Attorney Fees in Domestic Cases

Excerpts from District Court Bench Book Family Law

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GENERAL RULE

"North Carolina adheres to the **"American Rule"** with regard to awards of attorney's fees. *Ehrenhaus v. Baker*, __ N.C. App. __, __, 776 S.E.2d 699, 704 (2015). Under this rule, each litigant is required to pay his or her attorney's fees, unless a statute or agreement between the parties provides otherwise. *In re King*, 281 N.C. 533, 540, 189 S.E.2d 158, 162 (1972)".

Davignon v. Davignon, 782 S.E.2d 391(N.C. App. Feb. 16, 2016).

Child Support

1. Authorization.

   a. G.S. 50-13.6 allows a court in its discretion to award reasonable attorney fees in an original action for support or for custody and support, including a motion in the cause to modify or vacate, to an interested party acting in good faith who has insufficient means to defray the expense of the suit. [G.S. 50-13.6; *Belcher v. Averette,* 152 N.C. App. 452, 568 S.E.2d 630 (2002) (trial court has considerable discretion in allowing or disallowing attorney fees in child support cases).]

   b. Fees also are authorized to an interested party, as deemed appropriate under the circumstances, upon a finding that the supporting party has initiated a frivolous action or proceeding. [G.S. 50-13.6.] *See* below for more.

   c. G.S. 52C-3-312(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015, provides that if an obligee prevails, a responding tribunal in North Carolina may assess against an obligor filing fees, reasonable attorney fees, other costs, and necessary travel and other reasonable expenses incurred by the obligee and the obligee's witnesses. The tribunal may not assess fees, costs, or expenses against

the obligee or the support enforcement agency of either the initiating or the responding state or foreign country, except as provided by other law. Attorney fees may be taxed as costs and may be ordered paid directly to the attorney, who may enforce the order in the attorney's own name. Payment of support owed to the obligee has priority over fees, costs, and expenses.

d. Attorney fees may be awarded under a separation agreement entered into pursuant to G.S. 52-10.1 that provides for attorney fees, unless the provision is otherwise contrary to public policy. [*Hennessey v. Duckworth,* 231 N.C. App. **17**, 752 S.E.2d 194 (2013) (*citing Bromhal v. Stott*, 341 N.C. 702, 462 S.E.2d 219 (1995)).]

2. Discretion as to award and amount.

a. The trial court has the discretion to award attorney fees once the statutory requirements of G.S 50-13.6 have been met. [*Hennessey v. Duckworth,* 231 N.C. App. 17, 752 S.E.2d 194 (2013) (*citing Atwell v. Atwell,* 74 N.C. App. 231, 328 S.E.2d 47 (1985)).]

b. The amount of attorney fees to be awarded rests within the sound discretion of the trial judge. [*Burr v. Burr*, 153 N.C. App. 504, 570 S.E.2d 222 (2002); *Robinson v. Robinson,* 210 N.C. App. 319, 707 S.E.2d 785 (2011) (*citing Burr).*]

c. The trial court has discretion to award less than the total amount claimed by an attorney. [*See Kuttner v. Kuttner,* 193 N.C. App. 158, 666 S.E.2d 883 (2008) (order awarding only a portion of mother's attorney fees upheld).]

d. Trial court has no discretion in an action for child support to award legal fees pursuant to a contingent fee contract. [*Davis v. Taylor,* 81 N.C. App. 42, 344 S.E.2d 19, *review denied,* 318 N.C. 414, 349 S.E.2d 593 (1986).] Such contracts in child support cases are void as against public policy.

3. Type of proceedings in which fees awarded. An award of attorney fees is proper in:

a. An action or proceeding for the custody, 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. [G.S. 50-13.6.]

b. A contempt proceeding for willful failure to pay child support. [*Belcher v. Averette,* 152 N.C. App. 452, 568 S.E.2d 630 (2002). *See also Smith v. Smith*, 121 N.C. App. 334, 465 S.E.2d 52 (1996) (obligor ordered to pay obligee's attorney fees in case enforcing consent judgment providing for payment of college expenses).]

c. Proceedings for retroactive child support.

4. When request for an award of fees is properly made.

a. A request for attorney fees may be properly raised by a motion in the cause subsequent to the determination of the main action. [*In re Scearce,* 81 N.C. App. 662, 345 S.E.2d 411, *review denied,* 318 N.C. 415, 349 S.E.2d 590 (1986) (request for fees in a custody case pursuant to G.S. 50-13.6).]

b. There is no requirement that a party first pay attorney fees before seeking an award pursuant to the statute. [*Belcher v. Averette,* 152 N.C. App. 452, 568 S.E.2d 630 (2002) (denying as irrelevant father's motion to compel mother to answer a discovery request that sought proof that she had paid her attorney fees).]

c. The court of appeals has noted that no case has imposed a time limitation for the filing of a motion for attorney fees in a child custody and child support action pursuant to G.S. 50-13.6, except that a proper notice of appeal divests the trial court of jurisdiction to enter an order for fees while the appeal is pending. [*Bramblett v. Bramblett,* 218 N.C. App. 454, 721 S.E.2d 763 (2012) (**unpublished**) (order awarding attorney fees upheld against claim that request was not timely when it was not included in complaint and was asserted more than a year after complaint filed; motion for fees was filed after conclusion of hearing on child custody and support, and trial court heard and ruled on motion before entry of an order in the custody and support action and prior to any appeal); *Balawejder v. Balawejder,* 216 N.C. App. 301, 721 S.E.2d 679 (2011) (when a custody order is appealed, the trial court loses jurisdiction to consider a request for attorney fees arising out of the custody case).] *But see Duncan v. Duncan*, 366 N.C. 544, 742 S.E.2d 799 (2013).

i. Note, however, that for attorney fees to be included in the amount withheld from a supporting party's income, the court of appeals has held that such a claim should be asserted before entry of the withholding order. [*Glatz v. Glatz,* 98 N.C. App. 324, 390 S.E.2d 763 (denial of motion for attorney fees filed three months after entry of the income withholding order affirmed; G.S. 110-136.6(a), allowing court costs and attorney fees to be included in amount withheld, "clearly contemplates" that such claims be asserted before

entry of the income withholding order), *review denied,* 327 N.C. 427, 395 S.E.2d 677 (1990).]

5. Ability of party to pay award of fees.

   a. The plain language of G.S. 50-13.6 contains no requirement that a trial court make a finding of ability to pay on the part of the person being ordered to pay before attorney fees may be awarded in a custody and support action. [*Loosvelt v. Brown*, 235 N.C. App. 88, 760 S.E.2d 351 (2014) (although some cases have "mentioned" an obligor's ability to pay an award of fees under G.S. 50-13.6, the statute requires no such finding); *Respess v. Respess,* 232 N.C. App. 611, 754 S.E.2d 691 (2014) (*citing Van Every v. McGuire,* 348 N.C. 58, 497 S.E.2d 689 (1998)) (before awarding fees to mother in custody and support action, trial court was not required to find that father had resources available to pay the fees); *Webster v. Webster*, 182 N.C. App. 767, 643 S.E.2d 84 (2007) (**unpublished**). *But see Smith v. Barbour,* 195 N.C. App. 244, 671 S.E.2d 578 (2009) (trial court findings were sufficient to establish father's ability to pay a portion of attorney fees awarded to child's grandparents); *Roberts v. McAllister,* 174 N.C. App. 369, 621 S.E.2d 191 (2005) (affirming trial court's order requiring mother to pay half of father's attorney fees based, in part, on conclusion that mother had the means to pay half), *appeal dismissed,* 360 N.C. 364, 629 S.E.2d 608 (2006); *Cunningham v. Cunningham,* 171 N.C. App. 550, 615 S.E.2d 675 (2005) (affirming the trial court's award of attorney fees but remanding the issue of defendant's ability to pay a final, lump sum fee award of $17,000 in light of a new equitable distribution order entered in the case).]

6. Insufficient means to defray litigation expenses.

   a. A party has insufficient means to defray the expenses of a suit when he is unable to employ adequate counsel in order to proceed as a litigant to meet the other spouse as a litigant in the suit. [*Belcher v. Averette,* 152 N.C. App. 452, 568 S.E.2d 630 (2002).]

   b. In determining whether a party has insufficient means to defray the expenses of the suit, the trial court should focus on both the disposable income of the spouse seeking fees and on her separate estate. [*Van Every v. McGuire,* 348 N.C. 58, 497 S.E. 2d 689 (1998) (trial court also may compare the estates of the parties); *Bookholt v. Bookholt*, 136 N.C. App. 247, 523 S.E.2d 729 (1999) (citing *Van Every*) (findings failed to take into account plaintiff's liquid estate of $88,000 and focused instead on her negative disposable income to justify award of fees), *superseded by statute on other grounds as stated in Williamson v. Williamson*, 142 N.C. App. 702, 523 S.E.2d 729 (2001); *Murn v. Murn*, 723 S.E.2d 583 (N.C. Ct. App. 2012) (**unpublished**) (*citing Belcher v. Averette*, 152 N.C. App. 452, 568 S.E.2d 630 (2002)) (plaintiff was without sufficient means to pay fees when

fees were approximately four times her monthly gross income and evidence showed that defendant owed child support arrearages of $12,036, which meant that plaintiff had to assume majority of financial responsibility for shared monthly basic child support obligation of $4,438.50, which took vast majority of her monthly income).]

