr. Burgett’s, but go well beyond the “bare statutory language” that she cannot employ adequate counsel. *Dixon v. Gordon*, 223 N.C. App. 365, 373, 734 S.E.2d 299, 305 (2012); *cf. id.* (“Although information regarding father’s gross income and employment was present in the record in father’s testimony, there are no findings in the trial court’s order which detail this information.”). These findings support the trial court’s determination that, without, at least, partial payment of attorney’s fees, Ms. Thomas would not, “as litigant, [be] able to meet [Mr. Burgett], as litigant, on substantially even terms with respect to representation by counsel.” *Quick v. Quick*, 305 N.C. 446, 461, 290 S.E.2d 653, 663 (1982), *superseded in part by statute on other grounds*, N.C. Gen. Stat. § 50-13.4(f)(9) (1983); *see also Hudson*, 299 N.C. at 474, 263 S.E.2d at 725 (“[H]e or she must be unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit.”).

Mr. Burgett then argues that the trial court failed to make adequate findings pertaining to the reasonableness of its award regarding Ms. Thomas’ attorney’s time and skill during her representation. Mr. Burgett does not contend that the amount of attorney’s fees is not supported by the evidence. *See Hudson*, 299 N.C. at 473, 263 S.E.2d at 724 (“[T]he *amount* of the award rests within the sound discretion of the trial judge and is reviewable on appeal only for abuse of discretion.” (emphasis in

original)). He argues only that the trial court failed to make the appropriate statutory findings to determine its award was reasonable. We disagree.

The trial court expressly referenced and relied on Ms. Thomas' attorney's amended affidavit for attorney's fees—which came at the trial court's request. The detailed affidavit describes the attorney's experience and background in domestic relations law, her hourly rate, the total number of hours she worked on Ms. Thomas' case, and attaches as an exhibit more than 30 pages of records identifying the specific work she performed for Ms. Thomas. *See Savani v. Savani*, 102 N.C. App. 496, 505, 403 S.E.2d 900, 905-06 (1991) (holding that the trial court did not abuse its discretion in the amount of fees given based on findings of the hourly rate and number of hours worked provided by the plaintiff's attorneys' affidavits). We thus reject Mr. Burgett's argument.

Lastly, Mr. Burgett argues that the trial court erred in awarding attorney's fees without giving him an opportunity to be heard and contest Ms. Thomas' attorney's amended affidavit prior to the trial court's order. Mr. Burgett contends that this case is analogous to *Allen v. Allen*, 65 N.C. App. 86, 308 S.E.2d 656 (1983). In *Allen*, the trial court issued an order awarding custody to the defendant and directed the plaintiff to pay the defendant's attorney's fees but deferred a ruling as to the amount until a later date when the plaintiff would appear in court. *Id.* at 87, 308 S.E.2d at 657. Before another hearing, the defendant's counsel filed an affidavit

itemizing his expenses and time spent on the case. *Id.* at 88, 308 S.E.2d at 658. A copy of the affidavit was never delivered to the plaintiff or his counsel, nor were they notified when the trial court would decide the matter on attorney’s fees. *Id.* The day after the affidavit was filed, the trial court entered an *ex parte* judgment against the plaintiff, ordering him to pay over \$16,000 in attorney’s fees. *Id.*

In vacating the trial court’s order, we reasoned that the plaintiff had the right to question the reasonableness of the affidavit and the services rendered. *Id.* We held that, because “parties have a right, not only to be present, but to be heard when their substantial rights and duties are being adjudged”—such as paying more than \$16,000 in legal fees—the plaintiff should have been presented with the opportunity to “question the necessity or reasonableness of any service claimed, as well as the worth of any service approved.” *Id.* at 88-89, 308 S.E.2d at 658-59.

Here, on 17 May 2017, Ms. Thomas’ attorney served an affidavit of fees on Mr. Burgett’s attorney. Two months later, in the morning prior to the July 2017 hearing, Ms. Thomas’ attorney filed that same affidavit with the trial court, and the issue of fees and the affidavit itself was discussed at the hearing. Two months later, by email sent 21 September 2017, the trial court informed the parties of its findings and rulings to be declared in its later order, including that Ms. Thomas should be awarded attorney’s fees. In that email, the trial court instructed Ms. Thomas’ attorney to “provide an affidavit of her time” to the trial court and Mr. Burgett’s attorney and



told the parties that “[i]f either of [them had] questions, don’t hesitate to find me.” Subsequently, Ms. Thomas’ attorney filed her amended affidavit of fees on 11 January 2018 and served it on Mr. Burgett’s attorney that same date. Eight days later, on 19 January 2018, the trial court entered its permanent child support order and ordered that Mr. Burgett pay \$15,000 of the \$23,132.50 in legal fees and expenses incurred by Ms. Thomas.

This case is readily distinguishable from *Allen* in that Mr. Burgett had adequate notice and frequent opportunities to address the trial court regarding Ms. Thomas’ legal expenses. Throughout the litigation, Mr. Burgett and his attorney were notified by Ms. Thomas and the trial court regarding the issue of attorney’s fees. Mr. Burgett chose not to object to Ms. Thomas’ motion for attorney’s fees during the July hearing. Mr. Burgett did not notify the trial court or Ms. Thomas’ attorney of any objection to the amended affidavit filed and served at the trial court’s request. Mr. Burgett argues that he “had no opportunity to be heard after the requested amount” was amended by Ms. Thomas’ attorney. Yet in his brief, Mr. Burgett concedes that Ms. Thomas’ “counsel did serve [his] counsel with a copy of the amended affidavit.” Mr. Burgett’s attorney had eight days to contest anything within that amended affidavit but failed to act on it. Moreover, unlike *Allen*, the trial court only ordered Mr. Burgett to pay a portion, rather than the entirety, of Ms. Thomas’ attorney’s fees. Accordingly, we hold that the trial court did not deprive Mr. Burgett

of his opportunity to be heard.<sup>14</sup>

Although we hold that the trial court did not err in awarding attorney's fees, we vacate and remand the award for the trial court to consider the amount in light of its new determination of Ms. Thomas' monthly child support expense. As we concluded in Part B, no competent evidence supported the trial court's finding that Ms. Thomas incurred a monthly expense of \$500 for D.N.B.'s band participation. The record does not indicate whether, or how, the trial court weighed its erroneous finding of this monthly expense in its calculation of the attorney's fees award.

### **III. Conclusion**

In sum, we reverse the trial court's finding that at the time of the hearing, Ms. Thomas was incurring \$500 in monthly expenses for D.N.B.'s band participation and we vacate the trial court's order with respect to its (1) calculation of Mr. Burgett's gross income; (2) deviation from the Guidelines in not removing Mr. Burgett's social security payments from his child support obligation; and (3) award of attorney's fees, and remand these matters for further proceedings consistent with this opinion.

REVERSED IN PART, VACATED IN PART, AND REMANDED.

Judges DILLON and COLLINS concur.

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<sup>14</sup> Mr. Burgett also argues in his reply brief that there is "nothing in the record that indicates when [his] attorney actually received" a copy of the amended affidavit, but fails to provide evidence of a contrary date of receipt. Absent any conflicting evidence, we rely on the record before us and the stipulated date of the certificate of service.