Attorney Fees in Child Custody Actions

As I mentioned in an earlier post, parties to civil actions are responsible for paying their own attorneys' fees unless a statute specifically permits fee shifting. In child custody actions, G.S. 50-13.6 allows a court to shift some or all of one party's fees to the other party under certain circumstances. The statute provides that:

> In an action or proceeding for the custody or support, or both, of a minor child, including a motion in the cause for the modification or revocation of an existing order for custody or support, or both, the 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.

If the grounds for entitlement are met, awarding the fee is still in the court's discretion, as is the amount awarded. Our courts have made clear, however, that fee orders will be remanded if they do not include specific findings of fact as to both entitlement and reasonableness. I discuss the required findings below.

Policy. The purpose of the fee-shifting provision in 50-13.6 is not to act as sanction against the party ordered to pay the other's fees. Instead, it is to help level the playing field for a party at a financial disadvantage in litigating custody of a child. As our Supreme Court has said, the statute helps make it possible for a party "to employ adequate counsel to enable [him or her], as litigant, to meet [the other party] in the suit." *Taylor v. Taylor*, 343 N.C. 50 (1996). For this reason, fee eligibility does not depend on the outcome of the case. Fees are available even to a party who does not prevail, as long as he or she participated in good faith. *Hausle v. Hausle*, 226 N.C. App. 241 (2013).

Scope. The statute applies in custody and child support actions and actions to modify or revoke existing orders in such cases. The Court of Appeals has also applied it in contempt actions brought to enforce child custody and support orders. *Wiggins v. Bright*, 198 N.C. App. 692 (2009). An award can also include fees incurred during appeal of these matters. *McKinney v. McKinney*, 228 N.C. App. 300 (2013).

***Required Findings*.** There are specific findings of fact that must be included in the attorney fee order. There must be findings to show the movant's entitlement to the fee, and then the court must make findings to support the reasonableness of the amount awarded. *Cunningham v. Cunningham*, 171 N.C. App. 550 (2005). If the judge opts to deny an attorney fee, the court must still make findings of fact adequate to show the basis for its denial. *Diehl v. Diehl*, 177 N.C. App. 642 (2006). [Note: Those of you already familiar with G.S. 50-13.6 will recall that the statute goes on to require an additional finding about adequate support. That finding applies in *child support only* cases, which are not the focus of this blog post.]

Entitlement to Fees. Fees may only be awarded to "an interested party acting in good faith who has insufficient means to defray the expense of the suit." A court's determination of these factors is reviewed *de novo* on appeal. *Hudson v. Hudson*, 299 N.C. 465 (1980).

- *"Interested party*". In most cases the "interested party" will be one parent or the other, but it also applies to intervenors, such as the grandparents seeking to enforce visitation in *Smith v. Barbour*, 195 N.C. App. 244 (2009), and to the custody-seeking foster parents in *In re Baby Boy Scearce*, 81 N.C. App. 662 (1986).

- *"Acting in good faith"*. In most custody actions this issue will not be hotly contested, and a straightforward finding that the movant was "acting in good faith" in seeking custody is likely to suffice. The Court of Appeals has said that a party acts in good faith in a custody action "by demonstrating that he or she seeks custody in a genuine dispute with the other party." *Setzler v. Setzler*, 781 S.E.2d 64 (2015). In *Setzler*, the Court of Appeals rejected an argument that a movant lacked good faith in seeking more time with her children merely because she had struggled with drug addiction and "should know that she is a poor parent." The court explained that, "[t]o support such an outcome would be to negate the efforts made by parents, such as defendant, to correct previous mistakes and become better parents and would serve to bar such parents from bringing custody actions." *Id.* at 66.

- *"Hav[ing] insufficient means to defray expense of suit"*. It is not enough for the order to make a conclusory statement reflecting this statutory language. *See Dixon v. Gordon*, 223 N.C. App. 365 (2012). The order must include specific findings that show how the court reached its determination, and those findings must be supported by evidence in the record. If the record does not already include detailed financial information about the movant (such as in a custody-only action), that information should be included with the fee motion. The court should start by examining the movant's income and expenses. *See Hinshaw v. Kuntz*, 234 N.C. App 502 (2014) (movant's monthly surplus of $4400 was enough to show she was able to pay attorney fees). If the income/expense figures show that the movant cannot pay fees, the court must also look to whether the movant has a separate estate or other assets that could be used to cover them. *See, e.g.*, *Respess v. Respess*, 232 N.C. App. 611 (2014) (error not to consider movant's estate and assets); *Bookholt Bookholt*, 136 N.C. App. 247 (1999) (error not to consider movant's separate $88,000 estate). If there is indeed a separate estate, the question for the court is whether it would be "unreasonably depleted" by paying the fees. Total depletion is not required. *Taylor*, 343 N.C. 50 (1996). In assessing unreasonable depletion, the court is *not* required to consider and make findings about the *non-movant's* assets and estate. *Id.*; *Loosvelt v. Brown*, 235 N.C. App. 88 (2014). But neither is the judge "placed in a straightjacket" in this respect, and in appropriate circumstances the judge is permitted to make this comparison if necessary. *Van Every v. McGuire*, 343 N.C. 58 (1998).

Reasonableness of Fees. The amount of reasonable attorney fees awarded is reviewed for abuse of discretion. It is clear, however, that in supporting a "reasonable" fee award, the court must make findings of fact as to the nature and scope of legal services rendered; attorney skill and time required; and the attorney's hourly rate and reasonableness in comparison to others. *Simpson v. Simpson*, 209 N.C. App. 320 (2011). A judge who witnessed hearings or the trial of a custody matter is in a good position to assess the skill and effectiveness of the attorney. But in almost every case, the trial court will also require the attorney for the movant to submit an affidavit that sets out facts to support each of the reasonableness factors. If an affidavit fails to state that the attorney's hourly rate is reasonable in comparison to other rates in the area, the judge is permitted—although by no means required—to take judicial notice of a reasonable rate (if the judge in fact has such knowledge). The Court of Appeals has "stress[ed], nonetheless, that the better practice is for parties to provide evidence of the customary local rate[.]" *Id*. And what if the attorney's affidavit does make the proper averment, but the court is unconvinced? The judge of course is not required to accept the statement on its face. Some judges may also require supporting affidavits from other local attorneys, and those affidavits will be similarly scrutinized. In the end, a judge may effectively reduce the hourly rate by calculating a fee based on a rate the judge knows to be reasonable.

Accompanying a fee affidavit should also be a detailed timesheet or invoice that breaks down the work performed, when, and by whom. A timesheet that merely set forth dates and hours spent working for the movant, but which provided no descriptions of the work performed, was not adequate to support a fee award. *Davignon v. Davignon*, 782 S.E.2d 391 (2016).

An award under this statute may include *only* fees incurred in pursuing the child custody and support claims. *See Robinson v. Robinson*, 210 N.C. App. 319 (2011) (error not to cull out fees related to equitable distribution claim); *Cunningham*, 171 N.C. App. 550 (2005) (error to include fees related to TPR action). At a minimum, then, the movant in a multi-claim action should provide time records that allow the court to see what time was spent on the relevant claims.

If a party seeks fees for paralegal time spent doing legal work, the court has discretion to award such fees as part of the attorney fees, but the court is not required to do so. (See my post about this here.)

And finally, a fee is not unreasonable merely because the movant's fees exceeded the other party's. The court's order should be based on the reasonableness factors listed above, and should not "gauge[d] by the fees charged to the other side." *Kuttner v. Kuttner*, 193 N.C. App. 158 (2008).