i. Fact that a party has a substantial separate estate does not automatically negate her right to attorney fees, but to award fees in such a case, the trial court must find that the use of the separate estate to pay litigation expenses would amount to an unreasonable depletion of that estate. [*Bookholt v. Bookholt*, 136 N.C. App. 247, 523 S.E.2d 729 (1999) (*citing Chused v. Chused*, 131 N.C. App. 668, 508 S.E.2d 559 (1998)) (findings insufficient when court failed to find that use of plaintiff's separate estate to pay her attorney fees would result in an unreasonable depletion of her estate and failed to determine whether plaintiff was an interested party acting in good faith), *superseded by statute on other grounds as stated in Williamson v. Williamson*, 142 N.C. App. 702, 523 S.E.2d 729 (2001); *Chused* (where court did not make findings addressing whether mother's estate would be unreasonably depleted if she had to pay her attorney fees, order requiring defendant to pay fees was reversed and remanded).]

ii. Plaintiff did not meet the statutory requirement of insufficient means to defray the expense of the suit when evidence established that she had a net estate of $665,652 and substantial income. [*Hudson v. Hudson,* 299 N.C. 465, 263 S.E.2d 719 (1980).]

c. A district court may determine that a party has sufficient means to defray costs of an action without considering the estate of the other party. [*Taylor v. Taylor*, 343 N.C. 50, 468 S.E.2d 33 (1996) (mother had means to defray expenses where her monthly income exceeded her expenses, she received $1.2 million in property settlement, and no unreasonable depletion of her estate would be required to pay attorney fees; rejecting mother's argument that this determination requires consideration of the relative estates of the parties); *Osborne v. Osborne*, 129 N.C. App. 34, 497 S.E.2d 113 (1998) (*citing Taylor)* (a court is not required to compare the parties' relative estates before attorney fees are awarded).]

i. Though not required, a comparison of estates is permitted. [*Van Every v. McGuire,* 348 N.C. 58, 60, 497 S.E. 2d 689, 690 (1998) (emphasis in original) (that G.S. 50-13.6 "does not *require* the trial court to compare the relative estates of the parties does not automatically mean that it does not *allow* or *permit* the trial court to do so in a proper case"); *Bookholt v. Bookholt*, 136 N.C. App. 247, 253, 523 S.E.2d 729, 733 (1999) (*citing Van Every)* (noting that a trial judge is not required to compare the separate estates of both parties in determining the propriety of attorney fees but may

do so under appropriate circumstances; on remand, trial court could "if it so chooses" compare the separate estates of the parties to determine whether requiring plaintiff to pay her attorney fees would result in an unreasonable depletion of her estate), *superseded by statute on other grounds as stated in Williamson v. Williamson*, 142 N.C. App. 702, 523 S.E.2d 729 (2001); *Hennessey v. Duckworth,* 231 N.C. App. 17, 752 S.E.2d 194 (2013) (addressing conclusion in custody and support action that plaintiff had insufficient means to defray expenses of the suit, noting that plaintiff was unemployed, and that her attorney fees alone "far exceeded" the value of her few assets combined, while defendant had monthly income of close to $11,000).]

d. Findings regarding insufficient means to defray expenses.

i. Determination that party has insufficient means to defray expenses must be supported by findings. [*Respess v. Respess,* 232 N.C. App. 611, 754 S.E.2d 691 (2014) (findings were sufficient as to plaintiff's income but remand was required when trial court made no findings as to her expenses or her assets and estate); *Church v. Decker*, 231 N.C. App. 514, 753 S.E.2d 742 (2013) (**unpublished**) (*citing Dixon v. Gordon,* 223 N.C. App. 365, 734 S.E.2d 299 (2012)) (matter remanded when defendant testified as to the value of her home, vehicle, and retirement accounts and as to amount of her annual salary but trial court failed to make findings that would support determination of insufficient means).]

ii. Finding that mother not able to defray litigation expenses upheld; mother had been paying all uninsured medical expenses for the past two years, and she had outstanding balances on those expenses at the time of the hearing. [*Leary v. Leary*, 152 N.C. App. 438, 567 S.E.2d 834 (2002); *Mason v. Erwin,* 157 N.C. App. 284, 579 S.E.2d 120 (2003) (in support only suit, trial court made necessary findings, which were buttressed by other findings, specifically, that plaintiff wife had debts totaling more than $3,700 and it took her six months to save the money necessary to pay her attorney's retainer).]

iii. *But see Belcher v. Averette,* 152 N.C. App. 452, 568 S.E.2d 630 (2002) (no finding as to plaintiff's ability to defray expenses but findings sufficient, as trial court found that minor children did not have the ability to pay and plaintiff was acting on their behalf).

7. Reasonableness of fees awarded.

a. A trial court, considering a motion for attorney fees under G.S. 50-13.6, is permitted, but is not required, to take judicial notice of the customary hourly rates for local attorneys performing the same services and having the same experience as the attorney representing the party seeking the fee award. This would satisfy the party's obligation to provide evidence as to the reasonableness of his attorney's hourly rate. [*Simpson v. Simpson,* 209 N.C. App. 320, 328 n.2, 703 S.E.2d 890, 895 n.2 (2011) (matter of first impression) (proceeding to modify child custody) (the court of appeals "stress[ed]", however, in a footnote that the better practice is for parties to provide evidence of the customary local rates rather than depending upon judicial notice).]

b. The reasonableness of attorney fees is not gauged by the fees charged by the other side. [*Kuttner v. Kuttner,* 193 N.C. App. 158, 666 S.E.2d 883 (2008) (plaintiff who was ordered to pay defendant's fees unsuccessfully argued that defendant's fees must be unreasonable because they were much higher than those charged by his own counsel).]

c. Findings as to reasonableness of fees.

i. To support the reasonableness of an award of attorney fees, the trial court must make findings regarding 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. [*Robinson v. Robinson,* 210 N.C. App. 319, 707 S.E.2d 785 (2011) (order awarding attorney fees must include findings as to the basis of the award, including the nature and scope of the legal services, the skill and time required, and the relationship between the fees customary in such a case and those requested); *Cunningham v. Cunningham,* 171 N.C. App. 550, 615 S.E.2d 675 (2005); *Thomas v. Thomas*, 200 N.C. App. 436, 683 S.E.2d 791 (2009) (**unpublished**) (where the trial court failed to make findings as to the reasonableness of mother's attorney fees, as well as other required findings, award of fees was reversed and issue remanded for further findings).]

ii. The trial court must make a finding of "reasonableness" regarding the nature and scope of the legal services rendered and the skill and time required. [*Reynolds v. Reynolds*, 147 N.C. App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting) (trial court did not err in awarding attorney fees of $55,000 when it made numerous findings relating to the skill and expertise of plaintiff's counsel and plaintiff's entitlement to have counsel of a certain caliber to meet defendant and his attorney on an equal footing), *rev'd per curiam on*

other grounds for reasons stated in dissenting opinion, 356 N.C. 287, 569 S.E.2d 645 (2002).]

iii. Court made proper findings as to the reasonableness of attorney fees in case finding former husband in contempt for failing to pay child support. [*Belcher v. Averette*, 152 N.C. App. 452, 568 S.E.2d 630 (2002) (trial court found that $6,000 in fees and costs was reasonable for the original hearing and appeal and that hourly rate and time expended as reflected in attorney's affidavit were reasonable).]

iv. No abuse of discretion when trial court determined number of hours for wife's counsel based on an extensive discussion with her counsel as well as careful consideration of the attorney's affidavit stating the number of hours he worked on wife's custody and support claims. [*Spicer v. Spicer,* 168 N.C. App. 283, 607 S.E.2d 678 (2005). *Cf. Murn v. Murn,* 723 S.E.2d 583 (2012) (**unpublished**) (when there were no findings as to the number of hours the attorney worked, order for fees was reversed and remanded for findings on the reasonableness of the fees awarded).]

8. Whether party must be successful in the underlying action.

a. There is no requirement in G.S. 50-13.6 that a party seeking fees in an action for child support or custody be the prevailing party. In many cases awarding fees pursuant to G.S. 50-13.6, whether the recipient of fees is the prevailing party is not raised or discussed. *Cf.* G.S. 52C-3-312(b), *amended by* S.L. 2015-117, § 1, effective June 24, 2015, which provides that if an obligee prevails, a responding tribunal in North Carolina may assess against an obligor reasonable attorney fees.

b. One case has specifically rejected the argument that because a party did not prevail in an action involving support and custody the party was not entitled to an award of fees pursuant to G.S. 50-13.6. [*See Burr v. Burr,* 153 N.C. App. 504, 570 S.E.2d 222 (2002) (father sought support and mother sought to modify custody; trial court continued primary custody with father and allowed mother visitation and ordered her to pay current and past support; award of fees to mother upheld, rejecting argument that because mother did not prevail at trial award of attorney fees was improper).] Custody cases are in accord. [*See Wiggins v. Bright,* 198 N.C. App. 692, 679 S.E.2d 874 (2009) (father ordered to pay mother's attorney fees when father's motion for contempt for mother's failure to comply with custody order was denied; order for fees affirmed, as fees were authorized by G.S. 50-13.6 and trial court made required statutory findings as to good faith and insufficient means, making it immaterial whether the recipient of fees was either the movant or the prevailing party; G.S. 50-13.6 requires only that recipient be "an interested party"; father's argument that party awarded fees must have

prevailed is contrary to *Burr*); *cf. Baumann-Chacon v. Baumann,* 212 N.C. App. 137, 138 n.1, 710 S.E.2d 431, 432 n.1 (2011) (stating in a footnote that "Plaintiff's claim for attorney's fees rests on [G.S.] 50-13.6 and 50-16.4, which authorize such relief in the event that a litigant successfully prosecutes child support, child custody, or spousal support claims and meets any other applicable conditions for such an award" and thus "rises or falls" with those claims).]

