

# Attorney fee shifting in custody actions

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Special Topic Seminar: Child Custody  
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## 50-13.6

### § 50-13.6. Counsel fees in actions for custody and support of minor children.

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.

*To "make it possible for [the party] to employ adequate counsel to enable [him or her], as litigant, to meet plaintiff in the suit."*

— Taylor, 343 NC 50 (1996).



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Includes contempt for failure to comply with prior order.  
- Wiggins, 198 NC App 692 (2009)

Also can include fees incurred on appeal of custody/support actions.  
- McKinney, 228 NC App 300 (2013)



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## Required findings

**§ 50-13.6. Counsel fees in actions for custody and support of minor children.**  
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Findings about *entitlement* are reviewed de novo.

*Amount* of fee awarded (if any) is reviewed for abuse of discretion.

-Hudson, 299 NC 465 (1980)

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## Required findings

Entitlement to fees

- Interested party
- Acting in good faith [when initiated action]
- Has insufficient means to defray expense of suit

Reasonableness of fees

- Nature and scope of legal services rendered
- Skill and time required
- Attorney's hourly rate and reasonableness in comparison to others.

Simpson (2011); Cunningham (2005).

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## SCENARIO

- You properly note that the statute says you “may” award fees in your “discretion.”

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- You have just reviewed an attorney fee motion. The movant *may* qualify, but it's a close call, and she didn't incur many fees anyway. So you decide to deny the motion in your discretion.
- Because you're denying it, you don't include findings of fact.
- *Should you have included findings?*

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- Because you're denying it, you don't include findings of fact.
- Should you have included findings?

**Yes.** Whether you grant or deny. *Tricebock* (2014), *Diehl* (2006), *Spicer* (2005).



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## Required findings

### Entitlement to fees

- Interested party* →
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## “Interested party”

- So, intervenors, too.
  - Grandparents enforcing visitation. *Smith v. Barbour*, 195 NC App 244 (2009).
  - Foster parents. *Baby Boy Scarce*, 81 NC App 662 (1986).



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## SCENARIO

- Father sought custody of his children.
- Your order gives father weekend visitation only.
- Father now seeks his \$8000 in attorney fees.
- You *are* able to find that he sought custody in good faith and that he is unable to defray the fees.
- Mother’s attorney balks: “How could he be entitled to fees when *my client* was the prevailing party?”
- *Does she have a point?*

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## “Interested party”

- So, intervenors, too.
  - Grandparents enforcing visitation. *Smith v. Barbour*, 195 NC App 244 (2009).
  - Foster parents. *Baby Boy Scarce*, 81 NC App 662 (1986).
- Need not be “prevailing” party. *Burr*, 153 NC App 504 (2002).
  - An award of fees is “*not contingent on the outcome.*” – *Hausle*, 226 NC App 241 (2013).
  - Good faith is the key here.

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To “*make it possible for [the party] to employ adequate counsel to enable [him or her], as litigant, to meet plaintiff in the suit.*”

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Back to the earlier  
**SCENARIO**

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- You *are* able to find that he sought custody in good faith and that he is unable to defray the fees.
- Mother’s attorney balks: “How could he be entitled to fees when *my client* was the prevailing party?”
- She also argues: “Your Honor, he hasn’t actually paid his attorney that money. He can’t get reimbursed for what he hasn’t paid!”

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Back to the earlier  
**SCENARIO**

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- Mother’s attorney balks: “How could he be entitled to fees when *my client* was the prevailing party?”
- She also argues: “Your Honor, he hasn’t actually paid his attorney that money. He can’t get reimbursed for what he hasn’t paid!”

Wrong – There’s no requirement that movant first pay fees. *Belcher, 152 NC App 452 (2002).*

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**Required findings**

Entitlement to fees

- Interested party
- Acting in *good faith* [when initiated action] →
- Has insufficient means to defray expense of suit

Reasonableness of fees

- Nature and scope of legal services rendered
- Skill and time required
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## “Good faith”

“Honesty of intention, and freedom from knowledge of circumstances which ought to put one on inquiry’ that a claim is frivolous.”

*Setzler v. Setzler* (NC App 2015)  
(quoting *Bryson v. Sullivan* (NC 1992))

“A party satisfies [this element] by demonstrating that he or she seeks custody in a genuine dispute with the other party.”

-Setzler



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## Required findings

### Entitlement to fees

- Interested party
- Acting in good faith [when initiated action]
- Has *insufficient means to defray expense* of suit →

### Reasonableness of fees

- Nature and scope of legal services rendered
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- Attorney’s hourly rate and reasonableness in comparison to others.



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## “Insufficient means to defray”

*Dixon v. Gordon*, 223 NC App 365 (2012).

From the DCJ’s order:

7. Father is entitled to an award of reasonable attorney’s fees payable by Mother to Father’s attorney.

8. Mother is able to pay an award of reasonable attorney’s fees to Father’s attorney.

46. Father is an interested party, acting in good faith, who does not have sufficient funds with which to employ and pay legal counsel to meet Mother on an equal basis. Father is entitled to a reasonable award of attorney’s fees on the issue of child custody. } Sufficient finding?



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## “Insufficient means to defray”

*Dixon v. Gordon*, 223 NC App 365 (2012).

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8. Mother is able to pay an award of reasonable attorney’s fees to Father’s attorney.

