

## Attorney fees in Domestic Relations Cases

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### General Rule: No Attorney Fees

• “North Carolina adheres to the **“American Rule”** with regard to awards of attorney’s fees. .... 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.”

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

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### Child Support and Custody

- GS 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.**”

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### Just child support.....

- When action is for support alone (without claim for custody), no attorney fees for child support claim unless:
  - Interested party
  - Acting in good faith
  - With insufficient means to defray cost of suit, and
  - ***“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.”***

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### PSS and Alimony

- GS 50-16.4: Counsel fees in actions for alimony, postseparation support.
  - **At any time that a dependent spouse would be entitled to alimony pursuant to G.S. 50-16.3A, or postseparation support pursuant to G.S. 50-16.2A, the court may, upon application of such spouse, enter an order for reasonable counsel fees, to be paid and secured by the supporting spouse in the same manner as alimony.**
  - When spouse **“is without sufficient means to subsist during the prosecution of the action and to defray the necessary expenses.”**
    - *Clark v. Clark*, 301 NC 123 (1980)

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### Policy

- Custody and Child Support
  - To “make it possible for [the party] to employ adequate counsel to enable [him or her], as litigant, to meet [the other party] in the suit.”
    - *Taylor*, 343 NC 50 (1996)
- PSS and Alimony
  - The “guiding principle ... is to enable the dependent spouse, as litigant, to meet the supporting spouse, as litigant, on substantially even terms by making it possible for the dependent spouse to employ adequate and suitable legal representation.”
    - *Clark*, 301 NC 123 (1980)

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### Custody, support, PSS and alimony

- Attorney fee statutes authorize fees for:
  - Initial proceedings
  - Modification proceedings
  - Contempt proceedings
  - Appeals

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### Other domestic statutes authorizing award of fees

- GS 6-21: Court may tax costs
  - (4) "in actions for **divorce** or alimony ... as may be just"
  - (10) "in proceedings under Article 3 of Chapter 49 regarding children born out of wedlock" [**paternity**]
  - "Costs" ... shall be construed to include reasonable attorney fees in discretion of court; but attorney fees in alimony is "determined and provided for in accordance with GS 50-16.4."
- GS 50B-3(a)(10)
  - "A [**domestic violence**] **protective order** may include ... award of attorney fees to either party."

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### Sanctions

- Rule 11 violations
  - Fees allowed as part of sanction if supported by adequate findings of fact
    - Rule 11(a), Rules of Civil Procedure
- Equitable distribution sanctions
  - GS 50-20(i): for removal of other spouse's separate property
  - GS 50-21(e): prejudicial delay of proceedings
- Discovery violations
  - Fees allowed if sanctions ordered
    - Rule 37(a)(4), Rules of Civil Procedure

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### Exceptions to statute requirement

- Attorney fees allowed without specific statute:
  - **Contempt to enforce ED judgment**
    - NOT for the ED proceeding; just contempt
    - *Hartsell v. Hartsell*, 99 NC App 380 (1990)
  - When allowed by express provision in **separation agreement**
    - *Bromhal v. Scott*, 341 NC 702 (1995)
    - Provision in separation agreement for reasonable attorney fees if one party fails to abide by agreement does not violate public policy

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### Findings of fact

- The key to orders addressing fee requests is appropriate findings of fact
- Findings about entitlement to fees
  - Question of law
  - Need all findings required by statute
  - After making findings, you “may” award fees or not
- Findings about amount of fees awarded
  - Must establish reasonableness of amount
  - As long as it is supported, amount is within your discretion
- See Check Lists in Family Law Bench Book

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### Custody and Child Support

- Entitlement to fees
  - Interested party
  - Acting in good faith
  - With insufficient means to defray expenses 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 community norm

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**Consider.....**

- Custody and child support case
- Mom was plaintiff, acting in good faith, probably has insufficient means to pay fees
- Dad is having trouble paying his own fees and other reasonable expenses
- Are you required to order dad to pay mom’s fees?

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**Fees are discretionary**

- GS 50-13.6
  - 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.”
- But – you must make findings of fact whether you allow or deny
  - See e.g. *Deihl v. Deihl*, 177 NC App 642 (2006)
  - P. 10 of handout

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**Consider.....**

- Father filed for child support order against mom
- Mom filed counterclaim for custody
- After trial, you leave custody with dad and award mom limited visitation; order mom to pay retroactive and prospective child support
- Mom requests attorney fees
- Dad says she is not entitled to fees because she did not prevail on her claim.
- Can you award fees to mom?