c. One case has upheld an award of fees under G.S. 50-13.6 when "[n]either party was a clear winner or loser." [*Hennessey v. Duckworth,* 231 N.C. App. 17, 21, 752 S.E.2d 194, 198 (2013) (2012 consent order resolved custody and child support claims; mother's claim for attorney fees under G.S. 50-13.6 allowed, father's claim for attorney fees denied; in considering whether the award of fees was precluded by a 2009 unincorporated separation agreement providing that the losing party in any enforcement action was solely responsible for all legal fees and costs, court found it difficult to say who was the "losing party" and who was the "prevailing party" when each party had prevailed on some issues; after court determined that the separation agreement was not applicable, award of fees to mother under G.S. 50-13.6. was upheld when trial court's conclusions as to good faith and insufficient means were supported by adequate findings, which were supported by affidavits and record evidence).]

d. Some appellate cases have reversed an award of fees when the underlying order for support is reversed or remanded on appeal. [*Kowalick v. Kowalick*, 129 N.C. App. 781, 501 S.E.2d 671 (1998) (*citing Walker v. Tucker*, 69 N.C. App. 607, 317 S.E.2d 923 (1984)) (when order decreasing amount mother paid in child support and denying her request for modification of alimony was remanded for findings, award of attorney fees to father was also reversed; father would have to show on remand that he was successful on those claims before being awarded fees); *Walker* (*citing Daniels v. Hatcher,* 46 N.C. App. 481, 265 S.E.2d 429 (1980)) (because portion of the order increasing child support payments was vacated, the award of attorney fees to plaintiff also must be vacated); *Mullen v. Mullen*, 79 N.C. App. 627, 339 S.E.2d 838 (1986) (*citing Walker)* (reversing award of attorney fees because portion of order increasing child support was reversed on appeal), *superseded by statute on other grounds as stated in Brooker v. Brooker,* 133 N.C. App. 285, 515 S.E.2d 234 (1999); *Daniels*, 46 N.C. App. at 485, 265 S.E.2d at 432 (when order increasing father's child support payment was reversed for insufficient findings, order for fees in mother's favor was also reversed, with fees to be reconsidered "only when and if the issue of whether plaintiff is entitled to an award of increased child support is determined in her favor").]

9. Other findings.

a. Findings are required when the court awards attorney fees and also when it denies fees.

i. Trial court is required to make findings of fact to support an award of attorney fees made pursuant to G.S. 50-13.6. [*Burr v. Burr*, 153 N.C. App. 504, 570 S.E.2d 222 (2002).]

ii. Where an award of attorney fees is prayed for but denied, the trial court must provide adequate findings of fact for the appellate court to review its decision. [*Diehl v. Diehl,* 177 N.C. App. 642, 630 S.E.2d 25 (2006) (*citing Gowing v. Gowing,* 111 N.C. App. 613, 432 S.E.2d 911 (1993)) (order denying request for attorney fees must contain findings supporting the court's decision; order that contained no findings relating to the denial of mother's request for fees, such as whether she had acted in good faith or had insufficient means to defray expenses, was remanded for findings); *Gowing* (trial court committed error when it made no findings of fact to support denial of attorney fees).]

b. Additional finding required in support only actions.

i. Where the action is solely one for support, the court may award attorney fees to an interested party if it finds "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." [G.S. 50-13.6; *Hudson v. Hudson,* 299 N.C. 465, 263 S.E.2d 719 (1980) (second sentence of G.S. 50-13.6 applies solely in a support only suit); *Spicer v. Spicer,* 168 N.C. App. 283, 607 S.E.2d 678 (2005) (before awarding fees in an action solely for child support, court must make the required finding under the second sentence of the statute); *Burr v. Burr,* 153 N.C. App. 504, 570 S.E.2d 222 (2002) (*citing Hudson)* (stating that a factual finding regarding refusal to provide support is only necessary when child support is not determined in the same proceeding with child custody).]

ii. Determining whether action is for support only or for support and custody.

(a) A case is considered one for both custody and support when both of those issues were contested before the trial court, even if the custody issue is resolved prior to the support issue being decided. [*Spicer v. Spicer,* 168 N.C. App. 283, 607 S.E.2d 678 (2005) (*citing Taylor v. Taylor,* 343 N.C. 50, 468 S.E.2d 33 (1996)) (when support issue was heard, custody was at issue; even though parties had resolved custody by consent by the time child support order was entered, for attorney fees purposes, the case was considered one for both support and custody).]

(b) An action was for both custody and support when mother's custody claim was pending when case was called for hearing and was not addressed until entry of the order from which appeal was taken. [*Loosvelt v. Brown*, 235 N.C. App. 88, 760 S.E.2d 351 (2014) (even though father's pleading admitted that it was in child's best interest for primary custody to be awarded to mother, and appellate court acknowledged that both parties may have believed and acted as if they had resolved the custody claims before entry of the order, order on appeal was the first and only order that granted legal and physical custody of the child to mother; award of fees to mother upheld).]

(c) An action was for both custody and support, even though the custody issue was "resolved in basically 15 minutes" at trial. [*Theokas v. Theokas*, 97 N.C. App. 626, 630, 389 S.E.2d 278, 280, *review denied,* 327 N.C. 437, 395 S.E.2d 697 (1990). *See also Taylor v. Taylor,* 343 N.C. 50, 468 S.E.2d 33 (1996) (*citing Lawrence v. Tise*, 107 N.C. App.140, 419 S.E.2d 176 (1992)) (an action is properly characterized as one for "custody and support" where both custody and support actions were before trial court when case was called for trial, even though custody issue was quickly settled).]

(d) An action was for both custody and support where wife sought increase in support and husband sought modification of custody. [*Fellows v. Fellows,* 27 N.C. App. 407, 219 S.E.2d 285 (1975).]

(e) Where issue of custody had been settled by the judgment of the court some five months prior to entry of child support judgment, action to determine child support was action for support only. [*Gibson v. Gibson*, 68 N.C. App. 566, 316 S.E.2d 99 (1984) (noting that what was important was not how the custody issue was settled or when but that it was settled and was not at issue when the judgment concerning support was entered). *See also Hudson v. Hudson,* 299 N.C. 465, 263 S.E.2d 719 (1980) (custody was initially raised but was disposed of in a consent order and was not at issue when support order was entered).]

iii. Whether support is adequate.

(a) Support can be inadequate even when it is paid as required by a consent judgment. [*Mason v. Erwin*, 157 N.C. App. 284, 579 S.E.2d 120 (2003) (finding that defendant had failed to provide adequate support was upheld, even though defendant paid support as required by a consent judgment; consent judgment did not require support pursuant to the

guidelines). *See also Carson v. Carson*, 199 N.C. App. 101, 680 S.E.2d 885 (2009) (support that father paid pursuant to an unincorporated separation agreement was not adequate).]

(b) Support was inadequate based on finding that needs of the children exceeded the amount of support voluntarily paid by plaintiff prior to the hearing. [*Leary v. Leary*, 152 N.C. App. 438, 567 S.E.2d 834 (2002).]

iv. Refusal to pay.

(a) In support only case, trial court erred in awarding attorney fees to wife without making finding that former husband had refused to provide adequate support under the circumstances existing at the time the action was initiated. [*Gibson v. Gibson,* 68 N.C. App.566, 316 S.E.2d 99 (1984); *Thomas v. Thomas,* 134 N.C. App. 591, 518 S.E.2d 513 (1999) (court failed to make specific finding that father refused to provide child support adequate under the circumstances existing at the time of the institution of this action; no findings that mother was acting in good faith or that her means were insufficient to defray the expenses of the suit were made).]

(b) A parent can be considered to be refusing to pay adequate support for a time period after a complaint for support is filed even though the parent paid the amount agreed upon by the parties in an unincorporated separation agreement. [*See Carson v. Carson*, 199 N.C. App. 101, 680 S.E.2d 885 (2009) (while amount paid pursuant to unincorporated agreement is presumed adequate for time period before action is commenced, trial court was ordered on remand to make proper finding as to whether defendant refused to pay what was adequate after action for support was filed).]

c. Findings in combined actions.

i. Since attorney fees are not recoverable in an action for equitable distribution (ED), in a combined action, the trial court's findings of fact must reflect that the attorney fees awarded are attributable only to the alimony or child custody and/or support claims. [*Robinson v. Robinson,* 210 N.C. App. 319, 707 S.E.2d 785 (2011) (when trial court failed to make findings reflecting the fees attributable to the alimony and child support portions of the case, appellate court was unable to determine whether the trial court erred by awarding fees for the ED portion of the case).]

ii. Order was upheld that excluded attorney fees for the ED portion of a case and directed husband to pay a portion of the approximately 75 percent of wife's attorney fees that were attributable to the custody, child support, and alimony portions of the case, even though the fee affidavits did not label every charge as being attributable to a particular issue. [*Cunningham v. Cunningham,* 171 N.C. App. 550, 615 S.E.2d 675 (2005) (since services were adequately described, the trial court could compare the time spent on each issue at trial and the evidence presented with the line-item services on the fee affidavits to rationally determine proper apportionment of fees). *See also Clark v. Clark*, 231 N.C. App. 514, 753 S.E.2d 743 (2013) (**unpublished**) (when plaintiff was entitled to attorney fees related to her motions to increase alimony and for payment of child support arrears, both of which were authorized by statute, the trial court was not required to set out amount of fees incurred as to each issue).]

