

## Attorney fees for contempt in family law cases: Only for a prevailing party?

In [Walter v. Walter](#), decided by the NC Court of Appeals on August 17, 2021, the court vacated an award of attorney fees in a contempt proceeding arising out of an alleged violation of a custody order because the party awarded fees did not prevail in the contempt proceeding. The court in *Walter* held that a party cannot be ordered to pay attorney fees if not found to be in contempt. Similarly, in *McKinney v. McKinney*, 253 NC App 473 (2017), the court of appeals reversed the trial court's award of attorney fees to mother after concluding the trial court's findings of fact did not support the conclusion father was in contempt for violating a custody order. *See also Ruth v. Ruth*, 158 NC App 123 (2003)(fees generally available only to prevailing party, except fees can be awarded to moving party when that party fails to prevail only because alleged contemnor complies with order after contempt proceeding initiated but before hearing).

However, in [Blanchard v. Blanchard](#), decided by NC Court of Appeals on September 21, 2021, the court of appeals held that when the trial court awards fees for a contempt proceeding pursuant to [GS 50-13.6](#), it is immaterial whether the party was the prevailing party.

[GS 50-13.6](#) provides:

"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."

According to [Blanchard](#), this statute authorizes the trial court to award fees for a contempt proceeding to enforce a child support or a custody order regardless of whether the party seeking fees prevailed in the contempt proceeding, if the court concludes the party was an interested party acting in good faith who has insufficient means to defray the expense of the suit. *See also Wiggins v. Bright*, 198 N.C. App. 692 (2009)([GS 50-13.6](#) also authorizes fees when the court determines the initiating party brought a frivolous action; plaintiff properly ordered to pay attorney fees incurred by defendant in defending frivolous proceeding for contempt)

### ***Blanchard v. Blanchard***

Mother in [Blanchard](#) filed a motion for contempt, alleging father violated terms of custody order. She also requested attorney fees. The trial court found father to be in contempt but reserved the issue of attorney fees for later hearing. Father appealed the contempt adjudication. While the appeal was pending, the trial court conducted the hearing on attorney fees and entered an order awarding mother attorney fees for the contempt proceeding.

Father appealed the attorney fee order, arguing that the appeal of the contempt adjudication divested the trial court of jurisdiction to address the attorney fee issue while the appeal was pending. GS 1-294 provides:

“When an appeal is perfected ... it stays all further proceedings in the court below upon the judgment appealed from, ... but the court below may proceed upon any other matter included in the action and not affected by the judgment appealed from.”

Mother argued that the attorney fee issue “was not affected by the judgment appealed from” because the outcome of the appeal of the contempt adjudication would not impact the trial court’s ability to award attorney fees. Father argued that because attorney fees can be awarded only to a party who prevails in a contempt proceeding, the outcome of the contempt order appeal directly affected the trial court’s ability to award attorney fees.

The court in [Blanchard](#) agreed with mother, explaining:

“[T]he question relevant to the analysis in this case is whether the award of attorney's fees to Mother under [N.C. Gen. Stat. § 50-13.6](#) constituted a “matter included in the action and not affected by the judgment appealed from.” [N.C. Gen. Stat. § 1-294](#). Nothing in the plain language of the statute suggests a determination that an interested party has acted in good faith or has insufficient means to cover the costs associated with the action are determinations contingent on the ultimate outcome of an appeal, by either party, from the underlying judgment. *Id.* In prior cases, awards of attorney's fees under [N.C. Gen. Stat. § 50-13.6](#) have been upheld even for the party who did not prevail at trial. See [Burr v. Burr](#), 153 N.C. App. 504, 570 S.E.2d 222 (2002). For example, in [Burr](#), this Court affirmed in part an order awarding attorney's fees to the defendant, who was not the prevailing party. *Id.* at 506, 570 S.E.2d at 224. In [Burr](#), the trial court awarded custody to the plaintiff and ordered the defendant to pay child support, but also ordered plaintiff, the prevailing party, to pay defendant's attorney fees as to the child custody and support claims. *Id.* at 506–07, 570 S.E.2d at 224.”

According to [Blanchard](#), the public policy supporting [GS 50-13.6](#) and the court’s ability to assign responsibility for attorney fees in custody cases has nothing to do with whether a party ultimately prevails. The court stated:

“[Burr](#) helps demonstrate that the clear intent of [N.C. Gen. Stat. § 50-13.6](#) is to allow the trial court the discretion to ensure one parent in a custody action will not have an inequitable advantage over the other parent—based upon a parent's inability to afford qualified counsel. See *Id.* at 506, 570 S.E.2d at 224. [North Carolina General Statute § 50-13.6](#) concerns leveling the field in a custody action by ensuring each parent has competent representation. [N.C. Gen. Stat. § 50-13.6](#). The trial court's authority to award attorney's fees under [N.C. Gen. Stat. § 50-13.6](#) does not depend upon who “wins” any particular ruling in a custody proceeding. See [Burr](#), 153 N.C. App. at 506, 570 S.E.2d at 224 (“Plaintiff here argues that because defendant did not prevail at trial, the award of

attorney's fees to defendant was improper. We disagree.”)”

### **Other authority for attorney fees?**

The court in [Blanchard](#) stresses that a party does not need to prevail to be entitled to attorney fees pursuant to [GS 50-13.6](#). But is there any other authority for a court to award attorney fees to a party in a contempt proceeding?

Neither the court in *Walter* or in *McKinney* identify the authority upon which the trial courts in those cases based the attorney fee orders that were vacated by the court of appeals because the party awarded fees did not prevail in the contempt matter, and neither case addresses GS 50-13.6 or any any authority for the award of fees.

However, it is well established that under the law of this state, attorney fees can be awarded only when authorized by statute. *Smith v. Smith*, 121 NC App 334 (1996). It also is clear that attorney fees generally are not available for contempt proceedings, and the court's inherent authority to issue sanctions for failure to obey its orders does not include an award of attorneys' fees. *Baxley v. Jackson*, 179 N.C. App. 635 (2006).

In family law matters, two statutes authorize fees for contempt proceedings; [GS 50-13.6](#) for custody and child support, and [GS 50-16.4](#) for PSS and alimony. *Cox v. Cox*, 10 NC App 476 (1971)(child support and custody statute); *Shumaker v. Shumaker*, 137 N.C. App. 72 (2000)(alimony). See also *Conrad v. Conrad*, 82 NC App 758 (1986) and *Hartsell v. Hartsell*, 99 N.C. App. 380 (1990)(authorizing fees in contempt proceeding for violation of equitable distribution judgment despite the lack of a statute authorizing fees in equitable distribution matters); *but cf.* *Powers v. Powers*, 103 NC App 697 (1991)(refusing to extend authorization for attorney fees without statutory authority beyond enforcement of an equitable distribution judgment).

In addition to these statutes, the court of appeals has held that attorney fees can be awarded as part of a sanction for the violation of Rule 11 in connection with a contempt proceeding in a custody matter. See *Jackson v. Jackson*, 192 N.C. App. 455, 665 S.E.2d 545 (2008) (affirming trial court's award to defendant of attorney fees as a sanction under G.S. 1A-1, Rule 11 for having to defend allegations that she had violated a custody order when the allegations were not legally sufficient to constitute criminal contempt).