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**Fees are not contingent upon outcome**

- As long as person requesting fees was an interested party, acting in good faith, with insufficient means, court has discretion to award fees
  - See *Burr v. Burr*, 153 NC App 504 (2002)

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**Good faith**

- Mom files for custody
- Trial court leaves custody with dad; gives mom limited supervised visitation
- Mom request fees
- Dad argues mom always has been an unfit parent due to substance abuse issues; reasonable person would know court would not award her custody; she was not "acting in good faith"
- ?????

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***Setzler*, 781 SE2d 64 (2015)**

- Good faith means "honesty of intention, and freedom from knowledge of circumstances which ought to put one on inquiry that a claim is frivolous"
- "A party satisfies [this element] by demonstrating that he or she seeks custody in a genuine dispute with the other party."
- A party will not be found to have acted in bad faith on the basis that "she should know that she is a poor parent."

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Consider.....

- What if dad argued that mom hasn't actually paid any attorney fees?

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Insufficient means

- There is no requirement that the party seeking fees pay the fees before requesting the award
  - *Belcher v. Belcher*, 152 NC App 452 (2002)

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Sufficient finding of fact????

- "Father is an interested party, acting in good faith, who does not have sufficient funds to employ and pay legal counsel to meet Mother on an equal basis."

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### Insufficient means

- Not without a lot more.....
- Cannot simply recite terms of the statute
  - *Dixon v. Gordon*, 223 NC App 365 (2012)
- Must include specific findings as to:
  - Party's disposable income and reasonable expenses, and
  - Party's separate estate (cash, accounts, assets)

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### Consider.....

- Dad files asking court to order primary custody to mom, visitation to him and to "settle child support"
- Court enters custody order, primary to mom and extensive visitation to day
- 5 months later, court holds child support trial
- Orders dad to pay child support
- Finds mom is interested party, acting in good faith, with insufficient means and orders dad to pay fees
- Dad argues court also needs to find he "refused to provide [adequate] support" at time case was initiated.

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### Just child support.....

- When action is for support alone (does not include claim for custody), no attorney fees for child support claim unless:
  - Interested party
  - Acting in good faith
  - With insufficient means to defray cost of suit, and
  - ***"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."***

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### Even if complaint is for both....

- “where the issue of custody has been settled and is not at issue when the trial court enters subsequent orders dealing only with child support, the action is one for *support only*.”
  - So additional finding is required
- “What appears to be important, however, is 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.”
  - *Gibson v. Gibson*, 68 NC App 566 (1984), citing *Hudson v. Hudson*, 299 NC 465 (1980)

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### PSS and Alimony

- Authorized upon finding requesting party:
  - Would be entitled to alimony or PSS;
  - Is dependent; and
  - Is without sufficient means to subsist during the prosecution of the action and to defray necessary expenses

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### Consider.....

- Wife awarded \$400,000 investment account in ED
- Her attorney fee for her PSS claim and alimony claim is \$40,000
- Can you order husband to pay her fees?

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### Maybe

- Is she still dependent?
  - Generally means deficit between her income and her reasonable expenses
- Will the payment of attorney fees unreasonably deplete her estate?
  - You can compare estates “under appropriate circumstances” but goal is not to make parties equal
  - Cf. *Parsons v. Parsons*, 231 NC App 397 (2013) and *Clark v. Clark*, 301 NC 123 (1980)

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### Amount of fees

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### Award in any type of case.....

- Amount within your discretion, supported by evidence
- You do not have to award amount requested by the attorney
- Attorney fees do not include costs
- Amount awarded can include paralegal fees if reasonable and are for “legal work”
  - See On The Civil Side Blog, Ann Anderson, PARALEGAL FEES, July 6, 2016 (civil.sog.unc.edu)
- Must not reimburse fees for work on claim where fees are not authorized
  - Example: No fees for ED

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**Award in any type of case.....**

- Reasonableness of order must be supported by findings about:
  - Nature and scope of services rendered
  - Skill and time required
  - Attorney's hourly rate and reasonableness compared to other attorneys in the community
    - Can take judicial notice of community standards but are not required to do so
    - *Simpson v. Simpson*, 209 NC App 320 (2011)('better practice' is to use actual evidence)

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