10. Cases with sufficient findings include:

a. *Roberts v. McAllister,* 174 N.C. App. 369, 621 S.E.2d 191 (2005), *appeal dismissed,* 360 N.C. 364, 629 S.E.2d 608 (2006). Order requiring mother to pay half of father's attorney fees supported by findings as to father's inadequate monthly income, the reasonableness of father's attorney fees, the increase in fees because of mother's failure to provide support after being asked to do so, and by further findings that father did not have sufficient assets to pay his fees and that mother had the means to pay the half ordered.

b. *Reynolds v. Reynolds*, 147 N.C. App. 566, 557 S.E.2d 126 (2001) (John, J., dissenting), *rev'd per curiam on other grounds for reasons stated in dissenting opinion*, 356 N.C. 287, 569 S.E.2d 645 (2002). Court found plaintiff to be an interested party who acted in good faith in bringing the action and who did not have sufficient funds with which to employ and pay counsel to handle case that spanned six-year period; court also found the fee award "reasonable and appropriate" and made numerous findings as to the skill and expertise of plaintiff's counsel.

11. Award of attorney fees in frivolous action by supporting party.

a. If the court finds as a fact that the supporting party has initiated a frivolous action, it may order the payment of reasonable attorney fees to an interested party as deemed appropriate under the circumstances. [G.S. 50-13.6.]

b. Father's action for custody and support was frivolous when he had not seen child since the date of separation, had not paid support or contributed to child's other expenses, and owed retroactive support and money for retroactive expenses. [*Doan v. Doan,* 156 N.C. App. 570, 577 S.E.2d 146 (2003).]

12. Award of attorney fees pursuant to provisions in a separation agreement.

a. Attorney fees may be barred by an express provision in a premarital agreement so long as the agreement is performed. [G.S. 50-16.6(b).]

b. Provisions within separation agreements requiring the payment of attorney fees upon a breach by one of the parties are not inconsistent with the public policy in this state. [*Bromhal v. Stott*, 341 N.C. 702, 462 S.E.2d 219 (1995).] For a custody and child support case finding that attorney fees provision in an unincorporated separation agreement was not applicable when the action was not one for breach or specific performance and awarding attorney fees pursuant to G.S. 50-13.6, *see Hennessey v. Duckworth,* 231 N.C. App. 17, 752 S.E.2d 194 (2013).

c. Therefore, provisions for attorney fees are enforceable as provided by the agreement. [*Bromhal v. Stott*, 341 N.C. 702, 462 S.E.2d 219 (1995).]

d. For more on attorney fees provisions in a separation agreement, *see Spousal Agreements*, Bench Book, Vol. 1, Chapter 1.

13. Standard of review on appeal of an award of attorney fees.

a. Whether statutory requirements necessary to support an award of attorney fees in a child custody and support suit have been met is a question of law, reviewable on appeal, and only when these requirements have been met does the standard of review change to abuse of discretion for an examination of the amount of attorney fees awarded. [*Hudson v. Hudson*, 299 N.C. 465, 263 S.E.2d 719 (1980); *Carson v. Carson,* 199 N.C. App. 101, 680 S.E.2d 885 (2009) (*citing Hudson)*; *Cunningham v. Cunningham,* 171 N.C. App. 550, 615 S.E.2d 675 (2005); *Doan v. Doan,* 156 N.C. App. 570, 577 S.E.2d 146 (2003).]

b. The trial court is granted considerable discretion in allowing or disallowing attorney fees in child support cases. Generally, an award will only be stricken if the award constitutes an abuse of discretion. [*Belcher v. Averette,* 152 N.C. App.

452, 568 S.E.2d 630 (2002); *Leary v. Leary,* 152 N.C. App. 438, 567 S.E.2d 834 (2002).]

14. Award of fees for services performed on appeal.

    a. An award of attorney fees for services performed on appeal should ordinarily be granted, provided the general statutory requirements for such an award are duly met, especially where the appeal is taken by the supporting spouse. [*Fungaroli v. Fungaroli*, 53 N.C. App. 270, 273, 280 S.E.2d 787, 790 (1981) (husband had taken three appeals concerning alimony and custody award to wife, the last of which challenged the trial court's award of fees to wife incurred, in part, for representation by her attorney in the North Carolina Court of Appeals, the North Carolina Supreme Court, and the U.S. Supreme Court; after citing G.S. 50-13.6, allowing award of attorney fees in child support and custody cases, and G.S. 50-16.4, allowing award of attorney fees in alimony cases, the court noted that "there is nothing in our statutory or case law that would suggest that a dependent spouse in North Carolina is entitled to meet the supporting spouse on equal footing, in terms of adequate and suitable legal representation, at the trial level only"); *McKinney v. McKinney, 228* N.C. App. 300, 745 S.E.2d 356 (2013) (*citing Fungaroli)* (award of appellate attorney fees in child custody and support matters pursuant to G.S. 50-13.6 is within trial court's discretion and extends to any appeal of those matters, whether interlocutory or final; award of $26,000 for fees incurred on appeal upheld), *review denied, 367 N.C. 288,* 753 S.E.2d 678, *review dismissed, 367 N.C. 288,* 753 S.E.2d 679 (2014).]

    b. The requirements of the statute authorizing an award of fees must be satisfied when awarding fees for services performed on appeal. [*See Fungaroli v. Fungaroli*, 53 N.C. App. 270, 280 S.E.2d 787 (1981) (award authorized by findings that wife was dependent, was entitled to the relief sought, and was without sufficient means to defray expenses of the suit); *see also Adams v. Adams,* 167 N.C. App. 806, 606 S.E.2d 458 (2005) (**unpublished**) (dependent spouse's motion to court of appeals for award of attorney fees for appeal remanded for finding that she was without sufficient means to afford such fees and for determination of the fee).]

    c. The appellate court cannot make the award. [*Tilley v. Tilley,* 30 N.C. App. 581, 227 S.E.2d 640 (1976) (mother in child support action, whose request for fees for the trial court proceeding was denied, a decision from which no appeal was taken, requested appellate court to award fees incurred for services performed by her attorney on appeal; G.S. 50-13.6 authorizes trial court to order payment of counsel fees but does not so authorize a reviewing court). *See also Messina v. Bell,* 158 N.C. App. 111, 581 S.E.2d 80 (2003) (plaintiff's request for attorney

fees on appeal pursuant to G.S. 6-21.1, allowing award of attorney fees in small verdict cases, remanded for trial court to make appropriate findings and to enter an award).]

Attorney fees in Child Support Modification Proceedings

1. Where the action is solely to modify an award of support, the court may award attorney fees to an obligee pursuant to G.S. 50-13.6 if the court finds that the obligee was acting in good faith, that the obligee had insufficient means to defray the cost of the proceeding, and that the obligor refused to provide adequate support under the circumstances existing at the time the motion was filed. [*See* G.S. 50-13.6; *Mason v. Erwin,* 157 N.C. App. 284, 579 S.E.2d 120 (2003) (trial court's three findings, that plaintiff was acting in good faith to obtain reasonable support for her daughter, that she lacked sufficient means to pay her attorney fees, and that defendant had refused to provide support at time modification was sought, supported award of fees).]
2. A court may award attorney fees to an interested party under G.S. 50-13.6 in connection with a supporting party's motion to modify a child support order if the court finds that the supporting party's motion to modify was "frivolous." [G.S. 50-13.6.]

Award of attorney fees in Contempt Proceeding to enforce child support.

1. The court may award attorney fees to an obligee pursuant to G.S. 50-13.6 in connection with civil contempt proceedings to enforce a child support order. [*See Ugochukwu v. Ugochukwu,* 176 N.C. App. 741, 627 S.E.2d 625 (2006) (*citing Blair v. Blair,* 8 N.C. App. 61, 173 S.E.2d 513 (1970)*)* (award of fees to wife based on husband's willful contempt for failure to pay child support upheld; payment of fees does not appear to be a purge condition); *Belcher v. Averette,* 152 N.C. App. 452, 568 S.E.2d 630 (2002) (defendant in contempt of child support provisions in a consent decree ordered to pay plaintiff's attorney fees pursuant to G.S. 50-13.6); *Smith v. Smith*, 121 N.C. App. 334, 465 S.E.2d 52 (1996) (agreement to pay college expenses is in nature of child support, so court was authorized to award attorney fees when father failed to pay those expenses); *but cf. Powers v. Powers,* 103 N.C. App. 697, 407 S.E.2d 269 (1991) (court reversed an award of attorney fees to wife after finding husband in contempt of consent judgment requiring husband to pay for child's college expenses, holding that order was not for "child support").]

2. Contempt power of the trial court includes the authority to require payment of reasonable attorney fees to opposing counsel as a condition of being purged of contempt for failure to comply with a child support order. [*See Shippen v. Shippen,* 204 N.C. App. 188, 693 S.E.2d 240 (2010) (*quoting Eakes v. Eakes,* 194 N.C. App.