46. Father is an interested party, acting in good faith, who does not have sufficient funds with which to employ and pay legal counsel to legal counsel to meet Mother on an equal basis.<sup>11</sup> Here, the only findings of fact were that “father ... fees on the issue of child custody does not have sufficient funds with which to employ and pay legal counsel to legal counsel [sic] to meet Mother on an equal basis.” 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. We believe that because the findings in this case contain little more than the bare statutory language, the order is insufficient to support an award of attorney’s fees. Therefore, we remand so that the trial court can make additional required findings of fact regarding father’s means to employ counsel.

Sufficient finding?  
**No.**

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## “Insufficient means to defray”

The findings must:

- Start with a focus on the movant’s disposable income and expenses.
- If applicable, must also consider the movant’s separate estate. (Cash, accounts, other assets).
  - *Bookholt* (1999): Error not to consider movant’s separate 88K estate
  - *Respass* (2014): Error not to consider movant’s estate and other assets

The big consideration:  
Will paying the atty fees *unreasonably* deplete that estate?  
(Total depletion is *not* required for fee award.)

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## SCENARIO

- Mother moves for \$41K in fees.
- Record includes extensive financial information for both mother and father.
- Your order finds that mother’s income is limited and she has \$18K in savings and separate assets.
- You conclude that her fees would unreasonably deplete her estate and order father to pay \$20K.
- Father appeals, arguing you should also have made findings about *his* estate, too, before making conclusions about “unreasonable depletion.”
- *Have you erred?*

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## “Unreasonable depletion of assets”

No.

- Comparison of parties’ relative estates is not *required*. *Taylor*, 343 NC 50 (1996), *Loosvelt*, 235 NC App 88 (2014).
- But it is *permitted* in proper circumstances.
  - *Van Every*, 348 NC 58 (1998)

trial court should focus on the disposable income and estate of defendant, it should not be placed in a straitjacket by prohibiting any comparison with plaintiff’s estate, for example, in determining whether any necessary depletion of defendant’s estate by paying her own expenses would be reasonable or unreasonable.



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## Required findings

### Entitlement to fees

- Interested party
- Acting in good faith [when initiated action]
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### Reasonableness of fees

- *Nature and scope of legal services rendered* →
- *Skill and time required.*
- Attorney’s hourly rate and reasonableness in comparison to others.



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Sample

*Davignon* affidavit



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Davignon v. Davignon, 782 S.E.2d 391 (2016)

before this Court are also wholly devoid of any evidence submitted to show Plaintiff was unable to defray the costs of this action. The trial court's findings of fact, without more, are insufficient to support an award of attorney's fees to Plaintiff under N.C. Gen.Stat. § 50-13.6.

Additionally, the trial court failed to make sufficient findings of fact "upon which a determination of the requisite reasonableness can be based, such as findings regarding the nature and scope of the legal services rendered, the skill and time required, the attorney's hourly rate, and its reasonableness with that of other lawyers." *Cobb v. Cobb*, 79 N.C.App. 592, 595, 339 S.E.2d 825, 828 (1986) (citations omitted). Plaintiff's counsel's affidavit of attorney's fees included his hourly rate, but merely set forth various dates and hours spent working on this case, without delineating the nature of the work performed for each date.

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Sample

*Lueallen order*

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*Lueallen*, 790 SE2d 690 (2014).

50-13.6, the order failed to make any findings as to "the nature and scope of the legal services rendered, the skill and time required, the attorney's hourly rate, and its reasonableness in comparison with that of other lawyers." *Smith*, 195 N.C.App. at 255, 671 S.E.2d at 586 (quoting *Cobb v. Cobb*, 79 N.C.App. 592, 595, 339 S.E.2d 825, 828 (1986)). It is necessary that the record contain findings regarding these factors in order to determine whether an award for attorney fees is reasonable, and "[i]f these requirements have been satisfied, the amount of the award is within the discretion of the trial judge and will not be reversed in the absence of an abuse of discretion." *Id.* (quotation marks and brackets omitted).

The parties offered detailed affidavits regarding attorney fees, so on remand the trial court must also make additional findings of fact addressing "the nature and scope of the legal services rendered, the skill and time required, the attorney's hourly rate, and its reasonableness in comparison with that of other lawyers" in support of its award of attorney fees. *Id.* (quoting *Cobb*, 79 N.C.App. at 595, 339 S.E.2d at 828).

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Sample

## Jackson affidavit



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### Nature and scope of attorney work

An order under 50-13.6 must indicate that court considered/granted fees *only for work on custody/support matters*.

- *Robinson*, 210 NC. App 319 (2011) (failure to cull out e.d. fees)
- *Cunningham*, 171 NC App 550 (2005) (proper apportionment of custody and e.d. fees)
- *Burr*, 153 NC App 504 (2002) (failure to cull out TPR fees)



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### SCENARIO

- Father moves for \$50K of fee-shifting.
- Mother's attorney argues that the fees requested are unreasonable as a matter of law because they greatly exceed the \$20K in fees incurred on the mother's side.

*Does this argument have merit?*



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## SCENARIO

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- Mother’s attorney argues that the fees requested are unreasonable as a matter of law because they greatly exceed the \$20K in fees incurred on the mother’s side.

Does this argument have merit?

No. That’s not a *dispositive* fact.  
*Kuttner*, 193 NC App 158 (2008) (award “not to be gauged by the fees charged to the other side”).



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## Required findings

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Sample

“Smith” affidavit



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## Attorney rate and reasonableness

Judge *may* take judicial notice of customary rate.

- *Simpson*, 209 NC App 320 (2011) (matter of first impression)

(Not required; and not the very best practice)



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Finally, let's look at...

## *Peeples* affidavit



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