303, 669 S.E.2d 891 (2008)*)* (order required payment of attorney fees as a condition of being purged of contempt for failure to comply with an order for child support and postseparation support; order vacated when it did not include the findings required when awarding attorney fees); *Eakes* (*citing Blair v. Blair,* 8 N.C. App. 61, 173 S.E.2d 513 (1970)*)* (contempt power of the trial court includes the authority to require payment of reasonable attorney fees to opposing counsel as a condition of being purged of contempt for failure to comply with a child support order

3. Required findings:

   a. Before any award of attorney fees, including for contempt, the trial court must make specific findings of fact concerning:
      - The ability of a party to defray the cost of the suit, i.e., that the party is unable to employ adequate counsel in order to proceed as a litigant to meet the other litigants in the suit;
      - The good faith of the party in proceeding with the suit;
      - The lawyer's skill;
      - The lawyer's hourly rate;
      - The nature and scope of the legal services rendered. [*Shippen v. Shippen,* 204 N.C. App. 188, 693 S.E.2d 240 (2010); *Eakes v. Eakes,* 194 N.C. App. 303, 669 S.E.2d 891 (2008) (orders in both *Shippen* and *Eakes* required payment of attorney fees as a condition of being purged of contempt for failure to comply with a child support order; both orders vacated and remanded for required findings).]

Note, however, that in an unpublished opinion the court of appeals has held that when a court orders payment of attorney fees to opposing counsel as a condition of being purged of contempt, rather than as a discretionary award pursuant to G.S. 50-13.6, findings as to the plaintiff's good faith and insufficient means are unnecessary. [*Walker v. Hamer,* 175 N.C. App. 796, 625 S.E.2d 202 (2006) (**unpublished**) (mother in contempt of an order allowing father visitation).] *Cf. Best v. Gallup,* 234 N.C. App. 115, 761 S.E.2d 755 (2014) (**unpublished**) (*citing Wiggins v. Bright,* 198 N.C. App. 692, 679 S.E.2d 874 (2009)) (defendant ordered to pay attorney fees as a purge condition in custody contempt order; award of fees reversed when contempt order awarding fees contained only one of the two findings required by G.S. 50-13.6).

4. As a general rule, attorney fees in a civil contempt action are not available unless the moving party prevails. However, in the limited situation where contempt fails because the alleged contemnor complies with the previous orders after the motion

to show cause is issued and prior to the contempt hearing, an award of attorney fees has been found proper. [*Ruth v. Ruth*, 158 N.C. App. 123, 579 S.E.2d 909 (2003) (when mother had returned children to father at time of contempt hearing, no contempt was found, but award of attorney fees to father under G.S. 50-13.6 affirmed); *see also Wiggins v. Bright,* 198 N.C. App. 692, 679 S.E.2d 874 (2009) (father ordered to pay mother's attorney fees when father's motion for contempt for mother's failure to comply with custody order was denied; order for fees affirmed, as fees were authorized by G.S. 50-13.6 and trial court made required statutory findings as to good faith and insufficient means, making it immaterial whether the recipient of fees was either the movant or the prevailing party; G.S. 50-13.6 requires only that recipient be "an interested party"; father's argument that party awarded fees must have prevailed is contrary to *Burr v. Burr,* 153 N.C. App. 504, 570 S.E.2d 222 (2002), which awarded attorney fees to a nonprevailing party in an action involving child custody and support, but not contempt).]

Child Custody

1. Authorization.

a. G.S. 50-13.6 allows a court in its discretion to award reasonable attorney fees in an original action for custody or for custody and support, or in a motion to modify or vacate, to an interested party acting in good faith who has insufficient means to defray the expense of the suit.

b. Fees also are authorized to an interested party as deemed appropriate under the circumstances upon a finding that the supporting party has initiated a frivolous action or proceeding. [G.S. 50-13.6.]

c. G.S. 6-21(11) provides that costs in custody cases under Chapter 50A, which includes reasonable attorney fees in such amounts as the court in its discretion determines and allows, shall be taxed against either party, or apportioned among the parties, in the court's discretion. [Two provisions in Chapter 50A authorize fees: G.S. § 50A-208(c) (attorney fees authorized when court declines to exercise jurisdiction because of a person's unjustifiable conduct) and G.S. § 50A-312 (attorney fees limited to registration and enforcement of custody determinations pursuant to Part 3 of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA)).]

d. Attorney fees may be awarded under a separation agreement entered into pursuant to G.S. 52-10.1 that provides for attorney fees, unless the provision is otherwise contrary to public policy. [*Hennessey v. Duckworth,* 231 N.C. App. 17, 752 S.E.2d 194 (2013) (*citing Bromhal v. Stott,* 341 N.C. 702, 462 S.E.2d 219 (1995)).]

2. Discretion as to award and amount

a. The trial court has the discretion to award attorney fees once the statutory requirements of G.S 50-13.6 have been met. [G.S 50-13.6 (court has discretion to award fees); *Hennessey v. Duckworth,* 231 N.C. App. 17, 752 S.E.2d 194 (2013) (*citing Atwell v. Atwell,* 74 N.C. App. 231, 328 S.E.2d 47 (1985)).]

b. The amount of attorney fees to be awarded rests within the sound discretion of the trial judge. [*Burr v. Burr*, 153 N.C. App. 504, 570 S.E.2d 222 (2002).]

c. The trial court has discretion to award less than the total amount claimed by an attorney. [*See Kuttner v. Kuttner,* 193 N.C. App. 158, 666 S.E.2d 883 (2008) (order awarding only a portion of mother's attorney fees upheld).]

3. Types of proceedings in which fees awarded. An award of attorney fees is proper in:

a. 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. [G.S. 50-13.6.]

b. A contempt proceeding involving custody or visitation.

4. When request for fees is properly made.

a. A request for attorney fees may be properly raised by a motion in the cause subsequent to the determination of the main action. [*In re Scearce,* 81 N.C. App. 662, 345 S.E.2d 411, *review denied,* 318 N.C. 415, 349 S.E.2d 590 (1986).]

b. There is no requirement that a party first pay attorney fees before seeking an award pursuant to the statute. [*Belcher v. Averette,* 152 N.C. App. 452, 568 S.E.2d 630 (2002) (denying as irrelevant father's motion to compel mother to answer a discovery request that sought proof that she had paid her attorney fees).]

c. The court of appeals has noted that no case has imposed a time limitation for the filing of a motion for attorney fees in a child custody and child support action pursuant to G.S. 50-13.6, "other than that a proper notice of appeal divests the trial court of jurisdiction to

hear a motion filed after notice of appeal has been given in the case." [*Bramblett v. Bramblett,* 218 N.C. App. 454, 721 S.E.2d 763 (2012) **(upublished)** (not paginated on Westlaw) (order awarding fees upheld against claim that request was not timely when it was not included in complaint and was asserted more than a year after complaint was filed; motion for fees was filed after conclusion of hearing on child custody and support, and trial court heard and ruled on motion before entry of an order in the custody and support action and prior to any appeal); *Balawejder v. Balawejder,* 216 N.C. App. 301, 721 S.E.2d 679 (2011) (when a custody order is appealed, the trial court loses jurisdiction to consider a request for attorney fees arising out of the custody case).]

5. Ability of party to pay award of fees.

a. The plain language of G.S. 50-13.6 contains no requirement that a trial court make a finding of ability to pay on the part of the person being ordered to pay before attorney fees may be awarded in a custody and support action. [*Loosvelt v. Brown*, 235 N.C. App. 88, 760 S.E.2d 351 (2014) (although some cases have "mentioned" an obligor's ability to pay an award of fees under G.S. 50-13.6, the statute requires no such finding); *Respess v. Respess,* 232 N.C. App. 611, 754 S.E.2d 691 (2014) (*citing Van Every v. McGuire,* 348 N.C. 58, 497 S.E.2d 689 (1998)*)* (before awarding fees to mother in custody and support action, trial court was not required to find that father had resources available to pay the fees); *Webster v. Webster*, 182 N.C. App. 767, 643 S.E.2d 84 (2007) (**unpublished**) (appellate court unwilling to create such a requirement). *But see Smith v. Barbour,* 195 N.C. App. 244, 671 S.E.2d 578 (trial court findings were sufficient to establish father's ability to pay a portion of attorney fees awarded to child's grandparents), *review denied,* 363 N.C. 375, 678 S.E.2d 670 (2009); *Roberts v. McAllister,* 174 N.C. App. 369, 621 S.E.2d 191 (2005) (affirming trial court's order, in support-only proceeding, requiring mother to pay half of father's attorney fees based, in part, on conclusion that mother had the means to pay half), *appeal dismissed,* 360 N.C. 364, 629 S.E.2d 608 (2006).]

6. Required Findings.

a. G.S. 50-13.6 requires a trial court to find that the party awarded fees (1) is an interested party acting in good faith (2) who has insufficient means to defray the expense of the suit.

b. In addition to the two required statutory findings set out immediately above, the trial court must make findings to support and show "the basis of the award, including the nature and scope of the legal services, the skill and time required, and the relationship between the fees customary in such a case and those requested." [*Davignon v. Davignon,* ___ N.C. App. ___, ___, 782 S.E.2d 391, 397 (2016) (quoting *Robinson v. Robinson,* 210 N.C. App. 319, 337, 707 S.E.2d 785, 798 (2011)).]

c. Good faith has been defined as "honesty of intention, and freedom from knowledge of circumstances which ought to put [one] upon inquiry" that a claim is frivolous. [*Bryson v. Sullivan*, 330 N.C. 644, 662, 412 S.E.2d 327, 336 (1992) (quoting BLACK'S LAW DICTIONARY 693 (6th ed. 1990)) (considering good faith in the context of a request for sanctions under G.S. 1A-1, Rule 11); *Setzler v. Setzler*, ___ N.C. App. ___, ___, 781 S.E.2d 64, 66 (2015) (quoting *Bryson*).]

To satisfy the requirement of good faith, a party must demonstrate "that he or she seeks custody in a genuine dispute with the other party." [*Setzler v. Setzler,* ___ N.C. App. ___, ___, 781 S.E.2d 64, 66 (2015) (quoting 3 Lee's North Carolina Family Law § 13.92 (2014)).]

A party will not be found to have acted in bad faith for seeking attorney fees in a custody case on the basis that "she should know that she is a poor parent." [*Setzler v. Setzler,* ___ N.C. App. ___, ___, 781 S.E.2d 64, 66 (2015) (mother awarded secondary custody of children was awarded attorney fees; father's appeal of the fee award was based on mother's struggle with drug addiction, which the appellate court rejected because to deny fees on this ground would negate efforts made by parents, such as the mother here, "to correct previous mistakes and become better parents" and could cause parents to refrain from seeking custody).]

d. Insufficient means to defray litigation expenses.

"Insufficient means" has been interpreted to mean that the party is unable to employ adequate counsel to proceed as a litigant to meet the other spouse as a litigant. [*Hudson v. Hudson,* 299 N.C. 465, 263 S.E.2d 719 (1980).]

A party requesting fees is not expected to deplete her estate. [*Taylor v. Taylor,* 343 N.C. 50, 468 S.E.2d 33 (1996) (wife had the means to defray her litigation expenses from her estate without unreasonably depleting it); *Cobb v. Cobb,* 79 N.C. App. 592, 339 S.E.2d 825 (1986) (to force wife to sell her only remaining asset, the former marital residence, to pay her attorney fees would constitute an unreasonable depletion of her separate estate).]

When considering whether a party has insufficient means to defray expense of the suit, the court should generally focus on the disposable income and estate of the party requesting fees, although a comparison of both parties' estates may sometimes be appropriate. [*Van Every v. McGuire,* 348 N.C. 58, 497 S.E.2d 689 (1998) (explaining that the trial court should not be placed in a straitjacket by prohibiting any comparison with the other party's estate, for example, in determining whether any necessary depletion of wife's estate by paying her own expenses would be reasonable or unreasonable); *Hennessey v. Duckworth,* 231 N.C. App. 17, 752 S.E.2d 194 (2013) (noting that plaintiff was unemployed and that her attorney fees alone "far exceeded" the value of her few assets combined, while defendant had monthly income close to $11,000).]

e. Findings regarding insufficient means to defray expenses.

Even though a custody-only case rarely requires detailed financial findings, in custody cases where attorney fees are awarded, specific findings as to insufficient means have been required. [*Dixon v. Gordon,* 223 N.C. App. 365, 373 n.1, 373, 734 S.E.2d 299, 305 n.1, 305 (2012) (*citing Atwell v. Atwell,* 74 N.C. App. 231, 328 S.E.2d 47 (1985)) (order awarding fees was remanded when findings contained "little more than the bare statutory language" as to father's means to employ counsel; appellate record contained information as to father's gross income and employment, but no findings were made on those points, the only finding being "father . . . does not have sufficient funds with which to employ and pay legal counsel [sic] . . . to meet Mother on an equal basis"), *review denied,* 366 N.C. 604, 743 S.E.2d 191 (2013); *Respess v. Respess,* 232 N.C. App. 611, 754 S.E.2d 691 (2014) (custody and child support case) (determination that a party has insufficient means to defray expenses must be supported by findings; findings were sufficient as to plaintiff's income, but remand was required when trial court made no findings as to her expenses or her assets and estate). *Cf. Smith v. Barbour,* 195 N.C. App. 244, 671 S.E.2d 578 (without setting out the findings in the opinion, court held that sufficient findings were made, even though father alleged that findings simply repeated the statutory requirements and were conclusory; court noted that almost identical findings were found sufficient in *Cunningham v. Cunningham*, 171 N.C. App. 550, 615 S.E.2d 675 (2005), *review denied,* 363 N.C. 375, 678 S.E.2d 670 (2009).] In *Cunningham,* the trial court found in relevant part that the "plaintiff is an interested party acting in good faith who has insufficient means to defray the expenses of this action" and that the plaintiff's attorney had been licensed to practice law since 1969, limited his practice to and was board certified in family law, and charged $300 per hour, which, the court found, was reasonable based upon his experience. [*Cunningham v. Cunningham*, 171 N.C. App. 550, 566, 615 S.E.2d 675, 686–87.]

Finding that "[p]laintiff did not have sufficient funds to defray the costs and expenses of this lawsuit, including attorneys' fees" was not sufficient when there was no evidence in the record as to plaintiff's financial circumstances. [*Davignon v. Davignon,* ___ N.C. App. ___, ___, 782 S.E.2d 391, 397 (2016).]

Evidence as to a party's income and expenses must be sufficient to support a determination that a party has insufficient means to defray expenses of the suit. [*Baines v. Baines,* 225 N.C. App. 840, 738 S.E.2d 829 (2013) (**unpublished**) (award of fees was reversed for insufficient evidence as to father's means when affidavit as to father's income and expenses was not submitted as an exhibit and discussion by father's counsel of father's income and expenses was not evidence).]

f. Reasonableness of fees awarded.

A trial court, considering a motion for fees under G.S. 50-13.6, is permitted but is not required to take judicial notice of the customary hourly rates for local attorneys performing the same services and having the same experience as the attorney whose fees are the subject of the request, if the judge has the necessary knowledge of the customary rate and believes there is no debate within the local community as to the customary rate. This would satisfy the moving party's

obligation to provide evidence as to the reasonableness of the attorney's hourly rate. [*Simpson v. Simpson,* 209 N.C. App. 320, 328 n.2, 703 S.E.2d 890, 895 n.2 (2011) (proceeding to modify child custody) (in this matter of first impression, the court noted in a footnote that the better practice is for parties to provide evidence of the customary local rates rather than depending upon judicial notice).]

That the trial court had ample opportunity to observe an attorney at a custody trial was sufficient to determine the reasonableness of her fee in comparison to attorneys of comparable experience and skill. [*Peters v. Pennington,* 210 N.C. App. 1, 707 S.E.2d 724 (2011) (*citing Dyer v. State,* 331 N.C. 374, 416 S.E.2d 1 (1992)).]

The reasonableness of attorney fees is not gauged by the fees charged by the other side. [*Kuttner v. Kuttner,* 193 N.C. App. 158, 666 S.E.2d 883 (2008) (rejecting argument that since the fees for plaintiff's counsel were much lower than the fees charged by defendant's counsel, defendant's fees must be unreasonable).]

g. Findings.

To support an award of attorney fees, "the trial court should make findings as to the lawyer's skill, his hourly rate, its reasonableness in comparison with that of other lawyers, what he did, and the hours he spent." [*Kuttner v. Kuttner,* 193 N.C. App. 158, 160, 666 S.E.2d 883, 885 (2008) (*quoting Falls v. Falls,* 52 N.C. App. 203, 221, 278 S.E.2d 546, 558 (1981)).]

When a finding as to the amount of time spent matched exactly the hours shown on the two attorney fee affidavits and plaintiff stipulated that the hourly rate was reasonable, trial court's findings more than adequately supported the reasonableness of the fees awarded. [*Kuttner v. Kuttner,* 193 N.C. App. 158, 666 S.E.2d 883 (2008).]

Finding based on an attorney's affidavit was insufficient when the affidavit stated the dates on which work was performed and the hours the attorney worked on that date but did not delineate the nature of the work performed on each date. [*Davignon v. Davignon,* ___ N.C. App. ___, ___, 782 S.E.2d 391, 397 (2016).]

A finding that addressed an award of attorney fees inappropriately expressed the personal opinion of the court and should not have been included in the order, but it was not essential to support any of the trial court's conclusions of law and did not warrant reversal. [*Kuttner v. Kuttner,* 193 N.C. App. 158, 165, 666 S.E.2d 883, 888 (2008) (finding stated that "[i]f this had been the Court's custody and child support case, she would want that level of effort spent on her behalf").]

h. Whether party must be successful in underlying action.

There is no requirement in G.S. 50-13.6 that a party seeking fees in a custody case be the prevailing party. In many cases awarding fees pursuant to G.S. 50-13.6, whether the recipient of fees is the prevailing party is not raised or discussed.

Several appellate opinions have rejected the argument that the recipient of fees in a custody action must be a prevailing party. [*See Wiggins v. Bright,* 198 N.C. App. 692, 679 S.E.2d 874 (2009) (when attorney fees awarded for mother's defense of a contempt proceeding for alleged failure to comply with a custody order were authorized by G.S. 50-13.6 and the trial court made the required findings as to good faith and insufficient means, it was immaterial whether the recipient of the fees was either the movant or the prevailing party; plaintiff's argument that the party awarded fees must have prevailed is contrary to *Burr v. Burr,* 153 N.C. App. 504, 570 S.E.2d 222 (2002)); *Burr* (rejecting husband's argument that because wife did not prevail at trial, award of attorney fees to her was improper; no abuse of discretion in the award of attorney fees for the custody and support portions of the lawsuit); *see also Ruth v. Ruth*, 158 N.C. App. 123, 579 S.E.2d 909 (2003) (recognizing general rule that attorney fees in a civil contempt action are not available unless moving party prevails but allowing nonprevailing party to recover attorney fees when other party had returned children prior to hearing; exception to prevailing party requirement for cases in which contempt fails because party has complied with order before contempt heard); *cf. Baumann-Chacon v. Baumann,* 212 N.C. App. 137, 138 n.1, 710 S.E.2d 431, 432 n.1 (2011) (stating in a footnote that "Plaintiff's claim for attorney's fees rests on N.C. Gen. Stat. §§ 50-13.6 and 50-16.4, which authorize such relief in the event that a litigant successfully prosecutes child support, child custody, or spousal support claims and meets any other applicable conditions for such an award" and thus "rises or falls" with those claims).]

Other custody cases have awarded fees based only on the requirements set out in G.S. 50-13.6 for awarding fees, with no discussion of prevailing party requirement. [*See Setzler v. Setzler,* ___ N.C. App. ___, ___, 781 S.E.2d 64, 66 (2015) (an award of fees to mother who received secondary custody upheld with no discussion of whether she had prevailed in the action against father, who was awarded primary custody); *Smith v. Barbour,* 195 N.C. App. 244, 671 S.E.2d 578 (order requiring father to pay portion of intervening grandparents' attorney fees affirmed based only on statutory findings of good faith/insufficient means and reasonableness of fees), *review denied,* 363 N.C. 375, 678 S.E.2d 670 (2009).] Note, however, that some child support cases have reversed, or indicated a willingness to reverse, an award of fees when the underlying order for support is reversed or remanded on appeal. [*See Walker v. Tucker*, 69 N.C. App. 607, 317 S.E.2d 923 (1984) (*citing Daniels v. Hatcher,* 46 N.C. App. 481, 265 S.E.2d 429 (1980)) (a court would abuse its discretion if, after determining that an increase in the award of child support was not warranted, it nevertheless proceeded to award attorney fees to plaintiff); *Mullen v. Mullen*, 79 N.C. App. 627, 339 S.E.2d 838 (1986) (*citing Tucker)* (in child support modification action, court reversed award of attorney fees because portion of order increasing child support award was reversed on appeal), *superseded by statute on other grounds as stated in Brooker v. Brooker,* 133 N.C. App. 285, 515 S.E.2d 234 (1999).] For more on these and other cases, *see Child Support Liability and Amount,* Bench Book, Vol. 1, Chapter 3, Part 1.

One case has upheld an award of fees under G.S. 50-13.6 when "[n]either party was a clear winner or loser." [*Hennessey v. Duckworth,* 231 N.C. App. 17, 20, 752 S.E.2d 194, 198 (2013) (consent order resolved custody and child support claims; mother's claim for attorney fees under G.S. 50-13.6 was allowed, while father's claim for attorney fees was denied; in considering whether the award of fees was precluded by an unincorporated separation agreement providing that the losing party in any enforcement action was solely responsible for all legal fees and costs, the court found it difficult to say who was the "losing party" and who was the "prevailing party" when each party had prevailed on some issues; after court determined that the agreement was not applicable, the award of fees to mother under G.S. 50-13.6. was upheld when the trial court's conclusions as to good faith and insufficient means were supported by adequate findings, which were supported by affidavits and record evidence).]

i. For attorney fees to a prevailing party under the UCCJEA in a proceeding for expedited enforcement of a foreign custody order, *see* G.S. 50A-312.

j. Other findings.

Findings are required when the court awards attorney fees and also when fees are denied.

An award of fees must be supported by findings. [*Smith v. Barbour,* 195 N.C. App. 244, 671 S.E.2d 578, *review denied,* 363 N.C. 375, 678 S.E.2d 670 (2009).]

Denial of fees must be supported by findings. [*Diehl v. Diehl,* 177 N.C. App. 642, 630 S.E.2d 25 (2006) (remand was required when trial court made no findings relating to its denial of fees); *Tricebock v. Krentz,* 234 N.C. App. 118, 761 S.E.2d 754 (2014) (**unpublished**) (*citing Gowing v. Gowing,* 111 N.C. App. 613, 432 S.E.2d 911 (1993)) (reversing order in custody case denying defendant attorney fees when only finding stated that the claim for attorney fees "should be" denied; further findings required).]

k. Findings in combined actions.

Since attorney fees are recoverable only if authorized by statute, in a combined action, the trial court's findings of fact must reflect that the attorney fees awarded are attributable only to the causes of actions authorized by statute. [*Burr v. Burr,* 153 N.C. App. 504, 570 S.E.2d 222 (2002) (matter was remanded for court to determine fees attributed to custody and support actions only; any award of fees for termination of parental rights cause of action was error).]

Order was upheld that excluded attorney fees for the equitable distribution portion of a case and directed husband to pay a portion of the approximately 75 percent of wife's attorney fees that

were attributable to the custody, child support, and alimony portions of the case, even though the fee affidavits did not label every charge as being attributable to a particular issue. [*Cunningham v. Cunningham,* 171 N.C. App. 550, 615 S.E.2d 675 (2005) (since services were adequately described, the trial court could compare the time spent on each issue at trial and the evidence presented with the line-item services on the fee affidavits to rationally determine proper apportionment of fees); *Clark v. Clark*, 231 N.C. App. 514, 753 S.E.2d 743 (2013) (**unpublished**) (when plaintiff was entitled to attorney fees related to her motions to increase alimony and for payment of child support arrearages, both of which are authorized by statute, the trial court was not required to set out amount of fees incurred as to each issue).]

7. Award of fees to third party.

Order requiring father to pay a portion of grandparents' attorney fees was upheld based on father's failure to cooperate with grandparents regarding visitation and father's failure to cooperate with child's psychological evaluation. [*Smith v. Barbour,* 195 N.C. App. 244, 671 S.E.2d 578 (maternal grandparents had intervened in action), *review denied,* 363 N.C. 375, 678 S.E.2d 670 (2009).]

8. Standard of review on appeal on an award of fees.

Whether the statutory requirements necessary to support an award of attorney fees in a child custody and support suit have been met is a question of law, reviewable on appeal, and only when these requirements have been met does the standard of review change to abuse of discretion for an examination of the amount of attorney fees awarded. [*Hudson v. Hudson*, 299 N.C. 465, 263 S.E.2d 719 (1980); *Carson v. Carson,* 199 N.C. App. 101, 680 S.E.2d 885 (2009) (*citing Hudson)*; *Cunningham v. Cunningham,* 171 N.C. App. 550, 615 S.E.2d 675 (2005); *Doan v. Doan,* 156 N.C. App. 570, 577 S.E.2d 146 (2003).]

9. Award of fees for services performed on appeal.

A trial court's discretionary authority to award attorney fees in child custody and support matters pursuant to G.S. 50-13.6 extends to any appeal of those matters, whether interlocutory or final. [*McKinney v. McKinney,* 228 N.C. App. 300, 745 S.E.2d 356 (2013) (*citing Fungaroli v. Fungaroli,* 53 N.C. App. 270, 280 S.E.2d 787 (1981)) (award of $26,000 for fees incurred on appeal upheld), *review denied,* 367 N.C. 288, 753 S.E.2d 678, *review dismissed,* 367 N.C. 288, 753 S.E.2d 679 (2014).]

10. Contingency fee agreements are void on public policy grounds in custody actions. *Maxwell Schuman & Co. v. Edwards,* 191 N.C. App. 356, 663 S.E.2d 329 (2008) (finding that an agreement between father and father's law firm in which certain legal fees were contingent upon a successful appeal of an order in a custody case was void against public policy; however, fees

and expenses not based on prohibited contingency fee arrangement could be collected by plaintiff Canadian law firm), *review denied,* 363 N.C. 128, 673 S.E.2d 358 (2009).]

Divorce

1. A court may award costs in an action for divorce, before or after judgment, as may be incurred by either spouse from the sole and separate estate of either spouse, as may be just. [G.S. 6-21(4).]
2. G.S. 6-21 provides that "costs" in divorce cases include reasonable attorney fees in such amounts as the court shall in its discretion determine and allow.

Equitable Distribution

1. When G.S. 50-20(i) and 50-21(e) are not applicable, there is no statutory authority for an award of attorney fees in an ED action and attorney fees are not recoverable. [*Eason v. Taylor,* 784 S.E.2d 200 (N.C. Ct. App. 2016); *Lauterbach v. Weiner,* 174 N.C. App. 201, 620 S.E.2d 317 (2005); *Cunningham v. Cunningham,* 171 N.C. App. 550, 566, 615 S.E.2d 675, 686 (2005) (quoting *Holder v. Holder,* 87 N.C. App. 578, 584, 361 S.E.2d 891, 894 (1987)) ("attorney fees are not recoverable in an action for equitable distribution").]

2. If an ED action is combined with actions in which attorney fees are awarded, such as child support or child custody [G.S. 50-13.6.] or alimony or postseparation support, [G.S. 50-16.4.] the findings of fact must reflect that the attorney fees awarded were attributable only to the alimony or child custody and support claims. [*Robinson v. Robinson,* 210 N.C. App. 319, 707 S.E.2d 785 (2011) (in a combined action for ED, alimony, and child support, findings should have reflected that attorney fees awarded were attributable only to the alimony and/or child support actions); *Cunningham v. Cunningham,* 171 N.C. App. 550, 615 S.E.2d 675 (2005) (citing *Holder v. Holder,* 87 N.C. App. 578, 361 S.E.2d 891 (1987)).]

3. Contempt. A party held in contempt for violating an ED order can be ordered to pay attorney fees, even though there can be no award for fees incurred in obtaining the ED order in the first place. [*Hartsell v. Hartsell*, 99 N.C. App. 380, 393 S.E.2d 570 (1990), *aff'd per curiam*, 328 N.C. 729, 403 S.E.2d 307 (1991)]

4. A contingency fee agreement in an ED action, that was separate from an hourly rate contract covering claims for divorce, custody, and child support, was not void on public policy grounds. [*Robinson, Bradshaw & Hinson v. Smith*, 129 N.C. App. 305, 498 S.E.2d 841 (provision in the contingency fee contract prohibiting wife from communicating with husband regarding ED was invalid but remainder of contract was enforceable; public policy rationale against contingency fee contracts in divorce, alimony, and child support actions not applicable to actions for ED), *review denied*, 348 N.C. 695, 511 S.E.2d 649, *review dismissed*, 348 N.C. 695, 511 S.E.2d 650 (1998).]

Domestic Violence

1. A protective order may include a provision awarding attorney fees to either party. [G.S. 50B-3(a)(10).]

2. Trial court's order requiring defendant in civil contempt of a marital dissolution agreement to pay attorney fees for his violation of the agreement was upheld. [*Marshall v. Marshall,* 233 N.C. App. 238, 757 S.E.2d 319 (2014) (defendant husband violated Tennessee marital dissolution agreement, registered and confirmed in North Carolina, that prohibited him from harassing his wife and two named individuals and authorized attorney fees upon a party's noncompliance).]

Paternity

1. G.S. 50-13.6, which authorizes attorney fees in a custody or support action, does not apply to an action under G.S. 49-14 to establish paternity. [*Guilford Cty. ex rel. Holt v. Puckett,* 191 N.C. App. 693, 664 S.E.2d 362 (2008) (citing *Smith v. Price,* 74 N.C. App. 413, 328 S.E.2d 811 (1985)). *See also Napowsa v. Langston,* 95 N.C. App. 14, 381 S.E.2d 882 (citing *Smith v. Price,* 315 N.C. 523, 340 S.E.2d 408 (1986)) (attorney fees incurred in prosecuting paternity actions may not be awarded under G.S. 50-13.6, as they may only be assessed as costs under G.S. 6-21(10)), *review denied,* 325 N.C. 709, 388 S.E.2d 460 (1989).]

2. The court has discretion to tax or apportion costs, including reasonable attorney fees, against either party or between the parties in civil actions to establish paternity of children born out of wedlock under Article 3 of G.S. Chapter 49. [G.S. 6-21(10); *Guilford Cty. ex rel. Holt v. Puckett,* 191 N.C. App. 693, 664 S.E.2d 362 (2008) (recognizing authority under G.S. 6-21(10) to award attorney fees but declining, on equitable grounds, in action brought on mother's behalf by county child support agency to order mother to pay defendant's fees after blood test excluded defendant as father).]

3. Taxing fees as part of costs is different than ordering payment of fees pursuant to a statute authorizing the court to do so. In the second instance, the award of attorney fees is an order of the court enforceable by contempt. When costs are taxed, a liability for payment is established which, if not paid, is satisfied by the enforcement methods used for any other civil judgment. [*See Smith v. Price,* 315 N.C. 523, 340 S.E.2d 408 (1986); 3 Lee's North Carolina Family Law § 16.19 (5th ed. 2002).]

Spousal Agreements

A. Attorney Fees

1. General rule; exception for separation agreements.

a. As a general rule, contractual provisions for attorney fees are invalid in the absence of statutory authority. [*Carswell v. Hendersonville Country Club,* 169 N.C. App. 227, 609 S.E.2d 460 (2005).]

b. The North Carolina Supreme Court has recognized an exception for contractual provisions for attorney fees contained in separation agreements. [*Carswell v. Hendersonville Country Club,* 169 N.C. App. 227, 609 S.E.2d 460 (2005) (citing *Bromhal v. Stott,* 341 N.C. 702, 462 S.E.2d 219 (1995)); *Potter v. Hileman Labs.,* 150 N.C. App. 326, 564 S.E.2d 259 (2002) (citing *Bromhal* as an exception to the general rule, as *Bromhal* permitted the enforcement of attorney fees provisions contained in a separation agreement based on public policy interests); *Lee Cycle Ctr. v. Wilson Cycle Ctr.,* 143 N.C. App. 1, 11 n.2, 545 S.E.2d 745, 752 n.2noting that the North Carolina Supreme Court has carved out an exception to the general rule and permits the enforcement of attorney fees provisions contained in separation agreements), *aff'd per curiam,* 354 N.C. 565, 556 S.E.2d 293 (2001).]

2. The *Bromhal v. Stott,* 341 N.C. 702, 462 S.E.2d 219 (1995) decision.

a. The North Carolina Supreme Court has interpreted G.S. 52-10.1 to authorize a married couple to include a provision for attorney fees in a separation agreement. [*Bromhal v. Stott,* 341 N.C. 702, 462 S.E.2d 219 (1995) (holding that provisions within separation agreements requiring the payment of attorney fees upon a breach by one of the parties are not inconsistent with the public policy of our state and are legal, valid, and binding under G.S. 52-10.1).]

b. Public policy supports the inclusion of a provision in a separation agreement requiring the payment of attorney fees upon a breach by one of the parties. [*Bromhal v. Stott,* 341 N.C. 702, 462 S.E.2d 219 (1995) (recognizing that separation agreements are different than other types of contracts where courts have frowned upon contractual obligations for attorney fees).]

3. Specific provisions that supported an award of attorney fees.

   a. Agreement provided that a party was entitled to recover reasonable attorney fees and other expenses incurred in an action to enforce provisions of the agreement. [*Bromhal v. Stott,* 341 N.C. 702, 462 S.E.2d 219 (1995) (trial court made extensive findings and conclusions as to the necessity of plaintiff bringing a lawsuit to enforce the agreement and as to the substantial attorney fees and costs incurred in the enforcement effort).]

   b. Agreement provided that if a party failed to perform an obligation under the agreement and the failure caused the other party to incur expenses, including reasonable attorney fees, to enforce the obligation, the defaulting party must indemnify and hold the other harmless from any such expense. [*Edwards v. Edwards,* 102 N.C. App. 706, 403 S.E.2d 530 (no error in award of attorney fees in an action for specific performance of alimony provisions in a separation agreement where the parties specifically contracted for indemnification of such fees in the agreement), *review denied,* 329 N.C. 787, 408 S.E.2d 518 (1991).]

   c. An award of attorney fees to husband in civil contempt action for wife's failure to comply with an order requiring wife to specifically perform her obligations under an unincorporated separation agreement was upheld. [*Gen. Motors Acceptance Corp. v. Wright,* 154 N.C. App. 672, 573 S.E.2d 226 (2002) (in an unincorporated separation, agreement parties assigned a car and related debt to wife; in a consent judgment adopted by the court as an order, wife was ordered to specifically perform her payment obligations under the agreement; in a civil contempt proceeding, award of attorney fees to husband for wife's failure to pay was upheld; award of fees was akin to a court awarding attorney fees through a contempt proceeding for a spouse's failure to pay a marital debt arising out of an equitable distribution award, for which an award of attorney fees is permitted).]

   d. Agreement provided that a party who failed to, among other things, perform any act reasonably necessary to carry out the agreement without undue delay or expense must reimburse the other party for any expense, including court costs, attorney fees, and travel expenses which, as a result of this failure, become reasonably necessary to carry out the agreement. [*Danai v. Danai,* 166 N.C. App. 279, 603 S.E.2d 168 (2004) (**unpublished**) (husband's attempt to frustrate the separation agreement's terms created a proper basis to award attorney fees under the separation agreement).]

   e. Agreement contained an "Enforcement" clause that allowed either party to recover attorney fees if he or she sued to enforce the agreement. [*Moon v. Moon,*

160 N.C. App. 708 (2003) (**unpublished**) (citing *Bromhal v. Stott,* 341 N.C. 702, 462 S.E.2d 219 (1995)) (award of attorney fees for the portion of wife's claim attributable to specific performance upheld), *cert. denied,* 358 N.C. 544, 599 S.E.2d 399 (2004). *Cf. Hennessey v. Duckworth,* 231 N.C. App. 17, 752 S.E.2d 194 (2013) (provision in unincorporated agreement, that losing party was solely responsible for all legal fees and costs upon breach or in a suit for enforcement, was not applicable when later action between the parties was not one for breach or specific performance of the agreement but became a G.S. Chapter 50 custody action).]

f. Attorney fees provision in an unincorporated agreement that "expresse[d] the general intent 'that the losing party pays all reasonable fees and costs that either side may incur' in litigation" did not preclude an award of statutory fees. [*Hennessey v. Duckworth,* 231 N.C. App. 17, 22, 752 S.E.2d 194, 198 (2013) (provision in agreement was not applicable to later action between the parties, but award of fees under G.S. 50-13.6 upheld).]

g. When attorney fees are authorized by an enforcement provision in an incorporated separation agreement, the trial court is not required to make the findings and conclusions required by G.S. 50-16.4. [*See Jackson v. Penton*, 206 N.C. App. 761, 699 S.E.2d 141 (2010) (**unpublished**) (provision provided that "Husband (defendant) shall pay to Wife (plaintiff) any and all reasonable attorney's fees incurred in enforcing this [alimony] obligation"; G.S. 50-16.4 not applicable).]

h. However, attorney fees are not allowed for research on the enforceability of an alimony escalation provision that the trial court found contrary to public policy. [*Jackson v. Penton,* 206 N.C. App. 761, 699 S.E.2d 141 (2010) (**unpublished**) (provision in incorporated separation agreement on which award of fees was based required that fees be reasonable; court found fees awarded to enforce a provision that was not enforceable were not reasonable).]